

The Relationship Between Child Support and Parenting Time

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Introduction

When child support guidelines were initially drafted, it was assumed that in most instances, the lesser-time parent would be the father, the father would see the children infrequently, and the father would have a higher income than the mother. Today, more custodial parents are male than before,¹ the wage gap between mothers and fathers has narrowed,² and a substantial number of fathers are more involved in their children's lives.³

Decades ago, it was rare for an obligor parent to have access to his child more than every other weekend and every other holiday and approximately

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1. In 1992, only 14% of custodial parents were males, while in 2018, the percentage increased to 20%. Compare LYDIA SCOON-ROGERS & GORDON LESTER, U.S. CENSUS BUREAU, U.S. DEP'T OF COM., No. P60-187, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS: 1991, at 2 (1995), <https://www2.census.gov/prod2/popscan/p60-187.pdf>, with TIMOTHY GRALL, U.S. CENSUS BUREAU, U.S. DEP'T OF COM., No. P60-269, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2017, at 2 (2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-269.pdf>.

2. Historically, female earnings averaged about 60% of male earnings, but climbed to 79% by 2014 (approximately 83% on a weekly basis). FRANCINE BLAU & LAWRENCE KAHN, THE GENDER WAGE GAP: EXTENT, TRENDS, AND EXPLANATIONS 2 (Nat'l Bureau of Econ. Rsch. 2016), <https://www.nber.org/papers/w21913.pdf>.

3. Daniel R. Meyer et al., *The Growth in Shared Custody in the US: Patterns and Implications*, 55 FAM. CT. REV. 1, 2 (2017).

three weeks in the summer (or about 20% of all overnights per year).⁴ Recent studies have found that shared placement has become more common.⁵ Census data find that 58% of noncustodial fathers and 73% of noncustodial mothers had provisions for visitation or joint custody or both in 1991, and that the percentage increased to 81% of noncustodial parents in 2018.⁶ These trends raise questions about how to calculate child support obligations in various situations, particularly when the payor parent has substantial access to the child.

This article will discuss various approaches that have been applied to how child support should be calculated (i) when the lesser-time parent has a higher income than the other parent but has substantial access, (ii) when both parents have equal joint physical custody, and (iii) when the greater-time parent has a higher income than the other parent. We will highlight the advantages and disadvantages of the various policy options.

I. Background Information

A. *The Theoretical Foundation of Child Support Guidelines in the United States*

Most states adopted child support guidelines in the late 1980s to fulfill a federal requirement that each state have advisory child support guidelines by 1987.⁷ The Family Support Act of 1988 expanded the requirement from statewide advisory guidelines to require rebuttable presumptive guidelines.⁸ The requirements were intended to correct several deficiencies: inconsistent order amounts among parties in similarly situated cases, inefficient adjudication of child support amounts due to

4. For example, one study of divorced fathers in 1981 found that only 8% of all fathers had possession of their child for four or more overnights per month. See Frank F. Furstenberg Jr. & Christine Winquist Nord, *Parenting Apart: Patterns of Childrearing After Marital Disruption*, 47 J. MARRIAGE & FAM. 893, 895 tbl.1, 896 (Nov. 1985).

5. See Meyer et al., *supra* note 3; DANIEL MEYER ET AL., CHANGES IN PLACEMENT AFTER DIVORCE AND IMPLICATIONS FOR CHILD SUPPORT POLICY (Inst. for Rsch. on Poverty 2019); Bruce Smyth et al., *Legislating for Shared-Time Parenting After Parental Separation: Insights from Australia?*, 77 LAW & CONTEMP. PROBS. 109 (2014); Marygold S. Melli & Patricia Brown, *Exploring a New Family Form—The Shared Time Family*, 22 INT'L J. L., POL'Y & FAM. 231 (2008).

6. See SCOON-ROGERS & LESTER, *supra* note 1, at 6; GRALL, *supra* note 1, at 7.

7. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 18, 98 Stat. 1305, 1321–22.

8. Family Support Act of 1988, Pub. L. No. 100-485, § 103, 102 Stat. 2343, 2346–48.

the lack of uniform standards, and inadequate levels of support when compared to poverty levels and the cost of child-rearing.⁹

A number of different conceptual models were proposed as a foundation for the creation of child support guidelines. For example, some commentators have argued that guidelines should be crafted so that both parents will have equal living standards until the child becomes an adult.¹⁰ However, no state has adopted this as a conceptual framework for guidelines. Instead, most states adopted a “continuity of expenditure” model of child support guidelines.¹¹ The principle of the continuity-of-expenditure model is that the child whose parents are living separately should receive the same level of financial support that the child would have received if the child and parents lived together as an intact family. To this end, the continuity of expenditure model is based on measurements of child-rearing expenditures in intact families. The continuity of expenditure philosophy has been implemented in the United States via the “income shares model” and the “percentage-of-obligor income model,” the two major types of models for the calculation of child support. All but three states use one of these two models. The income shares model, which is used by 41 states,¹² presumes that each parent is responsible for his or her prorated share of what an intact family with the same number of children and combined parental income spends on child-rearing. The obligated parent’s prorated share (based on the obligated parent’s share of the total parental income) is the basis of the child support order.¹³ Under the percentage-of-obligor income model, the presumptive child support amount is calculated based on only the income of the lesser-time parent.¹⁴ States utilizing the percentage-of-obligor income model often presume that the custodial parent spends at least an equal percentage of income or dollar amount on the child as the guidelines percentage or amount.

9. See ROBERT G. WILLIAMS, U.S. DEP’T OF HEALTH & HUM. SERV. OFF. OF CHILD SUPPORT ENF’T, DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ORDERS II-2 (1987); Jane C. Venohr & Robert G. Williams, *The Implementation and Periodic Review of State Child Support Guidelines*, 33 FAM. L.Q. 7 (1999).

10. See generally Marsha Garrison, *Child Support Policy: Guidelines and Goals*, 33 FAM. L.Q. 157, 157 (1999) (discussing a number of possible alternate goals for child support guidelines).

11. *Id.* at 160–62, 166–69. See Venohr & Williams, *supra* note 9, at 12; Jane C. Venohr, *Differences in State Child Support Guidelines Amounts: Guidelines Models, Economic Basis, and Other Issues*, 29 J. AM. ACAD. MATRIM. L. 377, 385 (2017).

12. *Child Support Guideline Models*, NAT’L CONF. OF STATE LEGISLATURES (July 10, 2020), <https://www.ncsl.org/research/human-services/guideline-models-by-state.aspx>.

13. See Venohr & Williams, *supra* note 9, at 12–15.

14. *Id.* at 10–12.

B. Federal Requirements

Federal law does not require adjustments in state guidelines for when the obligor has substantial access. Recent changes to federal requirements for state guidelines, however, attempt to make sure that states provide adjustments within their guidelines to not impoverish the obligor parent.¹⁵ States are now required to provide a self-support reserve or a similar adjustment in their guidelines. Self-support reserves have been established so that significant child support is not required if the obligor parent's income is below a certain specified amount.¹⁶ Most states with both a self-support reserve and an adjustment for timesharing do not allow both adjustments; rather, most take the lower of the two adjustments.

C. Timesharing Adjustment

In the past few decades, there has been a movement toward the adoption of formulas that adjust for parenting time. In 1998, 24 states provided formulas to adjust for parenting time.¹⁷ Today, more than two decades later, 38 states have now adopted a parenting-time adjustment formula for child support.¹⁸ The formulas and criteria for applying them vary. As set forth in more detail below, many states have adopted rules so that, once the obligor parent has the child for at least a specified number of overnights, the presumptive child support amount is reduced as the level of access increases. In addition, some states have incorporated rules so that, even if the obligor parent has substantial access or equal physical custody, child support should not be reduced if the impact would be to impoverish the recipient parent.¹⁹

To the extent that states provide a timesharing adjustment formula, it is helpful to know what level of parenting time is assumed in the basic

15. Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93492, 93494–95, 93562 (Dec. 20, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-12-20/pdf/2016-29598.pdf> (codified at 45 C.F.R. § 302.56(c)(ii)).

16. See LESLIE HODGES & LISA KLEIN VOGEL, INST. FOR RSCH. ON POVERTY, UNIV. OF WIS.-MADISON, RECENT CHANGES TO STATE CHILD SUPPORT GUIDELINES FOR LOW-INCOME NONCUSTODIAL PARENTS 5–6 (2019), <https://www.irp.wisc.edu/wp/wp-content/uploads/2020/01/CS-2018-2020-T4.pdf>.

17. See Venohr & Williams, *supra* note 9, at 18–19.

18. See JANE VENOHR, ECONOMIC BASIS OF MINNESOTA BASIC SCHEDULE AND PARENTING-TIME EXPENSE ADJUSTMENT 8 (2015), *reprinted in* MINN. DEP'T OF HUM. SERV. CHILD SUPPORT DIV., CHILD SUPPORT WORK GROUP FINAL REPORT app. E at 29 (2016), https://mn.gov/dhs/assets/child_support_work_group_2016_tcm1053-166182.pdf. [hereinafter VENOHR, PARENTING-TIME EXPENSE ADJUSTMENT]. Venohr (2015) reports 37 states. *Id.* Since then, Illinois has also adopted a formula. See 750 ILL. COMP. STAT. ANN. 5/505(a)(3.8) (West 2020).

19. *E.g.*, Richardson v. Richardson, 545 S.W.3d 895, 897 (Mo. Ct. App. 2018).

formula or table. Most states using the income shares guidelines make no assumption of parenting time in their basic table. This is because most income shares tables, which contain the basic child support obligation owed by both parents for a range of combined parental incomes and number of children for whom support is being determined, are based on economic measurements of child-rearing expenditures among intact families; that is, how much is spent on the children when the parents and the children live together. In other words, there is no timesharing arrangement in the underlying economic data because the parents live together.

As mentioned earlier, the income shares model is one type of continuity of expenditures model, which means the child support obligation relates to how much would have been spent on the child in an intact family. For example, Figure 1, which is an excerpt of the Illinois income shares table, shows that the basic obligation for one child when the parents have a combined income of \$7,000 net per month is \$1,136 per month. This amount is based on a study of how much an intact family spends for one child on average.²⁰ The obligated parent's prorated share of the basic obligation in the table is the basis of the child support order. An adjustment may be layered on top of this for parenting time.²¹ Pennsylvania is the only income shares state to incorporate a parenting-time adjustment into its basic table. The Pennsylvania table reflects how much is spent on a child in an intact family less what the obligated parent would need to cover most of the child's food and entertainment expenses, assuming the child is with the obligated parent 30% of the time.²²

20. JANE VENOHR, CTR. FOR POL'Y RSCH., TECHNICAL DOCUMENTATION: ILLINOIS SCHEDULE OF BASIC OBLIGATIONS AND STANDARDIZED NET INCOME TABLE 4 (2017), <https://www.illinois.gov/hfs/SiteCollectionDocuments/TechnicalDocumentationIllinoisScheduleNetIncomeTable.pdf>.

21. See ILL. DEP'T OF HEALTHCARE & FAM. SERVS., CHILD SUPPORT SERVS., SHARED PHYSICAL CARE SUPPORT OBLIGATION WORKSHEET, <https://www.illinois.gov/hfs/SiteCollectionDocuments/StandaloneSharedPhysicalCareSupportObligationWorksheet.pdf>.

22. JANE VENOHR, CTR. FOR POL'Y RSCH., 2015–2016 PENNSYLVANIA CHILD SUPPORT GUIDELINES REVIEW: ECONOMIC REVIEW AND ANALYSIS OF CASE FILE DATA 35 (2016), <https://www.humanservices.state.pa.us/CSWS/CSWS/Forms/PAGuidelines.pdf>.

