

Child Support Awards in Shared Custody Cases
By Joel R. Brandes

There is a distinction between "joint legal custody," which usually involves sharing in all the important decisions concerning the child, and "joint physical custody," which involves sharing time with and physically caring for the child. Although there is no consensus as to a precise definition of "joint custody," the Court of Appeals has commented that "joint custody" is generally used to describe joint legal custody or joint decision-making, as opposed to expanded visitation or shared custody arrangements. (*Bast v Rossoff*, 91 NY2d 723, 675 NYS2d 19 (1998)). It has been said that "joint legal custody," sometimes referred to as "divided" custody or "joint decision making," gives both parents "a shared responsibility for and control of a child's upbringing." It may include an arrangement between the parents where they alternate physical custody of the child. (*Braiman v. Braiman*, 44 NY2d 584, 407 NYS2d 449 (1978)).

It has been held that where there are two or more children and their custody is split between the parents, each party's proportionate obligation for support of the child(ren) residing with the other must be calculated, and after their respective obligations are determined, a net support obligation is derived by subtracting the smaller from the greater of them. (*Riseley v. Riseley*, 208 A.D.2d 132, 622 N.Y.S.2d 387 (3d Dept. 1995); *Scomello v. Scomello*, 260 A.D.2d 483, 688 N.Y.S.2d 199 (2d Dept. 1999))

Where there is "joint physical custody," the child lives alternatively with both parents. The daily child-rearing decisions are usually made by the parent with whom the child is then living, while the major decisions, such as those involving religion, education, medical care, discipline, or choice of school/camp, are jointly made. (*Trapp v. Trapp*, 136 AD2d 178, 526 NYS2d 95 (1st Dept. 1988)).

The Court of Appeals, in *Bast v Russoff*, (91 NY2d 723, 675 NYS2d 19 (1998)), observed that there are many different kinds of shared custody arrangements. It held that child support in a joint or shared custody case should be calculated under the Child Support Standards Act ("CSSA") just as it is in any other case. It observed that the CSSA requires the trial court to first calculate the basic child support obligation, using the three-step statutory formula, before resorting to the "paragraph (f)" factors in Domestic Relations Law § 240 (1-b) (f). It pointed out that in most instances, the court can determine the "custodial parent" for purposes of child support by identifying which parent has physical custody of the child for a majority of the time, indicating that, "[t]he reality of the situation governs". Even though each parent has a custodial period in a shared custody arrangement, for purposes of child support, the court can still identify the primary custodial parent. It rejected the proportional offset method which reduces each parent's pro-rata share of the basic child support obligation by the percentage of time each spends with his or her child.

All of the Appellate Divisions follow the rule of *Bast v. Russoff*, that a parent who has physical custody of the child for a majority of the time in a shared custody situation is considered the custodial parent for child support purposes (see *Rubin v. Della Salla*, 107 AD3d 60, 964 N.Y.S.2d 41 (1st Dept. 2013)); *Matter of Ambrose v. Felice*, 45 A.D.3d 581, 845 N.Y.S.2d 411 ([2d Dept.2007]); *Smith v. Smith*, 97 A.D.3d 923, 924, 947 N.Y.S.2d 840 ([3d Dept.2012]); *Matter of Gillette v. Gillette*, 8 A.D.3d 1102, 1103, 778 N.Y.S.2d 362 (4th Dept.2004)).

In *Baraby v Baraby*, (250 A.D.2d 201, 681 N.Y.S.2d 826 (3d Dept, 1998) the parties shared physical custody of the children on an equal basis by alternating weeks. Supreme Court applied the Child Support Standards Act and calculated the parties' combined parental income according to the three-step statutory formula. It then applied the proportional offset method. In doing so, the court reduced each party's monthly child support obligation by half and "netted out" those amounts to arrive at a support amount to be paid by the defendant to the plaintiff. The Third Department, noting that the Court of Appeals has explicitly rejected the use of the proportional offset method in shared custody cases held that the three-step statutory formula of the CSSA for determining the basic child support obligation must be applied in all shared custody cases and the noncustodial parent directed to pay a pro-rata share of that obligation unless the court finds that amount to be "unjust or inappropriate" based upon a consideration of the "paragraph (f)" factors. (Domestic Relations Law § 240 [1-b] [f]). It recognized that *Bast* did not specifically address how to apply the CSSA in cases of equal shared custody. It interpreted *Bast* as requiring the application of the CSSA to such situations. It held that where the parents' custodial arrangement splits the children's physical custody so that neither can be said to have physical custody of the children for a majority of the time, the parent having the greater pro-rata share of the child support obligation, determined after application of the three-step statutory formula of the CSSA, should be identified as the "non-custodial" parent for the purpose of support regardless of the labels employed by the parties. That parent must be directed to pay his or her pro-rata share of the child support obligation to the other parent unless "the statutory formula yields a result that is unjust or inappropriate." In that event, "the trial court can resort to the 'paragraph (f)' factors and order payment of an amount that is just and appropriate."

