The Women's Bar Association of the State of New York and the Suffolk County Women's Bar Association

WBASNY MATRIMONIAL & FAMILY LAW COMMITTEE Presents

50-50 Custody and its Impact on Child Support

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Friday, November 15, 2024

CASES

A. *50/50 PARENTING TIME*

I. 50/50 Parenting Time Granted

Tsung v. Tso, 190 A.D.3d 575, 139 N.Y.S.3d 64 (1st Dept. 2021).

- Facts
  - Parents signed custody agreement.
  - Father moved to modify the agreement.
  - The lower court modified custody to provide for 50/50 parenting time between the mother and the father.
  - The mother appealed.
- Holding
  - Affirmed. The court affirmed the lower court's ruling of 50/50 parenting time.
- Reasoning
  - The lower court ruled 50/50 parenting time because the children expressed how they wanted to see the father more often and the forensic found that the father's work schedule allowed for more time as he had complete control over his work schedule. Mother simply argues that the father lied about his work schedule by showing that he misrepresented the amount of times that he said he traveled for work. However the court found that the mother did not show how the forensics recommendations would have been any different had he known that the father typically travels seven, rather than four times per year for work.

Elizabeth B. v. Scott B., 189 A.D.3d 1833, 137 N.Y.S.3d 574 (3d dept., 2020)

- Facts
  - The parties had largely been following a shared access schedule established by orders in 2017, as well as, with one exception, an agreed-upon holiday parenting schedule.
  - Additionally, although some concerns were raised about the father's parenting skills, Supreme Court found that the mother's perception of events was "somewhat exaggerated and distorted" and noted that a child protective investigation into the father's conduct that was alleged to cause an injury to the child, though initially found to be "indicated," was ultimately adjudicated as unfounded.
  - The record further reflects that the father completed a parenting skills program and is willing to engage in co-parenting counseling.
- Holding
  - Substantial basis in the record supported trial court's conclusion that shared physical custody arrangement and joint legal custody was in child's best interests, as required to support an award of joint legal custody;

  - As to Joint legal custody, the record evidence reflects that the parties have been able to communicate with one another, largely via text messages, in order to provide for the child's needs, and their relationship is not so acrimonious as to render the award unworkable.
  - Overturned lower court's award of final decision-making to the Father and awarded same to Mother after stating, "*by awarding the father final decision-making authority, Supreme Court effectively granted him sole legal custody.*"

Margaret M.C. v. William J.C., 41 Misc.3d 459, 972 N.Y.S.2d 396 (Sup. Ct. Orange Cty. 2012).

- Facts
  - Mother filed from divorce from father.
  - Hearing was held to determine custody and parental access to their 3 children.
  - The lower court held that, in a matter of first impression, the best interests of the children warranted awarding joint legal and physical custody, with 50/50 time sharing.
- Holding
  - Considering the totality of the circumstances, the court found that the best interests of the children would be served by the parties sharing legal custody (such that all significant decisions pertaining to their physical wellbeing and education will be made jointly), and for physical custody to be shared by the parties alternating weeks with each parent having the children reside with them one week on and one week off.
  - The court held that this is the arrangement that had been in place for the past three summers and that there was little complaining about this arrangement by the parties.

D.Z. v. C. P., 856 N.Y.S.2d 497, 18 Misc.3d 1123(A) (Sup. Ct. Queens Cty. 2007).

- Facts
  - Parties were married June 14, 1998.
  - The parties have one daughter, born January 10, 2002.
  - Plaintiff filed for divorce on September 29, 2003.
  - Both parties are doctors.
  - Wife said that the marriage deteriorated because of the husband's controlling and demanding nature. Wife said husband would be violent to her.
  - An incident on Thanksgiving Day in 2003 led to the police being called.
  - Because of the order of protection, the husband originally had supervised visitation however since May 2004 the parties had a joint custodial arrangement.
- Holding
  - The parties awarded joint legal and physical custody of the parties' child with spheres of decision making (even though there was some conflict between the parties, including the existence of an order of protection)
- Reasoning

  - The court held that it must take into consideration the effect an award of sole custody to one parent may have on the relationship with the other parent when determining custody.
  - The Court believes that the only way that the child will have a meaningful relationship with both parents is if both parents have significant amounts of time with the child. The Court will not bow to the wrangling or pettiness of the parties, which the Court found that they need to overcome for the benefit of their daughter.