Figure 1²³*Excerpt of Illinois Income Shares Table*

Combined Adjusted Net Income		One Child	Two Children	Three Children	Four Children	Five Children	Six Children	
6525.00	–	6574.99	1078	1621	1929	2155	2371	2577
6575.00	–	6624.99	1085	1630	1941	2168	2385	2593
6625.00	–	6674.99	1091	1640	1953	2181	2400	2608
6675.00	–	6724.99	1097	1650	1965	2195	2414	2624
6725.00	–	6774.99	1104	1660	1976	2208	2429	2640
6775.00	–	6824.99	1110	1669	1988	2221	2443	2655
6825.00	–	6874.99	1117	1679	2000	2234	2457	2671
6875.00	–	6924.99	1123	1689	2012	2247	2472	2687
6925.00	–	6974.99	1129	1698	2023	2260	2486	2703
6975.00	–	7024.99	1136	1708	2035	2273	2501	2718
7025.00	–	7074.99	1142	1718	2047	2286	2515	2734
7075.00	–	7124.99	1148	1728	2059	2300	2530	2750
7125.00	–	7174.99	1155	1737	2070	2313	2544	2765
7175.00	–	7224.99	1161	1747	2083	2326	2559	2782
7225.00	–	7274.99	1168	1758	2095	2340	2574	2798
7275.00	–	7324.99	1175	1768	2107	2354	2589	2814
7325.00	–	7374.99	1181	1778	2119	2367	2604	2831
7375.00	–	7424.99	1188	1788	2132	2381	2619	2847
7425.00	–	7474.99	1195	1798	2144	2395	2634	2863
7475.00	–	7524.99	1201	1808	2156	2408	2649	2880

Most percentage-of-obligor income guidelines, which is the other type of continuity of expenditures model, also relate to measurements of child-rearing expenditures in intact families. Some states (such as Wisconsin) mentioned that they adjusted the percentages to account for the child's time with the obligated parent, but did not specify what assumption was made regarding the "normal" level of contact.²⁴ Other percentage-of-obligor income guidelines (such as those of Alaska and Mississippi) do not clearly state that any consideration of timesharing is considered in the basic percentages.²⁵

23. For the complete table, see ILL. DEP'T OF HEALTHCARE & FAM. SERVS., CHILD SUPPORT SERVS., INCOME SHARES SCHEDULE BASED ON NET INCOME, <https://www.illinois.gov/hfs/SiteCollectionDocuments/IncomeSharesScheduleBasedonNetIncome.pdf>.

24. INGRID ROTHE ET AL., INST. FOR RSCH. ON POVERTY, ESTIMATES OF FAMILY EXPENDITURES FOR CHILDREN: A REVIEW OF THE LITERATURE 10 (2001).

25. MISS. CODE. ANN. § 43-19-101(1) (2020); ALASKA R. CIV. P. 90.3(a)(2).

II. Calculating the Child Support Order When the Lesser-Time Parent Has Substantial Access and a Higher Income Than the Other Parent

A. Introduction

Although most states do not contain any parenting-time assumptions in their basic guidelines tables or percentages, most states have adopted a formula pertaining to how the guidelines support amount should be reduced based on the level of access by the obligor. This is premised on the assumption that, as the obligor-parent's parenting time increases, this increases the child-rearing costs of the obligor parent and reduces the expenses of the other parent. Most states with formulas provide that the formula is to be applied presumptively if the case meets certain criteria (e.g., a shared-custody order that the obligor parent actually exercises). These states, however, disagree about whether the obligor parent should receive some support reduction starting with a relatively low level of contact, or whether such an adjustment should begin only when there is substantial access because the custodial parent's expenses are not reduced by the child spending only a small number of overnights with the other parent.

Some commentators have argued that child support should not be presumptively reduced if the obligor parent has substantial access.²⁶ Proponents of this view contend that it is not clear that the recipient parent's expenses will be reduced as a result of substantial access, so it is not fair to presumptively reduce support when substantial access exists. The consideration of whether the custodial parent's expenses are reduced is also echoed in a recent New York case that involved a father who had possession of his child overnight three nights per week. He argued that, due to his level of possession, his support amount should be reduced below the normal presumptive amount of child support under the guidelines. The appellate court ruled that, based on the New York law, he did not have the right to have his presumptive support amount reduced due to his substantial parenting time without showing that his expenses had increased as a result or that the other parent's expenses had decreased.²⁷ In this particular case, a major consideration was the presentation of evidence that the custodial

26. See Karen Syma Czapanskiy, *The Shared Custody Child Support Adjustment: Not Worth the Candle*, 49 FAM. L.Q. 409 (2015).

27. *Jennifer VV. v. Lawrence WW.*, 124 N.Y.S.3d 474, 478–79 (App. Div. 2020); see also N.Y. FAM. CT. ACT § 413(1)(f)(9) (McKinney 2020) (“unjust or inappropriate” deviation factors may include “(i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent’s expenses are substantially reduced as a result thereof”).

parent's expenses were not substantially reduced by the obligor parent's time with the child.²⁸

A small number of states have merely treated the matter as a deviation factor, giving the court the power to reduce the presumptive award due to substantial access. In some of these states, courts have been critical of an absolute rule that an obligor should automatically get a certain reduction in child support as a result of a certain level of access.²⁹ Some statutes of this type (such as New Hampshire's) invite the court to consider, when deciding whether to reduce the support amount, whether the obligor's level of access reduces the expenses of the recipient parent.³⁰

In contrast with the New Hampshire and New York approaches summarized above, to obtain a parenting-time adjustment under the various formulas in force among most states today, the obligor does not have to establish that his level of access reduces the expenses of the other parent. Nonetheless, some states do give the court some discretion when applying the timesharing adjustment. For example, in the District of Columbia, a timesharing adjustment is not made if the recipient parent can show that such an adjustment would be unjust or inappropriate.³¹ In some other states, before a timesharing adjustment is made, the obligor parent must show that he or she contributed to the expenses of the child, in addition to paying child support.³²

28. *Jennifer VV.*, 124 N.Y.S.3d at 479.

29. See *In re Marriage of Sobieski*, 984 N.E.2d 163, 176 (Ill. App. Ct. 2013).

30. See N.H. REV. STAT. ANN. § 458-C:5(1)(h)(2)(B) (2020). The statute also allows the court to consider whether the parent with less income will have adequate resources to support the child in a similar style as the other parent. *Id.* § 458-C:5(1)(h)(2)(C).

31. D.C. CODE ANN. § 16-916.01(q)(3) (2020).

32. *E.g.*, WYO. STAT. ANN. § 20-2-304(c) (2020) (adjustment applies “[w]hen each parent keeps the children overnight for more than twenty-five percent (25%) of the year and *both parents contribute substantially to the expenses of the children*”) (emphasis added). Compare *Jensen v. Milatzo-Jensen*, 297 P.3d 768, 777–778 (Wyo. 2013) (obligor parent made such a showing), with *Fountain v. Mitros*, 968 P.2d 934, 938–39 (Wyo. 1998) (obligor parent did not make such a showing). See also N.J. CT. R. app. IX-A § 13(b) (2020), <https://njcourts.gov/attorneys/assets/rules/app9a.pdf> (“In determining if such an adjustment is appropriate, the court should consider whether the non-custodial parent has incurred variable expenses for the child during PAR Time and if PAR Time has reduced the other parent’s variable expenses for the child.”); S.C. CODE ANN. REGS. 114-4730(A) (2020) (“For the purpose of this section, shared physical custody means that each parent has court-ordered visitation with the children overnight for more than 109 overnights each year (30%) and that both parents contribute to the expenses of the child(ren) in addition to the payment of child support.”).

B. Adjustment Criteria

1. TIMESHARING CRITERIA

One common criterion for obtaining a parenting-time adjustment is that the lesser-time parent must have at least a certain number of overnights per year with the child. This is the approach used in many states and some other countries. In some Western European countries, the United Kingdom, and Canada, child support is not reduced until a specified access threshold is reached. For example, in the UK, child support is reduced when the obligor has access 53 nights per year. Greater reductions occur when the obligor has access for 104, 156, and more than 175 nights. In France, child support is reduced when the obligor has the child 25% of the time. Child support is reduced in Canada when the obligor has the child 40% of the time.³³ In Australia, child support begins to be reduced due to obligor access starting with 14% of all overnights (one night per week).³⁴

To make a parenting-time adjustment calculation, the country or state must specify how levels of contact are to be measured. While a few U.S. states attempt to measure time spent with each parent (e.g., one-fourth day, one-half day),³⁵ the most common way to measure levels of access is in terms of how many nights the child spends with the parent.³⁶ This is done due to the relative simplicity of this method, as well as the fact that, if a child spends the night with a parent, it is likely that the parent will provide dinner and breakfast. (Oregon generally uses overnights, but another method may be used if a parent has frequent contact that does not consist of overnights.)³⁷ Another related question is whether the child

33. For a general discussion of parenting-time adjustments in various countries, see generally Elke Claessens & Dimitri Mortelmans, *Challenges for Child Support Schemes: Accounting for Shared Care and Complex Families*, 28 J. EUROPEAN SOC. POL'Y 2, 11 (2018).

34. See Bruce Smyth et al., *Separated Parents' Knowledge of How Changes in Parenting Time Can Affect Child Support Payments and Family Tax Benefit Splitting in Australia: A Pre/Post-Reform Comparison*, 26 AUSTL. J. FAM. L. 1, 183–84 (2012).

35. See VA. CODE ANN. § 20-108.2(G)(3)(c) (2020); ARIZ. REV. STAT. ANN. § 25-320(11)(C) (2020).

36. See MINN. STAT. § 518A.36(1)(a) (2020); WYO. STAT. ANN. § 20-2-304(c); IOWA CT. R. 9.9; NORTH CAROLINA CHILD SUPPORT GUIDELINES, Form AOC-CV-628, at 5 (Mar. 1, 2020), https://www.nccourts.gov/assets/documents/forms/a162_1.pdf?xjkR4e2imYNRbMDxJJT.1ppuFWJUuUWf; FLA. STAT. ANN. § 61.30(11)(a)(10), (b) (West 2020); 750 ILL. COMP. STAT. ANN. 5/505(a)(3.8) (West 2020); IND. CT. CHILD SUPPORT RULES & GUIDELINES, GUIDELINE 6, https://www.in.gov/judiciary/rules/child_support/#g6.

37. See OR. ADMIN. R. 137-050-0730(2)(c) (2020).

support should be calculated based on the parenting time set forth in the decree or the parenting time actually occurring or both.³⁸

As mentioned earlier, of those states that have adopted a formula for the reduction of child support based on access levels, they do not agree regarding when the child support amount should begin to be reduced. Some states require nearly equal timesharing before the adjustment is applied. In other states, the child support amount is reduced by a small amount even with a very low level of access.³⁹ In the states that reduce support beginning with low levels of access, the child support reduction gradually increases as the number of overnights increases.⁴⁰ These parenting-time reduction schedules were created to attempt to give the obligor parent credit for the additional expenses that are incurred as parenting time increases.

Further, when the child support reduction starts at few overnights, there is not a precipitous drop in the guidelines support amount at any level of access. Such a precipitous drop in the child support amount with a small change in access is referred to as a “cliff effect.” For example, if a substantial number of overnights are required before a parenting-time adjustment can be made, and the guidelines-calculated amount is significantly reduced with additional access, then cliff effects are created. The cliff effect becomes larger as the minimum threshold is increased.

