RECEIVED
SUPREME COURT
STATE OF WASHINGTON
06 NOV 04 AM 8:08
BY C. J. MERRITT
CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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. 77858-2 STATEMENT OF ADDITIONAL AUTHORITY

Pursuant to RAP 10.8, Respondent submits the following additional authorities in support of his argument:

42 U.S.C. §654 (federal child support mandate, includes modification service);

42 U.S.C. §666(a)(10) (federal mandate for review and adjustment of child support orders, initiated by parents or by state);

RCW 74.20.010 (purpose of legislation is to meet needs of children and to keep families from becoming depending on state);

RCW 74.02.040(4) & (9) (authorizing state, through prosecuting attorney, to establish child support and authorizing adoption of rules to comply with federal law);

In re Marriage of Johnson, 96 Wn.2d 255, 634 P.2d 877 (1981) (upholding constitutionality of RCW 74.02.040);

RCW 74.20.220(3) & (4) (authorizing state to initiate proceedings to modify child support and to represent children in those proceedings);

WAC 388-14-2000 (defining eligibility for child support enforcement services from the division of child support, including in pertinent part as follows):

(2) DCS provides full support enforcement services under Title IV-D of the social security act to custodial parents or noncustodial parents who are not receiving a public assistance grant when:

(a) The custodial parent or former physical custodian of a child requests support enforcement services;

(b) A NCP submits a support order for inclusion in or a support payment to the WSSR, together with an application for support enforcement services;

(c) A public assistance recipient stops receiving a cash grant under the temporary assistance for needy families program;

(d) The department provides Medicaid-only benefits to a CP on behalf of a dependent child, unless the recipient of the Medicaid-only benefits declines support enforcement services not related to paternity establishment, medical support establishment or medical support enforcement; or

(e) A man requests paternity establishment services alleging he is the father of a dependent child.

WAC 388-14A-3900 (1):

When the division of child support (DCS) is providing support enforcement services under Title IV-D of the Social Security Act, DCS must:

(a) Review a superior court or administrative order for child support to determine whether DCS will petition to modify the child support provisions of the order; ...).

WAC 388-14A-3900(1) (will initiate review at party's request)

WAC 388-14A-3903 (conditions under which department will seek to modify child support) (quoted in pertinent part below):

(1) The division of child support (DCS) petitions to modify a support order when DCS finds during the review that each of the following conditions are present:

(a) The proposed change in child support based on the Washington state child support schedule:

(i) Is at least twenty-five percent above or below the current support

obligation;

(ii) Is at least one hundred dollars per month above or below the current support obligation; and

(iii) Is at least a two thousand four hundred dollar change over the remaining life of the support order; or ...

L. Morgan ,**Child Support Guidelines**: **Interpretation** and **Application** (Sup.2005) § 3.03 (in shared custody arrangements, "total expenditures by both parents increase" because parents pay "redundant costs") (attached).

Gallo v. Department of Labor and Industries, 155 Wn.2d 470, 120 P.3d 564 (2005) ("It is a well-established rule that new issues may not be raised for the first time on appeal by amici curiae.").

In re Disability Proceeding Against Diamondstone, 153 Wn.2d 430, 105 P.3d 1 (2005) (court generally declines to address even new constitutional issues raised for the first time on appeal unless the claim reflects a manifest error affecting a constitutional right).

Dated this 27th day of November 2006.

Patricia Novotny
WSBA # 13604
Attorney for Respondent
3418 NE 65th Street, Suite A
Seattle, WA 98115

Jacqueline Jeske
WSBA #16790
Attorney for State of Washington
King County Prosecuting Attorney
E400 King County Courthouse
516 3rd Avenue
Seattle, WA 98104

obligation;

(ii) Is at least one hundred dollars per month above or below the current support obligation; and

(iii) Is at least a two thousand four hundred dollar change over the remaining life of the support order; or ...

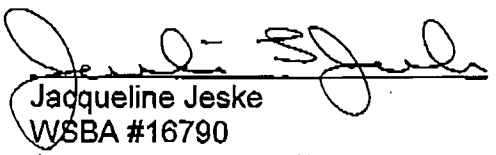
L. Morgan ,**Child Support Guidelines: Interpretation** and **Application** (Sup.2005) § 3.03 (in shared custody arrangements, "total expenditures by both parents increase" because parents pay "redundant costs") (attached).

Gallo v. Department of Labor and Industries, 155 Wn.2d 470, 120 P.3d 564 (2005) ("It is a well-established rule that new issues may not be raised for the first time on appeal by amici curiae.").

In re Disability Proceeding Against Diamondstone, 153 Wn.2d 430, 105 P.3d 1 (2005) (court generally declines to address even new constitutional issues raised for the first time on appeal unless the claim reflects a manifest error affecting a constitutional right).

Dated this ____ day of November 2006.

