Smisek v. DeSantis: Defining Child Support and 50/50 Parenting Time—Show Me the Money

By Lee Rosenberg, Editor-in Chief

By now, we should all know how this works. Child support as is set forth in the Child Support Standards Act (CSSA) since 1989 is a formula.[1] The Court of Appeals in *Cassano v. Cassano*[2] further elaborated upon the statutory three-prong test in order to determine parental income and the presumptive amount of child support. The Court of Appeals again made it clear in *Bast v. Rossoff*[3] exactly how the calculation is undertaken in cases of shared custody.

The permutations and combinations of split custody and shared custody have been the subject of many determinations at the appellate level. Quite simply—or so we thought—in cases of true joint 50-50 custody, the party with a greater income is deemed to be the non-custodial parent for purposes of child support.[4]

Figuring out whether 50-50 truly exists or establishing parenting time to determine the amount of time each parent has with the child in order to get to 50-50 or some other amount has also been the subject of various appellate decisions. Of course, just as you thought it was safe to get back in the water, the Appellate Division, Second Department, in *Smisek v. DeSantis*[5] has thrown the proverbial monkey wrench into the equation. So, get ready for more litigation, more battles, and more positioning. Did I mention more modification applications?

If we reverse engineer, the Second Department found a way to depart from what we thought was the correct manner of establishing residential custody in 50-50 cases, to ensure that the more monied spouse is determined to be the non-custodial parent, even though that spouse had more overnights with the child. The court has created a black hole for custody litigation under the guise of flexibility in determining who has more time for purposes of the calculation. Essentially, litigants are now forced to make sure that both in terms of overnight and daytime with the children get to 51% in order to be sure how child support will be determined and who will pay. Having equal time in an agreement will ultimately be meaningless in many cases. Whether the time is framed at one week on one week off, 2/2/3 or some other configuration, the temptation to manipulate the schedule going forward will be great in order to make sure that one party manages to get some extra overnights here or there; or where there is some agreed-upon switching of time, to accommodate "flexibility" as contemplated by an agreement or simply because the children are getting older and managing their schedules in a different way. It will all become fodder for litigation. The finality, which is sought to keep people out of court, will be called into question even more then we now see.

So, what has the decision in *Smisek* wrought? Let us go back in time first.

Cassano and the Three-Step Test

In *Cassano*, the Court of Appeals provided a brief historic perspective on the purposes of the CSSA and spelled out the methodology to be followed. *Cassano* originated in the Queens County Family Court and initially culminated in a hearing examiner's[6] decision made on Oct. 10, 1990—shortly after the CSSA was enacted. Ultimately, the matter found its way to the high court, which elaborated:

> The Child Support Standards Act, effective September 15, 1989, replaced a needs-based discretionary system with a precisely articulated, three-step method for determining child support...

As the statute directs, step one of the three-step method is the court's calculation of "combined parental income" in accordance with Family Court Act § 413(1)(b)(4)–(5) (*see,* Domestic Relations Law § 240 for analogous provisions). Second, the court multiplies that figure, up to $80,000, by a specified percentage[2] based upon the number of children in the household—17% for one child—and then allocates that amount between the parents according to their share of the total income (Family Ct.Act § 413 [1] [b][3]; [c]).

Third, where combined parental income exceeds $80,000—the situation at issue in this case—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" (Family Ct.Act § 413[1][c][3]). The "paragraph (f)" factors include the financial resources of the parents and child, the health of the child and any special needs, the standard of living the child would have had if the marriage had not ended, tax consequences, nonmonetary contributions of the parents toward the child, the educational needs of the parents, the disparity in the parents' incomes, the needs of other nonparty children receiving support from one of the parents, extraordinary expenses incurred in exercising visitation and any other factors the court determines are relevant (Family Ct.Act § 413[1][f]).