[Joint physical custody by not quite 50/50] Mannell v. Mannell, 146 A.D.3d 1107, 46 N.Y.S.3d 690 (3d Dept. 2017)

- Facts
  - Child was a teenager who expressed a preference to live primarily with the father and see the mother on weekends. Court indicated the child may have been influenced by the father.
  - Mother worked part time and lived very near to some of her family members. Father worked full time but not on his weekends with the child and his parents (with whom the father lived) were available to watch the child. Both parties helped with schoolwork and extracurricular activities.
  - Mother had a history of alcoholism but had been sober for almost 3 years at the time of the Family Court's Order.
  - Mother made allegations of domestic violence against father but the Court found those incidents did not provide a basis for finding the father unfit to provide "adequate moral guidance" and that all of the incidents happened prior to the parties' separation.
  - Mother has been "extremely cooperative" with father and has not refused any of his requests to spend additional time with the child.
  - Mother was primary caretaker while father frequently participates in hunting and outdoor activities with the child which the Family Court found to be "an integral part of the child's identity".
- Holding
  - Appellate Division affirmed Family Court's award of <u>joint</u> <u>physical</u> and legal custody to the parties after a hearing. Weekday physical custody was awarded to the mother with shared holidays, vacations and weekend parenting time for the father for two out of every three weekends, and further weekdays as the parties agree.

Steingart v. Fong, 156 A.D.3d 794, 67 N.Y.S.3d 44 (2d Dept. 2017)

- Holding
  - Appellate Division affirmed Family Court's award of joint physical and legal custody to the parties after a hearing with decision-making authority to the father with respect to educational and extracurricular decisions and to the mother with respect to medical and religious decisions. The Family Court set up detailed

parenting schedules for the school year and the summer which gave the parties equal time with their daughter. (The details of the schedules were not disclosed in the decision). The existence of an antagonistic relationship between the parties was not, without more, a basis to change the aware of shared physical custody.
  - The Family Court did not follow the recommendations of the forensic expert and the Appellate Division found that the lower Court had a sound and substantial basis for that.

Joseph M. v. Janice A., 2017 WL 7229679 (Family Court, NY County, 12/11/2017)

- Facts
  - Parties were unmarried parents of a child who was not yet two years old when they each filed their petitions seeking custody and sole decision-making authority. When child was nine months old, father made a comment to mother that he was going to allow the child to call his girlfriend "mom". Mother then started restricting contact between child and father. On the first day of the hearing, the Court issued a temporary order on consent granting equal access and joint decision making.
- Holding
  - Court awarded joint shared custody with equal time to each party with a very detailed schedule and many requirements – enrollment in an online co-parenting class ($100) and submission of proof of completion of class, continued AFC's appointment for 6 months, appointment of PC.

Hardy v. Figueroa, 128 A.D.3d 824, 9 N.Y.S.3d 140 (2d Dept. 2015)

<u>[The court does NOT award joint legal custody but affirms 50/50 parenting time]</u>

- Facts
  - Mother and father petitioned for custody over the child.
  - The lower court awarded the mother and the father shared physical custody of the child, awarded the father final authority with respect to child's educational, extracurricular and religious decisions, and awarded the mother final authority with respect to child's medical decisions.
- Holding
  - Affirmed – 50/50 parenting time but not joint legal custody.
- Reasoning
  - The court held that an award of joint legal custody was not appropriate here because of the parties' inability to cooperate and behave amicably, and considering the circumstances of the case, the court held that it was appropriate for the lower court to give each parent certain authority in separate decision making areas.
  - The antagonistic relationship between the parties effectively precluded an award of joint legal custody.
  - As for affirming the lower court's ruling for 50/50 parenting time – the court held that the lower court's ruling that the child would benefit from equal amounts of

time with each parent was accurate and that it would be in the child's best interests for physical custody to be shared by both of his parents.