Patricia Novotny
WSBA # 13604
Attorney for Respondent
3418 NE 65th Street, Suite A
Seattle, WA 98115



Jacqueline Jeske
WSBA #16790
Attorney for State of Washington
King County Prosecuting Attorney
E400 King County Courthouse
516 3rd Avenue
Seattle, WA 98104

§3.03 SHARED CUSTODY, SPLIT CUSTODY, AND EXTRAORDINARY VISITATION

[a] Determining Support in Shared Custody Cases

One of the most important variables in determining the proper amount of child support is the form of custody ordered by the court. In particular, where the parents have some form of shared physical custody, each parent is directly paying part of the child's expenses. This does not mean, however, that for every dollar the noncustodial parent pays in expenses, the custodial parent's expenses decrease. Rather, the total expenditures by both parents increase; the noncustodial parent's expenses increase, and the custodial parent's expenses do not decrease by the same amount. This is because each parent pays "redundant costs." Redundant costs are fixed expenses that both parents must pay, for example, a bedroom for the child, basic furniture and toys, housing expenses, utilities, etc.

Thus, while there should be some adjustment to the amount of support for shared physical custody, it is difficult for a child support formula to determine how much that adjustment should be.[81] Because of the need to make some kind of adjustment for shared custody, the support guidelines have incorporated provisions that make such an adjustment, but the guidelines widely vary in how that adjustment is calculated.

---

credit for child care); *Lewis v. Lewis*, 616 So. 2d 744 (La. Ct. App. 1993); *In re Fettig and Kailes*, 124 Or. App. 455, 863 P.2d 476 (1993); *Juttelstad v. Juttelstad*, 587 N.W.2d 447 (S.D. 1998) (cost of day care is figured by subtracting 25% from total cost of day care, not by making noncustodial parent pay just 25% of total cost).

[81] *See* K. Getman, "A Critique of the Effect of Non-Traditional Visitation and Custody Arrangements on Child Support Awards Under Current Guidelines and Formulas," *Essentials of Child Support Guidelines Development: Economic Issues and Policy Considerations* 127 (Women's Legal Defense Fund, 1987). Indeed, this aspect of child support formulation has been the most thorny for those devising guidelines. *See generally* Marygold S. Melli and Patricia R. Brown, *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 Houston L. Rev. 543 (1994).

The 1997 revision of the New Jersey guidelines focused almost exclusively on this problem. In the preamble to the guidelines, at paragraph 7(f), New Jersey guidelines state the following:

> The awards in the support schedules represent spending on children by intact families. In an intact family, the children reside in one household and no visitation is needed. This is similar to child support actions in which one parent has sole physical custody of a child and there is not visitation or shared-parenting. The awards in the Appendix IX-F support schedules represent situations in which the child is with the custodial parent 100% of the time. Although the Appendix IX-F awards are not reduced for visitation or shared-parenting time, they may be adjusted, if these factors are present in a specific case, through worksheet calculations.

Paragraphs 13 and 14 then provide a formula for reducing support due the custodial parent based on visitation and shared parenting. Thus, in New Jersey, credit is given to the noncustodial parent *from the first day of visitation*.

[1] What Constitutes "Custody"

In determining what constitutes shared custody, or custody itself for that matter, the guidelines define custody in a number of ways. Some define shared custody in terms of overnight visitation;[82] some define shared custody as being with the noncustodial parent a percentage of "time";[83] some define shared custody in terms of a percentage of the year.[84]

Where the definition is overnight visitation, determining whether the noncustodial parent has exercised visitation is not difficult.[86] Where the definition is more amorphous, such as time or day, the results can be varied. In *In re Marriage of Southwell*,[87] for example, the court was faced with interpreting the Oregon guidelines, which provide that there shall be special formula based on the "time" spent with the noncustodial parent. The court determined that time meant the number of overnights the child spent with the noncustodial parent. After all, when a child spends the night with a parent, that parent is responsible for dinner, bedtime, and breakfast, and perhaps even lunch if the child needs to bring lunch to school.[88]

---

[82] Alaska Civ. R. 90.3; Colo. Rev. Stat. § 14-10-115; Hawaii C.S.G.; Idaho R. Civ. Pro. 6(c)(6); Md. Fam. Code Ann. § 12–204; Mich. C.S.G.; Admin. R. Mont. 46.30.1531; N.C.C.S.G.; S.C. Soc. Serv. Reg. 114–4730; Va. Code Ann. § 29-108.2; Va. Code Ann. § 108.2; Wis. Admin. Code DWD 40.04(2); Wyo. Stat. § 20-6-301. *See, e.g., Shaw v. Shaw*, 646 N.W.2d 693 (N.D. 2002) (guidelines for shared custody that apply to 60 to 90 days of custody apply whether the order calls for "visitation" or "custody" for that number of days).

[83] Ala. R. Jud. Admin. 32; Ariz. C.S.G.; Cal. Fam. Code § 4055; D.C. Code Ann. § 16-916.1; La. Rev. Stat. Ann. § 9:315; Me. Rev. Stat. Ann. tit 19-A., § 2001; Miss. Code Ann. § 43-19-103; Mo. Sup. Ct. R. 88.01; Or. Admin. Reg. 137-050-0450; S.D. Cod. Laws Ann. § 25-7-6.10; Wash. Rev. Code Ann. § 26-19-075. *See DaSilva v. DaSilva*, 119 Cal. App. 4th 1030; 15 Cal. Rptr. 3d 59 (2004) (father's timeshare allocation should have included credit for part of the time child was in school, as calculation is based on parents' respective periods of primary physical responsibility for children rather than physical custody); *Somerville v. Somerville*, ___ N.Y.S.2d ___, 2004 WL 438616 (App. Div. 2004) (in determining "custodial parent" for child support purposes, more weight would not be given to daytime than to nighttime custodial hours on theory parental burden of care was greater when child was awake, and accordingly mother with whom child spent majority of total hours in any given week was the "custodial parent"). *Cf. Somerville v. Somerville*, 5 A.D.3d 878, 773 N.Y.S.2d 483 (3d Dep't 2004) (in determining custodial parent for child support purposes, more weight would not be given to daytime than to night time custodial hours on theory parental burden of care was greater when child was awake, and accordingly mother with whom child spent majority of total hours in any given week was the "custodial parent").

