Split and Shared Custody Arrangements

The CSSA and Shared Custody

Part Two of a Three-Part Article

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There are instances in which parents agree to substantially share the children's time between both their households, resulting in the children spending up to 50% of the time with the "noncustodial" parent. The Child Support Standards Act (CSSA) does not address this kind of sharing arrangement, which can lead to inequities.

Time and Money

This issue was examined by the Court of Appeals in *Bast v. Rossoff*, 91 NY2d 723 (1998), in which the non-custodial parent (the father in this instance) argued that the parties' stipulation of "shared custody" provided a sufficient basis upon which the court should deviate from the formula set forth in CSSA. A review of the *Bast* parties' parenting access schedule reveals that the non-custodial parent's time with the children amounted to roughly 4½ days every two weeks, or approximately 32% of the time. (By comparison, the court in *Bast* noted that the "usual" schedule of visitation amounted to approximately 20% to 25% of the total custodial time during a typical calendar year.) The father argued that the additional time he spent with his child, providing for her direct support by sheltering, feeding and entertaining her, entitled him to a child-support obligation based on a "proportional offset" formula, which, he argued, would reduce his support obligation.

The court specifically rejected this argument, stating that the statute is explicitly devoid of any such time-based consideration, and further noted that a review of the legislative history demonstrated that the legislature had originally considered, and ultimately rejected, at least two different proposals that would adjust child support where the parents shared custody of the children. This legislative history provided the Court of Appeals all the justification it needed to strictly adhere to the calculations set forth in CSSA without regard for the custodial arrangement, although the court noted the catch-all in the statute affording courts ultimate discretion where there is a finding that the application of the CSSA formula results in an "unjust and inappropriate" obligation.

The theory of the father's position in *Bast* seemed worthy of consideration, and would be even more applicable when that time is closer to, or even equals, 50% of the time. The practical application of the *Bast* decision and those of other courts has been, in some cases, blatantly unjust and illogical, particularly from a mathematical perspective.

A Case in Point

Consider the decision in the *Matter of Baraby v. Baraby*, 250 AD2d 201 (3rd Dept. 1998). In this case, the court stated that, where the parents share custody of the children on a true 50/50 basis, and there cannot be a "custodial parent" based on the amount of time spent with the children, the parent who earns more money will be deemed the non-custodial parent for child support purposes. In other words, whoever earns more pays child support to the other in accordance with the CSSA formula regardless of how the parties may have designated their roles with regard to custody of the children. This concept is fairly consistent throughout New York State. *See, e.g., Barr v. Cannata*, 57 AD3d 813 (2nd Dept. 2008); *Moore v. Shapiro*, 30 AD3d 1054(4th Dept. 2006). What is the result of this?

Cracks in the Logic

Let's consider some mathematical results, in the extreme, to illustrate this ruling. Our examples involve one child, a mother who earns $25,000 per year and a father who earns $100,000 per year

Example A: The father sees the child 25% of the time ("usual" visitation), so is ordered to pay the mother approximately $1,305 per month in child support.

Example B: The father never sees the child (no visitation by father), but is still ordered to pay the mother approximately $1,305 per month in child support.

Example C: The father is with the child exactly 50% of the time and is ordered to pay the mother approximately $1,305 per month in child support.

Example D: The child is with the father 51% of the time, and the mother is ordered to pay the father approximately $327 per month.

Based on this illustration, regardless of how the parties have defined "custody," the father would be paying the exact same amount of child support to the mother if he spends 50% of the time with the child as he would be paying if he never saw the child at all. Further, as compared with being with his child 50% of the time, an additional 1% with his child could result in a net differential of $1,632 dollars per month (nearly $19,600 per year) in child support (the $1,305 he wouldn't have to pay, plus the $327 he would receive in child support from the mother).

In light of the foregoing, the dictum in the *Bast* decision is very perplexing, and in practice seems counterintuitive. The court opined that a time-based adjustment in child support would "encourage a noncustodial parent to seek more custodial time to reduce the child support obligation. In our view, parents should seek shared custody because they desire to spend more time with their children." *Bast*, 91 NY2d at 731.

