FAMILY LAW QUARTERLY

49 No. 3 Fall 2015

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The Shared Custody Child Support Adjustment: Not Worth the Candle

KAREN SYMA CZAPANSKIY*

I. Introduction

Child support guidelines in more than half of the states provide for an adjustment when a child is in shared physical custody.[1] When compared with the outcome under the same guideline for a child in sole custody, the adjusted child support received by the primary household is generally lower, with an accompanying reduction in the standard of living in the child's primary household.[2] The question posed by this article is whether mandating a reduced standard of living for the child in the primary household is good policy. The answer is no; at least without significant change, the adjustment is not worth the candle.

Three arguments can be advanced in favor of the mandatory shared custody child support adjustment. First, the expenses of the parent in the secondary household increase significantly when that parent exercises greater custodial responsibility. Second, the benefit to the child from having significant time with each parent is so great that it is appropriate to reduce any economic disincentives that might discourage a parent from accepting a greater share of custodial responsibility. Third, the impact of the adjustment on the child and the child's primary household is not so great as to make a significant difference to the child.

These affirmative arguments fail to hold water, however. First, the economics of shared custody remain a mystery despite multiple calls for

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1. *See* LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 7.03(A)(2) Table 7-4 (3d ed. 2015) [hereinafter CHILD SUPPORT GUIDELINES].

2. *See infra*, § 2, for examples.

better research. As a result, while common sense suggests that the child's secondary household experiences increased costs, how much the costs increase is unclear. Second, while the child's interest in having a relationship with both parents is a given in most circumstances, the goal may be achievable without reducing the child support obligation. Third, the shared custody adjustment does not guarantee that the child will spend frequent overnights in the secondary home, because parents are not required to exercise their rights to custodial responsibility. Fourth, when a parent fails to spend the planned time with the children as promised, practical and legal obstacles impede eliminating the adjustment. Finally, the shared custody adjustment may have unexpected noneconomic impacts on the child's primary household, such as increasing the primary parent's actual and perceived vulnerability to financial and custodial challenges.

The shared custody adjustment works differently in different states. The first section of the article describes how the shared custody adjustment works in three typical states and its impact in each state on the standard of living in the child's primary and secondary households. The second section addresses the arguments for and against a legally mandated shared custody adjustment, as opposed to an adjustment agreed to by the parents. The third section offers recommendations for a more limited version of a shared custody adjustment.

II. Shared Custody Adjustment in Operation

The shared custody adjustments in Maryland, California, and New Jersey provide insight into how a variety of approaches to the adjustment operate in practice. In this section, child support under the law of each state is calculated for three families. The results are used to identify the relative standards of living in each household with and without the adjustment. In each scenario, the custody arrangement is for the two children to spend 60% of their nights in the home of their mother, which is called the primary household, and 40% in the home of their father, which is called the secondary household. The first family is middle income, with the father's income being $40,000 and the mother's $20,000.[3] The second family is high income, with the father's income being $100,000 and the mother's $50,000. The third family is low income, with the father's income being $20,000 and the mother's $10,000.

The standard-of-living measurement, is based on the Poverty Threshold, as adjusted to reflect the children's presence in each household for different

3. "Income" is defined differently by different states for purposes of calculating child support, with some states using gross income and others providing for a variety of deductions. For the purpose of the scenarios in this article, "income" means the money used to calculate the child support obligation, regardless of how that figure is derived.

amounts of time. The Poverty Threshold is a figure prepared annually by the Census Bureau for the purpose of identifying how many people and families live in poverty.[4] It is calculated for a variety of household sizes, and it differs depending on the number of adults and children in a household.

In 2014, the Poverty Threshold for a household of four with two children was $24,008.[5] I used that figure to calculate the standard of living experienced by the family if all four members are living together and sharing access to the combined incomes of the mother and the father. For a family of three with two children living together all the time, the 2014 Poverty Threshold was $19,073. Since the children in my scenarios live with one parent 60% of the time and the other parent 40% of the time, the Poverty Threshold for a family of three overestimates by some degree the costs for each household. As will be discussed later, how much each household is likely to spend is difficult to know with any certainty. In the absence of a guess by the Census Bureau, which does not calculate a Poverty Threshold for households where children are in shared custody, I substituted an estimate that probably underestimates the costs subtracted from the primary household and overestimates the costs added to the secondary household.

My substitute shared custody Poverty Threshold requires three steps. First, I identified the portion of the Poverty Threshold attributable to the presence of two children in a three-person household by subtracting the Poverty Threshold for a one-person household from the Poverty Threshold for a three-person household with two children. The difference attributable to the presence of two children in the household is $6,758. I then added 60% of the difference to the Poverty Threshold for a one-person household to identify a figure for the shared custody standard of living for the children's primary household. The total is $16,370. I added 40% of the difference to the Poverty Threshold for a one-person household to identify a figure for the standard of living for the children's secondary household. The total is $15,018.

A. Shared Custody Adjustment in Maryland

Maryland has an "income-shares" child support guideline. "Income-shares" is the formulaic approach used in child support guidelines adopted by almost every state.[6] Under this approach, a "basic support obligation"

4. *See* United States Census Bureau, Poverty Thresholds, *available at* https://www.census.gov/hhes/www/poverty/data/threshld.

5. *See id.*

6. *See* IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 299 (5th ed. Abr.

(BSO) is identified for families depending on the number of children in the family and the total amount of income acquired by the parents.[7] The BSO is supposed to reflect the amount of money spent on average by parents who are sharing a household with each other and their children, and it varies depending on the amount of income the parents acquire and the number of children they have.[8] Spending, in this context, refers to money spent by average parents beyond what they would spend on themselves to maintain the same standard of living if they did not have children in their household.[9] Once the BSO is identified (usually by means of a chart), the child support obligation is determined for each parent in proportion to their income, relative to the total income acquired by the parents.

In each of the three scenarios explored here, the mother's income is one-half of the father's income. In each scenario, the parents have two children. To see how the income shares approach works, imagine that the mother's income is $25,000 a year and the father's income is $50,000. Imagine further that the BSO identified by Maryland for parents of two children who earn a total of $75,000 is $15,000 a year.[10] Since the mother makes one-third of the total income, the mother's child support obligation is $5,000. Since the father makes two-thirds of the total income, the father's obligation is $10,000. The mother is expected to spend $5,000 of her income on the children as well as the $10,000 a year that she receives in child support from the father.