This is shown by comparing in Figure 2 the amount of support that would be due under the Illinois child support guidelines schedule using the Illinois timesharing reduction formula, which uses a 146-overnight threshold for applying the Illinois shared physical care adjustment,⁴¹ to how the support amount would change if the Colorado threshold of more than 92 overnights would be applied to the Illinois child support guidelines schedule.⁴² (Both Illinois and Colorado use the same general timesharing adjustment

38. See VENOHR, PARENTING-TIME EXPENSE ADJUSTMENT, *supra* note 18, at 8; JANE VENOHR & SAVAHANNA MATYASIC, CTR. FOR POL’Y RSCH., REVIEW OF THE ARKANSAS CHILD SUPPORT GUIDELINES: ANALYSIS OF ECONOMIC DATA, DEVELOPMENT OF INCOME SHARES CHARTS, AND OTHER CONSIDERATIONS 52 (2019), <https://www.arcourts.gov/sites/default/files/formatted-files/review-of-arkansas-child-support-guidelines.pdf>. Compare *Koeneman v. Boersma*, No. S-13882, 2011 WL 6116480, at *5 (Alaska Dec. 7, 2011) (parenting-time adjustment should be based on the terms of the order and not actual parenting time), with *Cnty. of San Diego v. P.B.*, 55 Cal. App. 5th 1058, 1068–72 (2020) (parenting-time adjustment should be based on actual access, not terms of the order).

39. See, e.g., ARIZ. CHILD SUPPORT GUIDELINES § 11 (Apr. 1, 2018), <http://www.azcourts.gov/Portals/34/Forms/FamilyLaw/AOCDRS10H2018.pdf>.

40. See *id.*

41. See 750 ILL. COMP. STAT. ANN. 5/505(a)(3.8) (West 2020).

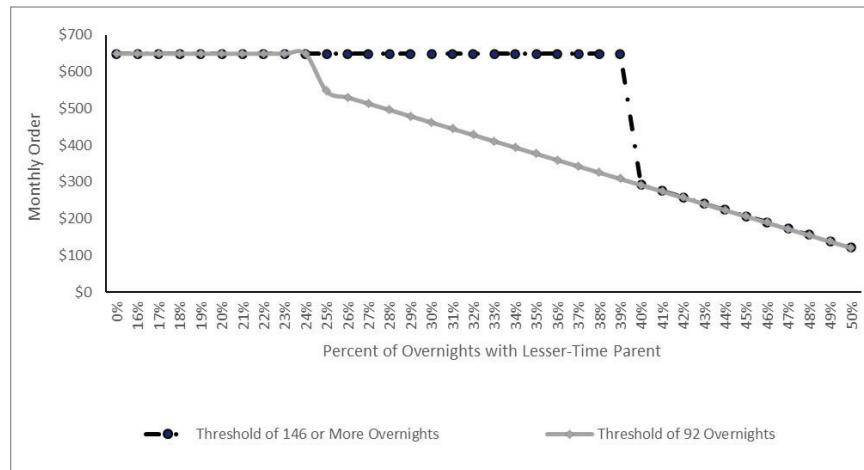
42. See COLO. REV. STAT. § 14-10-115(3)(h) (2020).

formula.⁴³) The comparisons consider a scenario where the father’s net income is \$4,000 per month, the mother’s net income is \$3,000 per month, there is one child, and there are no other adjustments. It is assumed in Figure 2 that the father is the lesser-time parent. The figure shows the changes in the monthly order amount as the lesser-time parent has more time with the child. The figure starts at zero timesharing, skips to 16% timesharing, and then tracks with one percent increases in the percent of overnights until equal physical custody of 50%. (Including one percent increments from 0–16% in the figure would make the graph unwieldy to read.) The cliff effect that results from the Illinois approach is much more dramatic than the cliff effect arising from the Colorado timesharing threshold.

Figure 2

Illustration of the Impact of Lower and Higher Timesharing Thresholds:

(Case Scenario: Income shares calculation using the Illinois income shares Schedule for one child where the lesser-time parent’s net income = \$4,000 per month and the greater-time parent’s net income = \$3,000 per month.)



43. Compare 750 ILL. COMP. STAT. ANN. 5/505(a)(3.8), with COLO. REV. STAT. § 14-10-115(8)(b).

2. TIMESHARING ADJUSTMENTS AND LOW-INCOME RECIPIENTS

One question presented by parenting-time child support reductions is whether they should be granted if they would significantly harm the financial condition of the household of the recipient parent. A few courts have not granted parenting-time reductions due to the low income of the recipient parent.⁴⁴ The parenting-time adjustment rules in Missouri, Virginia, and New Jersey provide that generally no support adjustment should presumptively occur if the recipient-parent's income is below a certain specified level.⁴⁵

C. Formulas for Adjusting for Timesharing

With the exception of the “cross-credit formula” (which is also called the “offset formula” in some states), no other timesharing formula is used by more than two states. The cross-credit formula is used by 23 states.⁴⁶

1. CROSS-CREDIT FORMULA

The cross-credit formula essentially calculates a theoretical order for each parent weighed by the percentage of time with the other parent. The parent with the larger theoretical order is the obligor parent and owes the difference between the two theoretical orders. Colorado was the first state to adopt this method and promulgated it in 1986.⁴⁷

The first step in calculating the child support amount under an income shares approach in most states using the cross-credit formula is to

44. See *Milam v. Milam*, 778 S.E.2d 535 (Va. Ct. App. 2015); *Richardson v. Richardson*, 545 S.W.3d 895 (Mo. Ct. App. 2018).

45. The Missouri guideline sets forth a level of “adjusted monthly income” of the recipient parent below which a parenting-time adjustment generally should not occur. This income level changes with the number of children in the household. See Directions, Comments for Use and Examples for Completion of Form No. 14, at 8, *Child Support Forms*, MO. COURTS (updated Mar. 13, 2019), <https://www.courts.mo.gov/file.jsp?id=114614> [hereinafter Directions, *Mo. Child Support Forms*]. In Virginia, the adjustment is not presumptively to be made if either parent's gross income is less than or equal to 150% of the federal poverty level. See VA. CODE ANN. § 20-108.2(G)(3)(d) (2020). In New Jersey, the adjustment is not presumptively made if the net income of the recipient parent is less than two times the poverty level for the recipient's household size. See N.J. CT. R. app. IX-A § 13(b)(3) (2020), <https://njcourts.gov/attorneys/assets/rules/app9a.pdf>.

46. See VENOHR, PARENTING-TIME EXPENSE ADJUSTMENT, *supra* note 18, at 10, which counted 21 states in 2015. Since then, Illinois, Nevada, and North Dakota have also adopted the cross-credit formula, while Minnesota no longer uses it. See 750 ILL. COMP. STAT. ANN. 5/505(a) (3.8) (West 2020); NEV. ADMIN. CODE § 425.115(3); N.D. ADMIN. CODE 75-02-04.1-08.1 (2020); MINN. STAT. § 518A.36 (2020).

47. See COLO. REV. STAT. § 14-10-115(8)(b) (2020).

increase the basic obligation owed by both parents by 50%⁴⁸ to account for some child-rearing expenses being duplicated when both parents have substantial access (i.e., the cost of housing and some transportation expenses). In other words, the cross-credit formula with such a multiplier assumes it costs more to raise a child in two households when both parents have substantial access than it does in one household. (A few states do not utilize a multiplier or use a multiplier other than 1.5.)⁴⁹

As shown in Figure 3, each parent’s share of that larger theoretical support amount is determined (under an income shares approach) based on each parent’s share of combined parental income. Once each parent’s shared-care enhanced child support obligation is calculated, that amount is multiplied by the percentage of overnights the child spends with the other parent. The smaller number is then subtracted from the larger number to arrive at the child support amount. The parent with the larger amount would pay the other parent the difference between the two amounts.⁵⁰

Figure 3

Illustration of the Cross-Credit Adjustment

Line		Parent A	Parent B	Combined
1	Monthly net income	\$4,000	\$3,000	\$7,000
2	Percentage share of income	57%	43%	100%
3	Basic obligation for 1 child (from Illinois Schedule)			\$1,136
4	Shared-care enhanced child support obligation (Line 3 multiplied by 150%)			\$1,704
5	Each parent’s share (Line 2 × Line 4)	\$971	\$733	
6	Overnights with each parent (must total 365)	146	219	365
7	Percentage time with each parent (Line 6 divided by 365)	40%	60%	100%
8	Each parent’s obligation (for Parent A, Parent A’s line 5 × Parent’s B Line 7; For Parent B, Parent B’s line 5 × Parent’s A Line 7)	\$583	\$293	
9	Shared custody obligation (subtract smaller from larger on Line 8)	\$290		

48. *E.g., id.*; 750 ILL. COMP. STAT. ANN. 5/505(a)(3.8).

49. *See* N.D. ADMIN. CODE 75-02-04.1-08.1; OKLA. STAT. tit. 43, § 118E(D)(2)(a)–(b) (2020).

50. For example, *see* Valdes v. Valdes, 154 So. 3d 1165, 1166–67 (Fla. Dist. Ct. App. 2015).

(An alternate way to make this calculation is to multiply each parent's enhanced shared-care child support amount by that parent's percentage of overnights, and then to subtract that amount from the enhanced shared-care child support amount to arrive at the amount each parent owes the other parent. Then the lower amount would be subtracted from the higher amount to arrive at the child support obligation.) Under this approach, if the shared-care child support amount is greater than the amount that would have resulted from a sole custody award, the parent normally pays the smaller amount.⁵¹

All states using a cross-credit approach set a certain timesharing threshold for its use. States do not agree regarding the appropriate threshold. Alaska and Vermont have chosen 30% of overnights, the District of Columbia has chosen 35%, and Illinois utilizes 40%.⁵² The cross-credit approach is commonly used with an income shares approach, although a few states with percentage-of-obligor income guidelines (such as Alaska and Wisconsin) also use it.⁵³

There are some strengths and weaknesses to the cross-credit with multiplier approach. The major strengths of a cross-credit formula are that it has been used for decades by many states and is easily explainable. The first weakness is that the child support is not reduced until the parenting-time level reaches the threshold. Once the parenting time reaches the threshold, child support frequently goes down substantially as parenting-time levels increase above the threshold. This creates a cliff effect. (This is evident in Figure 2.) Small variations in parenting time can result in substantial changes in child support. When there is a cliff effect, particularly a large cliff effect, there is a concern that the child support recipient may oppose the obligor's parenting time meeting the amount of timesharing required for the adjustment, while the obligor might want to meet that threshold. The result can be more litigation over parenting time.⁵⁴ Some commentators have questioned whether this is a significant

51. *E.g.*, COLO. REV. STAT. § 14-10-115(8)(b).

52. *See* ALASKA R. CIV. P. 90.3(b), (f)(1), <https://public.courts.alaska.gov/web/rules/docs/civ.pdf#page=124>; D.C. CODE § 16-916.01(q)(1); VT. STAT. ANN. tit. 15, § 657(a) (2020); 750 ILL. COMP. STAT. ANN. 5/505(a)(3.8) (West 2020).

53. *See* ALASKA R. CIV. P. 90.3(a), (b), <https://public.courts.alaska.gov/web/rules/docs/civ.pdf#page=124>; WIS. ADMIN. CODE DCF §§ 150.03(1), 150.04(2), https://docs.legis.wisconsin.gov/code/admin_code/DCF/101_199/150.