[84] N.M. Stat. Ann. § 40-4-11.1; Vt. Stat. Ann. tit. 15, § 657.

[85] [*Reserved.*]

[86] *E.g., In re Marriage of Southwell*, 119 Or. App. 366, 851 P.2d 599 (1993) (time with father to apply shared custody means overnights, not hours, where Colorado guideline defines shared custody as more than 92 overnights).

[87] 119 Or. App. 366, 851 P.2d 599 (1993).

[88] *See also* District of Columbia Child Support Guidelines Worksheet, which asks parents how many days are spent with the child, and defines a day as 18 out of 24 hours; *In re Marriage of Kummer*, 310 Mont. 470, 51 P.3d 513 (2002) (trial court's determination of which parent had "majority of

[2] What Constitutes "Shared Custody"

In applying the guidelines to shared custody cases, the first step is to determine whether the parents have shared custody. There are three possible ways in which shared custody can be determined: 1) based on an equal percentage of time the child spends with the parents; 2) based on a sliding scale to reflect the amount of time a child spends with the noncustodial parent; or 3) finding the presumptive amount based on sole custody and then deviating from that amount. Table 3-4, *infra*, delineates each state's method of determining shared custody.

TABLE 3-4
STATE-BY-STATE TREATMENT OF SHARED CUSTODY

	New Formula for Equal Custody	*Sliding Scale Based on % time*	*Deviation Factor*
Alabama			X
Alaska		X	
Arizona			X
Arkansas			X
California			X
Colorado		X	
Connecticut			X
Delaware	X		
D.C.		X	
Florida		X	
Georgia			X
Hawaii	X		
Idaho	X		
Illinois			X
Indiana			X
Iowa			X
Kansas		X	
Kentucky			X
Louisiana			X
Maine			X
Maryland		X	
Massachusetts			X
Michigan		X	
Minnesota		X	
Mississippi			X
Missouri			X
Montana			X

a 24 hour calendar day" would be reviewed for abuse of discretion); *In re Marriage of Clifton*, 149 Or. App. 229, 942 P.2d 827 (1997) (physical custody is determined by overnights). *But see In re Marriage of Hansen*, 81 Wash. App. 494, 914 P.2d 799 (1995) (any period totaling twenty-four continuous hours is "custody," not midnight to midnight).

[89] [*Reserved*.]

TABLE 3-4 (Continued)
STATE-BY-STATE TREATMENT OF SHARED CUSTODY

	New Formula for Equal Custody	*Sliding Scale Based on % time*	*Deviation Factor*
Nebraska		X	
Nevada		X	
New Hampshire			X
New Jersey	X		
New Mexico	X		
New York			X
North Carolina		X	
North Dakota		X	
Ohio			X
Oklahoma		X	
Oregon		X	
Pennsylvania			X
Rhode Island			X
South Carolina			X
South Dakota			X
Tennessee		X	
Texas			X
Utah		X	
Vermont		X	
Virginia		X	
Washington			X
West Virginia	X		
Wisconsin		X	
Wyoming		X	

[i] Equal Time as Shared Custody

In some states, where a child spends substantially equal amounts of time with each parent, the parents have shared custody.[90] These states are assuming that where each parent has substantially equal time, then the parents have substantially equal costs. If this test is met, the guidelines provide for a specific calculation of the guideline amount that is different from nonshared custody (called, in contrast, sole custody).

[90] Even in these "equal time" states, such as Hawaii, Kansas, New Jersey, and New Mexico, an adjustment is made for visitation in excess of 30% but less than 50%. In New Mexico, the distinction is made by calling equal custody "equal responsibility" and calling custody in excess of 30% "shared responsibility."

In Idaho, the test is not equal time, but equal sharing of costs and at least 35% overnight visitation. In any case, the definition of shared custody for child support purposes is not the same as the definition of shared custody for custody purposes. *In re Roth*, 26 Kan. App. 2d 365, 987 P.2d 1134 (1999).

[ii] *Sliding Scale to Reflect Amount of Time with Noncustodial Parent*

Other states provide that once a threshold amount of visitation in excess of the "ordinary" 20%[91] visitation is met, the support will be adjusted on a sliding scale to reflect the amount of time the children spend with each parent. Again, these states are making an assumption that when substantial amounts of time are spent with the child, then the costs to the noncustodial parent increase. The thresholds vary from state to state.[92]

[iii] *Shared Custody as a Deviation Factor*

Finally, some states view shared custody as a deviation factor.[93] The court will not apply any special formula, but will figure the presumptive amount based

---

[91] "Ordinary" visitation is every other weekend (52 days), plus two weeks during summer (14 days), plus another week or two for miscellaneous holidays (7–14 days), for a total of 73–80 days, or about 20%–21.9% of 365. *E.g.*, *Pool v. Pool*, 9 Neb. App. 453, 613 N.W.2d 819 (2000) (father had "typical" visitation schedule of 20%, and so support should have been calculated using sole custody worksheet). *See generally*, K. Czapanskiy, "Child Support, Visitation, Shared Custody and Split Custody," *Child Support Guidelines: The Next Generation* (U.S. Dep't of Health & Human Services, Office of Child Support Enforcement, 1994); K. Czapanskiy, *Child Support and Visitation: Rethinking the Connection*, 20 Rut.-Cam. L.J. 619 (1989). New Jersey recognizes an "ordinary" amount of visitation, but the guidelines presume no visitation, and a formula accounts for each and every night of overnight visitation.