Maryland's shared custody adjustment includes a "cliff." The shared custody adjustment applies only when the custodial order provides that the child is to spend more than 35% of overnights in the home of a second parent.[11] Once the cliff is reached, the BSO is multiplied by a factor of 1.5.[12] The adjusted basic support obligation is allocated to each parent based on the percentage of each parent's income relative to total parental income, and the resulting figure is the amount of each parent's child support

2014) [hereinafter ELLMAN ET AL.]; Jane C. Venohr & Tracy E. Griffith, *Child Support Guidelines: Issues and Reviews*, 43 FAM. CT. REV. 415, table 1 (2005).

7. MD. CODE ANN., FAM. LAW § 12-201(e) ("'Basic child support obligation' means the base amount due for child support based on the combined adjusted actual incomes of both parents.").

8. *Supra* note 6, at 307–08.

9. *Id.* at 306–07.

10. The actual BSO is $17,400. MD. CODE ANN., FAM. LAW § 12-204 (LexisNexis 2012).

11. MD. CODE ANN., FAM. LAW § 12-201(m)(1). Many states use a similar threshold before a shared custody adjustment is made. *See* MORGAN, CHILD SUPPORT GUIDELINES, *supra* note 1, at § 7.03(A)(2)(ii).

12. MD. CODE ANN., FAM. LAW § 12-204(f). Identifying a formula that takes into account the increased costs attributable to a child spending substantial time in two households has been, and remains, problematic. *See* LAURA W. MORGAN, CHILD SUPPORT GUIDELINES, *supra* note 1, at § 7.03(A) and note 88 (overview of problem).

obligation.[13] Each parent's obligation is then multiplied by the percentage of time the child is to spend with that parent.[14] Each parent keeps that amount and owes the remainder to the other parent; the actual payment is made by the parent whose obligation is a higher net amount after the other parent's obligation is subtracted.[15]

Table 1, below, shows the outcomes for the three scenarios under Maryland law, with and without the shared custody adjustment.

Table 1. Maryland

Note: All figures are annual.	Child Support Paid to Children's Primary HH	Income of Children's Primary HH	Standard of Living of Children's Primary HH	Standard of Living of Children's Secondary HH
Scenario 1: HH includes M, F, and 2 children; F's income = $40,000; M's income = $20,000	n/a	$60,000	250%	n/a
Scenario 1: Children in Primary HH 60% of time and Secondary HH 40% of time; no shared custody adjustment applied	$9,832	$29,832	182%	201%
Scenario 1: Children in Primary HH 60% of time and Secondary HH 40% of time; shared custody adjustment applied	$5,899	$25,899	158%	227%
Scenario 2: HH includes M, F, and 2 children; F's income = $100,000; M's income = $50,000	n/a	$150,000	625%	n/a
Scenario 2: Children in Primary HH 60% of time and Secondary HH 40% of time; no shared custody adjustment applied	$18,984	$68,984	421%	539%
Scenario 2: Children in Primary HH 60% of time and Secondary HH 40% of time; shared custody adjustment applied	$11,390	$61,390	375%	590%
Scenario 3: HH includes M, F, and 2 children; F's income = $20,000; M's income = $10,000	n/a	$30,000	125%	n/a
Scenario 3: Children in Primary HH 60% of time and Secondary 40% of time; no shared custody adjustment applied	$5,544	$15,544	95%	96%
Scenario 3: Children in Primary HH 60% of time and Secondary 40% of time; shared custody adjustment applied	$3,326	$13,326	81%	111%

13. MD. CODE ANN., FAM. LAW § 12-204(a)(1).

14. *Id.* § 12-204(m)(2).

15. *Id.* § 12-204(m)(3).

Table 1 demonstrates that, at every income level, the shared custody adjustment results in a reduction in total income in the children's primary household. The reductions for Scenarios 1, 2, and 3, are $3,933, $7,594 and $2,218, respectively. The standard of living in the children's primary household is also lower than the standard of living without the adjustment. The greatest decline relative to the Poverty Threshold occurs in Scenario 2, the high-income family. Without the shared custody adjustment, the children's primary household has a standard of living equal to 421% of the Poverty Threshold. With the adjustment, the standard of living falls to 375% of the Poverty Threshold. In Scenario 1, the middle-income family, the children's primary household goes from 182% to 158% of the Poverty Threshold. In Scenario 3, the children's primary household experiences a drop that takes it from just below the Poverty Threshold to nearly 20% below the Poverty Threshold.

The adjustment effectuates a transfer of income from the children's primary household to the children's secondary household, where the income available to the children's secondary household increases by $7,594 in Scenario 2; $3,933 in Scenario 1; and $2,218 in Scenario 3. The adjustment is supposed to reduce the financial burden on the secondary household attributable to the presence of the children for additional time. As discussed later, it is not known whether the secondary household experiences an increase in costs that is equivalent to the amounts identified in the formula, nor is it known whether the primary household experiences an equivalent reduction in costs. The cost-of-living comparisons suggest strongly that the amount overestimates the increase in the secondary household and underestimates the decrease in the primary household. Even after the Poverty Threshold is adjusted to reflect that the children spend 40% of the time in the secondary household, the standard of living in the secondary household rises after the shared custody adjustment, while the standard of living in the primary household falls. The increase in the high-income family is from 539% to 590% of the Poverty Threshold. In the middle-income family, the secondary household experiences an increase from 201% to 227% of the Poverty Threshold. The increase in the low-income scenario takes the children's secondary household from slightly below the Poverty Threshold to 111% of the Poverty Threshold.

B. Shared Custody Adjustment in New Jersey

Like Maryland, New Jersey is an income shares state.[16] While the basic income shares structure of New Jersey's child support formula is the same

16. New Jersey Courts, N.J.R. Ct. Appendix IX-A: Considerations in the Use of Child Support Guidelines 2 (2015), *available at* https://www.judiciary.state.nj.us/csguide/app9a.pdf.

as Maryland, New Jersey set its BSO amounts at lower for middle- and high-income families, and higher for low-income families.[17] As a result, the child support obligations of each parent are lower in Scenarios 1 and 2, and higher in Scenario 3.