54. In 2016, the committee reviewing the Minnesota approach stated that one primary goal was to adopt a new approach that did not have a significant cliff effect. *See* MINN. DEP'T OF HUM. SERV. CHILD SUPPORT DIV., CHILD SUPPORT WORK GROUP FINAL REPORT 3, 10–11 (2016), https://mn.gov/dhs/assets/child_support_work_group_2016_tcm1053-166182.pdf.

problem;⁵⁵ also, some parents may not be familiar with the law or may misunderstand it.

The second perceived weakness of this cross-credit approach is that it can result in the greater-time parent paying child support to the lesser-time parent if the lesser-time parent's income is substantially less than that of the other parent. While such a result is controversial in some states, it is perceived to be a desirable outcome in some other states.

2. MATHEMATICAL VARIATIONS TO THE CROSS-CREDIT FORMULA

There are at least two mathematical variations of the cross-credit formula. One variation is used by Michigan and Minnesota.⁵⁶ The other variation is used by Oregon.⁵⁷ The mathematical structure of these two formulas is rooted in the cross-credit formula, but they do not require a timesharing threshold for their application. These approaches have also been called "advanced math" or "non-linear" formulas because they are complicated mathematical formulas with exponential functions. The use of an exponential function allows the dollar reduction of the child support order for more overnights to increase gradually, rather than have a cliff effect. Figure 4 shows the formulas of these three states. Figure 5 compares the order amounts for the same case scenario shown in Figure 2 (the father is the lesser-time obligor parent with a net monthly income of \$4,000 and the mother's net monthly income is \$3,000). That is, the Michigan, Minnesota, and Oregon formulas (and a cross-credit formula with a threshold of 92 overnights) are applied on top of the Illinois child support guidelines schedule for comparison purposes to illustrate the impact of the timesharing formula, rather than the guideline support amount differences among states.

55. See generally Bruce Smyth & Bryan Rogers, *Strategic Bargaining over Child Support and Parenting Time: A Critical Review of the Literature*, 25 AUSTL. J. FAM. L. 210 (2011).

56. See MINN. STAT. § 518A.36(2)(b) (2020); MICH. STATE CT. ADMIN. OFF., FRIEND OF THE CT. BUREAU, 2017 MICHIGAN CHILD SUPPORT FORMULA MANUAL § 3.03 (2017), <https://courts.michigan.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/focb/2017MCSF.pdf>.

57. OR. ADMIN. R. § 137-050-0730(6)-(7) (2020), https://oregon.public.law/rules/oar_137-050-0730.

Figure 4

Formulas of States That Have Modified the Cross-Credit Approach

	Formula
Michigan ⁵⁸	$\frac{[(A_O)^{2.5} \times (B_S) - (B_O)^{2.5} \times (A_S)]}{[(A_O)^{2.5} + (B_O)^{2.5}]}$ <p>A_O Approximate percentage of overnights the children will likely spend with parent A annually</p> <p>B_O Approximate percentage of overnights the children will likely spend with parent B annually</p> <p>A_S Parent A's base support obligation</p> <p>B_S Parent B's base support obligation</p>
Minnesota ⁵⁹	$\frac{[(A_O)^3 \times (B_S) - (B_O)^3 \times (A_S)]}{[(A_O)^3 + (B_O)^3]}$ <p>Same key as Michigan</p>
Oregon ⁶⁰	<p>Credit percentage = $1 / (1 + e^{(-7.14 \times ((\text{overnights}/365) - 0.5)))} - 2.74\% + (2 \times 2.74\% \times (\text{overnights}/365))$</p>

58. See 2017 MICHIGAN CHILD SUPPORT FORMULA MANUAL, *supra* note 56, § 3.03(A)(2).

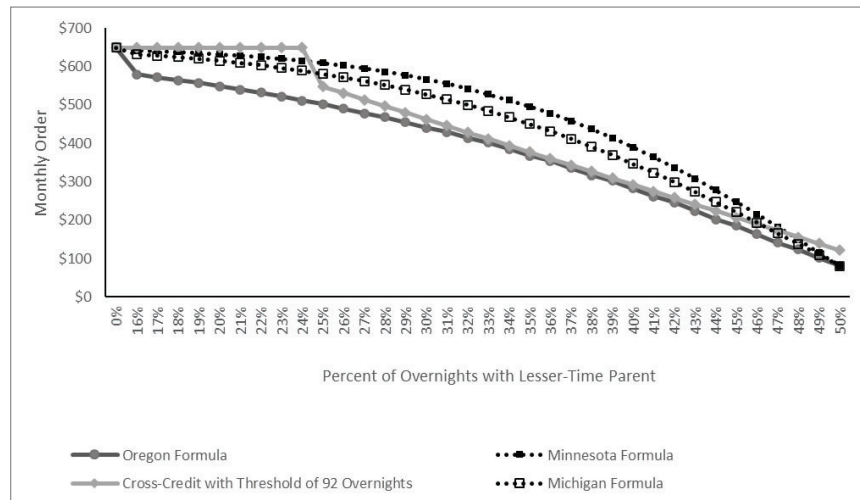
59. MINN. STAT. § 518A.36(2)(b).

60. OR. ADMIN. R. § 137-050-0730(6).

Figure 5

Comparison of Modified Cross-Credit Formulas

(Case Scenario: Income shares calculation using the Illinois income shares Schedule for one child where the lesser-time parent's net income = \$4,000 per month and the greater-time parent's net income = \$3,000 per month.)



As shown in Figure 4, the elements of the Michigan and Minnesota formulas are similar to the cross-credit formula in that both consider each parent's share of the basic obligation and weight it by the percentage of time the child is with the other parent. The difference is neither the Michigan timesharing adjustment nor the Minnesota timesharing adjustment applies a multiplier to the basic obligation. Instead, both states make an exponential function of the percentage of time: Michigan takes it to the 2.5 power and Minnesota takes it to the third power, which essentially cubes it. This causes the timesharing formula to start off with small adjustments when the lesser-time parent has few overnights and increases the adjustment as the parents move toward almost equal custody.

Figure 5 shows significant differences in support amounts in the four timesharing formulas when the lesser-time parent has few overnights, but the differences in the order amounts produced by the different timesharing formulas narrow as the lesser-time parent's time with the child approaches almost equal physical custody. When the lesser-time parent has the child for 40% of the time, the order amount would be \$292 per month under the cross-credit formula with a 150% multiplier, \$347 per month under

the Michigan timesharing formula, \$389 per month under the Minnesota timesharing formula, and \$282 per month under the Oregon timesharing formula. (The reader should keep in mind that the timesharing formulas are applied to the Illinois schedule to not confound differences among the timesharing formulas with differences with state child support schedules.) Figure 5 also shows that the Michigan timesharing adjustment produces a larger reduction than the Minnesota timesharing adjustment. In other words, the higher the exponential power used in the formula, the smaller the reduction.

The Oregon formula produces the greatest adjustment at low levels of timesharing. The Oregon formula was developed by a mathematics professor to yield gradual changes when the lesser-time parent had little time with the child and larger changes when the lesser-time parent has almost equal custody, and it was also designed to track what a cross-credit formula with a 1.5 multiplier would yield at almost equal custody.⁶¹ For ease of use, Oregon has developed a lookup table of overnights and percentage adjustments from its formula as well as an automated calculator.⁶² An excerpt of the Oregon lookup table is shown in Table 1.

Table 1

*Excerpt of the Oregon Lookup Table*⁶³

Overnights	Credit %	Overnights	Credit %	Overnights	Credit %	Overnights	Credit %
0	0.00%	36	3.19%	72	8.67%	108	17.77%
1	0.07%	37	3.30%	73	8.87%	109	18.09%
2	0.14%	38	3.42%	74	9.07%	110	18.41%
3	0.21%	39	3.54%	75	9.27%	111	18.73%
4	0.28%	40	3.66%	76	9.48%	112	19.06%
5	0.35%	41	3.78%	77	9.68%	113	19.39%
6	0.42%	42	3.91%	78	9.90%	114	19.72%
7	0.49%	43	4.04%	79	10.11%	115	20.06%

61. OR. CHILD SUPPORT PROGRAM GUIDELINES ADVISORY COMM., 2011–12 CHILD SUPPORT GUIDELINES REVIEW: GUIDELINES ADVISORY COMM. REPORT AND RECOMMENDATIONS 19–21, 19 n.6 (2012), https://justice.oregon.gov/child-support/pdf/guidelines_advisory_committee_report_and_recommendations_2011-12.pdf.

62. See *Parenting Time Calculator*, OREGON DEP'T OF JUST., CHILD SUPPORT, https://justice.oregon.gov/calculator/parenting_time/ (last visited Oct. 31, 2020).

63. OR. ADMIN. R. 137-050-0730(6), tbl. (2020), <https://justice.oregon.gov/child-support/pdf/137-050-0730.pdf>.

Overnights	Credit %	Overnights	Credit %	Overnights	Credit %	Overnights	Credit %
8	0.57%	44	4.16%	80	10.33%	116	20.40%
9	0.65%	45	4.30%	81	10.55%	117	20.75%
10	0.72%	46	4.43%	82	10.77%	118	21.10%
11	0.80%	47	4.56%	83	11.00%	119	21.45%
12	0.88%	48	4.70%	84	11.23%	120	21.81%
13	0.96%	49	4.84%	85	11.47%	121	22.17%
14	1.04%	50	4.98%	86	11.70%	122	22.54%
15	1.13%	51	5.12%	87	11.94%	123	22.90%
16	1.21%	52	5.27%	88	12.19%	124	23.27%
17	1.29%	53	5.41%	89	12.43%	125	23.65%
18	1.38%	54	5.56%	90	12.68%	126	24.03%
19	1.47%	55	5.71%	91	12.94%	127	24.41%
20	1.56%	56	5.87%	92	13.19%	128	24.80%
21	1.65%	57	6.02%	93	13.45%	129	25.19%
22	1.74%	58	6.18%	94	13.72%	130	25.58%
23	1.84%	59	6.34%	95	13.98%	131	25.98%
24	1.93%	60	6.51%	96	14.25%	132	26.38%
25	2.03%	61	6.67%	97	14.53%	133	26.78%
26	2.12%	62	6.84%	98	14.80%	134	27.19%
27	2.22%	63	7.01%	99	15.08%	135	27.60%
28	2.32%	64	7.19%	100	15.37%	136	28.01%
29	2.43%	65	7.36%	101	15.66%	137	28.43%
30	2.53%	66	7.54%	102	15.95%	138	28.85%
31	2.64%	67	7.72%	103	16.24%	139	29.27%
32	2.74%	68	7.91%	104	16.54%	140	29.70%
33	2.85%	69	8.09%	105	16.84%	141	30.13%
....

The major advantages to the mathematical variations of the cross-credit formulas are that they produce gradual reductions to the child support order as overnights increase (no cliff effect), they recognize that the rate of reduction should be less when there is little timesharing and more when there is greater timesharing, and they do not require a timesharing threshold. The disadvantages are that the formulas are not easily explainable, they cannot be calculated manually, and they can produce an adjustment at a very low number of overnights. The adjustment for a low number of overnights is a concern to policymakers who believe that the parent with more overnights does not incur a reduction in child-rearing expenditures until the child spends a substantial number of overnights with the other parent.