[92] In Alaska, the threshold is 30% visitation; in Colorado, the threshold is 92 overnights; the District of Columbia requires 40% visitation; in Maryland, the proportionate calculation does not come into play until the child spends 35% of the time with the noncustodial parent; in Michigan, the threshold is 128 days; in North Carolina, the threshold is 123 days; in Oregon, the threshold is 35% custody; in South Carolina the threshold is 109 nights; in Utah, the threshold is overnight visitation for more than 25% of the year; in Vermont, the threshold is 30% visitation; in Virginia, the threshold is 90 days of the year; in Wisconsin, the threshold is 110 overnights. Alaska Civ. R. 90.3; Colo. Rev. Stat. § 14-10-115; D.C. Code Ann. § 16-916.1; Md. Fam. Code § 12-204; Mich. C.S.G.; N.C. C.S.G.; S.C. Soc. Serv. Reg. 114-4730; Utah Code Ann. §§ 78-45-2; Vt. Stat. Ann. tit. 15, § 657; Va. Code Ann. § 20-108.2; Wis. Admin. Code DWD 40.04. *See also Gingola v. Velasco*, 668 So. 2d 1054 (Fla. 2d DCA 1996), and *Winters v. Katseralis*, 623 So. 2d 613 (Fla. 2d DCA 1993), affirmed in *Rooney v. Rooney*, Case No. 99-01923 (Fla. 2d DCA 12/30/99); *In re Marriage of Brubaker*, 690 N.W.2d 463 (Table, Text in WESTLAW), 2004 WL 1254627 (Iowa Ct. App. 2004) (father was not entitled to a 30% discount on child support under child support guidelines based on number of overnights with children, where he had children for approximately 100 overnights each year, which was well below the 128 days required for any credit under guidelines); *Wright (Osburn) v. Osburn*, 970 P.2d 1071 (Nev. 1998) (adopting offset formula); *Randall v. Randall*, 235 Wis. 2d 1, 612 N.W.2d 737 (2000) (where threshold 30% overnights was met, support calculated under shared-time formula); *Fountain v. Mitros*, 968 P.2d 934 (Wyo. 1998) (overnight threshhold of 40% plus contribution to support in substantial manner must be met in order for shared custody formula to kick in).

[93] California is listed as a deviation state, but its method is actually somewhat different than ordinary deviation. As noted above, guidelines generally assume 20% visitation. California, however, makes *no* assumption about visitation. Rather, the amount of time the child spends with the parent is built into the formula to determine the presumptive amount of support. Cal. Fam. Code § 4055(b)(1)(D). Further, even though the Minnesota guidelines list shared custody as a deviation factor, by case law an offset formula is used: *Valento v. Valento*, 385 N.W.2d 860 (Minn. Ct. App. 1986) (where each party has physical custody part of the time, use offset formula); *Tweeton v. Tweeton*, 560 N.W.2d 746 (Minn. Ct. App. 1997)

on sole custody, and then deviate from that amount. These states make no assumption that increased time with a child translates into increased costs for the noncustodial parent and decreased costs for the custodial parent. Rather, each case must be examined on its facts. Typical of the reasoning of states that have adopted this method is Alabama's:

> The Alabama child support guidelines do not specifically address the problem of establishing a support order in joint legal custody situations. Such a situation may be considered by the court as a reason for deviating from the guidelines in appropriate situations, particularly if physical custody is jointly shared by the parents. . . . Because of the infinite possibilities that exist in terms of time spent with each parent and other considerations associated with such custody, a determination of support is to be made on a case-by-case basis.[94]

This method is indistinguishable from granting a deviation based on extraordinary visitation,[95] and cases considering shared custody and extraordinary visitation as a deviation factor will be considered together.[96]

(applying *Hortis/Valento* formula for joint custody, even though father had sole physical custody under decree); *Rogers v. Rogers*, 606 N.W.2d 724 (Minn. Ct. App. 2000) (*Hortis/Valento* formula applies when each parent provides significant amount of child care, without regard to label attached to custody arrangement); *Schlichting v. Paulus*, 632 N.W.2d 790 (Minn. Ct. App. 2001) (failure to apply *Hortis/Valento* formula with proper findings warranted reversal). The same rule apparently holds true in Ohio. *See Weinberger v. Weinberger*, 24 Fam. L. Rep. (BNA) 1379 (Ohio Ct. App. 5/15/98).

Washington state also has a provision that there can be no deviation for time with the noncustodial parent when the custodial parent is receiving public assistance. *Sigler v. Sigler*, 85 Wash. App. 329, 932 P.2d 710 (1997).

