
THE NEW LINE 11 VISITATION CREDIT: THE NON-CUSTODIAL PARENT WINS WHILE THE CHILD LOSES

I. INTRODUCTION

The law requires after the dissolution of a marriage that the non-custodial parent pays child support for the minor child or minor children from that marriage.¹ Predictably, issues arise regarding the determination of child support payments. The current debate focuses on the extent to which child support orders should reflect the time a non-custodial parent spends with his or her minor child.² Recent modifications to Missouri's Child Support Guidelines attempt to address this issue with the addition of a child support visitation credit that allows a non-custodial parent to deduct a percentage from payments based on the amount of time spent with the child.³

1. See *infra* notes 10-13, 32 and accompanying text. See, e.g., *Boris v. Blaisdell*, 492 N.E.2d 622 (Ill. App. Ct. 1986) (denying that a non-custodial parent has a fundamental right not to support a minor child beyond basic necessities and affirming that a non-custodial parent must pay a percentage of income in child support); *State ex rel. Blackwell v. Blackwell*, 534 N.W.2d 89 (Iowa 1995) (holding that child support orders are enforceable with mandatory income withholding orders despite the later determination of lack of biological paternity); *L. Pamela P. v. Frank S.*, 449 N.E.2d 713 (N.Y. 1983) (holding that even if an individual becomes a parent involuntarily, this does not relieve the individual from support obligations for the child).

2. See *How Various States Are Dealing With Key Child Support Issues*, The MATRIMONIAL STRATEGIST (Lender Publications, New York, N.Y.), July 1997, at 1 [hereinafter *States Dealing With Child Support Issues*]. Several states enacted visitation adjustments or alimony adjustments whereby a reduction of a non-custodial parent's child support payments is based on the expenses paid on behalf of the child and the amount of time spent with the child by the non-custodial parent. *Id.* See also *infra* Part II.C.

3. States such as New Jersey, Arizona, and Colorado have enacted statutes that allow child support adjustments based on the amount of time the non-custodial parent spends with the child. See *infra* notes 77-101 and accompanying text. Specifically, the new Form 14 of the

Before the enactment of the Child Support Enforcement Amendments of 1984, few states used child support guidelines to determine the amount a non-custodial parent owed for support of a minor child.⁴ Consequently, most child support determinations were on a case-by-case basis. In 1988, the Family Support Act ended indiscriminate child support determinations, requiring states to implement guidelines.⁵ However, despite the implementation of guidelines, the state governments and the federal government remained concerned with the application of these guidelines to the complex domestic situation where both parents spent time and money caring for the child.⁶ Missouri's commitment that a minor receives

Missouri Child Support Guidelines includes the Line 11 Visitation Credit, allowing support payments made by a non-custodial parent to be offset based on the amount of time the non-custodial parent visits with the child. See MO. CIV. P. FORMS, Form No. 14 Line 11, in MO. CT. R. 385 (West 1999). See also *infra* Part II.D.

4. See *infra* notes 25-26 and accompanying text. See also Robert G. Williams, *An Overview of Child Support Guidelines in the United States*, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 1 (Margaret Campbell Haynes ed., 1994). As early as 1979, Delaware instituted a presumptive child support guideline through its family court. *Id.* Washington and Wisconsin also issued advisory child support guidelines by which child support amounts were supposed to be determined. *Id.* However, in the majority of jurisdictions, courts determined the amount of child support a non-custodial parent should pay on a case-by-case basis. *Id.*

5. See *infra* notes 27-30 and accompanying text. See also Williams, *supra* note 4, at 1. In mandating the adoption and use of presumptive guidelines, the federal government had in mind several major objectives:

- (1) To enhance the adequacy of orders for child support by making them more consistent with economic evidence on the cost of child rearing;
- (2) To improve the equity of orders by assuring more comparable treatment for cases with similar circumstances; and
- (3) To improve the efficiency of adjudicating child support orders by encouraging voluntary settlements and reducing the hearing time required to resolve contested cases.

Id.

In the years that followed, determinations based on uniform state guidelines replaced determinations on a case-by-case basis. See, e.g., *Ex parte Kiely*, 579 So.2d 1366, 1367 (Ala. Civ. App. 1991) (discussing the mandatory use of established child support guidelines to determine support levels); *Lockhart v. Lockhart*, 919 P.2d 454, 456-58 (Okla. Ct. App. 1996) (discussing the mandatory nature of Oklahoma's child support guidelines); *White v. Cook*, 440 S.E.2d 391, 392 (S.C. Ct. App. 1994) (stating that the application of the child support guidelines is mandatory unless unjust or inappropriate); *Grunewaldt v. Bisson*, 494 N.W.2d 193, 195 (S.D. 1992) (stating that it is a matter of settled law that SDCL 25-7-7 sets forth mandatory guidelines that courts must follow when setting levels of child support).

6. See generally Stephanie B. Goldberg, *Make Room for Daddy*, A.B.A. J., Feb. 1997, at 48 (discussing the "men's rights" movement as it relates to issues of divorce and the allegedly

the proper amount of child support led the Missouri Family Law Committee in 1998 to address several problematic issues concerning the child support guidelines.⁷

This recent development analyzes the changes to the Missouri Child Support Guidelines implemented in 1998. It explores the new and controversial Line 11 Visitation Credit, which gives a non-custodial parent, who is ordered to pay child support, a tax credit against the payments based on the amount of time the non-custodial parent spent with the child.⁸

Part II of this recent development is divided into four sections. The first section discusses the history of child support laws in the United States.⁹ The second section focuses on the Missouri Child Support Guidelines. The third section considers the connection between child support payments and visitation, as well as the notion of shared parenting. The fourth section explains the Line 11 Visitation Credit. Part III presents an analysis of the problems created by the Line 11 Visitation Credit. Part IV introduces a proposal that

unfair treatment some divorced men receive regarding child support payments); WEISBERG & APPLETON, *infra* note 10, at 729-55. *See, e.g.*, *Rodgers v. Rodgers*, 887 P.2d 269 (Nev. 1994) (discussing the role of a new spouse's income in determining the parent's child support obligations); *Logan v. Logan*, 424 A.2d 403 (N.H. 1980) (finding that the duty of parental support applies equally to natural, adopted, and step children); *Myers v. Moschella*, 677 N.E.2d 1243 (Ohio Ct. App. 1996) (discussing the complicated arrangements of financial support and visitation between a minor child's lesbian mother and biological father); *Curtis v. Kline*, 666 A.2d 265 (Pa. 1995) (discussing the state's requirement that divorced parents support their majority age children but no similar requirement that married parents support their majority age children); *Feltman v. Feltman*, 434 N.W.2d 590 (S.D. 1989) (discussing the modification of child support if minor children from multiple marriages exist); *Lozinski v. Lozinski*, 408 S.E.2d 310 (W. Va. 1991) (discussing the role of long-arm statutes when a parent who owes child support moves out of the state).

7. This review occurred per statutory requirements of the federal government. *See infra* note 30 and accompanying text. The result of the modification is the new Form 14 and the Line 11 Visitation Credit. *See infra* Part II.D.

8. *See* Order Amending Civil Procedure Form No. 14, in 968-969 MO. CASES XXXI (West 1998). The pertinent language of Line 11 reads: "This adjustment is based on the number of periods of overnight visitation of custody per year awarded to and exercised by the parent obligated to pay support under any order or judgement." MO. CIV. P. FORMS, Form No. 14 Line 11, in MO. CT. R. 385 (West 1999). The provision provides for a credit of possibly more than ten percent depending on the amount of time the child spent with the non-custodial parent. *Id.* *See also infra* Part II.D.

9. It is only with the knowledge of the federal government's involvement in child support regulations that one can understand Missouri's Child Support Guidelines and the importance of the new Line 11 Visitation Credit.

addresses these problems. Part V concludes that the Missouri Legislature needs to recognize that the Line 11 Visitation Credit sacrifices the financial security of the minor child from a divorce and does not accurately reflect the real costs of providing for that minor child living in two homes.

II. BACKGROUND

A. History of Child Support Laws in the United States

Child support is defined as court mandated, periodic transfers of money from a non-custodial parent to a custodial parent for the benefit of a minor child from a dissolved marriage.¹⁰ The concept of child support dates back to the eighteenth century when Blackstone asserted that parents had a moral duty to provide and to care for their child.¹¹ Despite this early recognition of a child's right to support,

10. See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 729 (Aspen Law & Business 1998). While in the past child support determinations used open-ended standards, this led to unpredictable results, and child support payments varied widely from jurisdiction to jurisdiction and court to court. *Id.* Consequently, courts now use mathematical formulae to determine the child support level. *Id.* See also Mehra v. Mehra, 819 S.W.2d 351 (Mo. 1991) (en banc) (upholding implicitly the use of guidelines to determine child support payments); Willoughby v. Loomis, 869 P.2d 271, 275 (Mont. 1994) (defining child support as the sum of money paid to the custodial parent to be used for the child at the discretion of the custodial parent).

"Child support" is also defined as "The legal obligation of parents to contribute to the economic maintenance, including education, of their children; enforceable in both civil and criminal contexts. In a dissolution or custody action, money paid by one parent to another toward the expenses of children of the marriage." BLACK'S LAW DICTIONARY 239 (6th ed. 1990).

11. See Judith G. McMullen, *Prodding the Payor and Policing the Payee: Using Child Support Trusts to Create an Incentive for Prompt Payment of Support Obligations*, 32 NEW ENG. L. REV. 439, 440-41 (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 447 (Clarendon Press 1765)). Blackstone asserted:

The duty of parents to provide for the *maintenance* of their children, is a principal of natural law By begetting them therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life, which they have bestowed, shall be supported and preserved. And thus the children will have a perfect *right* of receiving maintenance from their parents.

Id.

See also 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 446-54 (Dawsons of Pall Mall 1966) (1765). See generally *Ex parte Devine*, 398 So.2d 686 (Ala. 1981) (discussing both the history of child support and the gender presumptions regarding which

courts did not enforce the right until the twentieth century.¹² Today, federal and state laws obligate parents to monetarily support their child at levels that meet the child's basic human needs.¹³

parent should maintain custody of a minor child); Leslie J. Harris et al., *Making and Breaking Connections Between Parents' Duty to Support and Right to Control Their Children*, 69 OR. L. REV. 689, 692-94 (1990) (discussing the early history of child support laws in England and the United States); Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J. FAM. L. 807 (1988-1989) (discussing the history of child support in England and the United States).