[Not 50/50 but Alternate Parenting Plan] *Spence-Burke v. Burke*, 149 A.D.3d 1124, 52 N.Y.S.2d 477 (2d Dept. 2017)

- Holding
  - Appellate Division affirmed Family Court's award of physical custody to the father during the school year, physical custody to the mother during the summer, decision-making authority to the father for education and school-year extracurricular activities, and decision-making authority to the mother for religious activities and healthcare. The child was late to or absent from school 92 times in the three years preceding the hearing during which time the mother had custody of the child on weekday mornings. There was evidence that the mother interfered in the relationship between the father and the child. The forensic expert opined that both parties were fit, caring parents but were unable to work together, suggesting equal parenting time and decision-making authority in separate areas.

Scott M. v. Ilona M., 38 Misc.3d 1216, 976 N.Y.S.2d 870 (Supreme Court, Kings County. J. Sunshine, 2013)

- Facts
  - The father sought sole custody and made allegations of drug use (Ecstasy) by the mother and her "unilateral parenting style" and also noted his flexible work schedule. The father also objected to the mother's choice of the maternal grandmother as a babysitter for the child when the mother was at work, alleging she had obsessive compulsive tendencies which the child was also starting to have and that she touches the child inappropriately.
  - The mother requested joint custody or, alternatively, sole custody, and noted the parties' ability to cooperate to raise the child and the child's positive adjustment to the week on, week off schedule in effect during the litigation. She also alleged drug use (marijuana) by the father and that he allowed the child to be in the presence of the father's brother who was convicted of aggravated sexual battery of a minor female. The mother testified that she was the primary decision maker for matters relating to the child and that the father was inattentive to the child's health needs.
  - The Court noted that neither party identified a specific decision relating to the child upon which the parties could not ultimately come to an agreement in the past year and a half. The father testified that the parties were able to share vacation and holiday time and were even able to spend time with the child together. The mother testified that the parties were able to work together in a cooperative fashion. The parties selected the child's pre-K program together, toured the school together, and agreed the school was a suitable choice. They did

the same thing to select the child's kindergarten and enrichment programs. Both parties testified that they hoped the current arrangement of equal access would continue.
    - The Attorney for the Child supported a joint custody arrangement, stating that the child wanted that. The report of the forensic evaluator was admitted into evidence but the evaluator did not testify. The evaluator recommended that the current joint custody arrangement continue but, if the parties continued to fight over custody, that sole custody be awarded to the father or that the Court consider assigning each parent "a domain of expertise".
    - The Court expressed concern that the father was arguing for sole custody to avoid paying child support since he stated that he wanted the present equal access schedule to continue and his objections to decisions made by the mother appeared to be based on economic implications of those decisions. The Court found that the father failed to prove his claim that he was the child's primary care taker during the marriage or that he was the parent who initiated decisions for the child, either now or in the past. "The sense that the Court is left with is that he cooperates in parenting if it will not cost him too much money and he supports the decisions and plans and even helps implement the plans which are initiated by the mother".
    - The Court noted that the mother had taken steps to address her drug use, had consistently tested negatively, and recognized that her use of drugs had serious consequences. The Court noted that the incident of domestic violence alleged by the mother appeared to be an isolated incident culminating with the end of the parties' relationship.
- Holding
    - Supreme Court awarded joint custody of the parties' son to the parties with a week on, week off parenting schedule.

II. <u>50/50 Parenting Time Rejected</u>

Tatum v. Simmons, 133 A.D.3d 550, 21 N.Y.S.3d 208 (1st Dept. 2015).

- Facts
    - Judgment of Divorce awarded the parties joint legal custody of their child with separate decision-making zones and a near 50/50 parental access schedule.
    - The lower court determined that it was in the child's best interests for the parents to NOT have a 50/50 access schedule.
- Holding
    - Affirmed.
- Reasoning
    - The court looked at the interim access schedule that was in place and why it did not work/why it should not be continued as the permanent schedule going forward. The temporary access schedule during the pendency of the action was a

50/50 schedule, and the court found that this schedule had too many transitions and too much opportunity for conflict.
    - The court found that the forensic evaluator was overly optimistic about the parties' ability to work together in the future.
    - The court said that there was evidence of hostility and strife between the parties, which the court did not believe would subside even after the divorce.

Tumanova v. Ali, 164 A.D.3d 1247, 83 N.Y.S.3d 204 (2d Dept. 2018).

