REDUCTION IN CHILD SUPPORT FOR EXTENDED VISITATION IN UTAH: EXTRA-CREDIT OR FINANCIAL TIME-OUT?

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I. BACKGROUND AND INTRODUCTION

As more families face the realities of divorce, the court system is increasingly asked to make decisions regarding the best interests of the children involved. These decisions are mostly related to child support and visitation. By the 1970s, in almost all states, child support awards were determined on a case-by-case basis by a single judge.1 “This [case-by-case] system led to grave inequities and dissatisfaction . . . because people in identical circumstances were treated very differently.”2 In 1984, in an attempt to provide a more equal justice, the U.S. Congress required all states to “develop numerical child support guidelines.”3

Meanwhile, more studies were finding that non-custodial visitation decreased over time, which had negative effects on the well-being of the children involved.4 Accordingly, several states began to use child support reduction as a financial incentive for non-custodial parents who spent more time with their children.5 In addition to the desire to create an incentive, it also has been argued that non-custodial parents spend a significant amount of their income on the children when

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2 Id.
3 Id.
4 Mark D. Matthew, Curing the “Every Other Weekend Syndrome”.: Why Visitation Should Be Considered Separate and Apart from Custody; 5 WM. & MARY J. WOMEN & L. 411, 414–17 (1999).
5 Nebraska developed a court-guided system according to NEB. CT. R. § 4-210, which states:

[A]n adjustment in child support may be made at the discretion of the court when visitation or parenting time substantially exceeds alternating weekends and holidays and 28 days or more in any 90-day period. During visitation or parenting time periods of 28 days or more in any 90-day period, support payments may be reduced by up to 80 percent. The amount of any reduction for extended parenting time shall be specified in the court's order and shall be presumed to apply to the months designated in the order.

Minnesota also tried to take into account expenses by the non-custodial parent in its child support guidelines, which allows for a twelve percent reduction in child support if the non-custodial parent falls within the ten to forty-five percent parenting-time range. MINN. STAT. ANN. § 518A.36(2) (West 2006). Georgia simply allows for the “final award of child support [to be adjusted up or down] . . . upon a written finding that the presence of one or more of the following special circumstances makes the presumptive amount of support either excessive or inadequate . . . (5) . . . extended visitation.” GA. CODE ANN. §19-6-15 (1996).
they are visiting, and should, therefore, have their child support payments reduced when parenting time reaches a certain threshold.  

Utah’s statute, entitled “Reduction for Extended Parent Time” sets out that the base-child support award shall be reduced by fifty percent when the child is with the non-custodial parent for at least twenty-five of any thirty consecutive days, whether that time is due to court order or written agreement of the parties.  The statute also provides that the child support amount is reduced by twenty-five percent for time periods when the child is with the non-custodial parent at least twelve of any thirty consecutive days. Utah’s approach balances the two competing interests—expenditures and incentive—in a way that does not damage the interests of the child because it gives a reduction in payments to non-custodial parents only when they have prolonged periods of visitation. This also ensures non-custodial parents are not getting extra credit at the expense of the custodial parent. Adjusting child support payments to match visitation time can present significant issues, some of which will not be directly discussed in this note. However, this note will examine how Utah deals with the expenditure and incentive arguments. First, the note evaluates the argument that non-custodial parents incur a significant amount of expenditures during the course of normal (or even shorter) periods of prolonged visitation, and therefore deserve a reduction in child support payments. Second, the note discusses the incentives given by reducing child support payments for extra parent time, both to custodial and non-custodial parents.

II. EXPENDITURES AND CREDIT

There are two major theories relating to expenditures by non-custodial parents during visitation. The predominant theory in most states’ child support guidelines is known as the “cliff model” which assumes “no appreciable expenditures are

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7 UTAH CODE ANN. § 78B-12-216 (2008) stating: (1) The base child support award shall be: (a) reduced by 50% for each child for time periods during which the child is with the non-custodial parent by order of the court or by written agreement of the parties for at least 25 of any 30 consecutive days of extended parent-time; or (b) 25% for each child for time periods during which the child is with the non-custodial parent by order of the court, or by written agreement of the parties for at least 12 of any 30 consecutive days of extended parent-time.