12. During the nineteenth century, state courts and legislatures in the United States determined that parents have a legal duty to support their child. Harris, *supra* note 11, at 693-96. The older cases found that a parent's support obligations, though implicating a moral duty, were not enforceable at law. See *Gordon v. Potter*, 17 Vt. 112 (1845). *But see Kyne v. Kyne*, 140 P.2d 886, 888 (Cal. Dist. Ct. App. 1943) (holding that the trial court properly awarded support for a child); *Bard v. Bard*, 173 S.W.2d 569, 570 (Ky. Ct. App. 1943) (holding that a father had the duty to pay child support regardless of which parent retained custody); *Cromwell v. Benjamin*, 41 Barb. 558 (N.Y. App. Div. 1863) (holding that the father had a legally enforceable duty to support his children); *Brillhart v. Brillhart*, 176 S.W.2d 229, 231 (Tex. Civ. App. 1943) (holding that courts may make provisions for child support to be paid periodically from the rents and revenues of property belonging to the father).

Despite the fact that in the nineteenth century a presumption of law stated maternal care of children was preferred to paternal care, the father's support obligations to the mother remained. See JOSEPH I. LIEBERMAN, *CHILD SUPPORT IN AMERICA: PRACTICAL ADVICE FOR NEGOTIATING—AND COLLECTING—A FAIR SETTLEMENT* 3 (Yale University Press 1986). In contrast, before the nineteenth century, a child was viewed as the possession of the father. With this possession came the moral obligation to support one's child. *Id.* at 1-3. This was so well accepted that, if a couple separated, the father took custody of the child, and consequently, the obligation to support the child. *Id.*

This conception changed in the United States in the 1800's with the advent of the "tender years exception," stating that a minor child should be with the mother due to her historic role of taking care of the child. See also *Brown v. Jenks*, 25 So.2d 439, 440-41 (Ala. 1946) (reciting the maternal preference rule); *Hammac v. Hammac*, 19 So.2d 392 (Ala. 1944) (holding that a mother is especially fitted to bestow care and attention upon a minor child); *Mayes v. Timmons*, 183 S.W.2d 989, 990 (Tex. Civ. App. 1944) (citing general rule that girls of tender years should be awarded to their mother, providing she is fit and capable). *But see Ex parte Devine*, 398 So.2d at 686 (reviewing the "tender years exception" and finding that it "represents an unconstitutional gender-based classification"); *Adamson v. Chavis*, 672 So.2d 624, 626-27 (Fla. Dist. Ct. App. 1996) (finding that the tender years rule, which had been legislatively abolished, was improperly used to limit a father's visitation); *Shearer v. Shearer*, 448 S.E.2d 165, 167-68 (W. Va. 1994) (interpreting the "tender years exception" as favoring the primary caretaker).

In time, states codified the paternal obligation, making non-support a criminal misdemeanor with various pecuniary and penal penalties. See LIEBERMAN, *supra*, at 4.

13. See McMullen, *supra* note 11, at 441 (citing *Resong v. Vier*, 459 N.W.2d 591, 594 (Wis. Ct. App. 1990)). See also *In re Scarritt*, 76 Mo. 565, 584 (1882) (recognizing the legal duty of a father to support his children); *Smith v. Smith*, 969 S.W.2d 856, 858 (Mo. Ct. App. 1998) (finding that a parent may not escape the duty to provide child support merely by limiting work to reduce income); *Hough v. Hough*, 242 P.2d 162, 163 (Okla. 1952) (explaining that the duty to pay child support existed at common law); *Antonelli v. Antonelli*, 409 S.E.2d 117, 118-20 (Va. 1991) (holding that a parent may not escape the duty to provide child support because

In the United States, laws regarding child support independently developed in each state. As a result, these laws differed among the states.¹⁴ The inconsistencies created a myriad of problems because the laws treated similarly situated individuals differently. To remedy these problems, the federal government began to address child support issues, creating the Aid for Families with Dependent Children ("AFDC") program in 1935.¹⁵

As divorce became increasingly common, studies showed that the child and the custodial parent often were left in poverty.¹⁶ In 1967,

of voluntarily accepting a job that has the risk of paying less money). *See generally infra* notes 27-39 and accompanying text.

To review some states' child support guidelines see, for example, ALA. R. JUD. ADMIN. r.32, in 2 ALA. R. ANN. at 517 (1996-1997); COLO. REV. STAT. ANN. § 14-10-115 (West 1997 & Supp. 1998); FLA. STAT. ANN. § 61.30 (West 1997); MISS. CODE ANN. §§ 43-19-101 - 103 (1993); NEV. REV. STAT. § 125B.080 (1997); N.D. ADMIN. CODE ch. 75-02-04.1 (1996); UTAH CODE ANN. § 78-45-7.7 (1996); WYO. STAT. ANN. art. 3 (1997).

14. *See* LIEBERMAN, *supra* note 12, at 5. Historically, abandoned and orphaned children were a local or community responsibility rather than a federal concern. *Id.* *See* Scheule, *supra* note 11, at 825-26. *See, e.g.,* Ankenbrandt v. Richards, 504 U.S. 689, 693-701 (1992) (discussing the domestic relations exception to federal diversity jurisdiction); Bates v. Bushey, 407 F. Supp. 163, 164 (D. Me. 1976) (holding that the domestic relations exception to federal diversity jurisdiction applied to a paternity action because the states should control domestic relations law). *But see* United States v. Bailey, 115 F.3d 1222, 1231-32 (5th Cir. 1997) (holding that the domestic relations exception does not apply to federal actions brought under the Child Support Recovery Act (the "CSRA") because the act expressly grants an independent basis for federal jurisdiction).

15. *See* LIEBERMAN, *supra* note 12, at 5. AFDC was intended to limit community expenses on caring for abandoned and orphaned children. *Id.* However, some states extended AFDC to protect children whose fathers refused to provide child support. *Id.* In 1949, the state of New York reacted to the growing problem of dead-beat dads, giving a mother or child the right to sue for child support in New York and enforce it in the state in which the father lived. *Id.* at 5-6. Within one year, ten other states adopted laws similar to the one in New York. *Id.* at 6.

16. *See* Karl A.W. Demarce, Note, *Devaluing Caregiving in Child Support Calculations: Imputing Income to Custodial Parents Who Stay Home With Children*, 61 MO. L. REV. 429, 433 n.37 (1996). This often left individuals dependent on the government for support. *Id.* at 433. The poverty rate for female-headed, single-parent families is three times the national average. Sally F. Goldfarb, *Child Support Guidelines: A Model for Fair Allocation of Child Care, Medical, and Educational Expenses*, 21 FAM. L.Q. 325, 349 (1987). A major cause of poverty for these families is inadequate child support. *Id.* *See also infra* note 18 and accompanying text. *See generally* WEISBERG & APPLETON, *supra* note 10, at 734-35; LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (The Free Press 1985). *See, e.g.,* Loretta D. McDonald, Comment, *Child Support Guidelines: Formulas to Protect Our Children from Poverty and the Economic Hardships of Divorce*, 23 CREIGHTON L. REV. 835 (1989-1990) (discussing the economic pitfalls for children of divorced families).

recognizing the growing problems of the divorced parent, Congress assigned to state welfare agencies the responsibility of enforcing child support orders as a condition to receive federal government aid.¹⁷ By 1974, reports detailed the problems that economically poor parents, specifically those receiving welfare, had in the collection of child support payments.¹⁸ Based on these reports, the federal government initially limited its involvement in child support issues to the problems of those parents receiving welfare.¹⁹ The government's interest in the protection of the parent on welfare led to the creation of the Child Support and Establishment of Paternity Act of 1975.²⁰ This act created Title IV-D of the Social Security Act.²¹ Title IV-D required applicants to the AFDC program to assign their child support collection rights to the state governments and to cooperate in locating the delinquent parent owing child support payments.²²

17. See WEISBERG & APPLETON, *supra* note 10, at 763 (citing Deborah Harris, *Child Support for Welfare Families: Family Policy Trapped in Its Own Rhetoric*, 16 N.Y.U. REV. L. & SOC. CHANGE 619, 633 (1987-1988)). Congress required the states to comply with specific federal standards and adopted a program of federal monitoring. *Id.* at 763-64. See generally *Childrens and Parents Rights Ass'n of Ohio, Inc. v. Sullivan*, 787 F. Supp. 724, 726-27 (N.D. Ohio 1991) (discussing the history of federal involvement in child support enforcement) [hereinafter *Childrens and Parents Rights Case*].

18. See LIEBERMAN, *supra* note 12, at 6-7. By 1973, the AFDC program cost \$7.6 billion per year. *Id.* at 6. One congressional study issued in 1974 concluded that eighty percent of the children under the program had absent parents and that one-third of these children were covered by support orders. *Id.* The RAND Corporation reported that agencies often did not try to collect child support, though many of the fathers who owed support could afford to pay. *Id.* See also James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987); McDonald, *supra* note 16, at 835-38 (discussing the economic hardships of women and children following a divorce); Marsha Garrison, *Child Support and Children's Poverty*, 28 FAM. L.Q. 475 (1994) (book review).

19. See WEISBERG & APPLETON, *supra* note 10, at 764.

20. See Child Support Enforcement Act, Pub. L. No. 93-647, 88 Stat. 2351 (1975) (codified as amended at 42 U.S.C. §§ 651-669 (1988)). Under Title IV-D, all AFDC recipients had to assign their support rights to the states for collection. WEISBERG & APPLETON, *supra* note 10, at 764.