[94] Ala. R. Jud. Admin. 32, Comment. *Accord* Conn. C.S. and Arrearage G., Preamble (h)(4) (the commission considered including an adjustment for shared custody; the commission rejected this proposal in favor of continuing to provide discretion to the trier of fact to determine the appropriate adjustment); Ind. C.S.G., Guideline 6, Commentary (because of the infinite possibilities that exist in terms of time spent with each parent, travel between parents, and other considerations, such determinations are left to the sound discretion of the trial courts).

[95] *See, e.g., Jessen v. Jessen*, 697 So. 2d 717 (La. Ct. App. 1997) (where parents alternated custody every two months; husband entitled to adjustment from guidelines); *Bast v. Rossoff*, 91 N.Y.2d 723, 675 N.Y.S.2d 19 (1998) (basic percentages of New York's child support standards act do not apply in situations where parents share physical custody; drafters did not contemplate shared custody, so court must consider the total circumstances in both parents' homes to set support amount); *Carlino v. Carlino*, 716 N.Y.S.2d 272 (N.Y. App. Div. 2000) (half and half custodial arrangement is "extended visitation" warranting deviation); *LaLiberte v. LaLiberte*, 105 Ohio App. 3d 207, 663 N.E.2d 974 (1995); *Pauly v. Pauly*, 80 Ohio St. 3d 386, 686 N.E.2d 1108 (1997) (parent who is obliged to pay support under shared parenting order is not entitled to automatic reduction against support for time children reside with that parent; time sharing is a deviation factor for court's discretion); *Eickelberger v. Eickelberger*, 93 Ohio App. 3d 221, 638 N.E.2d 130 (1994) (court deviated from guidelines because parents had adopted a shared parenting plan, apportioning education, insurance, clothing, other expenses); *Doerr v. Doerr*, 189 Wis.2d 112, 525 N.W.2d 745 (Ct. App. 1996) (child support guidelines do not directly apply to a placement arrangement that combines primary placement for one of the children with shared placement for two other children).

[96] *See* § 3.03[d].

[3] Applying the Formula to Determine Support

Where the statute specifies the threshold amount of custody that must be met before the shared custody formula is applied, it is error for the court to apply that formula in the absence of evidence that the threshold has been met.[97] It is also error for the court not to apply the formula when the evidence indicates that the formula should be applied.[98]

[b] Determining Support in Split Custody Cases

Split custody, also called divided custody, arises when each parent has physical custody of one or more children of the parties. Because the guidelines did not need to face the question of what constitutes split custody, the guidelines were able to deal much more easily with the question of how support should be determined in split custody situations. The guidelines have taken two basic approaches: the offset approach, and split custody as a deviation factor. Table 3-5, *infra*, shows each state's choice of approach.

TABLE 3-5
STATE-BY-STATE TREATMENT OF SPLIT CUSTODY

	Split Custody Offset Formula	*Deviation Factor*	*No Provision*
Alabama	X		
Alaska		X	
Arizona	X		
Arkansas	X		

[97] *In re Marriage of Redford*, 776 P.2d 1149 (Colo. Ct. App. 1989); *In re Marriage of Clifton*, 149 Or. App. 229, 942 P.2d 827 (1997) (because threshold for adjustment is 35%, 30% was not enough); *In re Marriage of Southwell*, 119 Or. App. 336, 851 P.2d 599 (1993).

[98] *Potter v. Potter*, 55 P.3d 726 (Alaska 2002) (child support should be modified based on the parents' actual, as opposed to decretal, parenting time; support can be changed to recognize a de facto change in custody without changing the underlying custody award); *Wright v. Gregorio*, 855 P.2d 772 (Alaska 1993); *Arze v. Sadough-Arze*, 789 So. 2d 1141 (Fla. 4th DCA 2001); *In re Marriage of Sirowy*, 2002 WL 31529191 (Iowa Ct. App. Nov. 15, 2002) (credit for extraordinary visitation is mandatory, and the court cannot ignore it for other reasons); *Matter of Burkenstock*, 666 So. 2d 1168 (La. Ct. App. 1995) (despite father being designated primary custodial parent, custody was more in the nature of shared equal custody, so father had to pay support); *Eddie v. Eddie*, 201 Mich. App. 509, 506 N.W.2d 591 (1993); *Elsome v. Elsome*, 257 Neb. 841, 601 N.W.2d 537 (1999); *Benisch v. Benisch*, 347 N.J. Super. 393, 790 A.2d 213 (App. Div. 2002); *Boumont v. Boumont*, 691 N.W.2d 278 (N.D. 2005) (after trial court decided to leave unchanged equal-physical-custody provision of divorce judgment, court was required to apply child support guideline concerning equal physical custody when determining whether to increase former husband's child support obligation); *Hopkins v. Hopkins*, 152 S.W.3d 447 (Tenn. 2004) (child support guidelines do not provide no support be ordered when both parents shared equal parenting time); *Cranston v. Cranston*, 879 P.2d 345 (Wyo. 1994); *see also Molstad v. Molstad*, 193 Wis. 2d 602, 535 N.W.2d 63 (1995) (court should consider fact that one parent has custody 30% of time).