New Jersey's shared custody adjustment is also different from Maryland's with respect to some important details. First, the adjustment is available where the children are in the secondary household at least two nights a week and the parent has shown that separate living accommodations are provided in the secondary household.[18] Two nights a week is the equivalent of 28% of overnights, which is lower than Maryland's threshold of 35%. Maryland does not, however, require proof of living accommodations in both homes. Once the shared custody adjustment is available, New Jersey's formula adjusts the BSO to take into account anticipated variable and fixed expenses in both households,[19] while Maryland's formula adjusts the BSO by increasing it by 50%.[20]

Table 2 shows the results of applying New Jersey's shared custody to the three scenarios.

Table 2. New Jersey

Note: All figures are annual	Child Support Paid to Children's Primary HH	Income of Children's Primary HH	Standard of Living of Children's Primary HH	Standard of Living of Children's Secondary HH
***Scenario 1:* HH includes M, F, and 2 children; F's income = $40,000; M's income = $20,000**	n/a	$60,000	250%	n/a
***Scenario 1:* Children in Primary HH 60% of time and Secondary HH 40% of time; no shared custody adjustment applied**	$9,707	$29,707	181%	202%
***Scenario 1:* Children in Primary HH 60% of time and Secondary HH 40% of time; shared custody adjustment applied**	$6,083	$26,083	159%	226%
***Scenario 2:* HH includes M, F, and 2 children; F's income = $100,000; M's income = $50,000**	n/a	$150,000	625%	n/a

17. *Id.* Appendix IX-F: Schedule of Child Support Awards, *available at* http://www.judiciary.state.nj.us/csguide/app9f.pdf.

18. *Compare id. with* Md. Code Ann., Fam. Law § 12-201(m)(1) (LexisNexis 2012).

19. Appendix IX-A, *supra* note 16, at 13–14.

20. Md. Code Ann., Fam. Law § 12-204(f).

Table 2. New Jersey *(continued)*

Note: All figures are annual.	Child Support Paid to Children's Primary HH	Income of Children's Primary HH	Standard of Living of Children's Primary HH	Standard of Living of Children's Secondary HH
Scenario 2: Children in Primary HH 60% of time and Secondary HH 40% of time; no shared custody adjustment applied	$16,016	$66,016	403%	559%
Scenario 2: Children in Primary HH 60% of time and Secondary HH 40% of time; shared custody adjustment applied	$9,733	$56,083	365%	601%
Scenario 3: HH includes M, F, and 2 children; F's income = $20,000; M's income = $10,000	n/a	$30,000	125%	n/a
Scenario 3: Children in Primary HH 60% of time and Secondary 40% of time; no shared custody adjustment applied	$5,893	$15,893	97%	94%
Scenario 3: Children in Primary HH 60% of time and Secondary 40% of time; shared custody adjustment applied	$3,736	$16,083	84%	108%

Table 2 shows that the application of the New Jersey shared custody adjustment, as in Maryland, results in a reduction in the total income in the children's primary household. Because the BSOs are lower in New Jersey in two of the scenarios than in Maryland, the unadjusted child support in those scenarios is lower, and the differences between the adjusted and unadjusted support amounts is smaller. In Scenario 1, the middle-income family, the standard of living in the children's primary household goes from 181% of the Poverty Threshold to 159% of the Poverty Threshold. In Scenario 2, the high-income family, the change goes from 403% of the Poverty Threshold to 365%, while the children's primary household in the low-income family of Scenario 3 goes from 97% to 84% of the Poverty Threshold. The transfer of income seen in Maryland is also smaller in two scenarios in New Jersey, again, because the BSOs are lower. In New Jersey, the reductions are $3,624, $6,283, and $2,157, respectively.

With the shared custody adjustment, the standard of living in the children's secondary household rises relative to the Poverty Thresholds. In the middle-income family of Scenario 1, the increase is 202% to 226%. In the high-income family, the increase is 559% to 601%. In the low-income family of Scenario 3, the increase is 94% to 108%.

C. Shared Custody Adjustment in California

California sets its BSO at higher levels than either Maryland or New Jersey.[21] California also employs a sliding scale rather than a cliff, so there is no requirement that the child spend a minimum amount of time in the secondary household before child support is adjusted for shared custody.[22] The BSO assumes that the child spends all of the time in the primary household.[23] As the child's time in the primary household declines and the child's time in the secondary household increases, even by 1%, the amount of support payable by the secondary household into the primary household decreases.

An important difference between California on the one hand, and Maryland and New Jersey on the other, is that the BSO reflects no assumptions about the child spending time in two households. Although the unadjusted child support guidelines of Maryland and New Jersey appear to do the same, the reality is somewhat different. In both Maryland and New Jersey, the BSO is discounted based on a pair of assumptions: first, even without a shared custody order, children usually spend about 20% of the time in the secondary household and, second, the parent of the secondary household needs access to some of the BSO to cover the child's expenses.[24] Twenty percent of the child's time is the equivalent of what was traditionally called visitation time,[25] which was a common form of custodial arrangement in the late 1980s when child support guidelines were first adopted.

Because California does not discount its BSO to assume that the child spends about 20% of the time in the secondary household, the "unadjusted" outcome is not directly comparable to the Maryland and New Jersey outcomes. To avoid comparing apples to oranges, the unadjusted child support figures in Table 3 are the outcomes reached when the children spend 20% of their time in the secondary household.

21. CAL. FAM. CODE § 4055 (West 2013).
22. *Id.*
23. CAL. FAM. CODE § 4055(b)(1)(D).
24. *See* Irwin Garfinkel, Sara McLanahan, & Judith Wallerstein, *Visitation and Child Support Guidelines*, 42 FAM. CT. REV. 342, 354–56 (2004) (early child support guidelines were designed with assumption of child spending 20% of time in secondary household).
25. *See* MORGAN, CHILD SUPPORT GUIDELINES, *supra* note 1, at § 7.03(A)(2)(ii).