21. See WEISBERG & APPLETON, *supra* note 10, at 764. Title IV-D aimed at cutting the cost of welfare by going after delinquent fathers who were behind in their child support payments. LIEBERMAN, *supra* note 12, at 6-7. If a state's child support enforcement agency did not meet federal standards, the federal government reduced its contribution to the state's AFDC budget by five percent. *Id.* If a state's program was approved, the federal government paid seventy-five percent of the cost of the program. *Id.*

22. See LIEBERMAN, *supra* note 12, at 7. In addition, each state was required to establish a parent locator service to pursue deadbeat parents. *Id.* The state's child support enforcement agency could then use federal databases to aid in the search and could to get a court order to

However, because the government created Title IV-D for welfare recipients, its programs virtually ignored parents who needed assistance but were not on welfare.²³ Despite the amounts recovered, some viewed Title IV-D as a failure.²⁴ The perceived problems with Title IV-D led to the enactment of the Child Support Enforcement Amendments of 1984.²⁵ Included in the new legislation, Congress offered the state governments various enforcement incentive programs, which were in addition to the funds for the federal-compliant, state-implemented enforcement systems.²⁶

Four years later, Congress adopted the Family Support Act of 1988, extending the federal government's involvement in child support issues.²⁷ This statute addressed the inadequacies in the existing child support laws, including the fact that determinations of child support were inconsistent and/or insufficient.²⁸ To remedy these inadequacies, Congress required that the state governments implement numeric guidelines to aid courts in the determination of the appropriate level of child support in any given case.²⁹ Also

enforce payments. *Id.* However, Congress distinguished between Title IV-D cases (welfare cases) and non-Title IV-D cases (non-welfare cases). *Id.*

23. See, e.g., *Childrens and Parents Rights Case*, *supra* note 17, at 726-27.

24. See Peter Leehy, Note, *The Child Support Standards Act and the New York Judiciary: Fortifying the 17 Percent Solution*, 56 BROOK. L. REV. 1299, 1302 (1991). Leeley attributes this failure to the lack of incentives for state agencies to collect payments due to non-AFDC families. *Id.* The program did not always help even those on AFDC because states often concentrated their recovery efforts on the easiest cases in order to ensure that they would receive the federal subsidies. *Id.* Consequently, many families on AFDC went unaided by the Title IV-D programs. *Id.* (citing Paula Roberts, *Child Support and Beyond: Mapping a Future for America's Low-Income Children*, 27 CLEARINGHOUSE REV. 594, 595 (1988)). See also *id.* at Part I, for a discussion of the problems in the Title IV-D programs.

25. See Leehy, *supra* note 24, at 1303. When Congress enacted this law, it reiterated the need for child support enforcement for both AFDC and non-AFDC families. *Id.* In addition, non-mandatory, numeric guidelines regarding child support awards were to help create uniformity within each state. *Id.* See also 42 U.S.C. §§ 651-669.

26. See Leehy, *supra* note 24, at 1303.

27. See 42 U.S.C. §§ 651-669. This act extended federal involvement to non-Title IV-D cases (non-welfare cases). WEISBERG & APPLETON, *supra* note 10, at 764.

28. See *supra* notes 16-26 and accompanying text. In addition, the act established the procedures for the enforcement of all child support orders, including income withholding, liens, and disclosure of overdue support payments to consumer reporting agencies. WEISBERG & APPLETON, *supra* note 10, at 764. Also, it mandated procedures for the determination of paternity. *Id.*

29. Guidelines were to be available to judicial and administrative officials with responsibility for setting the levels of child support awards. Williams, *supra* note 4, at 1. The

included was a rebuttable presumption that the child support specified under the numeric guidelines was the appropriate amount to be awarded by the courts.³⁰ Furthermore, the federal government insisted that the states review their guidelines at least once every four years to ensure that the guidelines continued to provide each child with the appropriate amount of child support.³¹

Child Support Enforcement Amendment of 1984 gave the states three years to develop and implement guidelines. *Id.*

All state guidelines must require that a rebuttable presumption exist, that the amount of support indicated is appropriate, that deviations from the guidelines be in writing or specified on the record, that the guidelines apply to all child support cases within the state, and that the guidelines be numeric and quantitative in nature. Williams, *supra* note 4, at 2-3.

A court must justify any deviation from a state's guidelines. *See, e.g.,* Ball v. Minnick, 648 A.2d 1192, 1195-96 (Pa. 1994) (discussing the presumed appropriateness of the guidelines and the requirements for any deviations).

30. In contrast to the 1984 act, the Family Support Act of 1988 instructed the states to implement presumptive, child support guidelines within one year of its enactment. Williams, *supra* note 4, at 203. *See supra* note 5 and accompanying text, for a discussion of Congress' goals in mandating the adoption and use of the presumptive guidelines. *See also* Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L.Q. 281 (1987) (discussing the federal mandate that states adopt child support guidelines and explaining the role of these guidelines in the determination of the appropriate level of child support).

See Williams, *supra* note 4, at 2 (citing 42 U.S.C. § 667(b)). With this presumption in mind, states retain the flexibility to adopt child support guidelines to best meet the needs of that state's children. *Id.* For example, there are no restrictions on the types of guidelines states should adopt, and unlike other federal requirements, states have wide latitude when implementing these guidelines. *Id. See, e.g.,* Favrow v. Vargas, 647 A.2d 731, 743-45 (Conn. 1994) (finding that the language of the statute establishing the guidelines provides for the rebuttable presumption that the amount of the child support award is the proper amount); Dalton v. Clanton, 559 A.2d 1197, 1210-11 (Del. 1989) (stating that the guidelines require more than mere application of a formula, but provides for a rebuttable presumption that the amount awarded is proper); Woolridge v. Woolridge, 915 S.W.2d 372, 378 (Mo. Ct. App. 1996) (stating that there exists a rebuttable presumption that the amount of support awarded pursuant to the child support guidelines is the correct amount); Moss v. Bonnell, 412 S.E.2d 495, 498-99 (W. Va. 1991) (stating that the amount of the child support award should be consistent with the state's guidelines).

Guidelines were intended to address the deficiencies in the case-by-case system, including the inadequacy of orders when compared to the cost of raising children, the inconsistency of orders, causing inequitable treatment among similarly situated individuals, and the inefficiency of adjudication of child support amounts because of the lack of uniform rules. Williams, *supra* note 4, at 282-86 (discussing the inadequacies that plagued child support determinations before the federal mandate for guidelines).

31. *See* Williams, *supra* note 4, at 5.

Recognizing a duty to support one's child even after a divorce, the federal government mandates that the amount a non-custodial parent must pay is to be calculated in any divorce proceeding in which a minor child is involved.³² The states have the discretion to determine the method used to calculate the child support obligation.³³ Generally, states use one of three models when determining the obligation: (1) the percentage of obligor income model; (2) the income shares model; and (3) the Delaware Melson formula.³⁴ Under the percentage of obligor income model, courts determine child support based on a percentage of the non-custodial parent's income and the number of minor children from the marriage.³⁵ Under the income shares model, the most commonly used model, courts compute child support using

32. See, e.g., *Ridgway v. Ridgway*, 454 U.S. 46, 67-68 (1981) (stating that there are few legal duties that are more universally accepted than the duty of a father to support his child) (Powell, J., dissenting); *Childrens and Parents Rights Case*, 787 F.Supp. 724, 734-36 (N.D. Ohio 1991) (holding that the federal government's involvement in child support regulations is within the "pursuit of the general welfare" and that Congress has concluded that it is necessary to alleviate the effects of divorce on children); *Grubb v. Sterrett*, 315 F. Supp. 990, 994 (N.D. Ind. 1970) (finding that a stepparent has no legal duty to support a stepchild); *Luntsford v. Luntsford*, 117 F. Supp. 8, 9-10 (W.D. Mo. 1953) (noting that at common law a father has a legal obligation to support his child).

The traditional approach of calculating child support assumes that one parent is the primary caretaker and the other parent is a "visiting" parent who pays support to the custodial parent. McMullen, *supra* note 11, at 443.

33. See *supra* notes 27-31 and accompanying text.

34. See *Williams*, *supra* note 4, at 5-6; *Williams*, *supra* note 30, at 290-301, 303-04. These three methods focus on the parents' incomes, while ignoring any in-kind support received by the child. *Id.*

In addition, a fourth model exists, but is rarely followed. Jennifer Clifton Ferguson, Comment, *Missouri Child Support Guidelines*, 57 MO. L. REV. 1301, 1304-05 (1992). The goal of this model is to ensure both that the custodial and non-custodial families maintain a similar standard of living. *Id.* This reflects the notion that a child should enjoy as close to a pre-divorce standard of living as possible. *Id.* This model is similar to the Delaware Melson formula, but it provides for a more exact equality between standards of living. *Id.*

35. See *Williams*, *supra* note 4, at 5. The percentage of income the obligor must pay is set by state statute and varies from state to state. *Id.* Some percentage of obligor income guidelines are based on gross income and others are based on net income. *Id.* This method does not consider the income of the custodial parent, nor does it provide for child care, extraordinary medical expenses, or children subsequently born to the obligor. *Williams*, *supra* note 30, at 290. See also *Williams*, *supra* note 4, at 5, for a description of the guidelines in Wisconsin and Minnesota using this model. See *Marriage of Allan v. Allan*, 509 N.W.2d 593 (Minn. Ct. App. 1993) and *Marriage of Joyce v. Wagner*, No. CX-91-2494, 1992 WL 160846, at *1 (Minn. Ct. App. July 14, 1992), for examples of the percentage of obligor income method in Minnesota, and *Marriage of Abitz v. Abitz*, 455 N.W.2d 609 (Wis. 1990), for an example of the percentage of obligor income method in Wisconsin.

both the custodial parent's income and the non-custodial parent's income in an attempt to ensure that a child maintains the same standard of living after a divorce as before a divorce.³⁶ Finally, the Delaware Melson formula first determines each parent's minimal needs; then, it provides for the child's basic needs; if any income remains, the formula allocates an additional percentage of the parents' income to child support.³⁷

36. See McMullen, *supra* note 11, at 443 (citing JUDITH AREEN, FAMILY LAW: CASES AND MATERIALS, at 767 (1992)). This model is preferred in 32 states. WEISBERG & APPLETON, *supra* note 10, at 735. See, e.g., Marriage of Glick v. Lawmaster, 648 N.E.2d 370, 375 (Ind. Ct. App. 1995) (stating that Indiana adopted the income shares model in its Child Support Guidelines (quoting Carr v. Carr, 600 N.E.2d 943, 946 (Ind. 1992))); Voishan v. Palma, 609 A.2d 319, 321 (Md. 1992) (stating that Maryland adopted the income shares model in its Child Support Guidelines); Fink v. Fink, 462 S.E.2d 844, 853 (N.C. Ct. App. 1995) (stating that North Carolina adopted the income shares model in its Child Support Guidelines (quoting Commentary, 1995 North Carolina Child Support Guidelines)).