3. VARIABLE EXPENSES AND FIXED, DUPLICATED, AND NONDUPLICATED EXPENSES

A few states (e.g., Arizona, Indiana, Missouri, and New Jersey) premise their parenting-time adjustments on expenses of children grouped into three categories: variable expenses (which travel with the child, such as food), duplicated fixed expenses incurred by both parents (such as the cost of housing), and nonduplicated fixed expenses (such as clothing).⁶⁴ Although this is the premise underlying the parenting-time formulas in these states, the premise is not always evident because each of these states (except New Jersey) has converted the formula to a sliding-scale lookup table. Nonetheless, Indiana, Missouri, and New Jersey specifically discuss the foundation of this adjustment in their guidelines.⁶⁵

Indiana, Missouri, and New Jersey have not changed their underlying assumptions. Indiana assumes 35% of child-rearing costs are variable, Missouri assumes 38% are variable, and New Jersey assumes 37% are variable.⁶⁶ Another difference between the timesharing adjustments in these states is that all require a different minimum amount of overnights for an adjustment: Arizona requires at least four parenting-time days per year, Indiana generally requires at least 52 overnights per year, Missouri requires at least 36 overnights per year, and New Jersey generally does not specify a number of overnights for its adjustment for overnights not exceeding two or more per week.⁶⁷

At low levels of obligor parenting time, such timesharing adjustments try to give the obligor credit for variable expenses only. At higher levels of parenting time, the obligor is also given credit for duplicated fixed expenses.⁶⁸ For example, New Jersey begins to include adjustments for

64. VENOHR, PARENTING-TIME EXPENSE ADJUSTMENT, *supra* note 18, at 10–11. Arizona has changed its shared-parenting adjustment over the years such that it no longer obviously links to the concept of variable, duplicated fixed, unduplicated, and fixed child-rearing expenses.

65. See IND. CT. CHILD SUPPORT RULES & GUIDELINES, GUIDELINE 6 cmt., https://www.in.gov/judiciary/rules/child_support/#g6 [hereinafter IND. CT. GUIDELINE 6 cmt.]; Directions, *Mo. Child Support Forms*, *supra* note 45, at 14, Assumption 12; N.J. CT. R. app. IX-A § 13(a), 14(g) (2020), <https://njcourts.gov/attorneys/assets/rules/app9a.pdf>.

66. See IND. CT. GUIDELINE 6 cmt., *supra* note 65; Directions, *Mo. Child Support Forms*, *supra* note 45, at 14, Assumption 12; N.J. CT. R. app. IX-A § 13(a)(3), 14(g)(1).

67. See ARIZ. CHILD SUPPORT GUIDELINES § 11 (July 1, 2015), <http://www.azcourts.gov/Portals/31/Child%20Support/2015CSGuidelinesRED.pdf>; IND. CT. GUIDELINE 6 cmt., *supra* note 65; Directions, *Mo. Child Support Forms*, *supra* note 45, at 14, Assumption 12; N.J. CT. R. app. IX-A § 13.

68. For a more lengthy discussion of these schedules, see VENOHR, PARENTING-TIME EXPENSE ADJUSTMENT, *supra* note 18, at 10–11.

duplicated fixed expenses when the lesser-time parent has at least two overnights per week (28% timesharing).⁶⁹

There is a dearth of research confirming whether a particular expense is variable, duplicated fixed, or nonduplicated fixed. However, most states assume housing expenses, which is the largest expenditure category, are a duplicated fixed expense. States are mixed on their treatment of transportation expenses, which are the second-largest category of expenses. Depending on the state, some or all transportation expenses are considered variable expenses.⁷⁰ Food is normally considered a variable expense. Other categories of expenses, such as clothing, entertainment, and personal items, are less clear in their categorization. Yet these expenses comprise smaller shares of total child-rearing expenditures. A 2000 survey of parental expenditures regarding the living expenses of college students explored the classification of variable/duplicated fixed/nonduplicated fixed expenses and found conflicts with state assumptions.⁷¹ For example, many of the college students recalled that their nonresidential father purchased clothing for them,⁷² while clothing is typically deemed a nonduplicated fixed expense (hence, only incurred by one parent) in the states using this classification.

Figure 6 compares the parenting-time formulas for Arizona, Indiana, Missouri, and New Jersey using the same case scenario considered in Figures 2 and 5 (the father is the lesser-time obligor parent with a net monthly income of \$4,000 and the mother's net monthly income is \$3,000) and applying each of the state's timesharing formulas to the Illinois income shares child support schedule. When the lesser-time parent has 40% timesharing, the order amount would be \$300 per month under the Arizona timesharing formula, \$272 per month under the Indiana timesharing formula, \$342 per month under the Missouri timesharing formula, and \$333 per month under the New Jersey timesharing formula.

69. See N.J. CT. R. app. IX-A § 13(a), 14(c)(2).

70. For example, New Jersey considers the cost of the child's transportation to be a variable expense, while Indiana considers only some of the transportation expenses. Compare N.J. CT. R. app. IX-A § 13(a)(2), with IND. CT. GUIDELINE 6 cmt., *supra* note 65.

71. See William V. Fabricius & Sanford L. Braver, *Non-Child Support Expenditures on Children by Nonresidential Divorced Fathers: Results of a Study*, 41 FAM. CT. REV. 321 (2003).

72. *Id.* at 327.

The Arizona parenting-time formula, which is shown in Table 2,⁷³ consists of 13 intervals. The wide range of overnights within an interval (e.g., a 16.1% adjustment for 88 to 115 overnights) causes the downward staircase effect (i.e., notches) of the Arizona timesharing formula as the lesser-time parent has more time with the child. As observed in Figure 6, the Missouri parenting-time formula also has a downward staircase effect, but because it considers more and narrower timesharing intervals (18 intervals instead of 13 intervals like Arizona does),⁷⁴ the notches under the Missouri parenting-time formula are not as dramatic as those under the Arizona parenting-time formula.

The strengths of the variable/duplicated fixed/nonduplicated fixed timesharing premise are that it has a theoretical basis, can adjust for low levels of timesharing, and can be structured not to have a cliff effect. The weaknesses include the lack of empirical evidence on whether families actually organize their child-rearing expenditures this way and what the levels for each category of expense are, as well as the lack of clarity regarding at what timesharing threshold parents should move from sharing of variable expenses only to sharing of variable expenses and duplicated fixed expenses.

73. This is Parenting Time Table A from the Arizona Child Support Guidelines. The Guidelines also provide a Parenting Time Table B to be used when some child-rearing expenses are not substantially or equally shared in each household. ARIZ. CHILD SUPPORT GUIDELINES § 11 (Apr. 1, 2018), <http://www.azcourts.gov/Portals/34/Forms/FamilyLaw/AOCDRS10H2018.pdf> (depicting Parenting Time Tables A and B). Parenting Time Table B is rarely used, and there is a suggestion to eliminate it.

74. See Directions, *Mo. Child Support Forms*, *supra* note 45, at 8, Line 11 Direction.

Figure 6
Comparison of Variable, Duplicated Fixed, and Nonduplicated Fixed Formulas

(Case Scenario: Income shares calculation using the Illinois income shares schedule for one child where the lesser-time parent's net income = \$4,000 per month and the greater-time parent's net income = \$3,000 per month.)

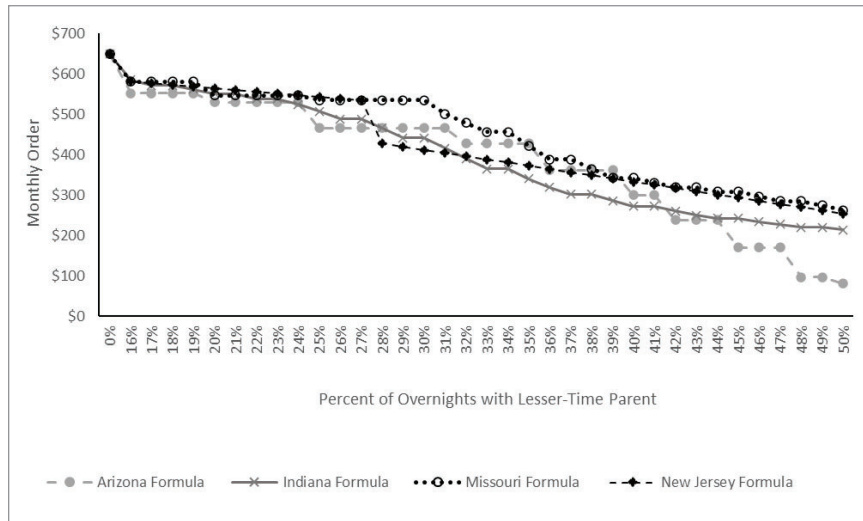


Table 2*Arizona's Parenting Time Table A*⁷⁵

Number of Parenting-Time Days	Adjustment Percentage
0–3	0
4–20	.012
21–38	.031
39–57	.050
58–72	.085
73–87	.105
88–115	.161
116–129	.195
130–142	.253
143–152	.307
153–162	.362
163–172	.422
173–182	.486

4. OTHER FORMULAS

Some states have established a sliding scale for the reduction of child support once the level of access reaches a certain level. For example, the Iowa guidelines provide that an obligor's obligation is to be reduced by 15% for 128 to 147 nights, 20% for 148 to 166 nights, and 25% for more than 167 nights (but less than equal physical custody).⁷⁶ Iowa also provides that a cross-credit formula with a 150% multiplier should be applied when there is equal physical custody.⁷⁷ Other states with sliding scales are Delaware and Kansas.⁷⁸ The lowest adjustment percentage is 10% and the highest is 30% in these sliding-scale formulas. Pennsylvania and North Dakota essentially provide a formulaic version of the sliding scale that allows the percentage reduction to vary from 10–20% in Pennsylvania and 9–16% in North Dakota.⁷⁹ Ohio simply provides an adjustment of

75. ARIZ. CHILD SUPPORT GUIDELINES § 11, *supra* note 73.

76. *See* IOWA CT. R. 9.9 (2020).

77. *See id.* R. 9.14(3).

78. *See* FAMILY COURT OF THE STATE OF DEL., DEL. CHILD SUPPORT FORMULA, EVALUATION AND UPDATE 43–44 (2018), <https://courts.delaware.gov/forms/download.aspx?id=39228>; KAN. CHILD SUPPORT GUIDELINES, § IV.E.2.b (2020), <https://www.kscourts.org/KSCourts/media/KsCourts/Child%20Support%20Guidelines/KSCSG-2020withoutmarkup.pdf>.

79. PA. R. CIV. P. 1910.16-4(c)(1)–(2) (2020); N.D. ADMIN. CODE 75-02-04.1-08.1 (2020).

10% for 90 or more overnights per year.⁸⁰ These percentage adjustments may be loosely linked to the concept such as variable/duplicated fixed/nonduplicated fixed child-rearing expenses, but this is not clearly stated in the guidelines.

Utah reduces its basic guidelines calculation by a factor of 0.27% for every overnight over 110 but not greater than 131 overnights.⁸¹ For overnights exceeding 131, Utah provides a deduction factor of 0.84% for each overnight.⁸² The 0.27% is the ratio of 100% divided by 365 overnights; hence, it is a per diem approach. It is not clear what the basis of the 0.84% is or why Utah set the threshold at 110 overnights. The Tennessee timesharing adjustment is also essentially a per diem adjustment. The Tennessee adjustment has a timesharing threshold of 92 overnights and is designed to result in an award of no support at 182.5 overnights when the parents have equal incomes.⁸³

To that end, the Tennessee adjustment factor for 92 overnights or more is the number of overnights multiplied by .0109589 (which is 2/182.5: that is, 92 overnights is a quarter of the year and 182.5 is half the year, so the timesharing formula contains percentages needed to result in a zero order at 50%/50% timesharing).