Table 3. California

Note: All figures are annual.	Child Support Paid to Children's Primary HH	Income of Children's Primary HH	Standard of Living of Children's Primary HH	Standard of Living of Children's Secondary HH
Scenario 1: HH includes M, F and 2 children; F's income = $40,000; M's income =$20,000	n/a	$60,000	250%	n/a
Scenario 1: Children in Primary HH 60% of time and Secondary HH 40% of time; no shared custody adjustment applied	$13,440	$33,440	204%	177%
Scenario 1: Children in Primary HH 60% of time and Secondary HH 40% of time; shared custody adjustment applied	$8,960	$28,960	177%	207%
Scenario 2: HH includes M, F, and 2 children; F's income = $100,000; M's income = $50,000	n/a	$150,000	625%	n/a
Scenario 2: Children in Primary HH 60% of time and Secondary HH 40% of time; no shared custody adjustment applied	$33,600	$66,400	511%	442%
Scenario 2: Children in Primary HH 60% of time and Secondary HH 40% of time; shared custody adjustment applied	$22,400	$72,400	442%	517%
Scenario 3: HH includes M, F, and 2 children; F's income = $20,000; M's income = $10,000	n/a	$30,000	125%	n/a
Scenario 3: Children in Primary HH 60% of time and Secondary 40% of time; no shared custody adjustment applied	$6,720	$13,280	102%	88%
Scenario 3: Children in Primary HH 60% of time and Secondary 40% of time; shared custody adjustment applied	$6,451	$16,451	100%	90%

The first thing to notice about the California outcomes is how much higher the orders are as compared with Maryland and New Jersey. In Scenario 1, the middle-income family, the unadjusted child support order is $13,440, which is more than $3,000 higher than the order in either of the other states. In Scenario 2, the high-income family, the unadjusted child support order is $33,600, which is more than twice the New Jersey amount, and nearly $15,000 higher than the Maryland order. Even in Scenario 3, the low-income family, the unadjusted order is higher by more than $1,000 in Maryland and more than $700 higher than New Jersey.

In addition, when the California order is adjusted to reflect that the children spend 40% of their time in the secondary household, the resulting orders remain higher than the comparable orders in Maryland and New Jersey. In Scenario 1, child support paid into the primary household is $8,960 in California, which is $2,961 higher than in Maryland and $2,897 higher than in New Jersey. In Scenario 2, the child support is $22,400 in California, which is $11,010 higher than in Maryland and $12,667 higher than in New Jersey. In Scenario 3, the child support is $6,451, which is $3,125 higher than in Maryland and $2,715 than in New Jersey.

The higher adjusted child support orders in California reflect two factors. One is the higher BSOs in California. The second is the methodology for adjusting the parental shares of the BSO in the adjustments used in Maryland and New Jersey, on the one hand, as compared to California on the other. Recall that the BSOs in Maryland and New Jersey show a discount of 20% to reflect assumptions about visitation patterns and costs. When child support obligations are further adjusted under Maryland and New Jersey law to account for shared physical custody, it may seem logical to apply the adjustment only to time that the children were to spend in the secondary household that exceeded the 20% assumption built into the BSO. Instead, the adjustment applies to all of the time the child spends in the secondary household. The first 20%, therefore, gets counted twice. The double adjustment does not apply under California law, so the adjusted amounts differ from the unadjusted amounts by a smaller margin.

Under California law, the standard of living of the children's primary household in each scenario experiences a smaller difference when the child support is adjusted for shared physical custody. In Scenario 1, the standard of living goes from 204% of the Poverty Threshold to 177% of the Poverty Threshold. In Scenario 2, the standard of living goes from 511% of the Poverty Threshold to 442% of the Poverty Threshold. In Scenario 3, the standard of living goes from 102% of the Poverty Threshold to 100% of the Poverty Threshold.

III. Is the Decline in the Children's Standard of Living Justified?

As section II demonstrates, Maryland, New Jersey, and California arrive at the same result in different degrees and through three somewhat different routes: in each state, the standard of living of the children's primary household is lower once the shared custody adjustment is applied than it would be in the absence of the shared custody adjustment. This result holds even though the standard-of-living measurement used in every instance

reflects the children's time spent in each household. The question for this section is whether, as a matter of public policy, mandating a shared custody adjustment is justifiable in light of the reduced standard of living the children experience in their primary home.

Figure 1 brings together the information discussed earlier about the standard of living the children experience in their primary and secondary households in each scenario and in each state.

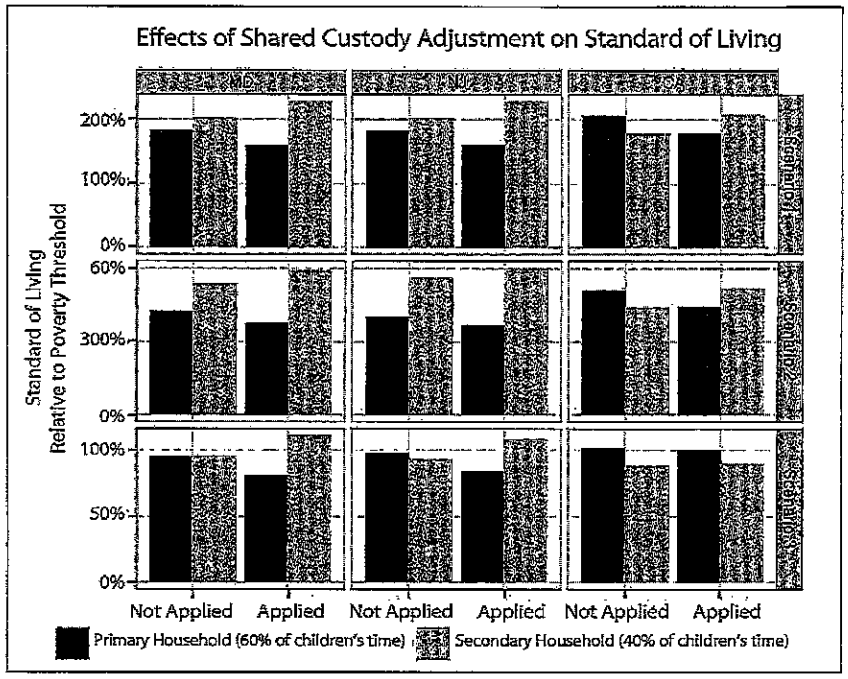

Figure 1 compares the standard of living the children experience in their primary and secondary households, assuming the children are spending 60% of their time in the primary household (represented by the dark bar) and 40% of their time in the secondary household (represented by the light bar). The pair of bars to the left in each facet is the standard of living when child support is calculated without the shared custody adjustment, and the pair of bars on the right of each facet is the standard of living when the shared custody adjustment is applied.