In *Baraby*, supra, the Third Department rejected the idea of giving greater weight to "waking hours" over sleeping hours, in determining which parent is the custodial parent. It noted that all of the Appellate Divisions have applied this rule where neither party could be said to have physical custody of the child for the majority of the time. (see *Powers v. Powers*, 37 A.D.3d 316, 316, 830 N.Y.S.2d 132 (1st Dept., 2007); *Cazar v. Browder*, 191 A.D.3d 837, 837–838, 138 N.Y.S.3d 900 (2d Dept.2021; *Matter of Conway v Gartmond*, 144 A.D.3d 795, 41 N.Y.S.3d 90 (2d Dept., 2016); *Matter of Rapp v. Horbett*, 174 A.D.3d 1315, 105 N.Y.S.3d 734 (4th Dept.,2019)) .

The rule enunciated by the Third Department in *Baraby* has been followed by the Fourth Department. See *Leonard v Leonard*, (109 AD3d 126, 968 N.Y.S.2d 762 (4th Dept., 2013)); *Matter of Disidoro v. Disidoro*, (81 A.D.3d 1228, 1229, 917 N.Y.S.2d 436 (4th Dept., 2011)); *Matter of Rapp v. Horbett*, (174 A.D.3d at 1316, 105 N.Y.S.3d 734 (4th Dept., 2019); *Matter of Soldato v. Benson*, 128 A.D.3d 1524, 8 N.Y.S.3d 841 [4th Dept., 2015)).

In *Rubin v. Della Salla* (107 AD3d 60, 964 N.Y.S.2d 41 (1st Dept. 2013)) the Appellate Division, First Department adopted a different approach. After a trial, the court awarded primary physical custody of the child to the father during the school year, with the mother having parenting time on alternate weekends (from Friday after school to Monday morning) and every Thursday overnight. During the summer, the schedule was reversed and the child would live primarily with the mother but would spend Thursday overnights and alternate weekends with the father. The mother would also have the child each midwinter school break, and the other school breaks were evenly divided. In addition, each parent was given two weeks with the child during the summer. Following the custody decision, the father moved for summary judgment dismissing the mother's cause of action for child support. He argued that, by the terms of the custody order, he was the custodial parent because the child would spend the majority of the year with him. He submitted to the court a calendar showing that during the period from July 2012 to June 2013 there were 206 overnights with the father and 159 with the mother. These custodial periods equated to the child being with the father 56% of the time and with the mother 44% of the time. The mother did not dispute the father's assertions that the child would reside with the father "most of the time," that the father was the "de-facto custodial parent," and that she may not be the "custodial parent" for purposes of the CSSA. She agreed that under a "strict application" of the CSSA, the father could not be ordered to pay child support, but argued that she was entitled to child support because any other result would be unjust and inappropriate. Supreme Court denied the father's motion, holding that it had the discretion to award the mother child support because she needed funds to pay her monthly rent and to maintain the type of home, she could not otherwise afford without the father's assistance.

The First Department held in *Rubin v. Della Salla* (107 AD3d 60, 964 N.Y.S.2d 41 (1st Dept. 2013)) that the father, as the custodial parent, could not be directed to pay child support to the mother, the noncustodial parent. Under the CSSA's plain language, only the noncustodial parent can be directed to pay child support. Domestic Relations Law § 240(1-b)(f)(10) and FCA § 413(1)(f)(10) state that, after performing the requisite calculations, "the court shall order the non-custodial parent to pay his or her pro-rata share of the basic child support obligation. " The mandatory nature of the statutory language undeniably shows that the Legislature intended for the noncustodial parent to be the payer of child support and the custodial parent to be the recipient. The CSSA provides for no other option and vests the court with no discretion to order payment in the other direction. *Bast v. Rossoff* left no other option than to direct payment by the noncustodial parent to the custodial parent in shared custody cases.

Referring to *Baraby v Baraby*, (250 A.D.2d 201, 681 N.Y.S.2d 826 (3d Dept, 1998)), the Rubin Court observed that Courts have uniformly followed Bast's direction that where parents have unequal residential time with a child the party with the greater amount of time is the custodial parent for CSSA purposes. The great disparity in overnights here was 56% to 44%. The Court pointed out that only where the parents' custodial time is truly equal, such that neither parent has physical custody of the child a majority of the time, have courts deemed the parent with the higher income to be the noncustodial parent for child support purposes.

The First Department found that the Supreme Court ignored its own custody schedule when it stated that the parents shared "very nearly equal" physical custody of the child. The Supreme Court focused on how much "waking, non-school time" the child spent with each parent, and suggested that a custodial parent could be identified by calculating the number of waking hours he or she spends with the child. The Appellate Division rejected the counting of waking hours as a method of determining who is the custodial parent. Instead, it believed that the number of overnights, not the number of waking hours, is the most practical and workable approach. Allowing a parent to receive child support based on the number of daytime hours spent with the child bears no logical relation to the purpose behind child support awards, i.e., to assist a custodial parent in providing the child with shelter, food, and clothing. Neither the CSSA, nor *Bast v. Rossoff*, allows for economic disparity to govern the determination of who is the custodial parent where the custodial time is not equal.