See Williams, *supra* note 4, at 5-6. This method calculates child support as the share of each parent's income that would have been allotted to the child if the household had remained intact. Williams, *supra* note 30, at 292. Calculating the child support obligation under the income shares model involves the following three steps:

1. Income of the parents is determined and added together.
2. A basic child support obligation is computed based on the combined income of the parents. This obligation represents the amount estimated to have been spent on the children jointly if the household were intact. The estimated amount, in turn, is derived from economic data on household expenditures on children. A total child support obligation is computed by adding the actual expenses for work-related child care expenses and extraordinary medical expenses.
3. The total obligation is then pro-rated between each parent based on his or her proportionate shares of income. The obligor's computed obligation is payable as child support. The obligee's computed obligation is retained and is presumed to be spent directly on the child. This procedure simulates spending patterns in an intact household, in which the proportion of income allocated to children depends on total family income.

Id. at 292-93.

This model is flexible, allowing for apportionment between the parents of additional basic expenses, such as child care or extraordinary medical expenses. WEISBERG & APPLETON, *supra* note 10, at 736 (quoting ANDREA H. BELLER & JOHN W. GRAHAM, SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT). A disadvantage is that it may reduce the incentive for the custodial parent to increase income from work because it will decrease child support payments.

Id.

37. See Williams, *supra* note 4, at 6. Elwood F. Melson, Jr., J., developed this method, and Delaware first used this method in 1979. *Id.* The basic principles of this formula are:

1. Parents are entitled to keep sufficient income for their most basic needs to facilitate continued employment.

Federal law mandates that states provide a cost-of-living adjustment and review their guidelines every four years to ensure that adequate child support is provided.³⁸ States must update economic data on the cost of raising a child. This data includes research findings, health insurance costs, extraordinary medical expenses, and childcare expenses. Because the federal regulations are silent on this updating process, each state retains the power to determine its own method.³⁹

B. Missouri Child Support Guidelines

Pursuant to federal requirements, Missouri passed legislation in 1989, directing its Supreme Court to establish guidelines for the determination of child support payments in judicial and administrative proceedings.⁴⁰ These guidelines regulate child support awards in divorce proceedings.⁴¹ The Missouri Supreme Court based the guidelines on findings made by the Family Law Section of the Missouri Bar and by the Missouri Department of Social Services.⁴²

2. Until the basic needs of children are met, parents should not be permitted to retain any more income than that required to provide the bare necessities for their own self-support.

3. Where income is sufficient to cover the basic needs of the parents and all dependents, children are entitled to share in any additional income so that they can benefit from the absent parent's higher standard of living.

Williams, *supra* note 30, at 295 (quoting Family Court of the State of Delaware, *The Delaware Child Support Form: Study and Evaluation*, REPORT TO THE 132ND GENERAL ASSEMBLY (1984)).

See, e.g., Turner v. Turner, 586 A.2d 1182, 1185-87 (Del. 1991) (discussing how the Delaware Melson formula is implemented); Dalton v. Clanton, 559 A.2d 1197, 1202-12 (Del. 1989) (discussing the history, use, and implementation of the Delaware Melson Formula in determining child support obligations in Delaware); Holley v. Holley, 382 S.E.2d 590, 592-93 (W. Va. 1989) (discussing the history and use of the Delaware Melson Formula in West Virginia).

38. *See supra* note 31 and accompanying text.

39. By using updated research, states can ensure that their guidelines provide adequate and appropriate child support despite changes in the cost of living or in the tax structure. Williams, *supra* note 4, at 10-11.

40. *See supra* notes 15-39 and accompanying text. *See also* MO. ANN. STAT. § 452.340.7 (West 1997). *See generally* Ferguson, *supra* note 34, for an in-depth discussion of the Missouri Child Support Guidelines.

41. *See* § 452.340.1.

42. *See* Ferguson, *supra* note 34, at 1306 (citing 1 Mo. Family Law § 14.15 (Mo. Bar 4th

The guidelines use the income shares model.⁴³ In addition, pursuant to federal requirements, a rebuttable presumption exists that the amount of child support calculated under the guidelines is the proper amount to be awarded.⁴⁴

On October 2, 1989, the Missouri Supreme Court adopted Rule 88.01, the Presumed Child Support Amount, in the Missouri Rules of Civil Procedure.⁴⁵ In conjunction with Rule 88.01, the court created Form 14, the Child Support Calculation Worksheet.⁴⁶ Then, the General Assembly of the Missouri Legislature established factors to be considered in awarding child support in a divorce proceeding and in modifying a child support award.⁴⁷

ed. 1988)).

43. See *supra* note 36 and accompanying text. See, e.g., *Mehra v. Mehra*, 819 S.W.2d 351, 353-54 (Mo. 1991) (stating that Missouri's Child Support Guidelines were based on the income shares model developed by the National Center for State Courts); *McLaughlin v. Horrocks*, 883 S.W.2d 95, 96 (Mo. Ct. App. 1994) (stating that Form 14 utilizes the income shares model to determine child support levels).

44. See § 452.340.9. A court may award a different amount, and thus rebut the presumed amount, if there is sufficient cause. *Id.* See, e.g., *Division of Child Support Enforcement v. Estrada*, 916 S.W.2d 443, 450 (Mo. Ct. App. 1996) (stating that a trial court is required to use Form 14 to calculate child support, and deviation from this calculation is only appropriate if the court finds, on the record, that the Form 14 amount is unjust or inappropriate); *Rothfuss v. Whalen*, 812 S.W.2d 232, 237 (Mo. Ct. App. 1991) (stating that the presumption is rebutted by a written finding or specific finding on the record that the amount calculated is unjust or inappropriate).

Similar standards are found in other states. See also *Demarce*, *supra* note 16, at n.43. See, e.g., *Marriage of Schletzbaum*, 809 P.2d 1251, 1254 (Kan. Ct. App. 1991) (holding that a support order deviating from the amount called for by Kansas' guidelines, without stating the reasons for the deviation, is erroneous and will be reversed); *Bernhardt v. K.R.S.*, 503 N.W.2d 233, 235 (N.D. 1993) (holding that the presumption may be rebutted and that the court may depart from established guidelines upon a showing of undue hardship for the obligor); *Marriage of Petersen*, 888 P.2d 23, 25-26 (Or. Ct. App. 1994) (stating that the guidelines allow for the rebuttal of the child support award, and listing the ten (10) factors to be considered (quoting OR. REV. STAT. § 25.280)); *Holley v. Holley*, 382 S.E.2d 590, 593 (W. Va. 1989) (holding that West Virginia law requires any master or judge deviating from the guidelines to state the reasons in writing).

45. See MO. R. CIV. P. 88.01, in MO. CT. R. 259 (West 1999). As of April 1, 1990, this rule became mandatory. Interview with The Honorable Thea A. Sherry, St. Louis County Associate Circuit Judge, in St. Louis, Mo. (Oct. 15, 1998).

46. Form 14 includes the calculation worksheet for the child support amount and the schedule of basic child support obligations. *Ferguson*, *supra* note 34, at 1306-07. The amount of child support determined by Form 14 is presumed to be correct. *Id.* See also MO. CIV. P. FORMS, Form No. 14, in MO. CT. R. 385 (West 1999).

47. See MO. REV. STAT. § 452.340.1 (1998).

In a proceeding for dissolution of marriage, legal separation or child support, the court

There are three basic steps to determine a child support award.⁴⁸
The first step is to state the combined gross income of both parents.⁴⁹

may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable or necessary for the support of the child, including an award retroactive to the date of filing the petition, without regard to marital misconduct, after considering all relevant factors including:

- (1) The financial needs and resources of the child;
- (2) The financial resources and needs of the parents;
- (3) The standard of living the child would have enjoyed had the marriage not been dissolved;
- (4) The physical and emotional condition of the child, and the child's educational needs;
- (5) The child's physical and legal custody arrangements, including the amount of time the child spends with each parent and the reasonable expenses associated with the custody or visitation arrangements; and
- (6) The reasonable work-related child care expenses of each parent.

Id.

MO. R. CIV. P. 88.01, *in* MO. CT. R. 259 (West 1999), states: "When determining the correct amount of child support, a court or administrative agency shall consider all relevant factors, including all relevant statutory factors." *Id.* In addition, Rule 88.01 discusses the rebuttable presumption that the amount of child support calculated pursuant to Form 14 is the proper amount to be awarded. *Id.*

Form 14 includes a calculation worksheet, instructions on how to use the form, and comments concerning its proper use. MO. CIV. P. FORMS, Form No. 14, *in* MO. CT. R. 385 (West 1999). See Demarce, *supra* note 16, at nn.42-48, for a discussion of the Missouri statute and Form 14.

Mo. Rev. Stat. 452.370 (1998). The statute reads, in part,

Except as otherwise provided . . . the provisions of any judgment respecting maintenance or support may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable. In a proceeding for modification . . . the court . . . shall consider all financial resources of both parties, including the extent to which the reasonable expenses of either party are, or should be . . .

See, e.g., Gibson v. Gibson, 946 S.W.2d 6, 7-10 (Mo. Ct. App. 1997) (stating that modifying an award requires a showing that a change in circumstances was so substantial as to make the present terms unreasonable and that to determine a new award a new Form 14 must be filled out); Warren v. Warren, 909 S.W.2d 752, 754 (Mo. Ct. App. 1995) (holding modification of support orders requires a showing of changes circumstances and use of the Form 14). *See* REV. STAT. MO. 452.370 (1998) (discussing requirements for modification of child support awards).

48. *See* Ferguson, *supra* note 34, at 1307-08.

49. *See id.* Both the custodial parent and the non-custodial parent must complete worksheets that then will be reviewed by a court. *Id.* at 1306-1307. "Gross income includes income from almost any source except public assistance benefits and child support received for other children." *Id.* at 1307. Missouri courts broadly define gross income for the purpose of

Next, the total obligation to the minor child is determined.⁵⁰ The final step is to identify the amount of child support to be awarded.⁵¹ The non-custodial parent pays the identified child support amount, and the custodial parent is expected to spend the determined total obligation directly on the child.⁵²

C. Child Support Payments and Visitation

In most states, child support and visitation by the non-custodial parent are separate obligations.⁵³ However, child support and visitation are not unrelated concepts.⁵⁴ The connection between child support and visitation should take the competing interests of parents

calculating child support. *See, e.g.*, *Buckner v. Jordan*, 952 S.W.2d 710-12 (Mo. 1997) (defining "gross income" for the purpose of determining child support and holding that the court could include per diem payments used for employment related travel); *Taranto v. State of Mo. Dep't of Soc. Serv., Div. of Child Support Enforcement*, 962 S.W.2d 897, 898 (Mo. Ct. App. 1998) (holding that annuity payments received in settlement of personal injury claim should be included in gross income for determining child support levels); *Gal v. Gal*, 937 S.W.2d 391, 392 (Mo. Ct. App. 1997) (finding loans a father received from his business could be added to gross income for purposes of determining child support); *Marriage of Wagner v. Wagner*, 898 S.W.2d 649, 650 (Mo. Ct. App. 1995) (finding maintenance awards paid to wife should not be included in gross income when determining husband's child support payments).