Looking top to bottom within each state, Figure 1 shows the degree to which the shared custody adjustment reduces the standard of living experienced by the children's primary household. The change is greatest in Maryland and New Jersey and more modest in California, regardless of the income group.

Looking left to right, Figure 1 shows the changes in standard of living in each income group. The first row of Figure 1 shows the outcomes for the high-income family (Scenario 1) in all three states. Looking left to right (within a scenario, across states) you can see that applying the shared custody adjustment exacerbates the gap in the standard of living between the primary and secondary households in Maryland and New Jersey and, in California, the primary household's slightly higher standard of living is reduced to a slightly lower standard of living. In Maryland and New Jersey, the middle-income family (Scenario 2) in Maryland experiences even greater disparities in the standard of living after the application of the shared custody adjustment, while the disparities in California again reverse the relative position of the two households, but the differences between them are more modest. In the low-income household (Scenario 3), only California's formula, both unadjusted and adjusted, maintains the children's primary household at 100% of the Poverty Threshold. In both Maryland and New Jersey, the adjustment depresses the children's primary household to less than 100% of the Poverty Threshold, while raising the standard of living in the secondary household above 100% of the Poverty Threshold.

Before examining the policy question, I want to note a basic premise. For the purposes of this article, I am only discussing the mandatory shared custody adjustment. Many parents decide that it is best for the children to spend substantial periods of time in each household, and the parents further agree to an allocation of the costs attributable to that arrangement in a way that seems satisfactory to them. I have nothing to say here to those parents or to courts that are asked to incorporate those agreements in custody and support orders. My concern is whether a parent who does not have the agreement of the other parent should be entitled to an adjustment of the usual child support order on the basis of shared physical custody and, if so, whether the adjustment should look similar to the ones in Maryland, New Jersey, or California. As I explain later, allowing a mandatory adjustment may be justifiable, but only in circumstances that are more limited than we see in the fairly typical examples of Maryland, New Jersey, and California.

Three principal justifications are offered for the shared custody adjustment. First, the expenses attributable to exercising custodial responsibility are significantly greater when a child spends more time with each parent. As a result, the secondary household needs to have access to more resources. Second, the benefit the child receives from having significant time with each parent is so great that any financial disincentives should be removed if they might deter the parent in the secondary household from keeping the children for a significant amount of time.

Third, the impact of the shared custody adjustment does not make a significant difference to the child or to the parent in the child's primary household.

A. Secondary Household's Increased Expenses

The claim that the child's secondary household experiences substantially greater costs when the child is there for more time seems a matter of common sense, but economic evidence is lacking on important points.[26] First, there is little knowledge about what it costs for a child to spend substantial time in two households. Second, the issue is complicated by the fact that some costs, such as those for food and other consumables, are dependent on the amount of time the child spends in each household, but others are not. Instead, costs such as maintaining a bedroom or an adequate car are redundant because both households must incur them.[27] Third, a formula may assume redundant costs for housing on the assumption that the child has a bedroom in two households. Some shared custody adjustments are allowed, however, without a requirement that the child spend overnights in the secondary household. Others do not require proof that additional space or provision is made for the child in the secondary household.[28]

In the absence of empirical support, legislatures have adopted a variety of guesstimates about how much more expensive it is to support a child in two households, and how much of the costs is variable and how much is not.[29] As was shown earlier, Maryland, New Jersey, and California each

26. *Compare* Garfinkel, McLanahan, & Wallerstein, *Visitation and Child Support*, *supra* note 24, at 348 (critique of methodology and conclusions about parental expenses in secondary household of children in shared custody in 2003 article by Fabricius and Braver, *infra*) *with* William V. Fabricius & Sanford L. Braver, *Non-Child Support Expenditures on Children by Nonresidential Divorced Fathers*, 41 FAM. CT. REV. 321 (2003); *see* Venohr & Griffith, *Child Support Guidelines: Issues and Reviews*, *supra* note 6 (inadequacy of economic data about costs when child is in two households).

27. *See* MORGAN, CHILD SUPPORT GUIDELINES, *supra* note 1, at § 7.03(A) (3d ed. 2015); Venohr & Griffith, *supra* note 6, at 423; Jo Michelle Beld & Len Biernat, *Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares, and the Realities of Shared Parenting*, 37 FAM. L.Q. 165, 190 (2003) (noting that there is "limited empirical research" on the topic but "substantial anecdotal evidence" that amount of time a child spends with each parent is not directly reflected in costs incurred by each parent for the child); Bruce R. Cohen et al., Guidelines Review Comm., Final Report and Recommendations of the Child Support Guidelines Review Committee, Appendix E, Section II at 8–10, *available at* http://www.guidelineseconomics.com/files/AZ_2010_recommendations.pdfs (differences between variable and redundant costs).

28. *See* MORGAN, CHILD SUPPORT GUIDELINES, *supra* note 1, at § 7.03(A)(1) (comparing states that apply shared custody adjustment only when child is spending overnights in secondary household with states that count child's "time" in each household). See text and *supra* notes 11–18 (comparing requirements of Maryland and New Jersey concerning overnights and providing space for child in secondary household).

29. *See id.* § 7.03(A)(2)(i) and (ii).

adopted somewhat different approaches, but no state has evidence to support its approach.

B. Removing Economic Disincentives from the Secondary Household Is Important for Child's Well-Being

Assuming that the common-sense insight is valid, although to an undetermined degree, the expenses of the child's secondary household are likely to increase as the amount of time that the child spends in that household increases. The argument for reducing the impact of the costs by means of the shared custody adjustment has two parts: first, the financial toll may discourage some parents in secondary households from seeking and exercising increased custodial responsibility; second, the disincentive works against the best interests of children because it is better for the child to have a relationship with both parents, and that relationship depends on the child spending more time in the secondary household.

