

Child Support Awards and Joint or Shared Custody

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DEFINING THE TERM "joint custody" is difficult, because the term "custody" is not defined by New York cases or statutes. 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 whereby they alternate physical custody of the child.¹

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.²

"Joint custody" is a two-prong concept. There is a distinction between "legal joint custody," which usually involves sharing in all the important decisions concerning the child, and "physical joint 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 recently 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.³ Former Chief Judge Breitel described joint custody as "reposing in both parents a shared responsibility for and control of a child's upbringing."⁴

As a practical matter, an award of sole custody to one parent may be so qualified that it is tantamount to an award

of "joint custody." For example, a court may direct the parties to consult with each other and agree upon major decisions affecting the child such as education, medical care and religion, so as to make the award nearly indistinguishable from "joint custody."

Applying the Child Support Statute

Since the enactment of the Child Support Standards Act (CSSA) in 1989,⁵ the courts have been struggling with the problem of how to apply the statute in joint custody situations. The problem arises from the fact that the statute does not address joint custody or shared custody situations. It requires the court to direct the "non-custodial parent" to pay his or her share of "the basic child support obligation," which is computed from the application of a numerical formula, unless the court determines that its application is unjust or inappropriate, and a variation is appropriate based upon a consideration of 10 enumerated statutory factors.⁶ In *Bast v. Rossoff*,⁷ the parties agreed on joint custodial decision making and had "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 weeks. The Court of Appeals held that "in shared custody situations child support should be calculated as it is in any other case." It found that the CSSA *applies* to cases of shared custody; it stated that the more difficult issue to resolve was *how* the CSSA should be applied in such cases. The Court noted that in New York "shared custody" encompasses a number of situations, including joint decision making, joint legal custody or shared physical custody of the child. The Court explained that the CSSA sets forth "a precisely articulated, three-step method" for determining the "basic child support obligation" as outlined in *Matter of Cassano v. Cassano* ⁸:

[S]tep one of the three step method is the court's calculation of the "combined parental income" * * *
Second, the court multiplies that figure, up to \$80,000, by a specified percentage based upon the number of children in the household -- 17 percent for one child -- and then allocates that amount between the parents according to their share of the total income * * *

Third, where the combined parental income exceeds \$80,000 * * * the statute provides that "the court shall determine the amount of child support for the amount of the combined parental income in excess of such dollar amount through consideration of the factors set forth in paragraph (f) of this subdivision and/or the child support percentage * * *

After completing this three-step statutory formula, under the CSSA the trial court must then order the non-custodial parent to pay a pro rata share of the basic child support obligation, unless it finds that amount to be "unjust or inappropriate" based on a consideration of the "paragraph (f)" factors (Domestic Relations Law [DRL] §240[1 b][f]). ***

Where the court finds the amount derived from the three-step statutory formula to be "unjust or inappropriate," it must order payment of an amount that is just and appropriate (DRL §240[1 b][g]). If the court rejects the amount derived from the statutory formula, it must set forth in a written order "the amount of each party's pro rata share of the basic child support obligation" and the reasons the court did not order payment of that amount (DRL §240[1 b][g]).

Although the CSSA is silent on the issue of shared custody and speaks in terms of a "custodial" and "non-custodial" parent in the application of its methodology, the Court saw no reason to abandon the statute in shared custody cases. While "joint custody" is generally used to describe joint legal custody or joint decision making, the Court was aware that many divorcing parents wish to maximize their parenting opportunities through expanded visitation or shared custody arrangements.

The Custodial Parent

The Court held that the reach of the CSSA should not be shortened because of the terminology employed by divorcing parents in settling custody arrangements. It stated 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. The 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. The plaintiff argued that the court should sanction a "proportional offset" formula to bridge the shared custody gap he perceived in the statute. Under his proposed formula, each parent's pro rata share of the basic child support obligation is multiplied by the percentage of time the child spends

with the other parent. The two resulting amounts are then offset against each other, and the "net" is paid to the parent with the lower amount. The Court rejected the use of a proportional offset because it found that the legislative history and language of the statute rejected this methodology. The Court of Appeals held that the trial court's rejection of the use of the three-step method for determining the basic child support obligation was an error as a matter of law, and it directed that the matter be remitted to the trial court for an application of the three-step process, before resorting to the paragraph (f) factors.⁹

Recently, in *Baraby v. Baraby*,¹⁰ the Appellate Division, Third Department, established what many believe is an inequitable method to identify the "primary" custodial parent, for purposes of the CSSA, in a shared custody case where there was no "primary" custodial parent. It held that when the parents equally share time with the children the parent with the greater income should be considered the non-custodial parent.

The parties married in 1978 and had two children. In November 1995, the parties separated and shared physical custody of the children on an equal basis by alternating weeks. In July 1997, the parties executed a separation agreement that continued their custody arrangement and resolved all other ancillary issues except child support.

That issue was tried before the Supreme Court, which applied the CSSA and calculated the parties' combined parental income according to the three-step method. It then applied the proportional offset method, reducing each parent's pro rata share of the basic child support obligation by the percentage of time each spent with the child.

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. As a result, the defendant was directed to pay the plaintiff \$365 per month for 1995, instead of \$1,325, and \$453 per month for 1996 and 1997, instead of \$1,290. The defendant argued on appeal that the only logical way to apply the CSSA to cases of equally shared custody is to divide between each parent the combined child support obligation arrived at by applying the three-step formula.

The Third Department rejected this argument, holding it is now settled that "[s]hared custody arrangements do not alter the scope and methodology of the CSSA," citing *Bast*. It found that the Court of Appeals had explicitly rejected the use of the proportional offset method in shared custody cases and that the three-step method for determining the basic child support obligation must be applied in all shared custody cases. The non-custodial parent was 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 in DRL §240[1-b][f], [g].

Pre-Separation Level

The court recognized that *Bast* did not specifically address how to apply the CSSA in cases of equally shared custody, but it construed *Bast* as requiring application of the CSSA to such situations so as to ensure that children will realize the maximum benefit of their parents' resources and continue, as nearly as possible, their pre-separation standard of living in each household.

In order to effectuate this goal, 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 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." Since the Supreme Court applied the proportional offset methodology, the matter was remitted for a recalculation of the defendant's child support obligation.

Notes

(1) *Braiman v. Braiman*, 44 NY2d 584 (1978).

(2) *Trapp v. Trapp*, 136 AD2d 178 (1st Dept. 1988).

(3) *Bast v. Rossoff*, 91NY2d 723 (1998).

(4) *Braiman v. Braiman*, supra.

(5) See Laws of 1989, Ch. 567; DRL §240 (1-b) and FCA §413 (1) (a).

(6) DRL §240 (1-b) (f). These factors are

"(1) The financial resources of the custodial and non-custodial parent, and those of the child; (2) The physical and emotional health of the child and his/her special needs and aptitudes; (3) The standard of living the child would have enjoyed had the marriage or household not been dissolved; (4) The tax consequences to the parties; (5) The non-monetary contributions that the parents will make toward the care and well-being of the child; (6) The educational needs of either parent; (7) A determination that the gross income of one parent is substantially less than the other parent's income; (8) The needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income pursuant to subclause (D) of clause (vii) of subparagraph five of paragraph (b) of this subdivision, and the financial resources of any person obligated to support such children provided, however, that this factor may apply only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action; (9) Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in exercising visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and (10) Any other factors the court determines are relevant in each case."

(7) Supra.

(8) 85 NY2d 649, 652.
(9) DRL §240[1-b][f], [g].
(10) __ AD2d __, 681 NYS2d 826 (3d Dept. 1998).

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