8 Id.

9 It is difficult to enforce any adjustment in child support for time spent with a parent. It would be nearly impossible for a court to monitor when the non-custodial parent had custody. It would also be a challenge for the court to determine whether a child and the non-custodial parent are actually spending any time together at all during the visit. When considering these issues, Oregon legislators proposed an amendment to their Child Support Act that, if passed, would stipulate: “[t]he child support obligation to be paid . . . may not be reduced based on the amount of parenting time allowed to the [non-custodial parent] unless the [non-custodial parent] shows, to the satisfaction of the court . . . the amount of parenting time actually spent with a child.” H.R. 3408, 73rd Leg., Reg. Sess. (Or. 2005).
made directly by [non-custodial parents] for child-rearing expenses at levels of contact or visitation beneath some threshold value, typically assumed to be around 30% time.”10 Another rationale for the cliff model, is that “even if [non-custodial parents] do incur such expenses at lower levels, any crediting in the form of lowered child support payments would be at the expense of resources the child should preferably have available at the custodial parent’s home.”11 An alternative theory argues that “nonresidential [parents] do make substantial expenditures at lower levels increasing, more or less steadily with increases in time the child spends with them.”12 Utah, as with most states, does not have anything in its child support guidelines to recognize expenditures at levels of visitation below thirty percent.13 In fact, in Utah, “joint physical custody” occurs when the non-custodial parent has thirty percent visitation.14 No modification of support or credit against expenditures is given to non-custodial parents under this thirty percent mark.

A study conducted by Fabricius and Braver, advocates of the alternative model, found evidence suggesting that non-custodial parents expend significant amounts of money on certain categories identified in the study, which included: (a) clothes, shoes, and personal items; (b) toys and games; (c) bicycles; and (d) bedrooms devoted to the child’s use.15 The results of this study showed that “with the exception of clothes, fully half of all [non-custodial parents] were already incurring appreciable expenses for these benchmarks” by the time they reached thirty percent visitation time with their children.16 Fabricius and Braver also found that fifty-five percent of non-custodial parents incurred the significant expense of providing a bedroom for their visiting children in their homes.17 Critics of including these expenditures in child support guidelines say that “offering credits or offsets to child support obligations at lower levels of time with the child would only encourage bad faith efforts on the part of obligors to bargain for more time simply to reduce the amount of child support ordered.”18 Other critics point out that there are simply costs associated with visitation and no credit should be given for expenditures that come with “normal visitation.”19

10 Fabricius & Braver, supra note 6, at 321.
11 Id. at 323.
12 Id. at 324.
13 Id. at 322 (explaining “[s]ince 1996, only four states (Arizona, New Jersey, California, and Missouri) have rejected the cliff model by incorporating child support credits for levels of visitation below 30%.”).
14 Utah Code Ann. § 78B-12-102(13) (2008) (stating that “joint physical custody' means the child stays with each parent overnight for more than thirty percent of the year, and both parents contribute to the expenses of the child in addition to paying child support.”).
15 Fabricius & Braver, supra note 6, at 324.
16 Id. at 332.
17 Id.
18 Id. at 323.

There is very little statutory or guideline statement on this point, but increasingly the literature and case law assume that 20 percent time is normal visitation time and the expenses of that amount of visitation have been
Some states, while still following the cliff model, allow credit to be given for certain expenditures.\textsuperscript{20} Several courts have expressed concern about giving expenditure credit to non-custodial parents because it would allow non-custodial parents to interfere with the decisions of the custodial parent on how money and support should be spent to serve the children’s needs.\textsuperscript{21} However, other states have a different rationale for refusing to build in credit for expenditures, mainly that there are expenses involved in visitation including entertainment, meals, vacation expenses and gifts, which are separate from support payments.\textsuperscript{22}