50. *See Ferguson, supra* note 34, at 1307-08. This figure combines the child support obligation, as determined by the schedule, using the parent's total adjusted gross income and the number of children to be supported, and the custodial parent's reasonable child support costs, less any federal income tax credits. *Id.*

51. *See id.* The child support obligation of each parent is calculated by dividing each parent's adjusted monthly gross income by the combined adjusted monthly gross income. *Id.* Then, this percentage is multiplied by the total child support obligation. *Id.* *See also infra* notes 130-26 and accompanying text.

52. *See* MO. CIV. P. FORMS, Form No. 14, in MO. CT. R. 385 (West 1999).

53. *See* Karen Czapanskiy, *Child Support, Visitation, Shared Custody and Split Custody*, in *CHILD SUPPORT GUIDELINES: THE NEXT GENERATION* 43 (Margaret Campbell Haynes ed., 1994).

54. *See id.* Rules governing child support and visitation fall into one of two categories: connected or disconnected. Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUT.-CAM. L.J. 619 (1989). An example of a connected rule is when a parent who fails to pay child support is denied visitation with the child and a parent who pays child support gets visitation. *Id.* However, the recent trend favors the enactment of disconnected rules. *Id.* Thus, the payment of child support bears no relation to the right of visitation. *Id.* *See, e.g.*, *Peterson v. Jason*, 513 So.2d 1351, 1352-53 (Fla. Dist. Ct. App. 1987) (stating that a court may deny visitation for willful and intentional failure of parent to pay child support); *Turner v. Turner*, 919 S.W.2d 340, 346 (Tenn. Ct. App. 1995) (holding that visitation may be denied when parent can afford to pay child support but refuses to do so).

and minor child into account.⁵⁵ First, in a majority of states, the amount of child support awarded is expected to apply only to the time that the child resides with the custodial parent.⁵⁶ Second, in some states, the amount of child support paid by a non-custodial parent is adjusted in cases of shared physical custody.⁵⁷

However, both the rules that connect the two concepts and the rules that do not, fail both the parents and the child.⁵⁸ Both sets of rules allow for optional parenting on the part of the non-custodial parent because the non-custodial parent remains free to determine whether to participate in the upbringing of the child.⁵⁹ Furthermore, connecting rules allow the non-custodial parent to withhold financial support for visitation rights, thereby endangering the economic stability of the child.⁶⁰ Also, these rules fail to adequately address parents' needs because they do not require the non-custodial parent to participate in child rearing, they may deny non-custodial parent time with the child, and they may contribute to gender bias.⁶¹

55. See Czapanskiy, *supra* note 53, at 619. Those interests are the child's need for emotional and financial support, the parents' needs for human association, and the parents' needs for personal autonomy. *Id.*

56. See Czapanskiy, *supra* note 53, at 43. In calculating the amount of child support, courts are to presume that the child spends some time with the non-custodial parent. *Id.* Thus, the custodial parent does not pay for the child while the child visits the non-custodial parent, and the award is discounted. *Id.*

57. See *id.* In this situation, the amount of money the non-custodial parent must pay is reduced, and the amount to be attributed to the non-custodial parent's household is increased. *Id.* The presence of a shared custody adjustment to child support indicates that the legislature's primary goal is to encourage both parents to share in the rights and responsibilities of child rearing. Karen Czapanskiy, *Volunteers and Drafters: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1446-47 (1991). See also COLO. REV. STAT. ANN. § 14-10-124(1) (West 1997 & Supp. 1998); WEISBERG & APPLETON, *supra* note 10, at 866-67 (citing works that discuss the relationship between custody and child support).

58. See Czapanskiy, *supra* note 53, at 619-20.

59. See *id.*

60. See *id.*

61. See *id.* at 620. Under connecting rules, the non-custodial parent's desire for contact with the child is given preference over the custodial parent's need for child support. *Id.* In addition, mothers are subject to indefinite and restrictive standards about facilitating access to the child. *Id.* On the other hand, disconnecting rules lead to gender-based paradigms. *Id.* Nurturing work is linked to the mother, and the sole, cognizable contribution of the father is monetary support. *Id.*

Current child support laws assume that the minor child spends the majority of time in the household of the custodial parent, and limited time with the non-custodial parent.⁶² Generally, states calculate child support amounts assuming that a child lives with the custodial parent eighty percent of the time, a figure supported by traditional visitation orders.⁶³ However, because of the reality of divorce, this calculation is often inaccurate. As many as half of the children whose parents do not live together rarely or never see the non-custodial parent.⁶⁴ Furthermore, even if the non-custodial parent visits, the child might not stay overnight.⁶⁵ Thus, because of the visitation assumption, an unvisited child may suffer two-fold: no contact with the non-custodial parent and lack of financial support below need.⁶⁶ States address the inaccuracies by allowing modifications of child support payments.⁶⁷

In some states, downward adjustments of child support only occur when parents share custody of a child, in contrast to when one parent is the custodial parent and the other parent is the visiting parent.⁶⁸ Often, because there are not bright line rules to differentiate between shared custody and visitation, states authorize the courts to adjust child support levels if the parents share custody.⁶⁹

62. See Czapanskiy, *supra* note 53, at 44.

63. See *id.* For example, if \$100.00 per month is needed to support the child, the non-custodial parent will pay \$80.00, and the remaining \$20.00 will be spent while the child is presumably visiting the non-custodial parent. *Id.* Traditional visitation orders assume that the child remains with the "visiting" parent for twenty percent of the time, including alternate weekends (for a total of 52 days), alternate holidays (approximately 3-4 days), and two weeks in the summer (14 days), for a total of about seventy (70) days, or twenty percent of the year. *Id.*

64. See Czapanskiy, *supra* note 53, at 44 (citing FRANK F. FURSTENBERG, JR. & ANDRE J. CHERLIN, *DIVIDED FAMILIES* (1991)).

65. See *id.*

66. See *id.* at 44.

67. See *id.* In Tennessee, upward modifications are possible if the non-custodial parent does not visit at least twice a month. *Id.* In California, child support is calculated based on the amount of time the child is expected to spend with each parent. *Id.* Also, states often permit downward modifications for unusual or extraordinary expenses, such as high transportation costs, in order to facilitate visitation. *Id.*

68. See *id.* In Colorado, a child is considered to be in shared physical custody if the child spends fewer than seventy-five percent of the time with one parent. *Id.* In Maryland, a reduction is permitted if the child is expected to spend thirty-five percent or more of the time with the visiting parent. *Id.* See also *infra* notes 70-100 and accompanying text.

69. See Czapanskiy, *supra* note 53, at 44-45.

Currently, more than half of the states allow for a downward adjustment of child support if the parents share custody of the child.⁷⁰ States reduce child support payments in this case to equalize the economic situations of the parents and to ensure proportional allocation of resources to the child.⁷¹ States that do not provide child support modifications in the case of shared custody base their decisions on the economic needs of the custodial parent and on the fear that financial incentives for custody will jeopardize the sincerity of the parties involved in custody battles.⁷²

Once states allow downward adjustments, they must determine the best method to calculate the adjustment.⁷³ Some states allow adjustments of child support payments based on the concepts of shared parenting and visitation.⁷⁴ These adjustments give the non-

70. *See id.* at 45. The argument in favor of shared custody is that it is better for a child to maintain a close relationship with both parents despite the marital breakdown. *Id.* In addition, it is believed that the expenses of the custodial home decrease and proportionately increase in the non-custodial home. *Id.* (citing ROBERT G. WILLIAMS & DAVID A. PRICE, ANALYSIS OF SELECTED FACTORS RELATING TO CHILD SUPPORT GUIDELINES (1993)).

71. *See id.* at 45.

72. *See id.* The former is because states want to avoid an incentive for parents to create two households for the child, when in fact, only one household adequately can be afforded. *Id.* States fear that this may jeopardize the child's financial security. *Id.* *See also* Marianne Takas, *Improving Child Support Guidelines: Can Simple Formulas Address Complex Families?*, 26 FAM. L.Q. 171, 183-84 (1992) (discussing the implementation of child support guidelines and shared parenting child support adjustments). The latter concern is based on the fear that a parent will fight harder to retain custody despite the fact that the child really may not be wanted. Czapanskiy, *supra* note 53, at 45. This will increase litigation and complicate child support proceedings to the detriment of the child's financial well-being. *See generally* Czapanskiy, *supra* note 57, at 1443-46 (discussing the problems with shared parenting plans, and the different objectives each parent may have concerning the daily care of the child); *see infra* Part III.

73. *See* Czapanskiy, *supra* note 53, at 45-46. Some states have opted for a discretionary approach, leaving the decisions to the courts, while other states have tried to include any adjustments within the guidelines. *Id.* at 46.

74. *See States Dealing With Child Support Issues, supra* note 2, at 1, 5-9. *See, e.g.,* CAL. FAM. CODE §§ 4053, 4055 (West 1994 & Supp. 1997). The California statute addresses the issue of a credit by including the percentage of time the child spends with the visiting parent in the calculation of the child support award. *Id.* The statute provides that the award should reflect the cost of raising the child in two homes and should minimize disparities in the child's standard of living. *Id.*

See, e.g., FLA. STAT. ANN. § 61.30 (West 1997 & Supp. 1999). The Florida Child Support Guidelines allow courts to adjust a child support award after considering the shared parenting arrangements. *Id.* The statute reads, in part:

The court may adjust the minimum child support award, or either or both parent's

custodial parent credit against the child support payments for the expenses paid on behalf of the child while with the non-custodial parent.⁷⁵ Credits are based on the notion that both parents share responsibility for providing food, housing, and transportation for the child.⁷⁶

Three states have implemented such programs: New Jersey,⁷⁷ Arizona,⁷⁸ and Colorado.⁷⁹ New Jersey's visitation credit recognizes that child support awards neither include adjustments for traditional visitation nor accurately reflect expenditures made by the non-custodial parent on behalf of the child while the child is with the non-custodial parent.⁸⁰ New Jersey's credit recognizes that the non-

share of the minimum child support award, based upon . . . (g) The particular shared parental arrangement, such as where the children spend a substantial amount of their time with the secondary residential parent, thereby reducing the financial expenditures incurred by the primary residential parent . . .