The question of whether increased costs in the secondary household act as a disincentive to parents has not been the subject of empirical study, so far as I know.[30] Professor Garfinkel, a longtime leader in child support research, has expressed skepticism on the basis that, "[p]arents who are really invested in their children expect to make sacrifices and do not expect financial rewards."[31] Based on the relative standards of living in primary and secondary households after the payment of child support described earlier (tables 1, 2, and 3), it appears that the low-income father in the secondary household has room for complaint about the toll that child support takes on his standard of living—with and without the shared custody adjustment.[32] In the other scenarios, payment of the unadjusted child support leaves the fathers in the secondary households enjoying a standard of living that exceeds that of the mother in the primary household, sometimes by a rather large degree. Making life financially easier for the fathers, in order to remove an economic disincentive for them to share more

30. Empirical scientists sometimes look for a natural experiment and, interestingly, the incentive question could be one of them. Some states, as discussed earlier, provide a mandatory shared custody adjustment to child support while others do not. If more children are in shared physical custody arrangements in the states with a mandatory adjustment, the explanation might be that parents in secondary households experience a price sensitivity reaction to exercising shared custody. If the same or fewer children are in shared physical custody in states that lack the adjustment, that might suggest that the financial costs of shared custody affect the decision-making of fewer parents in secondary households.

31. Garfinkel, McLanahan, & Wallerstein, *Visitation and Child Support*, *supra* note 24, at 345.

32. *See* Daniel L. Hatcher, *Forgotten Fathers*, 93 B.U. L. REV. 897, 908–09 (2013); Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 257–58 (2005).

time with their children, may not be a high priority. At the same time, some parents may seek shared custody strategically to reduce their child support obligations, an approach common enough to gain a name: "trading dollars for days."[33]

What happens in California is also interesting. As discussed earlier, the shared custody adjustment in California yields the smallest differential, so the child support obligation of the secondary household declines to a much smaller degree when the parent in that household undertakes a larger share of custodial responsibility. California, however, may be among the states with the highest percentage of parents whose children are in shared physical custody. Exploring this "natural experiment" might yield some important information about whether the discount yielded by the shared custody adjustment is needed as an incentive for parents to spend more time with their children.

Another aspect of the incentive issue receives less attention but may be just as important. Both parents may experience economic incentives when it comes to shared custody. The reduction in child support produced by the shared custody adjustment gives the parent in the primary household reason to oppose a shared custody arrangement.[34] This may be a major issue in situations where both parents agree the child will benefit from spending significant time in both households, but where the total parental income is insufficient to keep both households at a reasonable standard of living. As discussed earlier, Scenarios 1 and 3 demonstrate the problem. Further, both parents may experience opposing incentives most keenly in "cliff" states like Maryland and New Jersey, because a custodial shift of only a few nights a year can yield large differences in the child support received by the children's primary household.

Evidence about the importance to the child of having a relationship with both parents is more robust than evidence about the economic costs and incentives associated with shared custody.[35] Whether reducing the amount of child support transferred by a higher-income parent to the lower-income parent is a right way of achieving the goal of supporting the child's

33. *See* Bruce Smyth et al., *Legislating for Shared-Time Parenting after Parental Separation: Insights from Australia?*, 77 LAW & CONTEMP. PROBS. 109, 143–44 (2014).

34. *See id. See also* Belinda Fehlberg & Christine Millwood, *Post Separation Parenting and Financial Arrangements over Time: Recent Qualitative Findings*, 92 FAM. MATTERS 29, 38 (2013).

35. *See* Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 10 J. FAM. PSYCHOL. 91, 97 (2002) (review of the literature demonstrates that "children in joint custody are better adjusted, across multiple types of measures, than children in sole (primarily maternal) custody. This difference is found with both joint legal and joint physical custody and appears robust, remaining significant even when testing various categorical and continuous qualities of the research studies as moderators.").

relationship with both parents, however, is problematic in at least three ways.

First, offering a financial incentive may encourage some parents to seek overnight visitation with a child when that arrangement is inadvisable in terms of the child's best interests. For example, in situations where the parents are in high conflict, shared physical custody is generally inadvisable.[36] It is a highly questionable policy in these circumstances to give parents another incentive to fight with each other.[37]

The same holds true when the child is not old enough or emotionally stable enough to handle the experience. For example, frequent overnights may disrupt the development of children under the age of four.[38] The child is likely to thrive where parents have shared experiences with the child and can approach the question of multiple overnights with sensitivity to the particular child's needs and responses.[39] If a mandatory shared custody adjustment influences a parent to seek more overnight time with a young child, however, the decision may not be as deliberative or as child-centered as is necessary to serve the developmental needs of the young child.

Second, multiple overnights may not be necessary for the purpose of developing and sustaining a strong relationship between the child and both parents. Parents may develop and sustain deep long-term relationships with their children by spending frequent periods of time with the child during the day or having the child spend the night a couple of times a month.[40] Indeed,

36. Smyth et al., *supra* note 33, at 113 ("strong consensus among most parenting-time scholars that shared-time arrangements can work . . . badly for children in the high-conflict group, where children can be 'caught and used' in their parents' conflict"); Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 500 (2008) (co-parenting involving either joint decisionmaking or joint caretaking is not appropriate in cases involving domestic violence generally); Robert H. Mnookin & Eleanor Maccoby, *Facing the Dilemmas of Child Custody*, 10 VA. J. SOC. POL'Y & L. 54, 61 (2002) (joint custody is not infrequently ordered in cases where parents experiencing intense conflict in litigation, and many fewer of those parents were able to develop cooperative parenting styles).

37. Smyth et al., *supra* note 33, at 141 (shared custody is also not advisable in terms of children's outcomes when "mothers have safety concerns . . . [and] when arrangements are rigidly maintained").

38. Jennifer E. McIntosh, *Legislating for Shared Parenting: Exploring Some Underlying Assumptions*, 47 FAM. CT. REV. 389 (2009) (caveats about infants and younger children); Marsha Kline Pruett, Jennifer E. McIntosh, & Joan B. Kelly, *Parental Separation and Overnight Care of Young Children, Part I: Consensus Through Theoretical and Empirical Integration*, 52 FAM. CT. REV. 240 (2014) ("The small group of relevant studies to date substantiates caution about high frequency overnight time schedules in the zero-to-three-year period, particularly when the child's security with a parent is unformed, or parents cannot agree on how to share care of the child.").

39. *See* Jennifer E. McIntosh, Marsha Kline Pruett, Joan B. Kelly, *Parental Separation and Overnight Care of Young Children, Part II: Putting Theory into Practice*, 52 FAM. CT. REV. 256 (2014).

40. Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65

it has been found that, even where parents share only legal custody, many nonresident parents invest more time and resources in their children.[41]

Third, reducing child support may increase the financial stress on the parent in the primary household and make it necessary for her to spend more time at work and less with the child. It may also increase her stress levels and reduce her attentiveness to parenting. If the child needs a strong relationship with both parents, that's a bad outcome.

C. Impact on Child and Parent in Child's Primary Household

The shared custody adjustment to child support may be justified if the impact on the child's primary household is relatively minor compared to the impact on the child's secondary household not having the adjustment. As described earlier, it is indisputable that the child's primary household experiences a reduction in its standard of living with the adjustment relative to its standard of living without the adjustment. As the Maryland example further demonstrates, the adjustment also moves the responsibility for a larger percentage of the child's average costs onto the primary household than would occur without the adjustment.

Other impacts should also be considered. The shared custody adjustment is usually ordered at the same time as the custody arrangement. In some families, the shared custody arrangement may have been in place for some time before the order and, for that and other reasons, the parents may have a high degree of confidence that it will continue. No prediction is perfect, however, and many families experience "custodial drift." Drift can happen in two directions. Even though many fathers with shared custody and the shared custody adjustment to child support spend more time with their children than other fathers, custodial drift, when it occurs, is more likely to occur in the direction of the children's primary household.[42] Sometimes the parent in the primary household is satisfied with the new custodial arrangement. Regardless of that parent's satisfaction, however, he or she cannot go to court to require the other parent to exercise custodial rights.[43]

LA. L. REV. 1345, 1364–65 (2005) (while children who did the worst in the sample were those who saw their fathers infrequently, among those who saw their fathers regularly, "no increase in custodial time made a statistically significant difference.").

41. Chien-Chung Huang, Wen-Jui Han, & Irwin Garfinkel, *Child Support Enforcement, Joint Legal Custody, and Parental Involvement*, 77 SOC. SERV. REV. 255, 263 (2003) (found in a study of parents with joint legal custody, "Compared to nonresident fathers without joint custody, nonresident parents with joint custody pay between 22 and 38 percent more in child support and spend around twice as much time with their children.").

42. *See* Belinda Felhberg & Christine Millwood, *Post Separation Parenting and Financial Arrangements over Time: Recent Qualitative Findings*, 92 FAM. MATTERS 29, 32 (2013).

43. *See* Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619 (1989).

Less commonly, children in shared custody start spending more time in the secondary household. Both transitions have important economic consequences for the parent and children in the primary household.

Custodial drift is not a new or rare phenomenon. It was first reported by Maccoby and Mnookin in their 1992 book on California custodial arrangements.[44] More recently, a study documented significant instability in shared custody from 35:65 to (mainly) primary mother care in families where parents had some state of conflict before entering into mediation about their custody arrangements.[45] A study in Wisconsin found that a large percentage of shared custody arrangements were maintained over time.[46] In those that changed, however, nearly three out of four resulted in the mother having sole custody.[47]

Let's assume that the reduction in the standard of living resulting from the shared custody adjustment is justifiable when the child spends substantial time in two homes. When the child starts spending more time in the primary household, the reduction is exacerbated because the primary household picks up more of the child's expenses for items such as food, increased utility usage, and incidental expenses. In addition, the shared custody adjustment reduces the amount of money the primary household has available for redundant costs, such as housing and a car. For example, when the secondary household has no need of duplicating the child's bedroom, only the primary household has a need for that resource. When the child's residential pattern changes so that the child is spending more time in the primary household, the shared custody adjustment imposes an unjustifiable reduction on the standard of living in the child's primary household.

The negative economic consequences experienced by the primary household could be avoided if child support could be quickly adjusted to reflect the present situation. Australia has a child support system that could be a model for the quick resolution. Since child support amounts are assessed largely through an administrative system, both parents can notify the administrative agency of changes, and the child support is adjusted through a purely administrative process, unless the other parent files a prompt objection.[48] A comprehensive study of shared custody, however,

44. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY (1992).

45. McIntosh, *Legislating for Shared Parenting*, *supra* note 38.

46. Lawrence M. Berger et al., *The Stability of Shared Child Physical Placements in Recent Cohorts of Divorced Wisconsin Families*, Institute for Research on Poverty Discussion Paper No. 1329-07, Univ. of Wis. (2007) at 24–25.

47. *Id.* at 25.

48. *See* Australian Government Department of Human Services, *Your Choices as a Separated Parent*, *available at* http://www.humanservices.gov.au/customer/subjects/your-choices-as-a-separated-parent.

reports that parents in primary households often do not have a simple and speedy experience with the system, and the economic consequences of custodial drift remain unresolved in many cases.[49]

In the United States, remedying the economic consequences of custodial drift is more difficult procedurally than in Australia. Few states allow a judicial or administrative modification based solely on the actual custodial practices of the parents and children.[50] More commonly, courts require a modification of the custody order based on a judicial determination that there has been a significant change in circumstances; only then can the child support order be modified. In Florida, for example, a father was held to be entitled to the shared custody adjustment despite his history of not spending the planned amount of time with the children, so long as visitation time specified in the custody order exceeded the 40% threshold.[51] The child's mother had to get the custody order modified before the shared custody adjustment could be eliminated.

The difficulty experienced by the child's primary household can be compounded by the likelihood that the child lives with the lower-income parent and that parent has fewer resources to spend on an action seeking modification of child support. Further, proving a *de facto* change in custody requires credible evidence about when the child is with each parent, a burden that may be most difficult to satisfy when shared custody is based on a child spending "time" in each household, rather than overnights.[52] When custody must be modified, the burden increases.[53] Even the process for obtaining counsel changes; under federal law, states provide resources for modification of child support in some circumstances, but no state provides the same resources for a modification-of-custody action.[54]

49. Fehlberg & Millward, *supra* note 42, at 29.

50. *See* MORGAN, CHILD SUPPORT GUIDELINES, *supra* note 1, at § 7.03(A)(3) notes 103 and 104.

51. Buhler v. Buhler, 913 So. 2d 767 (Fla. Dist. Ct. App. 2005); *see* Eddie v. Eddie, 506 N.W.2d 591 (Mich. Ct. App. 1993) (parent entitled to shared custody adjustment regardless of whether the parent exercised his or her rights to visitation for all of the days contemplated in the custody order).