- Facts
    - Mother filed a petition for sole custody of the child.
    - Father filed a cross-petition for sole custody of the child.
    - At a hearing on the petitions, the mother testified that she was the child's primary caregiver. The father testified that the parties had shared caregiving responsibilities for the child while they lived together and that he had taken care of the child after the mother left.
    - The Family Court granted the father's cross-petition for sole custody and dismissed the mother's petition for sole custody.
    - The mother then brought this appeal.
- Holding
    - Affirmed.
    - The court held that the lower court's determination that an award of custody to the father was in the child's best interests has a sound and substantial basis in the record and thus will not be distributed.
- Reasoning
    - Joint custody is not appropriate here under the circumstances of this case because the record demonstrated that the parties are unable to cooperate on matters concerning the child.

Jorge JJ. v. Erica II., 191 A.D.3d 1188 (3d Dept. 2021)

- The Court denied Father's request for 50/50 custody, due to his history of child abuse and repeated false child abuse allegations against the Mother, as well as the Mother's history of providing a stable environment for the child as the custodial parent for years.

B. *50/50 PARENTING TIME AND RIGHT OF FIRST REFUSAL (CUSTODY*)

C.M.W. v. R.J.W, 73 Misc. 3d 1202(A) (N.Y. Sup. Ct. June 14, 2021)(Monroe County)

- Facts
    - The parties entered into a final Consent Order prior to trial which provided that they shall have joint legal custody and a shared 50/50 parenting schedule of their two (2) minor children. The parties' custody disagreement at trial boiled down disputes surround which 50/50 schedule would be in their children's best interest with the father preferring a alternating overnight schedule and weekend schedule and the mother preferring a "traditional" 2-2-3 schedule.

- Holding
    - The Hon. Richard Dollinger declined each parents right of first refusal, which would require the parent who had the children offer the other parent time in the event the parent with children were to be unavailable for a duration of time.
- Reasoning
    - "In this Court's experience the right of first refusal leads to disruption of the child's schedule, confuses the children and potentially cause disputes between the parents. Under the access schedule set by the Court, each parent will have substantial time during the week to be in the children's presence and have uninterrupted time during their weekends."

D.M.S.. v. S.S.P, 17 Misc. 3d 1108(A) (N.Y. Sup. Ct. October 4, 2007)(Nassau County)

- Facts
    - Mother filed a petition to modify her visitation arrangement by eliminating all mid-week visitation, changing the times of the visitation, and removing over of the father's three weekend visits each month. Mother further sought to be provided the "right of first refusal" in the event the father needed a childcare provider for his children during his parenting time.
- Holding
    - The court declined the Mothers' request.
- Reasoning
    - The Court did not believe it has the power to dictate to either parent who must be used as a childcare provider. Seeking such a right of first refusal is something the mother should have done when negotiating either of the two previous orders of the Court.

C. ***SHARED CUSTODY AND THE APPLICATION OF CHILD SUPPORT.***

The case law regarding shared custody and child support has definite grey areas in interpretation and is decided on a case-by-case basis. In what appears to be a confusing state of the law regarding split custody arrangements and child support has come down to the four departments different interpretations of the leading Court of Appeals case, *Bast v. Rossoff*, 697 N.E.2d 1009, 676 N.Y.S.2d 19, 1998 N.Y. Slip Op 05954 (1998). In *Bast* the Court of Appeals held that child support in a shared custody case should be calculated as it is in any other case, by utilizing the three-step statutory formula set forth in the CSSA.

Accordingly, the parties were two attorneys, who had one daughter. They agreed to a shared time allocation, whereby plaintiff- father would have the child Wednesday evening to Sunday Evening one week, and Wednesday evening to Thursday morning the following week.

The trial court rejected applying a proportional offset formula, which reduces support obligation based upon the amount of time he spends with the child.

The trial court concluded 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 CSSA percentages. The trial court then went on to the factors set forth in DRL 240(1-b) (f).

The Court of appeals went on the state that "the CSSA clearly 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. Even where a trial court rejects the amount derived from the statutory formula, it must set forth that amount in its written order."

The Court of Appeals held "the reality of the situation governs."