Id.

See, e.g., N.M. STAT. ANN. § 40-4-11.1 (Michie 1978). New Mexico's Child Support Guidelines provide two tables. "Table A" applies if one parent has the child for less than a specified percentage of time and divides the child support obligation between the parents based on each parent's percentage of total combined gross income. *Id.* "Table B" applies only if each parent has custody of the child for more than the specified percentage of time. *Id.*

See, e.g., N.Y. FAM. CT. ACT § 413.1 (Consol 1987). New York does not provide statutorily for adjustments based on shared parenting, but the state's courts are permitted to weigh various factors when making child support awards, including "the non-monetary contributions that the parents will make toward the care and well-being of the child." *Id.*

75. *See States Dealing With Child Support Issues, supra* note 2, at 5-9, for a description and comparison of several states' child support guidelines and visitation adjustments or credits.

76. *See* Maria P. Imbalzano & Robert J. Durst, II, *New Jersey's Amended Guidelines: An Innovative Approach to Child Support*, THE MATRIMONIAL STRATEGIST (Leader Publications, New York, N.Y.), July 1997, at 5.

77. *See infra* notes 80-88.

78. *See infra* notes 82-94.

79. *See infra* notes 95-101.

80. *See* SUPREME COURT FAMILY PRACTICE COMMITTEE, FINAL REPORT OF THE SUPREME COURT FAMILY PRACTICE COMMITTEE ON THE NEW JERSEY CHILD SUPPORT GUIDELINES 23-24 (1996) [hereinafter REPORT OF FAMILY PRACTICE COMMITTEE]. The committee expressly found that the non-custodial parent incurs some direct costs for the child during visitation and that the custodial parent does not incur these costs. *Id.* Variable expenses, such as food and transportation, can only be incurred by one parent at a time, and the lack of any adjustment in the former guidelines led to duplicate accounting of expenses. *Id.* Consequently, the cost of child support for divorced families was above that of similarly situated intact families. *Id.*

The guidelines were developed to provide the courts with the information needed to ensure fair and adequate child support awards. APP. R. PRAC., App. IX-A, *in* N.J. R. Ct. 518 (West 1999). The guidelines advance the principles that child support is a continuous duty of both

custodial parent's expenditure represents duplicate spending because it is already reflected in the amount of child support the non-custodial parent pays.⁸¹ To correct this problem, the Supreme Court Family Practice Committee recommended that, if the non-custodial parent shares parenting responsibilities, support obligations should reflect the money spent for the child while the child was in the non-custodial parent's custody in the form of a credit against the child support obligations.⁸² The committee proposed the changes to the state's guidelines because of several assumptions regarding visitation.⁸³ The credit assumes that forty percent of total marginal costs related to child rearing are variable costs for food, transportation, and entertainment.⁸⁴ Credits include these variable costs because New

parents, that a child is entitled to share in both parents' incomes, and that a child should not be the victim of divorce. *Id.* In addition, the guidelines provide a rebuttable presumption, and like Missouri, use the income shares model to calculate support levels. *Id.* at 518-19.

81. See REPORT OF FAMILY PRACTICE COMMITTEE, *supra* note 80, at 23-24.

82. See *id.* at 23-30. The Appendix to the Rules of Practice states that if a parent has custody of the child for more than twenty-eight percent of the time, the parent may qualify for a shared parenting child support award. App. IX-A, *supra* note 80, at 525-26. The reduction in the award shall not exceed the parent's time share of variable costs. *Id.*

Line 19 of New Jersey's Sole-Parenting Worksheet gives directions on how to adjust for the visitation credit. APP. R. PRAC., App. IX-B, in N.J. R. Ct. 5e6 (West 1999). The credit reflects variable costs of the non-custodial parent during visitation periods. The directions read, in part:

Enter the amount of the adjustment for variable expenses for the child during visitation periods The court may grant the non-custodial parent an adjustment for visitation equal to that parent's income share of the child's variable expenses for the percentage of time the child is with that parent. [T]he court should consider whether the non-custodial parent has incurred variable expenses for the child during the visitation period and if visitation reduced the other parent's variable expenses for the child. It is assumed that variable costs . . . for the child account for 37% of the total marginal child-rearing expenditures in intact families.

Id.

The non-custodial parent's percentage of overnights is calculated by dividing the number of overnights with the non-custodial parent by the total number of overnights with either parent. *Id.* This is multiplied by thirty-seven percent of the total child support obligation, which represents the variable cost of the non-custodial parent, and the result is the maximum visitation adjustment that can be awarded to the non-custodial parent. *Id.*

83. See REPORT OF FAMILY PRACTICE COMMITTEE, *supra* note 80, at 23-24. Among the assumptions made by the committee: the non-custodial parent incurs variable costs during visitation periods, only one parent can incur variable costs at a time, the custodial parent does not incur variable costs during visitation periods with the non-custodial parent, and variable costs are incurred in proportion to the amount of time a parent and child spend together. *Id.*

84. See *id.*; *infra* note 85.

Jersey found that the non-custodial parent was really paying twice: once when the child support payment was sent to the custodial parent, and again when the non-custodial parent exercised visitation rights.⁸⁵ The committee recommended the use of the variable costs formula to determine the maximum credit.⁸⁶ New Jersey also provides modification by either parent if there is non-compliance with the parenting plan or if the child suddenly spends more or less time with either parent.⁸⁷ In addition, the committee recommended that the courts use the income shares model and that child support obligations accurately reflect each parent's percentage of time spent with the child and the child-related expenditures.⁸⁸

85. See REPORT OF FAMILY PRACTICE COMMITTEE, *supra* note 80, at 23-24. For example, if a child spends 30 percent of overnights with the non-custodial parent, and the basic support obligation is \$100 per week, the variable expense credit is calculated as follows: $\$100 \times .40 \times .30 = \12.00 . *Id.* at 25. This \$12.00 is then deducted from the non-custodial parent's child support obligation. *Id.*

86. See *id.* at 26. When determining the visitation credit, courts are instructed to take other factors into account, such as whether the expenses actually were incurred. *Id.* In addition, any adjustment is presumed to be based on whether the visitation occurs as specified in the parenting plan. *Id.* at 23-24, 26-28. A parenting plan is the formal agreement between parents delineating the day-to-day care of the child. *Id.*

87. See *id.* at 26-30. The committee did not include credit for extended visitations (five or more consecutive overnights) because the visitations may be infrequent or may leave the custodial parent with insufficient funds to care for the child. *Id.* at 28-30. Instead, an adjusted award is intended to reflect the *typical* sharing of child-related expenses over the course of a year. *Id.*

88. See *supra* note 36 and accompanying text. This is the same model used by Missouri. See *supra* note 43 and accompanying text; *infra* notes 102-08 and accompanying text. Shared parenting differs from joint custody. REPORT OF FAMILY PRACTICE COMMITTEE, *supra* note 80, at 31 n.64. Joint custody means either joint legal custody or joint physical custody. *Id.* Legal custody refers to the responsibility for major decisions regarding the minor child, and physical custody refers to the day-to-day care and decisions involving the child. *Id.*; WEISBERG & APPLETON, *supra* note 10, at 849. See, e.g., *Bell v. Bell*, 794 P.2d 97, 99 (Alaska 1990) (discussing the preference for joint legal custody, regardless of the physical custody arrangement); *Marriage of Walker v. Walker*, 539 N.E.2d 509, 510 (Ind. Ct. App. 1989) (discussing the role of joint custody in divorce proceedings (quoting IND. CODE § 31-1-11.5-21 (1988))); *Lindner v. Lindner*, 569 So.2d 173, 175 (La. Ct. App. 1990) (discussing the presumption in favor of joint custody in Louisiana). In contrast, shared parenting refers to a parent's participation in the child's life, which may or may not encompass responsibility for major decisions. REPORT OF FAMILY PRACTICE COMMITTEE, *supra* note 80, n.64. It does require a sufficient amount of physical custody of the minor child that justifies consideration of the variable costs paid by the non-custodial parent. *Id.*

See REPORT OF FAMILY PRACTICE COMMITTEE, *supra* note 80, at 31. The rationale for a visitation credit, and not the mathematics of the visitation credit, is the focus of this paper. See *id.* at 31-53, for a discussion of New Jersey's shared parenting formulas.

Before New Jersey's adoption of a visitation credit, Arizona explored and enacted a visitation adjustment for shared custody arrangements.⁸⁹ Using the formula of Dr. Betson, Arizona developed a shared custody/visitation adjustment based on the percentage of time the child spent with the non-custodial parent.⁹⁰ Like New Jersey, Arizona sought to ensure that its guidelines maintained an acceptable standard of support for the child within the reasonable financial abilities of the parents and to provide similar levels of child support for similarly situated parents.⁹¹ Arizona law provides for a child support adjustment based on visitation.⁹² An adjustment proportionate to the share of child support is granted when the non-custodial parent exercises visitation rights.⁹³ Arizona law also states that if the time spent by each parent with the child is essentially equal and the gross incomes of the parents are equivalent, no child support shall be paid by either parent.⁹⁴

Colorado is the third state to be reviewed that recognizes the expenses paid by the non-custodial parent while the child is with that

89. See POLICY STUDIES, INC., ECONOMIC BASIS FOR UPDATED CHILD SUPPORT SCHEDULE: STATE OF ARIZONA 59-81 (1995) [hereinafter ECONOMIC BASIS FOR SCHEDULE]. ARIZ. REV. STAT. ANN. § 25-320 (West 1991 & Supp. 1998).

90. Dr. David Betson of the University of Notre Dame conducted a 1990 research study on child-rearing expenditures. REPORT OF FAMILY PRACTICE COMMITTEE, *supra* note 80, at 33-34. New Jersey based its visitation credit on his method of adjusting child support awards for the time that the child is with the non-custodial parent. *Id.* See also *id.* at 35-53, for a discussion of Dr. Betson's formula.

See ECONOMIC BASIS FOR SCHEDULE, *supra* note 89, at 59-63. The adjustment is based on the assumption that both parents should share child-rearing expenditures and that the non-custodial parent should only receive a credit for the expenditures made directly for the child. *Id.* at 60.

