LAW AND THE FAMILY

## "JOINT CUSTODY AND CHILD SUPPORT AWARDS"

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**WHEN REDUCED TO ITS most basic terms the Child Support Standards Act is not nearly as complicated as it first appears. You start with numbers, add the facts and multiply the calculators. However, if the "devil is in the details" then even the enthusiasts who applauded the CSSA in its heavenly, newborn days have considerable studying to do of the newest round of details. One of the initial concerns voiced about the CSSA was its application in a joint custody situation. The statute provides that unless the court finds that the non- custodial pro-rata share of the basic child support obligation is unjust or inappropriate, based upon consideration of the factors in Domestic Relations Law s240(1-b)(f)(1-10), the court must order the non-custodial parent to pay his or her pro rata share of the basic child support obligation based upon the application of the child support percentages to the combined parental income. [FN1] We concluded that where joint or shared custody is awarded, the court should award child support, based upon the factors in DRL s240(1-b)(f)(1- 10), taking into account the actual expenses of each parent in making his/her home available to the child on a full time basis, as is usual in joint custody situations. Certainly not a novel approach but a very workable one.**

**Supreme Court Decision**

**The sense and sensibility of this approach was adopted by the Supreme Court, New York County, in Bast v. Rossoff. [FN2] The parties agreed upon joint custodial decision-making and had a "shared time allocation." The father had his daughter with him from Wednesday evening until Sunday evening during alternate weeks and from Wednesday evening until Thursday morning during the other week. The Supreme Court concluded that the application of the CSSA percentages was inappropriate in cases of shared physical custody and that the percentages made no sense if adjusted for extensive visitation.**

**It held that where there is extensive time-sharing the court must look at the totality of the circumstances in both homes rather than rely on the percentages and concluded that while the CSSA applied to shared custody, the basic support percentages should not be used in any shared custody case. The father earned $75,876 and the mother earned $83,118. The father earned 48 percent of the total income. The court held that in a shared custody case it is reasonable and appropriate to consider the expenses of the child incurred by each of the parties as one of many factors referred to in DRL s240(1-b)(f)(1-10) in order to find a number that is just and appropriate. Based on the totality of the circumstances the court fixed the child support to be paid by the father to the mother at $750 per month. The father was also directed to bear 48 percent of the cost of the child care and 48 percent of the private school and health care costs for the child.**

**Direct, to the point, logical. Not, however, to the Third Department. In a decision which predated Bast, the Third Department initially held that application of the formula is appropriate in joint custody situations. In Holmes v. Holmes [FN3] petitioner had physical custody of the parties' two children approximately 60 percent of the time and respondent had physical custody of the children approximately 40 percent of the time. The Family Court directed the former husband to pay child support for his two children. Respondent argued that the CSSA should not apply where the parties shared physical custody, and if it did apply, then the Examiner's application of the formula was unjust.**

**The Appellate Division reversed and remitted the matter for a new child support determination. A majority of the court found that the parties had implicitly created a joint custody situation [FN4] and declined to hold that the CSSA had no application to the parties' joint custody arrangement. The court classified the parties as "simultaneously custodial and noncustodial parents." It went on to hold, however, that the hearing examiner's application of the child support percentage to that portion of combined parental income exceeding $80,000 was an improvident exercise of discretion where it failed to express any findings of the child's actual needs.**

**A two-judge minority had a different spin on it. They declared that the CSSA never contemplated that type of shared custody, where the parties are never simultaneously custodial and noncustodial parents, and warned that "the practical difficulties inherent in having the obligation to pay child support, imposed by the CSSA on the noncustodial parent, change back and forth between the parties depending upon which of them has physical custody of the children, would make application of the statute more than unwieldy." The partial dissenters saw the parent with custody the bulk of the time as the custodial parent while the period when the other parent has physical custody of the children should be considered "extended visitation," justifying a deviation from the support formula pursuant to FCA 413(1)(f)(9)(ii) if it was shown that the custodial parent's expenses were substantially reduced as a result thereof. [FN5]**

**Calculation on Remittal**

**On remittal the hearing examiner calculated the parties' combined parental income, based on incomes of $42,687 and $53,300 respectively, and computed the parties' proportional shares. The hearing examiner applied the child support percentage and arrived at the parties' respective support obligations for the first $80,000 of income. The hearing examiner then multiplied the parties' respective support responsibilities by 40 percent and 60 percent, representing the percentage of time that each party was, respectively, the noncustodial parent, and "netted out" those amounts to arrive at the amount of support to be paid by respondent to petitioner. The hearing examiner followed the same methodology in computing the parties' respective obligations for their remaining income over $80,000. After adding the two "net" figures, the hearing examiner arrived at a total support obligation of $65.75 payable weekly by respondent to petitioner. Family Court adopted the hearing examiner's determination and reasoning. The Appellate Division affirmed, finding that this was the correct methodology. [FN6]**