Whenever the basic child support obligation derived by application of the formula would be "unjust or inappropriate," the court must consider the "paragraph (f)" factors. That is so whether parental income is above or below $80,000 (Family Ct.Act § 413[1][b][1]; [c] [2], [3]). If the formula is rejected, the statute directs that the court "set forth, in a written order, the factors it considered"—an unbending requirement that cannot be waived by either party or counsel (Family Ct.Act § 413[1][g]).

Cassano remains the template to be used when calculating child support, with the $80,000 statutory income figure now being $163,000 as of March 2022. Where there is split custody—such as having one parent with one child and the other parent with another child—the calculation must be undertaken for each parent as a residential custodian.[7]

What is 50-50?

The Court of Appeals in *Bast v. Rossoff* followed on *Cassano* to restate that the three-prong test *does not change* in cases of shared custody and distinguishes between shared custody and split custody.

> Although the CSSA is silent on the issue of shared custody and speaks in terms of a "custodial" and "noncustodial" parent in the application of its methodology, we see no reason to abandon the statute, and its Federally mandated policy considerations, in shared custody cases. While "joint custody" is generally used to describe joint legal custody or joint decision making (see, e.g., Bliss v. Ach, 56 N.Y.2d 995, 998, 453 N.Y.S.2d 633, 439 N.E.2d 349; Braiman v. Braiman, 44 N.Y.2d 584, 589–590, 407 N.Y.S.2d 449, 378 N.E.2d 1019), we are aware that many divorcing parents wish to maximize their parenting opportunities through expanded visitation or shared custody arrangements. However, the reach of the CSSA should not be shortened because of the terminology employed by divorcing parents in resolving their marital disputes and settling custody arrangements. 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 time (see, Matter of Holmes v. Holmes, supra, at 189, 592 N.Y.S.2d 72 [Casey, J., concurring in part and dissenting in part]; see also, Nicholas v. Cirelli, 209 A.D.2d 840, 619 N.Y.S.2d 171; Harmon v. Harmon, 173 A.D.2d 98, 578 N.Y.S.2d 897). As noted by Supreme Court, "[t]he reality of the situation governs" (167 Misc.2d, at 753, 635 N.Y.S.2d 453). Thus, 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.
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> ...In this case, as in most cases, there are days when one parent has the child during the day and the other parent has the child at night. As a result, it is difficult to pinpoint a precise percentage of time that each parent spends with the child. Indeed, the parties hotly dispute the percentage of time plaintiff

> spends with the child. Plaintiff claims that he spends 42.9% of the time with his daughter, while defendant contends that plaintiff only spends between 32% and 36% of the time with the child.

In drafting agreements, or even where a court after trial has determined that joint custody is an appropriate result, it must still be determined who is the residential custodian for purposes of child support. In some agreements, we have seen self-determination of the parenting arrangement where one parent does not have clearly greater time, in simple terms: "true shared parenting" or "the parties shall have equal time with the children" with no set time or "given the age of the child, the parties shall arrange time directly with the child" or "given that the child is over the age of 18, no provision for custody is set forth" or "the parenting time schedule shall be on a '2/2/3 basis,'" and so on. None of these, however, solves the child support issue. Being cognizant of *Bast*, negotiation of the parenting time becomes critical. Many unfortunately use 50-50 as a wedge issue to negotiate or try to eliminate a child support obligation as opposed to it being a truly legitimate and obtainable goal. Since the CSSA permits opting out of the presumptive amounts to be awarded, parties can agree to a deviated child support amount or effectively no exchange of a basic child support payment, as long as the appropriate statutory language is in the agreement.[8] This is true as well in "traditional" parenting schedules where equal time is not present. That being said, the problem occurs in "equal" time cases even on initial determinations and more often, when post-judgment modification applications are made, or sometimes when the agreement—even if already part of a judgment of divorce—is reviewed by new counsel and challenged for one reason or another. The court is then placed in a position to determine what equal time means, who is the residential parent for child support purposes, and/or is equal really equal.