With this analysis, the court is placing the possible risk of improper motivation for increased custodial time above the inequity of a parent with equal custodial time incurring both a direct support obligation and

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a child support payment to a parent from whom his or her income may differ only slightly. But the decision and rationale employed by the court in *Bast* and its progeny serves as a disincentive to maximizing the noncustodial parent's time with the children when there is no difference in the amount of support they must pay. The problem becomes more acute when the parties' incomes are relatively equal and both must incur the expense to maintain appropriate housing for the children.

Our firm recently had a client who, burdened by a high child support obligation, could not afford to be with the children during three meal times per day, so he reduced his visitation hours with his children to avoid being with them during the breakfast and dinner hours. The concern of the *Bast* court — that parents may seek to spend more time with their children only to reduce their support obligation — appears to be far less troubling than parents being compelled to limit time with their children because of the attendant cost.

Some potential for relief currently exists through variance from the regular application of the CSSA if the court finds that the presumptively correct amount would be "unjust or inappropriate" pursuant to the ninth factor in both DRL § 240 (1-b)(f) and FCA § 413 (1)(f). In both statutes, the court has the discretion to deviate from the CSSA basic support obligation where there are: 1) extraordinary expenses incurred in connection with visitation; or 2) where there are periods of "extended visitation" and the custodial parent's expenses are substantially reduced as a result.

The Fourth Department in *Carlino v. Carlino*, 277 AD2d 897 (4th Dept. 2000), saw this open door and was prepared to act upon it to provide relief for a noncustodial parent with equal parenting time. The court held that a shared custody arrangement, where the noncustodial parent is with the children 50% of the time, is to be considered "extended visitation"; therefore, the statute affords the court discretion to adjust the basic child support obligation where it is established that the expenses incurred as a noncustodial parent substantially reduce the costs the custodial parent must bear. In *Carlino*, however, the noncustodial parent failed to demonstrate that the custodial parent's expenses were substantially reduced as a direct result of the additional time the noncustodial parent spent with the child, so the matter was remitted for a further hearing on the issue. This decision provides some hope to noncustodial parents who wish to maximize their time with the children without added financial burden.

A Prior Decision

A prior Third Department decision, however, seems to limit somewhat the lifelines offered by the ninth factor. The court in the *Matter of Pandozy on Behalf of Gaudette v. Gaudette*, 192 AD2d 779 (3rd Dept. 1993), rejected the concept that the provision of "routine and essential services such as meals, lodging and entertainment to the children during visitation" would be deemed "extraordinary visitation expenses" as mentioned in FCA § 413 (1)(f)(i) (and no doubt its equivalent DRL § 240 (1-b)(f)(i)). Neither *Pandozy* nor *Carlino* provide any specific guidance into what types of expenses may be "extraordinary expenses," nor into what may constitute a "substantial" reduction of expenses for the custodial parent resulting from extended visitation.

Since each party to a shared custody arrangement must maintain adequate housing for the children when they are residing with that parent, the "reduced" custodial parent expenses would necessarily be unrelated to housing for the children. On the other hand, given the need for both parties to maintain a suitable residence for the children, differences in income may still have to be considered, perhaps along the lines of formulas employed for split custody as discussed below.

This is where it may be beneficial for the legislature to address the language in the statutes and provide more guidance to the courts, thus increasing the chance for more meaningful, consistent and predictable child support results (which would also reduce the potential for financially motivated custody disputes).

Next month, we will discuss the effects the CSSA can have when applied to split-custody situations, where there are multiple children and each parent has primary custody over at least one of them.

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Pre-Marital Debt

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and when courts cannot.

Let us first look at a straightforward scenario: when separate property increases in value during the marriage. When the assets are distributed, who gets credit for the increase in value? That depends on who or what caused the increase in value. The Domestic Relations Law, when defining separate property, specifically excludes from the category of separate property the increase in value of separate property that is due in part to the contributions or effort of the other spouse. D.R.L. § 236(B)(1)(d)(3). As the Second Department clearly explained:

> Appreciation in the value of separate property is considered separate property, "except to the extent that such appreciation us due in part to the contributions or efforts of the other spouse" [ ]. When the nontitled spouse makes direct financial contributions to the property and/or direct nonfinancial contributions to the property "such as by personally maintaining, making improvement to, or renovating a marital residence," or the appreciation is the result of both parties' efforts, appreciation due to those efforts constitutes marital property subject

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