**In Simmons v. Hyland [FN7], decided this month, the Third Department retreated from its position in Holmes. Although it refused to overrule Holmes it stated that it was "unwilling to extend its reach beyond cases presenting sharply similar facts." In Simmons the Family Court granted the parties joint legal custody of their child and provided that respondent have "custodial time" with the child at all times other than specified periods when petitioner was to have "custodial time" with her. This consisted of three extended weekends a month, from Thursday afternoon to Sunday afternoon, two weekdays in the "off" week and a full week during the months of July and August of each year. During 1995 the child was with respondent 69 percent of the time and with petitioner 31 percent of the time.**

**Both parties sought support in the Family Court. The hearing examiner determined that the custodial arrangement created a "split custody situation" and made a net support award in the manner prescribed in Holmes, which required respondent to pay $34 per week to or on behalf of petitioner. The Hearing Examiner took into account the petitioners' income of $8,164 and respondent's income of $29,600 and the fact that petitioner was close to the poverty level. The respondent was required to bear the full cost of health insurance and uncovered medical expenses and substantially all of the child care costs incurred by both parties.**

**An unsympathetic Family Court rejected respondent's objections and an appeal was taken. Respondent reasoned that as "de facto custodian" he should not be required to pay child support to petitioner. The Appellate Division agreed with him. It noted that in Holmes "a bare majority" of the court decided to extend the "split custody" analysis of Matter of Kerr v. Bell, [FN8] to a "time-sharing" custody arrangement where one parent had custody of the child or children for part of the time and the other parent had custody of the same child or children for part of the time. The Court noted that in Holmes there was no great disparity in the parties' respective incomes or custodial time and the application of the CSSA resulted in a net support award in favor of the parent who had custody for the greater part of the time (although in a lesser amount than if she had been treated as the custodial parent). [FN9]**

**Split Custody Theory**

**The Third Department stated it was taking no position on the propriety of applying the split custody methodology of Holmes and held that the same approach was unwarranted in Simmons. It found that the parties' choice to apply the label "custodial time" did not alter the essential terms of the order, which it viewed as embodying a grant of primary physical custody to respondent, subject to liberal structured visitation to petitioner. It challenged the wisdom of applying the split custody formula where, as here, the parties' incomes and the division of "custody" were so disparate as to bring about a child support award in favor of the parent enjoying custody for the far smaller time period.**

**Moreover, except for a $10 child care expense, the record was devoid of evidence concerning the actual expenses petitioner incurred in connection with her visitation or the concomitant diminution in respondent's expenses, if any. Therefore, the court could not discount respondent's claim that a portion of his child support payments were being used by petitioner as supplementary income.**

**The court concluded that this case brought to "full realization" the concerns of the partial dissenters in Holmes, and that not only is the split custody approach unwieldy in a timeshare case, but that it also has the potential for encouraging a parent to keep a stopwatch on visitation in order to increase his or her split custody proportion, thereby providing a basis for annual applications for modification of the child support award.**

**It held that as the de facto custodial parent, the respondent may not be compelled to pay child support to petitioner and concluded that Family Court correctly established petitioner's child support obligation at the minimum level of $25 per month. [FN10] It noted that the application of one or more of the factors set forth in FCA 413(1)(f)(1) through (9) would not permit a lower award and held that ordinary expenses incurred during extended visitation, such as food, housing and clothing, do not qualify for treatment as an extraordinary circumstance under FCA 413(1)(f)(9)(ii). [FN11]**

**In an unusual determination, the court concluded that respondent could not recoup the sums he paid to petitioner under the order it had reversed because "so much of the order as eliminated respondent's support obligation was analogous to a downward modification of the outstanding support order."**

**The order compelling petitioner to pay support was made retroactive to the date of respondent's cross-petition for support and it directed that to the extent that petitioner's income continued to be less than or equal to the poverty income guidelines amount for a single person as reported by the Department of Health and Human Resources, her unpaid child support arrears could not exceed $500. [FN12]**

**FN1. DRL s240(1-b)(f)(10); See also FCA s413(1)(f)(1-10).**

**FN2. \_\_\_ Misc2d \_\_\_, 635 NYS2d 453 (S. Ct., New York County, 1995).**

**FN3. Holmes v. Holmes, 184 AD2d 185 (3d Dept., 1992).**

**FN4. Id.**

**FN5. Holmes v. Holmes, supra, at 189-190.**

**FN6. \_\_\_ AD2d \_\_\_, 655 NYS2d 454 (3d Dept, 1997).**

**FN7. \_\_\_ AD2d \_\_\_, \_\_\_ NYS2d \_\_\_, 1997 WL 675009, (3d Dept., 1997).**

**FN8. 178 AD2d 1 (3d Dept., 1992) (where four children resided with one parent and a fifth resided with the other).**

**FN9. Matter of Holmes v. Holmes, \_\_\_ AD2d \_\_\_, 655 NYS2d 454.**

**FN10. Citing FCA 413(1)(g). But see, Matter of Rose v. Moody, 83 NY2d 65**

**FN11. Citing Matter of Pandozy v. Gaudette, 192 AD2d 779, 780.**

**FN12. Citing FCA s413[1][g].**

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