Figure 7 illustrates the impact of these different approaches by comparing the order amounts under the Iowa, Pennsylvania, Tennessee, and Utah timesharing formulas applied to the same case scenario considered in earlier figures (the father is the lesser-time obligor parent with a net monthly income of \$4,000 and the mother's net monthly income is \$3,000), using the Illinois income shares child support schedule. When the lesser-time parent has the child 40% of the time, the order amount would be \$479 per month under the Iowa timesharing formula, \$536 under the Pennsylvania timesharing formula, \$357 per month under the Tennessee timesharing formula, and \$432 per month under the Utah timesharing formula. Figure 7 shows that a sliding-scale percentage such as the Iowa timesharing formula and Pennsylvania's timesharing formula produces cliff effects at each timesharing interval (128, 148, and 167 overnights in Iowa) or when the timesharing threshold is met (40% timesharing in Pennsylvania). In contrast, the per diem approaches used by Tennessee and Utah produce more gradual changes in the order amount as the child's time with the lesser-time parent increases.

80. OHIO REV. CODE ANN. § 3119.051(a) (LexisNexis 2020).

81. UTAH CODE ANN. § 78B-12-208(3)(a) (LexisNexis 2020).

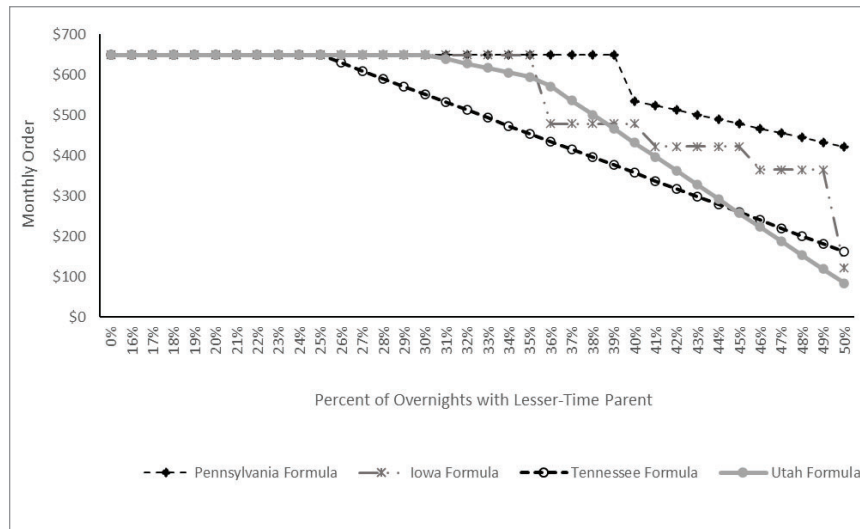
82. *Id.* § 78B-12-208(3)(b).

83. TENN. COMP. R. & REGS. § 1240-02-04-.04(7)(h)(2), (4)(i).

Figure 7

Comparison of Other Formulas

(Case Scenario: Income shares calculation using the Illinois income shares schedule for one child where the lesser-time parent's net income = \$4,000 per month and the greater-time parent's net income = \$3,000 per month.)



The strength of the sliding scale and per diem timesharing adjustments is that they are simple. The weaknesses are that the adjustment thresholds can still result in cliff effects and the percentage adjustments can appear arbitrary.

5. SUMMARY OF TIMESHARING ADJUSTMENTS FOR WHEN LESSER-TIME PARENT HAS MORE INCOME

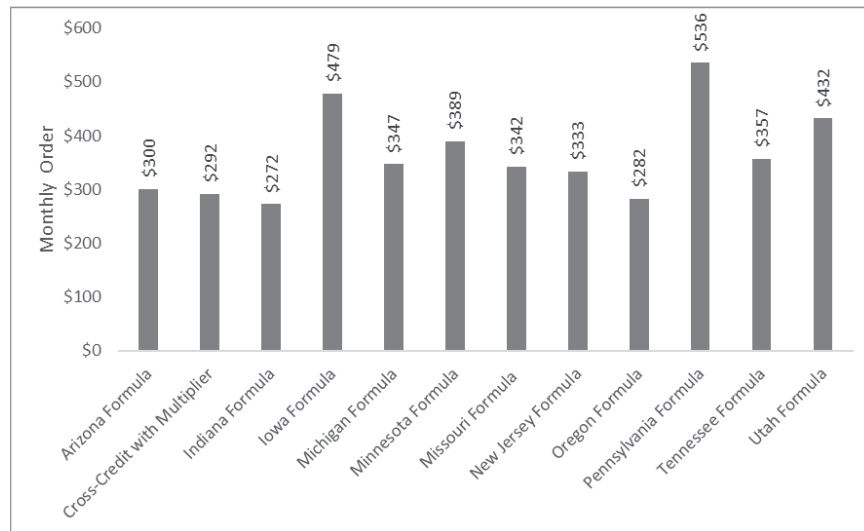
Many states have adopted formulas for reducing child support based on the obligor's parenting time. In these states, the criteria for applying the adjustment, the adjustment formulas, and formula parameters vary widely. Only the cross-credit with a 150 multiplier is used by more than two states. Due to these large variations, state timesharing formulas produce very different order amounts even when the same child support schedule is used. This is illustrated by Figure 8, which compares the 12 different timesharing formulas graphed earlier using the same case scenario (the monthly income of the lesser-time parent is \$4,000 and the monthly income of the other parent is \$3,000) and the Illinois income shares child support guidelines schedule, and assumes that the lesser-time parent cares

for the child 40% of the time. It shows the monthly order ranges from \$272 per month using the Indiana timesharing formula to \$536 per month using the Pennsylvania timesharing formula. In contrast, the sole custody order for this case in Illinois is \$649 per month.

Figure 8

Comparison of the 12 Formulas When Lesser-Time Parent Has Child 40% of Time

(Case Scenario: Income shares calculation using the Illinois schedule for one child where the lesser-time parent's net income = \$4,000 per month and the greater-time parent's net income = \$3,000 per month.)



The information presented in Figure 8 should not be used to rank which state timesharing formulas produce more or less support orders. As is seen in the next section, the rankings vary with the circumstances of the case scenario being considered.

III. Calculating the Child Support Order When Both Parents Have Equal Physical Custody

Most formulas used for the scenario where the lesser-time parent has more income and substantial access apply when both parents have equal physical custody. However, a few states with parenting-time adjustment formulas for substantial access have decided to use a different approach when parents have equal physical custody. Most states with a different

formula rely on the sliding-scale formula or the variable/duplicated fixed/nonduplicated fixed formula. These states also need to clarify what constitutes “equal physical custody.” For example, would an arrangement of 45%/55% parenting time constitute equal physical custody?⁸⁴

Some have argued that there should not be a child support obligation if there is equal physical custody. For example, in Western Europe, some countries abate child support when there is equal physical custody.⁸⁵ This approach is generally not accepted in the United States, at least when the parents have different incomes.

In most states, including all states using the cross-credit formula at lower levels of timesharing, the parenting-time adjustment approach to substantial access also applies to equal physical custody. Pursuant to the cross-credit approach discussed above, when there is equal physical custody, the higher-income parent would pay some child support to the other.⁸⁶ However, if both parents have equal incomes, no child support would be due.⁸⁷ The modifications to the cross-credit adopted in Oregon, Michigan, and Minnesota also result in no child support when there are equal physical custody and equal incomes.⁸⁸

Not all states agree that when there are equal joint physical custody and equal income, no child support should be due. For example, in some of the states that reduce child support using the concept of variable/duplicated fixed/nonduplicated fixed expenses, such as Indiana and New Jersey, there is an assumption that, even with equal physical custody and equal incomes, one parent may be paying the nonduplicated fixed expenses relating to the child, so some child support should be due.⁸⁹ Some states with a sliding-scale percentage or a percentage formula, such as Pennsylvania, also do not produce a zero order when there are equal physical custody and equal income. Also, in some of these states, such as Iowa⁹⁰ and North Dakota,⁹¹ there is a different formula for equal physical custody.

Figure 9 compares the results of the 12 parenting-time adjustment formulas applied to an equal physical custody situation and the Illinois

84. *E.g.*, *Bluestein v. Bluestein*, 345 P.3d 1044 (Nev. 2015) (joint physical custody exists where both parents have physical custody of the child at least 40% of the time).

85. *See generally* Christine Skinner & Jacqueline Davidson, *Recent Trends in Child Maintenance Schemes in 14 Countries*, 23 *INT. J. LAW, POL’Y & FAM.* 25, 43–44 (2009).

86. *See* VENOHR, PARENTING-TIME EXPENSE ADJUSTMENT, *supra* note 18, at 17.

87. *Id.* at 15.

88. *Id.*

89. *Id.* at 10–12.

90. *See* IOWA CT. R. 9.14(3).

91. *Compare* N.D. ADMIN. CODE 75-02-04.1-08.1 (2020), *with* N.D. ADMIN. CODE 75-02-04.1-08.2 (2020).

income shares child support schedule. It considers two scenarios. The first scenario is the same scenario that has been considered in previous figures: There is one child, the father has a net income of \$4,000 per month, and the mother has a net income of \$3,000 per month. The first scenario reveals a wide variation in the results of the parenting-time formulas with the exceptions of the mathematical modifications of the cross-credit formula used by Michigan, Minnesota, and Oregon. Each of these mathematical formulas yields an order of \$81 per month because of the similarities in their mathematical calculation. The parenting-time formulas of the other states all yield greater amounts. The states using the variable/duplicated fixed/nonduplicated fixed concept (with the exception of Arizona) and the percentage adjustment at equal physical custody (e.g., Pennsylvania) and Tennessee's per diem approach yield considerably higher amounts.

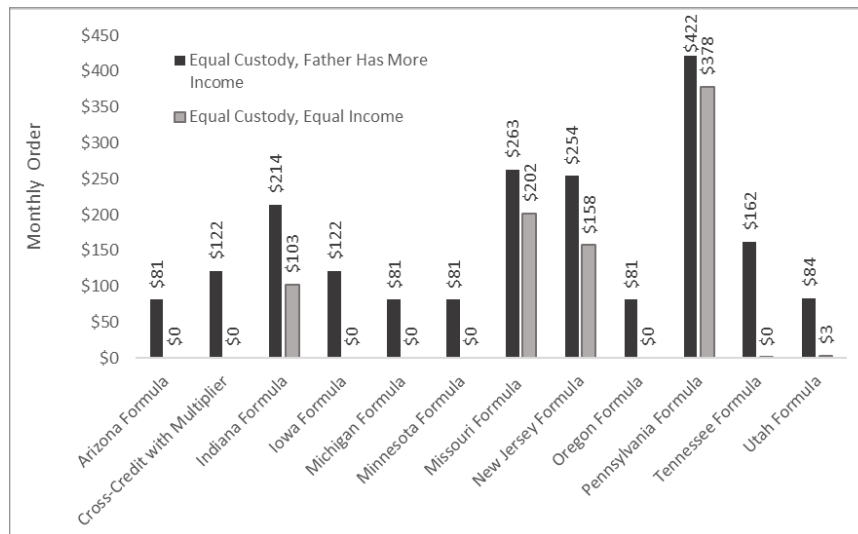
In the second scenario, there is still one child, but the parents have equal incomes: Each parent has a net income of \$4,000 per month. Figure 9 shows 7 of the 12 timesharing formulas considered produce a zero order when there are equal physical custody and equal income. This includes the cross-credit formula with 150% multiplier, the mathematical modifications of the cross-credit approach (the Michigan, Minnesota, and Oregon parenting-time formulas), the Arizona formula (which has modified its variable/duplicated fixed/nonduplicated fixed premise to produce a zero order when there are equal physical custody and equal incomes), the Tennessee parenting-time formula (which is a per diem approach), and the Iowa parenting-time formula (which provides for a cross-credit with 150% multiplier at equal physical custody). While the Utah timesharing formula comes close to zero for the equal physical custody and equal income with a three-dollar-per-month order, the state parenting-time formulas using the pure variable/duplicated fixed/nonduplicated fixed concept do not because there is always one parent who incurs some nonduplicated fixed expenses. New Jersey assumes that the parent incurring the fixed expenses in equal physical custody is the parent with whom the child resides mostly when attending school.

