IN THE COURT OF APPEALS

JANET LYNN MORGAN,	)	KNOX CIRCUIT
	)	C.A. NO. 03A01-9705-CV-00166
Plaintiff-Appellee	)	
vs.	)	HON. BILL SWANN
	)	JUDGE
MICHAEL LEE MORGAN,	)	AFFIRMED AND REMANDED
Defendant-Appellant	)	

WM. STANTON MASSA, III, Knoxville, for Appellant.

PATRICK T. PHILLIPS, Knoxville, for Appellee.

OPINION

McMurray, J.

Michael Lee Morgan [father] appeals from the trial court's judgment requiring him to pay $192.50 per month child support to

his ex-wife, Janet Lynn Morgan [mother]. The sole issue on appeal is whether the court erred by refusing to award the father child support for the three months in the summer during which he has physical custody of the children for a greater number of days than does the mother.

The parties were granted an absolute divorce on May 6, 1996. The trial court approved their Marital Dissolution Agreement (MDA), which provided that the mother would have primary residential custody during the nine months of the school year and the father during the three months of summer. Each party was allowed liberal visitation, averaging five days out of every two weeks during those times when the other had primary residential custody. The MDA provided for joint legal custody of their two children, then ages nine and six years.

The parties' arguments regarding child support issues were heard by the child support referee for Knox County on July 3, 1996. The referee found that pursuant to the MDA, the mother had custody of the children for an average of 203.5 days per year, and the father had custody for 161.5 days per year. In his written findings and recommendations, the referee found that:

> A variance from the Child Support Guidelines is in order in that [father] has residential custody of the children for a period of time each year and that he has physical possession of the children over twice the number

> of days per year anticipated by the guidelines, that the amount of child support ordered should be one-half (½) the guidelines amount ...

The referee, found the father's gross income to be $400 per week, and recommended that the father pay $225.50 per month, exactly one-half the amount corresponding to a $400 weekly income under the child support guidelines.

The father sought a review of the referee's findings and recommendations in the circuit court, arguing that his gross weekly income was less than $400, and disputing the recommendation that he pay $225.50 monthly in child support. The father offered his recent paycheck stubs into evidence, which showed that his weekly income was $342.00. The circuit court after a hearing adopted the referee's findings and conclusions, but modified the child support order to reflect that the father's income was $342 per week. The court held:

> The Referee was correct in reducing [the father's] child support obligation by 50% since his co-parenting time is almost exactly twice that contemplated by the Tennessee Child Support Guidelines. Thus, [the father] should pay the sum of $192.50 per month as ongoing child support. This amount is arrived at as follows: ($342.00 per week x 52 weeks ÷ 12 months = $1,482.00 per month; $1,482.00 per month = $385.00 per month Guidelines Support; $385.00 per month ÷ 2 = $192.50 per month on-going support).

On appeal, the father argues that since he has primary residential custody for three months out of the year, the mother should pay him child support for those three months. It appears that a calculation of child support in this manner would result in an annual reduction in the father's child support obligation of approximately $180 per year. The mother, on the other hand, argues that the trial court's ruling was proper and correct.

Our review is de novo with a presumption of correctness of the trial court's findings of fact unless the evidence preponderates otherwise. No such presumption attaches to the court's conclusions of law. T.R.A.P. 13(d).

In child support cases, the court is required to apply the child support guidelines as a rebuttable presumption. See T.C.A. § 36-5-101(e)(1). If the court finds that strict application of the guidelines would be unjust or inappropriate for the particular case, it must so find in writing, including "a justification for the variance from the guidelines." Id. The trial court did so in this case.

The sole authority upon which the father rests his argument is Graham v. Graham, an unreported case of this section, where the court upheld an award of child support to a parent while she had custody of their child during the summer months. Graham v. Graham,

1995 WL 447785 (Tenn. App. July 31, 1995). The Graham court did not impose any kind of requirement that the trial court award child support during a parent's summer custody; it simply noted "the Trial Court's wide discretion in awarding child support," and found no abuse of that discretion under the circumstances. Moreover, Graham made it clear that the trial court could properly have taken such action as the court did in the present case:

> While an adjustment of support for the extended visitation period might have been made by reducing the monthly payments required of Mrs. Graham, we find the Trial Court acted properly in requiring payments to Mrs. Graham during the summer months. [Emphasis added].

Id. at *4.

Under the circumstances of the present case, we find that the evidence does not preponderate against the trial court's judgment. Physical custody of the children is divided fairly close to evenly between the two parents.[1] The guidelines are based on the assumption that the primary custodial parent has custody for approximately 285 days per year, with "co-parenting time" granted to the non-custodial parent for the remaining 80 days:

> These guidelines are designed to apply to situations where children are living primarily with one parent but stay overnight with the other parent at least as often as every other weekend from Friday to Sunday, two weeks in the summer and two weeks during holidays throughout the year . . . . In situations where overnight time is divided

[1] The mother has the children for 55.7 percent of the year, and father for 44.3 percent.

> more equally between the parents, the courts will have to make a case-by-case determination as to the appropriate amount of support. (Emphasis added).

Tenn. Comp. R. & Reg., Ch. 1240-2-4-.02(6).[2]

As the trial court correctly noted, the parties' MDA provided that the father would exercise more than twice the "co-parenting time" than that anticipated by the guidelines. Under the circumstances of this case we find no error in the trial court's downward deviation from the guidelines based on the increased number of days in which the father has physical custody of his children. We are further of the opinion that it was well within the trial court's discretion not to award the father "offsetting" child support during those months when he has primary residential custody especially in view of the trial court's action in reducing the father's child support obligation for the same reasons. To reduce the father's child support obligation because of high "coparenting time" while at the same time requiring the mother to pay child support to him would result in a double reduction for the husband. We find such a circumstance to be inequitable and inappropriate. A single reduction is proper.

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[2]We should note that no standardized method of calculation has been established for calculating downward deviation from the child support guidelines. Consideration of deviation on a "case by case" basis would seem to make a standardized method difficult. For another approach, see Casteel v. Casteel, 1977 WL 414401, an opinion of this court, authored by Senior Judge William Inman, filed at Knoxville, July 24, 1997. (A rule 11 application for permission to appeal has been filed with the Supreme Court but has not as yet been acted upon.

The trial court's judgment is affirmed in all respects and the case is remanded for such further action as may be necessary. Costs on appeal are assessed to the appellant.

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Don T. McMurray, Judge

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Houston M. Goddard, Presiding Judge

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Charles D. Susano, Jr., Judge

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MICHAEL LEE MORGAN,	)	AFFIRMED AND REMANDED
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Defendant-Appellant	)	

JUDGMENT

This appeal came on to be heard upon the record from the Circuit Court of Knox County, and briefs filed on behalf of the respective parties. Upon consideration thereof, this Court is of the opinion that there was no reversible error in the trial court.

The trial court's judgment is affirmed in all respects and the case is remanded for such further action as may be necessary. Costs on appeal are assessed to the appellant.

PER CURIAM