TABLE 3-5 (Continued)
STATE-BY-STATE TREATMENT OF SPLIT CUSTODY

	Split Custody Offset Formula	*Deviation Factor*	*No Provision*
California		X	
Colorado	X		
Connecticut	X		
Delaware			X
D.C.			X
Florida		X	
Georgia		X	
Hawaii	X		
Idaho	X		
Illinois			X
Indiana		X	
Iowa			X
Kansas	X		
Kentucky		X	
Louisiana			X
Maine	X		
Maryland			X
Massachusetts		X	
Michigan	X		
Minnesota			X
Mississippi		X	
Missouri	X		
Montana	X		
Nebraska	X		
Nevada		X	
New Hampshire		X	
New Jersey		X	
New Mexico	X		
New York	X		
North Carolina	X		
North Dakota	X		
Ohio	X		
Oklahoma	X		
Oregon	X		
Pennsylvania	X		
Rhode Island		X	
South Carolina	X		
South Dakota		X	
Tennessee	X		
Texas	X		
Utah	X		
Vermont	X		
Virginia	X		
Washington			X
West Virginia	X		
Wisconsin	X		
Wyoming	X		

[1] The Offset Approach

Under the first approach, support is computed according to an offset formula. Under this formula, first compute the support the father would owe to the mother for the children in her custody as if those children were the only children of the parties. Second, compute the support the mother would owe the father for the children in his custody if those children were the only children of the parties. Third, subtract the lesser support obligation from the greater. The parent who owes the greater obligation then pays the difference in support to the other parent. Thus, even though only one parent is actually paying support, a support duty is flowing from both parents to all children.[99]

[2] As a Deviation Factor

Under the second approach, the court views split custody as a deviation factor.[100] Where split custody is a deviation factor, the final award is in the discretion of the decision-maker.

---

[99] *Roye v. Hogg*, 689 So. 2d 131 (Ala. Civ. App. 1996); *Lonigro v. Lonigro*, 55 Ark. App. 253, 935 S.W.2d 284 (1996); *Devereaux v. Devereaux*, 710 So. 2d 1043 (Fla. 2d DCA 1998) (using offset approach); *Brock v. Brock*, 695 So. 2d 744 (Fla. DCA 1997); *Gingola v. Velasca*, 668 So. 2d 1054 (Fla. Dist. Ct. App. 1996); *Harris v. Harris*, 690 N.E.2d 742 (Ind. Ct. App. 1998) (using offset method, citing Guideline 6); *In re Marriage of Cranston*, 23 Kan. App. 2d 350, 929 P.2d 820 (1997); *In re Marriage of Hansen*, 18 Kan. App. 2d 712, 858 P.2d 1240 (1993); *Farris v. Farris*, 673 So. 2d 1276 (La. Ct. App. 1996); *Broussard v. Broussard*, 672 So. 2d 1016 (La. Ct. App. 1996); *Sefkow v. Sefkow*, 427 N.W.2d 203, 215 (Minn. 1988); *Crews v. Crews*, 949 S.W.2d 659 (Mo. Ct. App. 1997); *Replogle v. Replogle*, 903 S.W.2d 551 (Mo. Ct. App. 1995); *Stewart v. Stewart*, 866 S.W.2d 154 (Mo. Ct. App. 1993); *Sinclair v. Sinclair*, 837 S.W.2d 355 (Mo. Ct. App. 1992); *In re Marriage of Arbuckle*, 243 Mont. 10, 792 P.2d 1123 (1990); *Erickson v. Erickson*, 127 N.M. 140, 978 P.2d 347 (Ct. App. 1999); *Parisio v. Parisio*, 240 A.D.2d 900, 658 N.Y.S.2d 546 (1997); *DeVoe v. Erck*, 226 A.D.2d 1111, 641 N.Y.S.2d 961 (1996); *Wetzel v. Wetzel*, 589 N.W.2d 889 (N.D. 1999) (split custody is by offset formula, and should not be confused with shared custody); *Beckley v. Beckley*, 90 Ohio App. 3d 202, 628 N.E.2d 135 (1993); *State ex rel. M.M.G. v. Graham*, 123 Wash. App. 931, 99 P.3d 1248 (2004) (child support analysis which applied to split custody arrangement, pursuant to which each parent was primary residential caretaker of one or more children and each parent should be viewed as both support obligor and support obligee for purposes of calculating support obligations under the child support statutes, did not apply to shared residential arrangement, in which two children divided their time between their divorced parents' two households).

[100] *Gallant v. Gallant*, 882 P.2d 1252 (Alaska 1994); *Lowe v. Lowe*, 47 Conn. App. 354, 704 A.2d 236 (1997); *In re Marriage of Keown*, 225 Ill. App. 3d 808, 587 N.E.2d 644 (1992); *Risely v. Risely*, 208 A.D.2d 132, 622 N.Y.S.2d 387 (1995); *Roy v. Roy*, 188 A.D.2d 274, 590 N.Y.S.2d 468 (1992). *But see Simpson v. Simpson*, 680 So. 2d 1085 (Fla. Dist. Ct. App. 1996) (because guidelines do not purport to cover split custody, it cannot be a "deviation"; trial court is free to use any method it wants in such a situation).