The comparisons in Figure 9 should not be used to draw the conclusion that there are substantial orders for all cases involving equal physical custody and equal incomes. It is not uncommon for parties with almost equal physical custody and almost equal incomes to agree upon a zero order.

Figure 9

Comparison of the 12 Formulas When There Is Equal Timesharing

(Case Scenarios: Income shares calculation using the Illinois income shares child support schedule for one child: In the scenario where the father has more income, his net income is \$4,000 per month and the mother's income is \$3,000 per month; and in the scenario where the parents have equal incomes, both parents have net incomes of \$4,000 per month.)



IV. Calculating the Child Support Order When the Lesser-Time Parent Has a Lower Income Than the Other Parent

A. Formulas

It is normally assumed that the lesser-time parent will pay support to the greater-time parent. One reason for this is that it was assumed that the income of the lesser-time parent would be greater than that of the other parent.⁹² Should this rule extend to situations where the income of the lesser-time parent is less than that of the other parent? The underlying premise of the income shares model is that both parents should contribute financially toward the cost of raising their child in proportion to their share of the parents' combined income. For example, in a Colorado case,

92. See *Dudgeon v. Dudgeon*, 318 S.W.3d 106, 111 (Ky. Ct. App. 2010).

the lesser-time parent with a monthly income of \$2,000 was ordered to pay child support to the greater-time parent, who had a monthly income of \$19,500.⁹³ In many such cases, the standard of living of the lower-income parent would be lower than that of the other parent, even before the income transfer required by a child support obligation.⁹⁴ Still, creating a special rule for a situation when the lesser-time parent has a lower income than the other parent would be inconsistent with the cross-credit formula, which essentially calculates a theoretical order for each parent, weights each parent's theoretical order by the child's time with the other parent, and provides that the parent with the larger amount owes the other parent the difference.⁹⁵ In other words, the cross-credit formula is just a mathematical calculation indifferent to which parent pays support in these circumstances. It is just where the numbers land.

Figure 10 compares some parenting-time formulas shown earlier for a scenario where the father is the lesser-time parent with a net income of \$4,000 per month and the mother's net income is \$5,000 per month. There is one child and the Illinois child support schedule is applied to each state's timesharing formula. Figure 10 shows that four of the six timesharing formulas result in the mother owing the father child support for this case scenario, even when the father is the lesser-time parent with substantial access. The obligated parent flips from the father to the mother at 45% timesharing under the cross-credit formula with the 150% multiplier, 46% timesharing under the Tennessee timesharing formula, 47% timesharing under the Oregon timesharing formula, and 50% timesharing under the Indiana timesharing formula. Although not shown, it would also flip for the Michigan and Minnesota timesharing formulas. In other words, it will flip using the cross-credit formula and mathematical modifications to the cross-credit formula. Tennessee uses a per diem formula, which will generally flip depending on the parameters. Sliding-scale percentages and formulas, such as what Pennsylvania uses, will not flip. Whether the variable/duplicated fixed/nonduplicated fixed formulas flip depends on the parameters. As shown in Figure 10, the Indiana timesharing formula, which is based on the variable/duplicated fixed/non-duplicated fixed concept, flipped, while Missouri's version of the concept did not for this particular scenario.

93. See *Marriage of Antuna*, 8 P.3d 589, 596–97 (Colo. App. 2000).

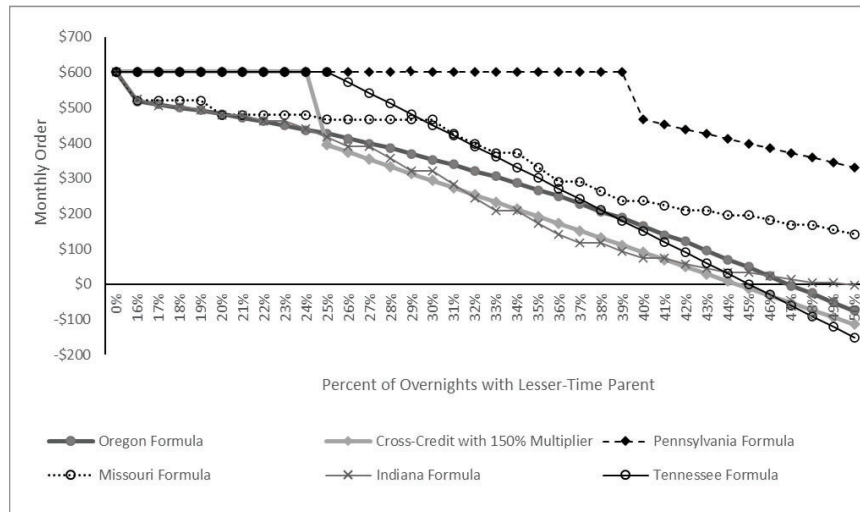
94. See generally J. Thomas Oldham, *The Appropriate Child Support Award When the Noncustodial Parent Earns Less Than the Custodial Parent*, 31 HOUS. L. REV. 585 (1994).

95. See *supra* text accompanying notes 46–53.

Figure 10

Comparison of Selected Formulas When Lesser-Time Parent Has Lower Income

(Case Scenario: Income shares calculation using the Illinois income shares schedule for one child where the father/lesser-time parent's net income = \$4,000 per month and the mother/greater-time parent's net income = \$5,000 per month.)



At 50% timesharing for this scenario, the cross-credit formula with a 150% multiplier would result in the mother owing the father \$113 per month, the Oregon timesharing formula would result in the mother owing the father \$75 per month, the Tennessee timesharing formula would result in the mother owing the father \$150 per month, the Indiana timesharing formula would result in the mother owing the father \$2 per month, the Pennsylvania timesharing formula would result in the father owing the mother \$331 per month, and the Missouri timesharing formula would result in the father owing the mother \$141 per month. Missouri, however, does indicate a guidelines deviation could be granted for this circumstance.

The reader should note that although Figure 10 shows four of the six state timesharing formulas flip which parent is obligated to pay support, the outcome will differ depending on the circumstances of the case. The flipping could occur at a lower level of timesharing if the lesser-time parent has significantly lower income relative to the other parent. Further, a guidelines deviation may be granted for this circumstance.

A few states have adopted an absolute rule or have case law that if a greater-time parent has the child for more than a specified number of overnights, that parent cannot be ordered to pay child support.⁹⁶ Other states have adopted a presumption that the obligated parent should have a reduction in child support once the number of overnights exceed a certain number.⁹⁷

B. Case Law

Because courts may deviate from the guidelines when appropriate or just or in the best interest of the child, case law often informs the treatment of shared-parenting situations. Perhaps the most challenging cases of this type involve situations where the greater-time parent has a high income and the other parent has substantial access and a low income. For example, in a recent Illinois case, the father's net monthly income was almost \$21,000 and the mother's net monthly income was \$929.⁹⁸ The mother had substantial access, but less than 50% of all overnights.⁹⁹ Over the father's objection, the appellate court affirmed the trial court's order that the father had to pay monthly child support of \$3,990.¹⁰⁰

In a similar case, a New York court ruled that New York law did not give a New York court the power to order the custodial parent to pay child support, even when the greater-time parent was wealthy and the other parent had limited resources and substantial access.¹⁰¹ In contrast, the Pennsylvania Supreme Court reversed the denial of a child support award against a greater-time parent when the greater-time parent had a substantially higher income than the other parent and the other parent had contact for about 27% of the year.¹⁰² The Illinois Supreme Court has also affirmed an order finding the court had authority to require the greater-time parent to pay child support to the other parent, who had "nearly equal" time with one of the children but less-frequent contact with the other child, when the lesser-time parent's income was much lower than that of the

96. See *State Dep't of Hum. Servs. v. Coldwater*, 364 P.3d 672 (Okla. Civ. App. 2015) (noting that the Oklahoma limit is 205 or more overnights).

97. See P.A. R. Civ. P. § 1910.16-4(c) (2020).

98. See *McClure v. Haisha*, 51 N.E.3d 831, 832, 833 (Ill. App. Ct. 2016).

99. *Id.* at 833.

100. *Id.* at 835-39.

101. See *Rubin v. Salla*, 964 N.Y.S.2d 41, 52 (App. Div. 2013) (Acosta, J., dissenting in part) (noting that the father, who had custody for 56% of overnights, had about \$20 million in assets).

102. See *Colonna v. Colonna*, 855 A.2d 648, 651-52 (Pa. 2004). The case was remanded for further proceedings. *Id.*

greater-time parent.¹⁰³ In both of these cases, the Pennsylvania and Illinois supreme courts were generally supportive of requiring the greater-time parent to pay child support when the greater-time parent's income was significantly higher than that of the other parent.

A recent Texas case presented a similar issue. Texas relies on a percentage-of-obligor income guideline formula.¹⁰⁴ While the statute is not totally clear, it has been assumed by lawyers and judges that the guideline is to be applied to the income of the lesser-time parent. (Of course, the court can deviate from this presumptive amount if there is a reason to deviate.)¹⁰⁵ In this particular case, the parents were granted joint legal custody.¹⁰⁶ The father (who had a significantly higher income than the mother) was granted more than 70% of all overnights.¹⁰⁷ To calculate the presumptive child support award, the trial court calculated the presumptive child support award that the mother would have owed under the guidelines and subtracted it from the presumptive award that the father would have had to pay based on his income.¹⁰⁸ (Texas has no specific formula for reducing child support due to parenting time.) The trial court concluded that the father therefore should pay the mother monthly child support based on the difference between the two presumptive obligations because it was "in the child's best interest to have an adequate amount of resources available in each home to support the child."¹⁰⁹ The appellate court affirmed.¹¹⁰

The authors believe that the cases summarized above in this section create a great deal of uncertainty regarding how a child support award should be calculated if the greater-time parent has a significantly higher income than the other parent. One of the goals of child support guidelines was to create more predictability in child support awards. There seems to be some disagreement as to how guidelines should be applied when the

103. See *In re Marriage of Turk*, 12 N.E.3d 40, 43–51 (Ill. 2014). When this article was about to be published, the Court of Special Appeals of Maryland issued an opinion affirming an award of child support from the greater-time parent to the lesser-time parent. In this case, the greater-time parent had an annual salary of approximately \$1.3 million, while the other parent had an annual salary of \$50,000. *Kaplan v. Kaplan*, No. 3387, 2020 WL 6789989, at *2–3, 11–13 (Md. Ct. Spec. App. Nov. 18, 2020).

104. See TEX. FAM. CODE ANN. § 154.125 (West 2020).

105. See *id.* § 154.123.

106. See *In re A.R.W.*, No. 05-18-00201-CV, 2019 WL 6317870, at *3 (Tex. App. 2019).

107. *Id.* at *8.

108. *Id.* at *2, *3.

109. *Id.* at *2.

110. *Id.* at *4, *9–10.

greater-time parent has a higher income than the other parent, and this uncertainty will encourage litigation.