Utah’s child support guidelines fall squarely within the no-credit-for-expenditures camp. In \textit{Ross v. Ross}, the Utah Supreme Court held that a non-custodial father was not entitled to credit for expenditures because allowing such credit would vary the terms of his divorce decree and interfere with the custodial mother’s right to determine the manner in which the money should be spent.\textsuperscript{23} Utah does, however, accommodate the increasing amount of expenditures by non-custodial parents as visitation increases. After visitation hits the thirty percent point, child support payments are gradually decreased.\textsuperscript{24} Then, at thirty-five percent visitation, child support is drastically reduced. Finally, at fifty percent visitation (assuming equal incomes), no child support payments are required at all.\textsuperscript{25} Further, there is a strong argument for not calibrating expenditures into child support awards. As Garfinkel and McLanahan have stated:

\begin{quote}
Given that visitation declines systematically over time, finely calibrating all or even most child support obligations to the amount of visitation is a terrible idea. It sets up the custodial parent with an increasingly inadequate amount of child support unless she proactively \end{quote}

\textit{Id.} (emphasis added).\textsuperscript{26} See State \textit{ex rel.} Burt v. Morgan, 716 So. 2d 729 (Ala. Civ. App. 1998) (credit can be awarded only for expenses that can “clearly be categorized as essential to basic child support . . .,” and that credit may not be given for extra expenses that are not part of the “legal child support obligation.”). \textsuperscript{21}


\textit{Ross}, 592 P.2d at 603 (the court also held that only if the custodial parent “consented to the voluntary expenditures as an alternative manner of satisfying his . . . child support obligation, [would the non-custodial parent] receive credit for such expenditures”). \textsuperscript{24}


\textit{Id.}
pursues a modification of the agreement based on the actual behavior of her ex-spouse . . . . Finely calibrating also leads to the possibility of a continuing battle between parents about how much visitation actually takes place.26

The danger Garfinkel and McLanahan warn about is exactly what Utah hopes to avoid. Floor debates regarding the creation of the governing statute make clear that giving too much of a reduction in child support would lead to a significant loss in income for the custodial parent because just an additional “one or two overnights per month will result in an immediate and substantial loss of child support for the custodial parent.”27 Calibrating child support based on how much time is spent with the non-custodial parent puts children in a dangerous situation where they are nothing more than the ball in their parents’ game of financial keep-away.

This is not to say that Utah does not recognize expenditures by the non-custodial parents under the thirty percent visitation line. Utah’s statute takes into account that non-custodial parents may be faced with a situation where they have their children for extended periods of time (twelve or more days), in which case child support is reduced accordingly.28 Utah’s statute is correct, in that it only gives credit for expenditures when the non-custodial parent has visitation for an extended period of time, even if the overall visitation remains under thirty percent.

III. INCENTIVES GIVEN

It also is argued that crediting non-custodial parents for extended parent time can be positive. Garfinkel and McLanahan acknowledge “crediting more [non-custodial parents] with visitation . . . creates an incentive for the [non-custodial parent] to have the child stay over more often.”29 However, they call this argument “dubious” because it “assumes not only that greater father involvement would increase child well-being but, [also] that the increase in father involvement motivated solely by the change in financial incentives will increase child well-being.”30 This argument is less “dubious” when viewed in conjunction with studies that show “continued contact between the child and the non-custodial parent may lead to improved cognitive and social development for the child. It will also help the child address negative feelings about the divorce.”31 In addition, there is evidence this contact “may improve or reinforce the non-custodial parent’s willingness to contribute to [the child’s] financial support” in the first place.32 This

26 Garfinkel, supra note 1, at 345.
29 Garfinkel, supra note 1, at 345.
30 Id.
31 Matthew, supra note 4, at 418.
32 Id.
argument is strengthened by the fact that the relationship between child and non-custodial parent provides benefits to society as well as the child. ³³ If a non-custodial parent is encouraged to spend time with his child, and is more willing to pay not only the financial support ordered by the court, but also to pay for other expenses, then it benefits the child’s economic interest and society’s as well. ³⁴ As Mark Matthew discusses:

[I]t is far more effective and efficient to encourage and enforce visitation than to pursue non-custodial parents with child support enforcement services. It takes fewer resources to make non-custodial parents feel as though they are part of their children’s lives and thus willingly pay child support, than to focus upon a child support enforcement system which pursues garnishment of wages and other collection means without any connection to visitation. ³⁵

Matthew’s argument is compelling, given the number of non-custodial parents who lose all contact with their children or stop paying child-support. ³⁶ The thrust of the argument is that by giving a non-custodial parent a decrease in their child-support payments for spending more time with their child, the amount of time that parent spends with the child will increase, and will hopefully combat some of the statistics evidencing limited parental involvement.