[3] Comparing the Two Approaches

Where the guidelines have no express provision relating to split custody, the courts have taken both approaches.[101] The better approach is the offset method, because this method explicitly recognizes the fact that there are two households, two sets of medical expenses, child care expenses, and deviation factors for each child. Merely figuring support for all children and then deviating because custody is split will not adequately provide for the needs of each child.[102]

[c] Abatements for Block Visitation

In addition to allowing specific formulaic credits for shared custody and split custody, some states have opted to grant abatements for block visitation. Block visitation is where the child spends a specific block of time, usually a month, with the noncustodial parent.[103] In order to be entitled to the abatement,

---

[101] *In re Marriage of Steadman*, 283 Ill. App. 3d 703, 670 N.E.2d 1146 (1996) (in cases of split custody, the court may use the guidelines or consider factors listed in § 505; the guidelines not necessarily applicable); *In re Marriage of Will*, 489 N.W.2d 394 (Iowa 1992) (adopting offset approach); *Berlin v. Berlin*, 360 N.W.2d 452 (Minn. Ct. App. 1985) (adopting deviation approach); *In re Marriage of Oakes*, 71 Wash. App. 646, 861 P.2d 1065 (1993) (adopting deviation approach); *Nixon v. Nixon*, 631 So. 2d 42 (La. Ct. App. 1994) (adopting offset approach, and rejecting deviation approach adopted in *Leonard v. Leonard*, 615 So. 2d 909 (La. Ct. App. 1993)).

[102] *See Nixon v. Nixon*, 631 So. 2d 42 (La. Ct. App. 1994) (adopting offset approach, and rejecting deviation approach).

[103] Alaska Civ. R. 90.3 (the court may allow an adjustment of up to 50% for any period in which the obligor parent has extended visitation over 27 consecutive days); *In re Guidelines for Child Support*, 314 Ark. Appx., 863 S.W.2d 291 (1993) (where the child spends more than 14 consecutive days with the noncustodial parent, the court may grant an adjustment; any partial abatement or reduction of child support should not exceed 50% of the child support obligation during the extended period of more than 14 consecutive days); Fla. Stat. Ann. § 61.30 (if a child has visitation with a noncustodial parent for more than 28 days, the court may reduce the amount of support paid to the custodial parent during the time of visitation not to exceed 50% of the amount awarded); Idaho R. Civ. Pro. 6(c)(6) (in cases not involving shared custody, the court may reduce the amount of support if a parent has the child for 30 consecutive days or more; a reasonable reduction would be 50% for the duration of the physical custody); Indiana C.S.G. (commentary recommends abatement of support for visitation seven days or longer and extended visitation); Kan. C.S.G. (extraordinary visitation, defined as in excess of 30% of time or a 30-day block of time, is a deviation factor that may require adjustment); Mich. C.S.G. (every order should address the issue of visitation abatement where the child spends eight consecutive overnight periods with a noncustodial parent); Mo. Sup. Ct. R. 88.01 (the obligation of the noncustodial parent to make support payments shall abate for such periods of time in excess of 30 days that the custodial parent has relinquished physical custody of the child); Neb. C.S.G. (during visitation periods of four or more weeks, support payments may be reduced by 50%); S.D. Cod. Laws. Ann. § 25-7-10 (an abatement of a portion of the child support may be ordered if a child spends more than 29 consecutive days with the noncustodial parent); Utah Code Ann. § 78-45-2 (the child support order shall provide that the base child support award be reduced by 50% for each child for time periods during which the child is with the noncustodial parent for at least 25 of any 30 consecutive days). *E.g.*, *Brown v. Brown*, 914 P.2d 206 (Alaska 1996).

the parent seeking the abatement must show that the block visitation was not contemplated,[104] and that the abatement is authorized by statute.[105]

Where the guidelines have failed to specify an abatement for block visitation, some courts have granted such an abatement under their authority to deviate from the guidelines for extended visitation.[106]

Where an abatement for block visitation is sought, the request for the abatement must come after the block visitation has occurred.[107]

[d] Extraordinary Visitation as a Deviation Factor

Extraordinary visitation as a deviation factor arises in two different scenarios under the guidelines. First, the guidelines may provide that shared custody, the particular custodial arrangements, or extraordinary visitation are all deviation factors.[108] Second, the guidelines might provide that shared custody comes into play when the noncustodial parent reaches a particular threshold amount of visitation, usually somewhere above 30%. In this latter scenario, visitation above the presumed 20% amount under the guidelines, but below the threshold amount for shared custody, is extraordinary visitation, and such extraordinary visitation may necessitate deviation. In both these cases, the court must decide whether to deviate from the presumed guideline amount because of the amount of time the children spend with the noncustodial parent.

---

[104] *Gallant v. Gallant*, 945 P.2d 795 (Alaska 1997); *Olson v. Olson*, 585 N.W.2d 134 (N.D. 1998) (no abatement, since visitation already taken into account in setting original order); *Whalen v. Whalen*, 490 N.W.2d 276 (S.D. 1992).

[105] *Compare Griffith v. Griffith*, 2004 WL 595870 (Alaska, Mar. 24, 2004) (court did not abuse its discretion in ordering a 50% child-support credit for any month in which ex-husband actually had physical custody of child for at least 27 days or in providing that credit should begin the first summer after ex-husband filed his motion to modify custody); *In re Marriage of Holeyfield*, 847 S.W.2d 175 (Mo. Ct. App. 1993) (father had right to abatement for extended visitation under Missouri statute); *Bondi v. Bondi*, 255 Neb. 319, 586 N.W.2d 145 (1998) (custodial parent has expenses that continue despite visitation); *with Beehler v. Beehler*, 693 N.E.2d 638 (Ind. Ct. App. 1998) (father not entitled to credit for 11 week block visitation); *Sillis v. Hernandez*, 608 So. 2d 289 (La. Ct. App. 1992) (mother had right to receive support from father during three summer months father was domiciliary parent in absence of judgment stating support would cease for those months); *Abbott v. Dunlap*, 597 So. 2d 1212 (La. Ct. App. 1992) (no abatement for child's visitation during summer).