52. MORGAN, CHILD SUPPORT GUIDELINES, *supra* note 1, at § 7.03(A)(1).

53. *See* Garfinkel, McLanahan, & Wallerstein, *supra* note 24, at 345 (discussing decline in visitation over time and problem that child support adjustments fall most heavily on the parent with more custody time, which is likely to increase over time, and the burden of seeking a modification of the child support order falls on that parent).

54. *See* Stacy Brustin & Lisa Vollendorf Martin, *Paved with Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 803, 806 (2015) (child custody not part of federal program for representation in child support matters; ordinarily, parents using the program must file separate child custody and visitation actions).

Custodial drift also can occur in the direction of the secondary household.[55] That form of drift may be a reflection of the child's closer relationship with one of the parents or some other legitimate reason, such as the proximity of one parent's home to a child's friends, school, or preferred activities. A concern, however, arises about whether a child's attraction to the secondary household is increased by the relatively higher standard of living of that household, particularly if the degree of difference between the two households is the result, in part, of the shared custody adjustment.

While the differential in standard of living between the primary and secondary households may not be noticeable to a young child, it may be visible in multiple ways to an older child or to adolescents. Perhaps the household of the higher-income parent is able to provide more electronic devices, entertainment, vacations, restaurant meals, designer clothing, and other luxuries, all of which could be quite attractive to some children. It is possible that the higher-income parent might use the differential to subtly—but effectively—convince a child to spend more time with that parent and less time with the lower-income parent. Obviously, this is not the purpose of the shared custody adjustment, which is intended to support the child's relationship with both parents, but it can be a significant concern for a lower-income parent who has been providing the primary household for the child. As of yet, no scholar of shared custody has focused on this potentially perverse impact of the shared custody adjustment. It is time someone did.

IV. Recommendations

The arguments advanced in favor of the mandatory shared custody adjustment to child support have not taken sufficient notice of the reduced standard of living experienced by a child's primary household, the negative incentives experienced by both parents, and the lack of evidence about key assumptions. Once those issues are taken into account, little remains to show why the mandatory adjustment should be recommended. It may be possible, however, to structure an acceptable mandatory adjustment. Based on what is known so far about shared custody and the child support adjustment, a restructured adjustment needs to satisfy at least the following nine points:

1. A child's primary household should not fall below 200% of the Poverty Threshold because of an adjustment.[56]

55. *See* Berger et al., *supra* note 46.

56. Most means-tested public benefits programs are available to recipients with incomes between 125% and 185% of the poverty line, which is a simplified alternative to the Poverty Threshold. *See* http://aspe.hhs.gov/poverty/faq.cfm#programs. The standard of 200% of the

2. Where the parents' income is insufficient to maintain one household at 200% of the Poverty Threshold, no shared custody adjustment should be considered.
3. Where the shared custody adjustment increases the differences in the standard of living between the child's primary and secondary household by a large measure, no adjustment or a reduced adjustment should be considered.[57]
4. No adjustment should be permitted when the child is under the age of five, or where the parents have exhibited high levels of conflict.
5. Adjustments should be based on actual parental behavior over a minimum period of time, rather than on a prospective parenting plan or custody order.
6. The amount of the adjustment should be based on data about both unavoidable redundant expenses, such as costs associated with increased living space, and on nonredundant expenses, such as food and utilities.
7. The amount of the adjustment should not reflect expenses attributable to ordinary periods of visitation that are already taken into account in the child support guidelines.[58] If the child spends little to no time in the secondary household, child support should be adjusted to reflect increased nonredundant expenses.
8. Time with each parent should be measured by number of overnights in each household and evidence that the secondary household includes additional space and facilities because the child spends time there.
9. Modifications in the shared custody adjustment should be based on conduct of the parents over a minimum period of time, not on a

Poverty Threshold is used here because the shared custody adjustment affects a private economic transfer from a parent who can, presumably, afford to transfer the unadjusted amount of child support. Research on the long- and short-term social, emotional, physical, educational, and vocational impacts of child poverty demonstrate the importance of reducing the stress children experience from living in low-income households, often defined as households with income below $25,000 a year, an amount that is substantially above 100% of the Poverty Threshold for a household with a parent and child. *See generally* Greg Duncan, K. Magnuson, and E. Votruba-Drzal, *Boosting Family Income to Promote Child Development*, 24 THE FUTURE OF CHILDREN 99 (2014). A trial court in Virginia tried to make the reduced standard of living in the child's primary household the basis for deviation from the mandated shared custody adjustment, but its order was reversed by the appellate court. According to the trial court, with the reduced child support under the shared custody adjustment, the wife would lack the ability "to maintain minimal adequate housing and provide other basic necessities for the child." The finding was held to be too non-specific to satisfy the standard for deviation. Pharo v. Pharo, 450 S.E.2d 183 (Va. Ct. App. 1994).

57. *See* Marygold S. Melli & Patricia R. Brown, *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 HOUS. L. REV. 543, 570–71 (1994).

58. *Id.* at 568.

change in the custody order, and should be available expeditiously and at little expense.[59]

V. Conclusion

The mandatory shared custody adjustment is one of those public policies that seems more reasonable the less it is examined. Once one looks below the surface, little can be found to support the mandatory adjustment, at least in its present form. The adjustment exacts a cost in terms of the child's standard of living in the household where the child spends the most time. Despite a legal history of at least three decades, studies have not demonstrated that the adjustment is worth the cost it imposes on children, whether in terms of offsetting improvements in children's well-being or development, in terms of improved economic fairness between the parents, or in terms of enhanced parental incentives about spending time with children. What we know without a doubt is that parents who agree to shared custody can figure out what works for their children and for themselves and that what they figure out is going to work well for their children. The mandatory shared custody adjustment relies on that experience to impose a singular solution on parents who have not come to any agreements about how to make shared custody work.[60] The policy is based on speculation, and children should not be made to bear the costs of guesses.

59. *Id.* at 570.

60. Smyth et al., *supra* note 33, at 112 ("Thus, although parents with shared-time arrangements tend to report that their children are doing well, and that they and their children like the arrangements, the characteristics of shared-time families make positive outcomes for children in these families more likely than in other separated families. This point is often missed when groups advocating a presumption of equal time assume or assert that these good outcomes are the *consequence* of the shared-time arrangements.") (emphasis in original).