However, the assumption that a decrease in child support will lead to an increase in parental interest is also problematic. As Garfinkel and McLanahan point out, “[t]here are many factors that influence [non-custodial parent] visiting. They include the [non-custodial parent]’s attitude to the child, the response of the child, the attitude of the [custodial parent], the attitude of the new spouses, whether there are new children in the second marriage, and so forth.” ³⁷ To assume the financial incentive would outweigh any of these other concerns ignores the psychological realities of families and children in these types of situations. Garfinkel further notes “[t]he financial incentive would be a very small part of [the factors that influence parental visiting]. Parents who are really invested in their children expect to make sacrifices and do not expect financial rewards.” ³⁸

³³ Id. at 419.
³⁴ Id.
³⁵ Id. at 420.
³⁶ Jessica Pearson & Nancy Thoennes, The Denial of Visitation Rights: A Preliminary Look at its Incidence, Correlates, Antecedents and Consequences, 10 LAW & POL’Y 363, 375–79 (1988) (citing several studies, one of which points out “in cases involving children living in one-parent families where the non-custodian is believed to be alive, ‘over a third of children lost contact all together with the biological parent living outside the home’” (internal citations omitted). Another cited study shows “two years following the divorce, 30% of the children saw their [non-custodial parent] about once a month or less. A third study showed after two years, thirty percent of the non-custodial parents no longer visit their children” at all).
³⁷ Garfinkel, supra note 1, at 345.
³⁸ Id.
there are limited studies available on this issue, Garfinkel’s position seems logical; it is difficult to conclude that a decrease in child support would create enough incentive to make a difference in the amount of time a noncustodial parent would spend with their child.

Even assuming that there is an incentive created for the non-custodial parent to spend more time with their child, one should not forget that child support is intended to promote what is in the best interest of the child. “Income discrepancies continue to exist between [non-custodial parents’] and [custodial parents’] homes following divorce, and concerns have been expressed that the overall financial well-being of children should not be sacrificed in pursuit of increasing contact with a [non-custodial parent].”39 When viewing the problem from the perspective of what will be best for the child, it is apparent that the thought of taking child support dollars away from custodial parents becomes less appealing. “Child support elevates the child’s financial situation in the [custodial parent]’s home, and this is an important predictor of the child’s well-being. Thus, child support dollars have a powerful influence on children’s well-being after divorce, more powerful than income from other sources . . . .”40 Even though increased contact with a non-custodial parent is beneficial to a child, research indicates it is in the best interest of the child to have contact as well as child support, and that one should not substitute for the other: “adolescents were more likely to graduate from high school and attend college when they had both contact and financial support from their fathers (over having only one or the other).”41 As Garfinkel and McLanahan note, “even if there were an increase in child well-being resulting from this kind of increased [non-custodial parent] involvement, it could easily be offset or exceeded by the decrease in child well-being resulting from reductions in the [custodial parent]’s and child’s standard of living.”42

Another problem is that even if reducing child support for extended parent time does create an incentive for non-custodial parents to spend more time with their children, it also creates an incentive for custodial parents to resist increased visitation because it means a direct loss of income for their family. A Utah legislator noted that sometimes a reduction in child support can be so drastic that the loss of income becomes an impediment to visitation.43 Thus, Utah’s statute would help “parents avoid fights over whether an extra night with a child is just to