In *Rubin v. Della Salla*,[9] from 2013, the First Department reversed the denial of the father's summary judgment motion after the lower court held that the mother was not precluded from seeking child support though the mother "conceded 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 Child Support Standards Act (CSSA). She also agreed that under a 'strict application' of the CSSA, the father could not be ordered to pay child support." The *Rubin* court reviewed *Bast* as well shared custody cases in all four appellate departments, the underlying custody decision, and calculated the parties' parenting time with the child.

> Here, given the schedule set by the court's custody decision, there is no question that the father has physical custody of the child for a majority of the time and should be considered the custodial parent for child support purposes. Based on the custody order, for the July 2012 to June 2013 time period, the child will spend 206 overnights with the father compared to 159 with the mother. Thus, the child will be with the father for a majority of the time (56%), and with the **6 mother a minority of the time (44%). The extra 47 days the child spends with the father translates into nearly 30% more than the mother's time. Put another way, the child is with the father approximately 130% of the time he is with the mother. The great disparity in overnights here—56% to 44%—stands in marked contrast to the cases cited by the mother where the parents have equal, or essentially equal, custodial time (see e.g. Barr v Cannata, 57 AD3d 813 [2d Dept 2008]; Matter of Carlino v Carlino, 277 AD2d 897 [4th Dept 2000]; Baraby v Baraby, 250 AD2d at 201).

The court below ignored its own custody schedule when it stated that the parents here share "very nearly equal" physical *69 custody of the child. In an attempt to equalize the custodial time, the court focused on how much "waking, non-school time" the child spends with each parent. In other words, the court suggested that a custodial parent could be identified by calculating the number of waking hours he or she spends with the child. The mother makes a similar argument on appeal, contending that she should be considered the custodial parent because she "sees" the child on a majority of days during the year. For example, she counts a Thursday overnight as two days simply because she saw the child after school on Thursday and again on Friday morning.

This approach was soundly rejected in Matter of Somerville v Somerville (5 AD3d 878 [3d Dept 2004]). In that case, the child spent the majority of custodial time each week with his mother, and the father was ordered to pay child support. The father appealed, claiming that he should be considered the custodial parent because he had physical custody of the child during most of her "waking hours." The father argued that more weight should be given to daytime than to nighttime hours because a child needs less parental care during the time the child is sleeping. The court

denied the father's objections to the child support order, finding his argument "patently absurd and . . . entitled to no serious consideration" (5 AD3d at 880; see also Matter of Joleene D.R. v Robert J.W., 15 Misc 3d 1148[A], 2007 NY Slip Op 51201[U] [Fam Ct, Oswego County 2007] [rejecting claim that the court should give less weight to sleeping time]). We reach the same result here and reject the counting of waking hours as a method of determining who is the custodial parent. Although the Court in Bast did not elaborate on what constitutes a "majority of time," we believe that the number of overnights, not the number of waking hours, is the most practical and workable approach. In Smith v Smith (97 AD3d 923 [2012]), a case directly on point, the Third Department endorsed the use of overnights. In that case, during the school year, the children were with their father 18 out of every 28 nights, and with their mother the remaining 10 nights. For the summer, school recesses and holidays, the parents shared equal parenting time. Despite the fact that the father had the children for the majority of time, the trial court nevertheless designated him the noncustodial parent by virtue of his greater income, and directed him to pay child support. The Third Department reversed that determination, finding that the trial court's order violated Bast v Rossoff. The court held that

> "[i]nasmuch as 'shared' custody is not synonymous with 'equal' custody and [the father] clearly has physical custody for a majority of the time during the greater part of the year, Supreme Court incorrectly determined that [the father] was the noncustodial parent for child support purposes . . . and erred in directing [the father] to pay child support to [the mother]" (97 AD3d at 924).

The *Rubin* court went on to examine what it felt to be the impropriety of using waking hours and the ability to manipulate those hours to establish a basis for child support—characterizing it as a potential "moving target." The court held that the CSSA does not permit financial circumstances to determine who is the custodial parent although those circumstances can be offered to affect the ultimate award.