In *Matter of Smisek v DeSantis*, 2022 WL 4361153 (2d Dept., 2022) the Support Magistrate and the Family Court agreed with the father that the mother could not be awarded child support because a strict counting of the parties' custodial overnights with the children rendered the father the custodial parent. After a trial, the Family Court awarded the parties joint legal custody and shared parenting time. The parenting time schedule was as follows: during the months of September through June, the father had parenting time with the children from Sunday at 8:00 p.m. through Wednesday at 9:00 a.m., as well as on alternating weekends from Friday at 9:00 a.m. through Sunday at 8:00 p.m. The mother had parenting time during those months from Wednesday at 9:00 a.m. through Friday at 9:00 a.m., and alternating weekends from Friday at 9:00 a.m. through Sunday at 8:00 p.m. During the months of July and August, the mother had parenting time from Monday at 9:00 a.m. through Thursday at 9:00 a.m., as well as alternating weekends from Thursday at 9:00 a.m. through Monday at 9:00 a.m. The father had parenting time during those months on alternating weekends from Thursday at 9:00 a.m. through Monday at 9:00 a.m., as well as one period of seven consecutive days. The parties alternated custody on all other school breaks and holidays. In its decision after trial, which set forth the same parenting time schedule, the Family Court stated that it was giving "residential custody" to the father "solely for the purpose of determining the children's school district."

The Support Magistrate found no precedent from the Second Department, as to the method of determining which parent was the custodial parent for purposes of child support in a shared custody arrangement. Following the First Department's decision in *Rubin v. Della Salla*, (107 AD3d 60, 964 N.Y.S.2d 41 (1st Dept. 2013)), the Support Magistrate concluded that the parent who has the greatest number of custodial overnights was the parent considered to have custody of the child the majority of the time and, therefore, was the custodial parent for child support purposes. Since the father had more custodial overnights, the Support Magistrate granted the father's motion pursuant to CPLR 3211(a) to dismiss the mother's petition for child support and dismissed the proceeding. The Family Court agreed with the Support Magistrate and denied the mother's objections. The mother appealed.

The Second Department surveyed the relevant case law in all of the Departments and rejected the father's contention that status as the custodial parent must be determined based upon a strict counting of custodial overnights and that the Baraby rule only applies to a true 50/50 split of custodial overnights. While a strict counting of overnights might have the advantage of ease of application, it also has disadvantages. Most significantly, such a method does not always reflect the reality of the situation. It concluded that while counting custodial overnights may suffice in most shared custody cases, that approach should not be applied where it does not reflect the reality of the situation. Similarly, while it may be clear in most cases which parent's share of the parenting time constitutes the majority of custodial time (citing *Bast v. Rossoff*, 91 N.Y.2d at 729 n. 3, 675 N.Y.S.2d 19, 697 N.E.2d 1009), the reality of the situation must also be considered where there is a closer division of parenting time.

The Second Department found that under all of these circumstances, and considering the reality of the situation, including the overall amount of time each parent spends with the children, this was a case in which the "custodial arrangement splits the children's physical custody so that neither can be said to have physical custody of the children for a majority of the time" (citing *Baraby v. Baraby*, 250 A.D.2d at 204, 681 N.Y.S.2d 826). Since it had not been determined in this case which parent had the greater pro rata share of the child support obligation, it remitted the matter to the Family Court for further proceedings on the mother's petition for child support, including calculation of an appropriate award of support to her in the event that she is determined to have the lesser pro rata share of the child support obligation.

Conclusion

Where the parents' custodial arrangement splits the children's physical custody so that neither can be said to have physical custody of the children for a majority of the time, the parent having the greater pro-rata share of the child support obligation (the higher income), determined after application of the three-step statutory formula of the CSSA, should be identified as the "non-custodial" parent for the purpose of support

regardless of the labels employed by the parties. That parent must be directed to pay his or her pro-rata share of the child support obligation to the other parent unless “the statutory formula yields a result that is unjust or inappropriate.” In that event, “the trial court can resort to the ‘paragraph (f)’ factors and order payment of an amount that is just and appropriate.” All of the Appellate Division departments have applied this rule where neither party could be said to have physical custody of the child for the majority of the time.

Moreover, all of the Appellate Departments have rejected the counting of waking hours as a method of determining who is the custodial parent. Each believes that the number of overnights, not the number of waking hours, is the most practical and workable approach. The Second Department also rejected the contention that status as the custodial parent must be determined based upon a strict counting of custodial overnights. While counting custodial overnights may suffice in most shared custody cases, that approach should not be applied where it does not reflect the reality of the situation. The reality of the situation must also be considered where there is a close division of parenting time.

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