40 Id. at 431-32 (citing Virginia W. Knox & Mary Jo Bane, Child Support and Schooling, in CHILD SUPPORT AND CHILD WELL-BEING, 20, 285–316 (Irwin Garfinkel et al., eds., 1994); see also Virginia W. Knox, The Effects of Child Support Payments on Developmental Outcomes for Elementary School-Age Children, 31 J. HUM. RESOURCES, 816, 833–834 (1994) (discussing how child support payments had a positive relation to improved scores on standardized tests through elementary school, and even while other types of income had a positive effect, child support appeared to be even more positive).
41 Buchanan & Jahromi, supra note 39, at 432.
42 Garfinkel, supra note 1, at 345.
get extra dollars, and encourages visitations with parents and children without having those visits tied so much to the money."\textsuperscript{44}

Garfinkel also discusses this secondary incentive, noting that “reducing child support orders for each day of visitation creates an incentive for the resident parents to resist visitation, leading to increased conflict in cases where non-resident parents want to see their children."\textsuperscript{45} Divorce is already stressful and filled with conflict, but when combined with parental disagreements about visitation it becomes even more so.\textsuperscript{46} Viewing this through a best interest standard,\textsuperscript{47} it is difficult to justify adding to the psychological pressures that are already present.\textsuperscript{48}

Utah’s statute avoids giving direct incentive to non-custodial parents, and thereby avoids such problems as parents using the child as a financial pawn. The statute does, however, give one important incentive; if the need arises for a non-custodial parent to have an extended period of visitation with the child, she would not be forced to pay both the direct costs of raising that child, and the full child support amount to the custodial parent. This accommodation increases the likelihood that the non-custodial parent would care for the child in situations where the custodial parent is unable to do so, because a block of time (extended illness, travel, incarceration, etc.) clearly raises issues of “expenses shifting from one parent to the other.”\textsuperscript{49}

\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Janet R. Johnston, \textit{High-Conflict Divorce}, 4 FUTURE CHILD. 165, 172. Johnston explains:
[C]onflict between spouses tends to erode a couple's capacity to co-operate in the care and guidance of children. As a consequence of divided parental authority and lack of respect given to one another, parenting tends to become more problematic: discipline is more coercive, and expectations are more inconsistent, all of which are predictive of more negative and distant parent-child relationships and an increase in children's emotional and behavioral problems.
\textsuperscript{47} “The best interest standard is designed to look at the totality of the circumstances surrounding the child and determine her placement with the parent who will make determinations . . . that would best serve the child’s interests.” Matthew, supra note 4, at 426.
\textsuperscript{48} Lillian C. Scheiner et al., \textit{Custody and Visitation Counseling: A Report of an Innovative Program}, 31 FAM. REL., 99, 101 (1982) (“When unresolved marital and family problems get played out as custody dramas, when parents put their own needs first and their children's second, or when a parent's fight for custody is to gain a personal advantage at a child's expense, children become victims of their family's pathology.”).
\textsuperscript{49} See Melli, supra note 19, at 225. She explains:
One reason states make provisions for extended time may be because a block of time raises clearly the question of expenses shifting from one parent to the other. However, as a matter of good public policy, making adjustments in the child support amount for periods as short as a week or even a month is questionable, particularly when the total amount of visitation may be less time than ordinary visitation. Guideline reviewers in states with such provisions ought to reexamine carefully their rationale and their use.
\textsuperscript{Id.
IV. CONCLUSION

Given Utah’s stance on expenditure reimbursement as set forth in *Ross v. Ross*, and that there may not be any real benefit to the child’s well-being from increased non-custodial parental involvement at the cost of child support, it would be unwise for Utah to provide any more financial incentives to non-custodial parents than it already does. The State of Utah has recognized that non-custodial parents who have their children for prolonged periods of time do incur greater expenses during that time. By decreasing child support payments by twenty-five percent (or even as much as fifty percent) only for the time periods the child is with the non-custodial parent, and even then only for extended periods of time, Utah helps to maintain the child’s standard of living at all times. Giving extra credit to non-custodial parents, at the expense of the custodial parent, goes against the best interest of the child and only keeps the custodial family in perpetual financial time-out.