The Court went on to specifically reject the proportional formula, reciting that the proportional formula could greatly reduce a child support award and deprive the child of needed resources, that a threshold of the percentage of time comes into play and encourages the non-custodial parent to seek more time for reasons of reducing a support obligation, where they should want to spend time with the child. Also, the proportional formula is difficult to apply. The main difficulty is calculating the percentage of time each parent spends with the child, especially when there are spilt days.

Bast was decided in June of 1998, in December the third department applied Bast in the case of

Baraby v. Baraby, 681 N.Y.S.2d 826, 250 A.D.2d 201, 1998 Slip Op. 11250 (3rd Dept. 1998).

The Court in *Baraby* recognized that *Bast* never addressed how to apply the CSSA in cases of equal shared custody.

Here, the parties were married with two children. The court held 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 to the other parent unless the statutory formulae yield a result that is "unjust or inappropriate."

Nevertheless, the court interpreted *Bast* to apply by calculating the three-step formula and that the parent who has the higher pro rata share of the support obligation, should be deemed as the non-custodial parent for support purposes.

The first department in Rubin v. Della Salla, 964 N.Y.S. 2d, 107 A.D.3d 60, Slip Op. 02681 (1st Dept. 2013), who applied *Bast* held 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.

Accordingly, the parties had a custody arrangement that provided the father with more time with the child and was deemed the custodial parent. The mother challenged as the result of child support was "unjust and inappropriate" after conceding the child spent more time with the father.

The court went on to discuss waking hours to determine how much custodial time was spent with a parent and reject that method **and instead held the number of overnights, not waking hours would determine who is the custodial parent for purposes of child support**. "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 approach." There was born the rule that a strict counting of overnights determined the custodial parent.

The Fourth Department had an interesting case on the effect of sole custody with a spilt parental schedule. The Court found that the cases involved awarded joint legal custody, whereas this Plaintiff was awarded sole legal custody; "that fact, however, should not affect the child support determination. Although the award of sole legal custody to plaintiff allows him to make important decisions in the children's lives, that decision-making authority does not increase his child-related costs. A parent's child-related costs are dictated by the amount of time he or she spends with the children, and, here, plaintiff spends no more time with the children than does defendant. We note, moreover, that there is already a significant disparity in the parties' incomes, and an award of child support to plaintiff would only widen that gulf. In our view, the children's standard of living should not vary so drastically from one parent's house to the other." *Leonard v. Leonard*, 109 A.D.3d 126, 129, 968 N.Y.S.2d 762, 764 (4th Dept. 2013).

The Second Department in *Smisek v. DeSantis*, 209 A.D.3d 142, 174 N.Y.S.3d 139, 2022 N.Y. Slip Op. 05210 (2nd Dept. 2022) rejected the strict counting of overnights and instead ruled that *Bast* held that the "reality of the situation" prevails. This is a case from Nassau Family Court where the father argued successfully that the *Baraby* rule should be applied and that the strict counting of overnights yielded which parent was the custodial parent for purposes of child support. The Second Dept rejected this interpretation and applied a more flexible approach in that the "reality of the situation" is the deciding factor.

The court held that while a counting of 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. Examples of the reality of the situation governs were given by the Court citing *Riemersma v. Riemersma*, 84 AD3d 1474, 3rd Dept, where each party had seven out of fourteen overnights. However, it was undisputed that the mother had the children 65% as it considered the "overall amount of time" each parents spend with the Children. In *Smisek*, the custody arrangement was near to 50-50, with the mother having a greater number of custodial days and hours and father with more custodial overnights, she argued due to the 50-50 nearness, the court should have a more flexible approach then a strict counting of overnights. The Court agreed and held that the reality of the situation in 50-50 cases govern, basically making each split custody case an exercise in counting of overnights and hours. It appears when it is as near as 50-50 as it gets, the lower wage earner collects child support.

Therefore, the current state of the law would be that in cases with true shared custody, the statutory formula in the CSSA applies first, then there is the consideration for if the calculation yields a result that is "unjust or inappropriate." Also, in determining which parent is the custodial parent for purposes of child support, the strict counting of overnights may work in

some departments, but the “reality of the situation” is the rule to follow in the Second Department. The lesson here is that it depends on which department you are in depends on the nuance of computing custodial time.

EXCESSIVE VISITATION

Another aspect to consider is the case line that discusses “excessive visitation” in contrast to 50-50 custody.