[106] *Bliss v. Bliss*, 493 N.W.2d 593 (Minn. Ct. App. 1992) (court properly deviated from guidelines to account for nine-week visit); *Mocnik v. Mocnik*, 838 P.2d 500 (Okla. 1992) (approving child support obligation set by trial court that considered eight consecutive weeks of visitation with the father during the summer). *See* §3.03[d], on extraordinary visitation.

[107] *Houser v. Houser*, 535 N.W.2d 882 (S.D. 1995); *Sjolund v. Carlson*, 511 N.W.2d 818 (S.D. 1994); *Whalen v. Whalen*, 490 N.W.2d 276 (S.D. 1992).

[108] *E.g.*, *Griffith v. Griffith*, 705 So. 2d 435 (Ala. Civ. App. 1997) (abatement for six week visitation in summer was deviation, had to include findings); *Bast v. Rossoff*, 91 N.Y.2d 723, 675 N.Y.S.2d 19 (1998); *Gray v. Gray*, 885 S.W.2d 353 (Tenn. Ct. App. 1994) (guidelines do not apply in cases of shared custody, split custody, and extended visitation; determination of proper support in those cases should be made on case-by-case basis).

In considering whether to deviate for extraordinary visitation, the courts have seemingly developed a two-part test. First, the court will determine if the visitation is in fact extraordinary. Visitation that is little over the standard 20% will usually not be considered extraordinary visitation warranting deviation.[109]

Second, the court will focus its inquiry on whether the extra time spent with the noncustodial parent results in a greater financial burden on the noncustodial parent and in a concomitant lesser financial burden on the custodial parent.

The Washington State guidelines state the test clearly:

> 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 support to meet the basic needs of the child or if the child is receiving aid to families with dependent children. When determining the amount of the deviation, the court shall consider evidence concerning the increased expenses to a parent making

[109] *See, e.g., Flanagan v. Flanagan*, 656 So. 2d 1228 (Ala. Civ. App. 1995) (one-month visitation in summer is not extraordinary visitation); *In re Marriage of Fox*, 559 N.W.2d 26 (Iowa 1997) (departure not warranted where father had child 30% of time, which was little over that enjoyed by parents with liberal visitation, abrogating *In re Gilliam*); *In re Marriage of Horning*, 480 N.W.2d 91 (Iowa Ct. App. 1991) (visitation amounting to 21% of time for father was not reason for deviation); *Temple v. Temple*, 651 So. 2d 466 (La. Ct. App. 1995) (statute does not require deviation for extensive visitation; deviation not required, especially where there is no extended continuous period of visitation); *Sarwar v. Sarwar*, 117 S.W.3d 165 (Mo. App. 2003) (trial court application of a 10% adjustment multiplier, to provide husband with visitation credit against child support, was not an abuse of discretion in marital dissolution case, even though husband had more than 109 nights of overnight visitation with child per year; the use of a higher multiplier was discretionary); *Stewart v. Stewart*, 988 S.W.2d 622 (Mo. Ct. App. 1999) (father entitled to adjustment on child support where he had children six days out of every 14); *Schubert v. Tolivar*, 905 S.W.2d 924 (Mo. Ct. App. 1995) (father who had custody for two weeks at end of each of three summer months was not entitled to deviation for extraordinary visitation, since he did not ever have children for 30-day stretch); *Elkin v. Sabo*, 310 N.J. Super. 462, 708 A.2d 1225 (Ch. Div. 1998) (adjustments for visitation time were reserved for situations where visitation is above the norm); *Susan M. v. Louis N.*, 206 A.D.2d 612, 614 N.Y.S.2d 584 (1994) (partaking of regular visitation is not a reason to deviate down from the guidelines); *Gaudette v. Gaudette*, 192 A.D.2d 779, 596 N.Y.S.2d 173 (1993) (every weekend visitation does not constitute extraordinary visitation); *Schmaltz v. Schmaltz*, 586 N.W.2d 852 (N.D. 1998); *Connor v. Connor*, 434 Pa. Super. 288, 642 A.2d 1136 (1994) (27% visitation not extraordinary).

The Florida statute, Fla. Stat. Ann. § 61.30(11)(b), was amended in 1999 to provide that the court *shall* deviate whenever there is "substantial" shared parenting time. Thus far, there has been only one case, *Jones v. Johnson*, 747 So. 2d 1066 (Fla. DCA 2000), to interpret this new statute. In this case, the court stated that any method of apportioning a support award should account for proration of time spent with the child, as well as the parties' incomes. The court should 1) calculate the total child support award, and each parent's share under the guidelines as it is presently done; 2) determine the amount of time each parent has the child and reduce it to a percentage, *e.g.*, each parent has the child 50% of the time; 3) proportion the total child support award to each parent, based on the percentage of time each parent has the child with him or her; and 4) offset each parent's dollar responsibility under the guidelines.