> In finding that the father could be considered the noncustodial parent, the motion court improperly focused on the parties' financial circumstances rather than their custodial status. In doing so, the court endorsed an approach where the determination of the custodial parent is based not on whom the child spends the majority of the time with, but instead on which parent has the lesser monetary means. No matter how well-intentioned the court may have been, 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.

The "equal" time scenario still results in the parent with the higher income being designated as the non-custodial parent for child support purposes and *Rubin* does not change this.[10] In establishing who has the majority of the physical custody time, the First Department cited to *Rubin* in 2020's *Marsha V. v. Garfield V.*[11,12] The Third Department in 2004's *Sommervile v. Summervile*[13] (cited in the *Rubin* decision) is followed in the Third Department in 2016's *Mitchell v. Mitchell.*[14] Interestingly, *Mitchell* is referenced in the Second Department's decision in *Conway v. Gartmond.*[15] *Laskowsky v. Laskowsky,*[16] also in the Third Department, follows *Mitchell* and noted that the overnights were split evenly so that the party with the greater income became the non-custodial parent for child support purposes. *Smith v. Smith,*[17] standing for the same proposition regarding overnights in determining custodial time and also cited in *Rubin,* was more recently followed in 2018's *E.I v. Y.A.,*[18] from Queens County.

Smisek: Forget the Overnights

And, back to the 2022 holding in *Smisek.*

At the trial level (Nassau County Family Court), the court determined that a strict counting of the overnights showed that the mother was not the custodial parent for child support purposes and could not then recover child support from the father. The mother argued that while the father did have more overnights, she had more days/hours and that "the parenting time schedule set by the Family Court was 'as close to exactly 50/50 as the [c]ourt could devise' taking into account issues concerning school." The support magistrate (then affirmed by the judge after objections were filed) followed *Rubin* as she "perceived a split of authority between the Appellate Division, First and Third Judicial Departments, on the one hand, and the Appellate Division, Fourth Judicial Department, on the other, with no precedent from this Court, as to the method of determining which parent was the custodial parent for purposes of child support in a shared custody arrangement."

The Second Department then, looking at language in various cases which uses the phrase "the reality of the situation" in viewing the amount of parenting time each party has, determined that a "flexible" approach was proper and rejected the other holdings.

> ...we reject the father's contention in the instant case 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, as discussed above, such a method does not always reflect the reality of the situation. Furthermore, determining status as the custodial parent on this basis, without considering the reality of the situation, is more likely to encourage gamesmanship on the part of parents in their requests for, or agreements as to, custody, with each parent vying for a slightly higher number of overnights. As observed by the Court of Appeals, parents' requests for, or agreements as to, custody should be governed by their desire and ability to spend time with their children and their children's best interests, rather than considerations of child support awards (see Bast v. Rossoff, 91 N.Y.2d at 731, 675 N.Y.S.2d 19, 697 N.E.2d 1009).
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> ...In sum, 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 (see 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.

In *Smisek*, the parties were never married, so there is no property distribution. The mother had moved out of the home where the father and children were living and then petitioned for custody. Joint legal custody and shared parenting time were determined at trial. The father was a partner in a law firm and the mother was a dance instructor in a studio she partially owned.

In essence, the court in *Smisek* looked to the financials—the opposite of the *Rubin* court, which determined this approach to be inappropriate under the CSSA. The following language is instructive:

> Moreover, a flexible approach is more likely to promote the objectives of the CSSA. One of the primary objectives of the CSSA was "to increase child support awards so that children do not 'unfairly bear the economic burden of [parental] separation'" (Bast v. Rossoff, 91 N.Y.2d at 731, 675 N.Y.S.2d 19, 697 N.E.2d 1009, quoting Governor's Approval Mem, Bill Jacket, L 1989, ch 567 at 2, 1989 N.Y. Legis Ann, at 250). It is a "generally accepted fact that shared custody is more expensive than sole custody" (Bast v. Rossoff, 91 N.Y.2d at 730, 675 N.Y.S.2d 19, 697 N.E.2d 1009). As the Court of Appeals explained, "shared custody *151 actually increases the total cost of supporting a child by necessitating duplication of certain household costs in each parent's home" (id. at 730, 675 N.Y.S.2d 19, 697 N.E.2d 1009). Flexible application of the Baraby rule will ensure that children "realize the maximum benefit of their parents' resources and continue, as near as possible, their preseparation standard of living in each household," when, in a practical sense, they truly have two primary households (Baraby v. Baraby, 250 A.D.2d at 204, 681 N.Y.S.2d 826). On the other hand, a strict approach to determining which parent is the custodial parent for purposes of child support will make it difficult or impossible for a parent with a lower income to share what is essentially close to equal parenting time, as opposed to precisely equal or greater custodial overnight time. In such cases, the children may experience a significant disparity in standard of living in their two households.

The decision in *Smisek* was unanimous and remitted back to Family Court. Since this is not then a "final determination," it is not ripe for the Court of Appeals—yet. In the meantime, start counting those days and nights.

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Endnotes

1. DRL 240(1-b); FCA 413.
2. 85 N.Y.2d 649 (1995).
3. 91 N.Y.2d 723.
4. *See e.g., Baraby v. Baraby*, 250 A.D.2d 201 (3d Dep't 1998).
5. 209 A.D.3d 142 (2d Dep't 2022).
6. Now known as support magistrates.
7. *See e.g., Kerr v Bell*, 178 AD2d 1 (3rd Dep't 1992).
8. If the statutory requirements are not met, deviation from the presumptive amount to be awarded under the CSSA will be deemed unenforceable and a de novo determination required. *See e.g., Bushlow v. Bushlow*, 89 A.D.3d 663 (2d Dep't 2011); *Hardman v. Coleman*, 145 A.D.3d 1146 (3d Dep't 2017); *Panzarella v. Panzarella*, 106 A.D.3d 1527 (4th Dep't 2013).
9. 107 A.D.3d 60 (1st Dep't 2013).
10. *Soldato v. Benson*, 128 A.D.3d 1524 (4th Dep't 2015); *Daniel M.G. v. Annette P.*, 181 A.D.3d 461 (1st Dep't 2020).
11. 184 A.D.3d 521 (1st Dep't 2020). *See also Joseph M. v. Lauren J.*, 45 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2014).
12. *Rubin* is also cited with approval in *T.M. v. J.K*, 54 Misc. 3d 195 (Fam. Ct., Ontario Co. 2016).
13. 5 A.D.3d 878 (3d Dep't 2004).
14. 134 A.D.3d 1213 (3d Dep't 2013).
15. 144 A.D.3d 795 (2d Dep't 2016).

    The "custodial parent" within the meaning of the Child Support Standards Act is the parent who has physical custody of the child for the majority of the time (*see Bast v. Rossoff*, 91 N.Y.2d 723, 728, 675 N.Y.S.2d 19, 697 N.E.2d 1009). Where neither parent has the child for a majority of the time, the parent with the higher income, who bears the greater share of the child support obligation, should be deemed the noncustodial parent for the purposes of child support (*see Mitchell v. Mitchell*, 134 A.D.3d 1213, 1214, 21 N.Y.S.3d 438; *Leonard v. Leonard*, 109 A.D.3d 126, 128, 968 N.Y.S.2d 762; *Barr v. Cannata*, 57 A.D.3d 813, 814, 870 N.Y.S.2d 120; *Baraby v. Baraby*, 250 A.D.2d 201, 204, 681 N.Y.S.2d 826).
16. 187 A.D.3d 1342 (3d Dep't 2020).
17. 97 A.D.3d 923 (3d Dep't 2012).
18. 59 Misc. 3d 1212(A) (Sup. Ct. Queens Co. 2018).