The Georgia Supreme Court considered a case very similar to the Texas *In re A.R.W.* case discussed above. At the time this case was decided, Georgia, like Texas, relied on a percentage-of-obligor income guideline formula and had no specific formula for reducing child support due to parenting time. In a custody modification action, the court awarded the father 60% of the parenting time and the mother 40%.¹¹¹ The father had a higher income than the mother. To calculate the child support obligation, the Georgia trial court, like the court in *In re A.R.W.*, subtracted the amount that the mother would be ordered to pay under the guidelines from the presumptive amount the father would have to pay if the guideline would be applied to his income¹¹² and ordered the father to pay the mother the difference, which was \$1,087 per month.¹¹³ The Georgia Supreme Court ruled that the trial court had misapplied the guidelines. To calculate the presumptive award, the Georgia Supreme Court clarified that the guidelines should be applied to the income of the lesser-time parent.¹¹⁴ The Georgia Supreme Court explained that the trial court can, of course, then deviate from the presumptive amount for good cause.¹¹⁵ The Georgia Supreme Court stated that it could be possible to order the greater-time parent to pay child support if adequate grounds for deviation could be established to do so.¹¹⁶ However, because the trial court had misapplied the guidelines, the Georgia Supreme Court reversed the child support order of the trial court and remanded the case for the trial court to recalculate child support.¹¹⁷

Perhaps some objective standard could be established to govern the award of child support when the income of the greater-time parent exceeds that of the other parent, particularly in those states that have not adopted a parenting-time adjustment formula. For example, one type of objective standard would be to specify that, if the lesser-time parent's income is less than a certain specified percentage of the income of the other parent, and the lesser-time parent has the child for at least a certain specified number of overnights, the greater-time parent can be ordered to pay child support.

111. *See Williamson v. Williamson*, 748 S.E.2d 679, 679 (Ga. 2013).

112. *Id.* at 682.

113. *Id.* at 680.

114. *Id.* at 682–83.

115. *Id.*

116. *Id.*

117. *Id.* A concurring judge in an Illinois case made a similar point when Illinois had a percentage-of-obligor income guideline. *See In re Marriage of Turk*, 12 N.E.3d 40, 51–55 (Ill. 2014) (Theis, J., concurring).

A disadvantage of such a system is that it could create a substantial cliff effect at the threshold. As was mentioned above, a number of parenting-time adjustment approaches clarify when the greater-time parent should pay child support and the presumptive amount of the support payment.

V. Other Concerns

One concern regarding parenting-time adjustments for child support is that, over time, parenting time will decrease. This would require the greater-time parent to go to court to modify support to reduce or eliminate the child support parenting-time reduction. One study found that, compared to the level of contact at divorce, for parents with a shared-care arrangement, there was some reduction in the level of contact for some fathers (19% of fathers with young children reduced contact, while 30% of fathers with older children reduced contact).¹¹⁸

Another concern is that timesharing will not occur as specified in the order. A Florida statute provides that, if an obligor parent does not regularly exercise the timesharing schedule set forth in the parenting plan, this is a substantial change in circumstances that can justify a modification in child support retroactive to the date the parent first failed to exercise the specified access rights.¹¹⁹ A few other states have similar provisions. Some states provide a simplified procedure for an order modification if the amount of parenting time used to calculate the support amount does not actually occur on a regular basis. None of these states clarify how large the difference between the amount of timesharing that occurred and what was considered in the order is required to be eligible for a modification.

Still another concern is if a “typical” level of timesharing is assumed in the standard basic child support schedule, what should be done if the timesharing is actually less? Tennessee and Pennsylvania are the only states with guidelines that explicitly state what a standard amount of timesharing is under the guidelines. The Tennessee guideline provides what the adjustment should be if actual timesharing is more or less than the standard amount. Pennsylvania, which incorporates an adjustment for 30% timesharing of the lesser-time parent in its basic child support schedule, does not specify a formula for when actual timesharing is less than 30%. Tennessee assumes a standard amount of timesharing of 80 overnights (every other weekend, two weeks in the summer, and two weeks during holidays through the year), and also uses a per diem approach to adjust

118. See Melli & Brown, *supra* note 5, at 256.

119. See FLA. STAT. § 61.30(11)(c) (2020).

the basic formula amount upward if the lesser-time parent has the child 68 overnights or less per year.¹²⁰ Some courts have endorsed increasing child support above the presumptive guideline amount if the obligor has little or no contact with the child.¹²¹

VI. Summary and Policy Choices

This Article identifies several approaches to parenting-time adjustments in state guidelines. Some state guidelines provide for timesharing as a guideline deviation factor, while most states provide a parenting-time adjustment formula. The criteria for applying the parenting-time formula vary, but often a state-determined level of timesharing must be met before an adjustment is made.

By far the most common formula is a cross-credit formula with a specified minimum threshold of timesharing before an adjustment occurs. Three states have taken the basic concept of the cross-credit formula and mathematically modified it to result in a more gradual change in the order amount as the lesser-time parent's time with the child increases. In addition to the states that have adopted some variation of a cross-credit formula, other states use a wide variety of parenting-time formulas. None of these other formulas are identical. A few states base their timesharing adjustment on the principle that child-rearing expenses can be classified as variable, duplicated fixed, and nonduplicated fixed. Under these formulas, the lesser-time parent receives credit for variable expenses at low levels of timesharing and additional credit for variable and duplicated fixed expenses at almost equal levels of timesharing. In addition, there are states that use a sliding-scale percentage adjustment or formula and still other states that use a per diem approach for timesharing above a state-determined threshold.

The graphs in this Article reveal certain differences among the various approaches. For example, the rate of decrease due to more overnights with the child generally is more gradual under the modified cross-credit formulas as well as under Indiana's version of the variable/duplicated fixed/nonduplicated fixed timesharing formula. This occurs because a parenting-time adjustment begins at a relatively low level of access by the payor. In contrast, the cross-credit formula and sliding-scale percentages and formulas do not provide an adjustment until the specified timesharing

120. TENN. COMP. R. & REGS. 1240-02-04-.04 (7)(a), (i) (2020).

121. See *In re* Marriage of Krieger, 199 P.3d 450, 457 (Wash. Ct. App. 2008); Gray v. Gray, 909 So. 2d 108, 114 (Miss. Ct. App. 2005).

threshold is met. The cross-credit formula can have a significant cliff effect at the timesharing threshold required for applying the adjustment. When the recipient has no income, the child support amount under the cross-credit with multiplier is greater than the amounts calculated using the mathematically modified cross-credit formulas. When both parents have equal incomes, many of the formulas go toward no child support with equal joint physical custody, while most parenting-time formulas based on the variable/duplicated fixed/nonduplicated fixed expense concept and the sliding-scale percentage or formula do not. When the lesser-time parent's income is significantly less than that of the greater-time parent, under the cross-credit and the modified cross-credit formulas and the per diem approach, the greater-time parent begins to pay support once the lesser-time parent's percentage of overnights gets close to equal timesharing, but not under most versions of the variable/duplicated fixed/nonduplicated fixed expenses model or the sliding-scale percentage or formula.

A number of the differences in results mentioned above reveal policy choices states make when adopting a parenting-time adjustment approach. First, should the adjustment be applied when the recipient's household income is below a certain level? If so, what should that level be?

The parenting-time support reduction adjustments described above presumptively apply once the obligor parent establishes that he or she meets the specified threshold for a parenting-time adjustment. Should there be any ground for not applying the parenting-time adjustment, other than the relative poverty of the recipient parent, as mentioned in the previous paragraph? If so, what other reasons should there be for not applying the adjustment?

Second, should child support be reduced if there is a relatively low level of obligor contact or should a more substantial threshold be specified before support is reduced? Note that approaches with a threshold by definition do not reduce support until the threshold level of access is reached, and then reduce support more substantially as parenting time exceeds the threshold. The cliff effect resulting from the threshold conceivably could increase litigation, which could be a concern. However, it could be argued that it is fair not to reduce child support until a certain threshold of contact is met because the recipient's expenses are not significantly reduced until the obligor's access is substantial.

Third, what should be the magnitude of the parenting-time child support reduction at various levels of contact? (Note the large variation in award amounts in Figure 8 for support when the obligor parent has possession of the child 40% of all overnights and in Figure 9 when the parties have equal physical custody.)

Fourth, should the greater-time parent ever have to pay child support to the other parent if the greater-time parent's income is significantly higher? Should it be possible for the greater-time parent to be ordered to pay a substantial amount in support if the parents' incomes are very different?

Should the same formula be used when there is substantial access by the obligor, as when there is equal joint physical custody? If a different formula is to be used, what constitutes equal joint physical custody, when a different formula would apply? Further, if two different formulas are to be used, how can the transition from one formula to the second formula be made without a cliff effect?

Finally, should the parenting-time adjustment be made based on the level of access set forth in the court order, or should the adjustment be based on the actual number of overnights, if that differs from what is set forth in the order (or if there is no order)?

VII. Conclusion

States are required to review their child support guidelines at least once every four years.¹²² Most states review their guidelines through a commission or committee that typically consists of a wide range of stakeholders, such as attorneys, judges, representatives of the state child support agency, parents, children's advocates, economists or accountants, and academicians.¹²³ Adopting parenting-time formulas or expanding parenting-time formulas are often issues discussed in these reviews. Committees and commissions in states without parenting-time formulas generally are interested in adopting formulas to create greater consistency in shared-parenting situations and to respond to an increased number of cases with shared parenting. Many committees and commissions in states with parenting-time formulas, particularly those that require timesharing thresholds be met before an adjustment occurs, generally seek to alleviate the cliff effect.

Committees and commissions considering parenting-time adjustment formulas share two common objectives. The first objective is to keep the adjustment simple. The common beliefs are that a simple formula is easier to explain and easier to calculate and can be calculated manually. (This is a particular concern in states without automated calculators or where judges and decision-makers with authority to issue child support orders

122. 45 C.F.R. § 302.56(e) (2020).

123. JANE VENOHR, REVIEW OF THE NEVADA CHILD SUPPORT GUIDELINES 78–82 (2016), <https://www.leg.state.nv.us/Session/79th2017/Exhibits/Senate/JUD/SJUD144D.pdf>.

lack computers.) However, states often find a trade-off between keeping it simple and creating cliff effects. The second objective is to minimize parental strife regarding parenting time. The concern is that too large of an adjustment for substantial access will fuel more litigation over the obligor-parent's time with the child.

Most recently, commissions have officially and unofficially favored the Oregon formula because of its gradual support decrease as the obligated parent's time with the child increases. In addition, they are encouraged by Oregon's reports that its formula does not increase litigation because each additional overnight creates a minuscule decrease in the order amount.¹²⁴ However, final approval of any guidelines changes typically rests with the legislature or the state's supreme court, depending upon whether the state sets its guidelines via legislation, court rule, or administrative rule.¹²⁵ Legislatures and supreme courts appear to be less receptive to dramatic changes in parenting-time formulas and generally do not favor timesharing formulas (like the Oregon formula) that begin to reduce support after relatively few overnights.

The Oregon formula may seem particularly extreme in states that currently have no timesharing adjustment formula or have adopted a formula that requires a parent to have a large number of overnights before the adjustment is applied. For these states, it may be more attractive to adopt a cross-credit formula with a multiplier and a relatively low threshold, or if they have already adopted a cross-credit formula, the state could consider lowering the threshold. The effect of the change can be evaluated as a part of the next review of the state's child support guidelines to determine whether the timesharing adjustment better serves children and families.

124. STATE OF COLORADO CHILD SUPPORT COMM'N, FINAL REPORT 17 (2016), <https://childsupport.state.co.us/sites/default/files/2019-08/DCSS%20Commission%20FINAL%20PRINT%20DOCUMENT%206-17-19-smaller%20file%20%281%29%20%281%29.pdf>.

125. Most states with guidelines set in administrative rule also require legislative approval for substantive guidelines changes such as those that change the state timesharing formula.