91. See § 25-320. The guidelines provide for a presumption that the amount of support ordered is the proper amount in that particular situation. *Id.*

92. See *id.* The Schedule of Child Support Obligations is based on expenditures of an intact household, and consequently, "there is no consideration for costs associated with visitation." *Id.* The adjustment for costs associated with visitation attempts to correct this result. *Id.*

93. See *id.* To adjust for visitation, Arizona requires its courts first to determine the total amount of time of expected visitation. *Id.* If a parent spends four hours with the child, the parent is credited 1/4 of a day with the child, and one (1) full day is credited if the parent spends more than twelve (12) hours with the child. *Id.* After calculating the number of visitation days, the courts refer to the Visitation Table, crediting a portion of the parent's child support obligation. *Id.*

94. See *id.*

parent while the child is with that parent.⁹⁵ Colorado's guidelines took effect on November 1, 1986.⁹⁶ The state uses the income shares model to determine the appropriate level of child support.⁹⁷ Like other states using this model, the goal is to ensure that the child receives the same portion of the parents' income as if the marriage had remained intact.⁹⁸ In cases of shared custody, Colorado multiplies the total child support obligation by the percentage of time the child spends with each parent.⁹⁹ Moreover, Colorado's approach to shared custody recognizes what most other states do not: it costs more to run two households than one. Because certain expenses are duplicated, Colorado makes an adjustment before determining the amount of child support each parent must pay by multiplying the total obligation amount by 1.50.¹⁰⁰ Only then does Colorado determine each parent's obligation based on the amount of time spent with the child.¹⁰¹ Consequently, Colorado applies a visitation credit to a larger numerical figure. This not only adjusts for the costs expended by the non-custodial parent, but inherently recognizes the costs associated with maintaining two households.

D. Line 11 Visitation Credit

On October 1, 1998, the new Missouri Child Support Guidelines took effect.¹⁰² Missouri's guidelines use the income shares model, apportioning to the child the amount of money that would have been received had the household and marriage remained intact.¹⁰³ Before the new guidelines, Form 14 did not consider the costs of the non-

95. See COLO. REV. STAT. ANN. § 14-10-115 (West 1997 & Supp. 1998).

96. See Richard E. Poley, *Calculating Income in Child Support Cases*, FAMILY LAW NEWSLETTER (CBA Family Law Section, The Colorado Lawyer, Denver, Colo.), Mar. 1996, at 53. The guidelines, established pursuant to the federal mandate, were based on the policy that a child is to receive adequate levels of support subject to the parents' ability to pay. *Id.*

97. See *id.*

98. See *supra* note 36 and accompanying text.

99. Section 14-10-115.

100. See *id.* Colorado adjusts for the fact that after a divorce a family incurs increased total costs in raising a child. Takas, *supra* note 72, at 185-86.

101. See *supra* note 99 and accompanying text.

102. See *supra* note 8.

103. See *supra* note 36 and accompanying text.

custodial parent associated with the time spent with the child.¹⁰⁴

The new Missouri Child Support Guidelines included the new Line 11.¹⁰⁵ Line 11's instructions state that the obligor is to receive a portion of the amount expended on the child as a credit against the total child support payments.¹⁰⁶ The adjustment is calculated by multiplying the basic child support amount by a factor set forth in a table attached to Form 14.¹⁰⁷ The result is then subtracted from the basic child support amount, and this second result is the actual child support obligation due.¹⁰⁸

III. ANALYSIS

As predicted, the enactment of the new Missouri Child Support Guidelines provoked polarized responses.¹⁰⁹ In theory, the new guidelines responded equitably to the economic concerns of members of divorced families.¹¹⁰ However, the Line 11 Visitation Credit remains the most controversial aspect of the new guidelines because it gives the non-custodial parent, usually the father, credit against child support payments for time spent with the child.¹¹¹ For the first time, Missouri linked child support payments with visitation and joined the ranks of other states that have a credit for money spent on the child while with the parent.¹¹² Thus, in Missouri, the more time a child spends with a non-custodial parent, the less child support that

104. Compare MO. CIV. P. FORMS, Form No. 14, in MO. CT. R. 385 (West 1999) with MO. CIV. P. FORMS, Form No. 14, in MO. CT. R. 373 (West 1997).

105. Line 11 is titled: "Adjustment for a portion of amounts expended by the parent obligated to pay support during periods of overnight visitation or custody." MO. CIV. P. FORMS, Form No. 14, in MO. CT. R. 385 (West 1999).

106. See *id.* For example, a parent who sees the child for less than 36 overnight visits receives no credit, while a parent who sees the child for 92-109 overnight visits receives a ten percent credit. *Id.* If a parent sees the child for more than 109 overnight visits, the guidelines allow an adjustment greater than ten percent. *Id.*

107. The basic child support amount is calculated using Line 5 of Form 14. *Id.*

108. See *id.*

109. See *More Time, Less Money*, ST. LOUIS POST-DISPATCH, July 29, 1998, at B6.

110. See *id.* Specifically, the guidelines addressed many of the complaints raised by divorced fathers. See generally Goldberg, *supra* note 6 (discussing the complaints of divorced fathers regarding child support payments and the effect of such payments on their lives).

111. See *supra* notes 102-08 and accompanying text.

112. See *supra* notes 79-101 and accompanying text.

parent is obligated to pay.¹¹³ However, doubts exist whether the Line 11 Visitation Credit will protect the financial and emotional well being of the child.

A visitation credit seems to solve the dual expenditure problem facing divorced families, crediting for expenses like rent, food, and transportation. The credit reduces the non-custodial parent's child support obligations on the premise that the non-custodial parent spends money on behalf of the child while exercising visitation rights.¹¹⁴ Fairness dictates that the expenses of the non-custodial parent need recognition, because while the child is with the non-custodial parent that parent pays for the variable expenses.¹¹⁵ However, while a visitation credit seems reasonable on its face, in reality, the results are harsh for the custodial parent, the child of a divorce, and the Missouri court system.

The primary problem with Missouri's visitation credit rests with the numbers on which child support, and subsequently, the visitation credit are based. The income shares model used in Missouri premises support on the notion that a child in a divorced household should enjoy the same standard of living after the divorce as before.¹¹⁶ However, the factor in the table accompanying Form 14, that is, the table Missouri courts must use to determine each parent's basic child support obligation, cannot meet the needs of a divorced family because they are based on the amount of money for an intact household to function. Missouri's numbers do not take into account that it costs more for those in a divorced family to survive than it costs for those living in one household.¹¹⁷ Even before Missouri credits the non-custodial parent's child support payments for

113. According to The Honorable Thea A. Sherry, St. Louis County Associate Circuit Judge, in St. Louis, Mo. (Oct. 15, 1998), this reasoning marks a change in philosophy. See *supra* note 45. "Originally, the laws were focused on securing financial security for women, and now [Missouri] is cutting back." *Id.*

114. This assumes that after a divorce each parent must pay the expenses for a separate residence.

115. See *More Time, Less Money*, *supra* note 109. The variable expenses include food, housing, and transportation, among other things. *Id.*

116. See *supra* note 36 and accompanying text.

117. According to The Honorable Thea A. Sherry, St. Louis County Associate Circuit Judge, in St. Louis, Mo. (Oct. 15, 1998), there are not sufficient studies on which reliable numbers for the cost of maintaining two households after a divorce can be based. See *supra* note 45.

visitation, the guidelines cannot adequately provide for the child's financial needs.¹¹⁸ A visitation credit compounds the problems of a faulty child support system because it decreases the already inadequate amount of money the custodial parent receives for support of the child.

Having established that the numbers do not reflect the actual costs of the custodial parent to support a household, it is possible to analyze the visitation credit itself. On close inspection, it is evident that the visitation credit, as it currently stands, will not solve the problems plaguing Missouri's child support system. Problems with the visitation credit occur both prior to its application when the parties are determining custody and during the calculation of the child support obligations using Form 14.

First, the visitation credit may be an incentive for parents to create a second household for the child when they can ill-afford to do so.¹¹⁹ A second household may spread already inadequate resources thin, placing the child's financial security in jeopardy.¹²⁰ By crediting the non-custodial parent's child support obligation, the custodial parent's household faces a financial decline without an equivalent decline in the non-custodial parent's income.¹²¹ If the custodial parent already has been pushed close to the brink of poverty following a divorce, a reduction in child support paid because of visitation credit may push the family below the poverty line or cause the family to be unable to afford basic necessities.

Another potential problem with the visitation credit is that it gives parents a financial incentive to enter into shared custody arrangements when there is no indication that the child will benefit from such an arrangement. Parents should not be encouraged to enter

118. The numbers in the Child Support Guidelines represent a false premise on which Missouri courts must rely to determine child support awards. Interview with The Honorable Thea A. Sherry, St. Louis County Associate Circuit Judge, in St. Louis, Mo. (Oct. 15, 1998). In most cases, there was not enough money before the divorce, so the further reduction of child support by the visitation credit risks sending individuals into poverty. *Id.*

119. See Czapanskiy, *supra* note 53, at 45.

120. See *id.*

121. See *id.* (quoting Marianne Takas, *Improving Child Support Guidelines: Can Simple Formulas Address Complex Families?*, 26 FAM. L.Q. 171, 186 (1992)). A credit disproportionately and negatively affects the primary custodial household. Takas, *supra* note 72, at 185-86. See, e.g., *infra* notes 133-37 and accompanying text.

into a shared custody arrangement because of a visitation credit where all evidence suggests that the child will not benefit from such an arrangement.¹²² In situations where the parents are conflicting over matters in the dissolution, a shared parenting plan may be more harmful than if one parent were to retain sole custody of the child. Unless evidence indicates that shared custody is best for the child, it should not be granted merely because one parent wants a financial benefit. With the visitation credit, the child's interests may be subjugated because one parent seeks to exercise visitation rights solely to reduce the child support payments. Of equal concern, the custodial parent may resist shared custody or visitation with the non-custodial parent if the result is less child support because of such time spent.¹²³ Consequently, while the goal of most custody arrangements is to foster a relationship between both parents and the child, the visitation credit threatens this goal by encouraging one parent to resist visitation.

In addition, the visitation credit encourages insincere negotiations about custody arrangements.¹²⁴ Thus, concern for the child's welfare is displaced by concern for the financial consequences of visitation and the impact on the amount of child support paid or received.¹²⁵

Missouri's visitation credit potentially creates an administrative nightmare if thousands of divorced parents file motions to modify existing awards or if parties in the midst of divorce proceedings protract litigation because of custody disputes. In the ensuing months and years, Missouri courts can expect issues concerning child custody to use more of the courts' resources because the visitation credit makes it harder to calculate child support awards between parents arguing over the amount of time actually spent with the child. This threatens the child's financial security because money spent on litigation is money that the child desperately needs to meet basic

122. See Czapanskiy, *supra* note 53, at 45.

123. This resistance, if so motivated, is of great concern if the child would benefit from spending more time with the non-custodial parent. *Id.*

124. See *id.*

125. "Battles between parents will be waged as one side fights to limit visitation to get money and another side fights to get visitation in order to give less money. In the end, the child loses." Interview with The Honorable Thea A. Sherry, St. Louis County Associate Circuit Judge, in St. Louis, Mo. (Oct. 15, 1998).

necessities.

Another situation that may arise is if a court grants the visitation credit to the non-custodial parent but that parent does not exercise visitation rights, forcing the custodial parent to bring the non-custodial parent to court to have the child support award modified and the visitation credit removed.¹²⁶ In a second scenario, the non-custodial parent unexpectedly visiting the child will seek implementation of the visitation credit through the courts. In the former situation, the child receives less money because the court assumed the child would visit the non-custodial parent and the non-custodial parent actually would spend money on the child, offsetting the custodial parent's expenses. In the latter scenario, the non-custodial parent will go to court in an effort to get the visitation credit for the amount of time spent with the child. In both situations, the visitation credit automatically reduces the child support payments, and the parents must return to court to have the child support modified if visitation is or is not exercised. Consequently, the child does not receive the proper amount of financial support, and money that should go toward the child's welfare is spent on attorney's fees and court costs.

Furthermore, the non-custodial parent does not have to prove that any money actually was spent on the child while the child was with the non-custodial parent. Consequently, there is the risk that the non-custodial parent receives the credit, but does not expend any money on the child.

In the situation where the custodial parent refuses to grant visitation because of the fear of losing needed child support money through the visitation credit, the non-custodial parent must go to court to have visitation rights enforced. In this situation, animosity between the parents may develop, placing the child in the middle of a custody battle. Frequently, the courts follow policies that encourage the child's interaction with both parents; however, the visitation credit may affect the child's relationship with his or her parents as lengthy custody battles take the place of weekly visits.¹²⁷ The

126. See Czapanskiy, *supra* note 53, at 45 (citing Karen Czapanskiy, *Volunteers and Drafts: The Search for Parental Equality*, 38 UCLA L. REV. 1415, 1444-46, n.109 (1991)).

127. See *supra* note 57.

visitation credit subverts the prevailing policy, pitting parents against one another over visitation, custody, and the application of the visitation credit and placing the child in the middle.

Finally, litigation may arise if a court deviates from the guidelines. Parents unhappy with a court's decision regarding the application of the visitation credit may expend resources fighting the court's order rather than spending those resources on the child. In addition, because the guidelines allow judicial discretion, there is the risk that the visitation credit will be inconsistently applied throughout the state. Though uniformity remains a major reason for the guidelines, the visitation credit allows too much room for judges to treat similarly situated individuals differently.¹²⁸

Aside from these policy arguments against the visitation credit, completed Form 14s demonstrate that the visitation credit only exacerbates existing child support problems, primarily because a small change in the numbers can lead to a big change in the resulting circumstances.¹²⁹ In addition, the Form 14s show not only the standard-of-living discrepancy between the custodial parent and the non-custodial parent, but prove that the visitation credit only worsens the financial situation of the custodial parent.

Courts calculate child support awards after looking at the monthly combined gross income of both parents.¹³⁰ In a situation with one child and both parents earning \$2000.00 per month, the proportionate shares of combined income equaling fifty percent, after looking at the chart accompanying Form 14, the basic child support amount is \$610.00. Form 14 then requires courts to account for additional child rearing costs.¹³¹ In this hypothetical, the custodial parent is awarded the full \$60.00 credit. The non-custodial parent is credited with \$28.00 for health care costs.¹³² According to calculations per Form

128. See *supra* notes 14-15, 27-30 and accompanying text.

129. See interview with The Honorable Thea A. Sherry, St. Louis County Associate Circuit Judge, in St. Louis, Mo. (Oct. 15, 1998).

130. See MO. CIV. P. FORMS, Form No. 14, in MO. CT. R. 385 (West 1999).

131. The more typical costs include reasonable, work-related, child care expenses paid by the custodial parent and health insurance expenses paid by the non-custodial parent. *Id.* For purposes of this hypothetical, these are the only two costs used.

132. After discussions with several attorneys, this amount was the most common for a family with one child, although it will vary according to the individual situations.

14, the total combined child support obligation is \$778.00, and each parent's obligation is \$389.00. After crediting the non-custodial parent for health care expenses paid, the presumed child support amount for the non-custodial parent is \$361.00. Next, the courts must apply the visitation credit. The amount is not based on the non-custodial parent's obligation, but rather, it is based on the basic child support amount of \$610.00.¹³³ Assuming that the non-custodial parent shares custody of the minor child with the custodial parent for more than ninety-one (91) days, the non-custodial parent receives a credit of at least ten percent or \$61.00.¹³⁴ Thus, the final child support amount paid by the non-custodial parent is \$300.00. The visitation credit reduced the non-custodial parent's child support obligation by nearly fifteen percent. Furthermore, the custodial parent must support a two-person household on \$2,300.00 per month, while the non-custodial parent lives on \$1,700.00 per month.

The problems with the visitation credit are demonstrated more clearly when the non-custodial parent earns more than the custodial parent. Assuming that the custodial parent earns \$2,000.00 per month and the non-custodial parent earns \$6,500.00 per month, the non-custodial parent's proportionate share of the combined income is seventy-six percent, while the custodial parent's share is twenty-four percent. The chart accompanying Form 14 indicates a basic child support amount of \$993.00.¹³⁵ After providing the custodial parent with the maximum child care credit allowed under Form 14, and after providing the non-custodial parent with a credit of \$28.00 for health insurance costs,¹³⁶ the total combined child support obligation is \$1,161.00. The custodial parent's share is \$278.64, and the non-custodial parent's share, including a credit for health insurance costs, is \$854.36. Assuming that the non-custodial parent receives a ten-percent visitation credit, the obligation of the non-custodial parent is \$755.06. The visitation credit reduced the non-custodial parent's child support obligation by more than eleven percent. Furthermore, the custodial parent must support a two-person household on

133. See MO. CIV. P. FORMS, Form No. 14, in MO. CT. R. 385 (West 1999).

134. This assumes that the non-custodial parent spent 92 to 109 days with the child. *Id.*

135. See MO. CIV. P. FORMS, Form No. 14, in MO. CT. R. 385 (West 1999).

136. See *supra* note 131.

\$2,755.06, while the non-custodial parent lives on \$5,744.94, more than twice the amount of money of the custodial parent.

The two above hypotheticals clearly demonstrate that the child support awards do not provide sufficient money to the custodial parent, and that the visitation credit is unfair in light of the inadequate allocation of resources between the custodial parent and non-custodial parent. In both instances, the visitation credit reduced the child support award by more than ten percent. This is simply unacceptable. Furthermore, Form 14 provides that the visitation credit can be increased at the judge's discretion, meaning that the discrepancy could be even greater.¹³⁷

IV. PROPOSAL

All the evidence indicates that, while valid in theory, the visitation credit does not work under the present guidelines. Consequently, Missouri must do one of two things to ensure that the child from a divorced marriage receives the necessities to maintain the lifestyle enjoyed when the parents were still married. First, Missouri must invest the money and do the research to rework the guidelines so that they accurately reflect what it costs a divorced family to live as two households in today's modern society.¹³⁸ Accurate guidelines would solve many of the problems currently associated with child support. They would ensure that the child receives what is needed to maintain the same lifestyle, and that each parent pays the proper amount of money for that child.

However, because of the cost of such a study, the best alternative is that Missouri adopts the Colorado approach to child support. Like in Missouri, Colorado's Child Support Guidelines assume that an intact family exists. However, Colorado recognizes that it inherently costs more to raise the minor child in two households resulting from a divorce. Consequently, judges and administrators in Colorado multiply base child support levels by 1.5 to reflect this additional

137. See MO. CIV. P. FORMS, Form No. 14, in MO. CT. R. 385 (West 1999).

138. According to The Honorable Thea A. Sherry, St. Louis County Associate Circuit Judge, in St. Louis, Mo. (Oct. 15, 1998), there are not enough studies completed to create a chart that accurately reflects the costs of two households resulting from a divorce. See *supra* note 45.

cost.¹³⁹ Only then will judges and administrators credit the non-custodial parent for the money spent on the child while exercising visitation rights. This approach recognizes the fact that divorce costs more money for all parties, not just the custodial parent and child. However, it also recognizes that the non-custodial parent's expenses should be recognized and included in the child support calculation.

It may appear that the combination of shared custody and a visitation credit is a fair share for the non-custodial parent of the increased costs of raising the child. However, Missouri fails to realize that the non-custodial parent typically earns more money and lives at a higher standard-of-living than the custodial parent.¹⁴⁰ Consequently, Missouri's current guidelines and the Line 11 Visitation Credit do not take into account that the non-custodial parent, even without the credit, can better afford to bear the increased costs of raising the minor child subsequent to a divorce.¹⁴¹ Missouri must develop child support guidelines and a visitation credit that takes these facts into account.

In order to address the current problems of Missouri's new Line 11 Visitation Credit, Missouri must reevaluate the method used by the courts to calculate child support. If the guidelines are corrected, then many of the policy arguments against them will no longer exist. Recognizing in the child support calculations that it inherently costs more to maintain two households, Missouri will reduce the chance that parents will seek custody for financial reasons. Parents will be able to maintain two successful households because the corrected guidelines will ensure that all parties have what is needed to take care of themselves and the minor child.

V. CONCLUSION

While the new Line 11 Visitation Credit that was added to the Missouri Child Support Guidelines answers many of the complaints of "mad dads" who believe that they pay too much money in child support, in reality, it only helps the non-custodial parent to the

139. See *supra* notes 95-101 and accompanying text.

140. See Takas, *supra* note 72, at 187; *supra* notes 133-37 and accompanying text.

141. See Takas, *supra* note 72, at 187.

detriment of the minor child. The visitation credit sacrifices the child's well being and financial security by reducing the already inadequate child support. In order to solve equitably post-dissolution child support issues, the Missouri Legislature must create guidelines that fairly, accurately, and realistically provide for divorced families that live in two households. The legislature must ensure that child support in Missouri accurately reflects the reality of divorce and the costs of providing for one child in two homes.

Robert Scott Merlin *

* J.D. 1999, Washington University.