R.K. v. R.G., 169 A.D.3d 892, 894–95, 94 N.Y.S.3d 622, 625–26 (2nd Dept. 2019).

The trial court ordered that the mother's four weeks of summer parental access with the parties' child be nonconsecutive, directed that the father shall have parental access with the parties' child on the first three weekends of every month, directed that the mother shall pay 58% of the cost of a parenting coordinator, and authorized the parenting coordinator to resolve issues between the parties.

The Second Department disagreed with the Supreme Court's determination to direct that the father shall have parental access with the child on the first three weekends of every month., A parenting schedule that deprives the custodial parent of any significant quality time with the child is excessive (*see Matter of Sarfati v. DeJesus*, 158 A.D.3d 807, 808–809, 71 N.Y.S.3d 165; *Matter of Rivera v. Fowler*, 112 A.D.3d 835, 836, 978 N.Y.S.2d 48; *Chamberlain v. Chamberlain*, 24 A.D.3d at 593, 808 N.Y.S.2d 352). Here, the parenting schedule awarding the father parental access with the school-aged child, who was born in 2007, three weekends per month was excessive, as, given the respective work and school schedules of the mother and child, it effectively deprived the mother of any significant quality time with the child (*see Matter of Sarfati v. DeJesus*, 158 A.D.3d at 809, 71 N.Y.S.3d 165; *Matter of Patrick v. Farris*, 39 A.D.3d 864, 865, 835 N.Y.S.2d 617; *Chamberlain v. Chamberlain*, 24 A.D.3d at 592–593, 808 N.Y.S.2d 352). Under the circumstances of this case, we find that it would be more appropriate for the father to have parental access with the child every other weekend, and one overnight per week (*see Matter of Sarfati v. DeJesus*, 158 A.D.3d at 809, 71 N.Y.S.3d 165; *Matter of Rivera v. Fowler*, 112 A.D.3d at 837, 978 N.Y.S.2d 48).

To extend further on the caselaw reciting three consecutive weekends as excessive visitation as it deprives the custodial parent of meaningful time with the child, there is another Second Department case called Sarfati.

Sarfati v. DeJesus, 158 A.D.3d 807, 809, 71 N.Y.S.3d 165, 167 (2nd Dept. 2018).

Here, the visitation schedule awarding the father visitation with the school-aged children three weekends per month was excessive, as it effectively deprived the mother of any significant quality time with the children (*see Matter of Patrick v. Farris*, 39 A.D.3d 864, 865, 835 N.Y.S.2d 617; *see also Matter of Razdan v. Mendoza–Pautrat*, 137 A.D.3d 1149, 1150, 27 N.Y.S.3d 641; *Matter of Rivera v. Fowler*, 112 A.D.3d at 836, 978 N.Y.S.2d 48). Under the

circumstances of this case, including the mother's consent to alternate weekend visitation, we find that it would be more appropriate to award the father visitation on alternate weekends.

Another extension of excessive visitation in the Second Dept is *Waldron v. Dussek*, 48 A.D.3d 471, 472, 851 N.Y.S.2d 630 (2nd Dept. 2008).

Here, the determination of the Family Court to award the father visitation with the children on the first three weekends of every month is not supported by the record. Under the circumstances, the best interests of the children would be better served by awarding the father visitation with the children on alternating weekends rather than the first three weekends of every month, **particularly since one of the children is of school age, and visitation on alternating weekends is thus "a more appropriate schedule, consistent with the parental rights and responsibilities of both parties**" (*Chamberlain v Chamberlain*, 24 AD3d 589, 593 [2005]; *see Matter of Patrick v Farris*, 39 AD3d 864, 865 [2007]; *Jordan v Jordan*, 8 AD3d 444, 445 [2004]).

As for the Fourth Department, in *Miller v. McCown-Hall*, 134 A.D.3d 1386, 1387, 21 N.Y.S.3d 514, 514–15 (4th Dept. 2015).

It discussed a case regarding grandparent visitation. The Court ruled there was excessive visitation with the grandmother which deprived the mother of meaningful holiday time. The Court agreed with the mother, that the trial court abused its discretion in awarding the paternal grandmother excessive visitation that "deprived the mother of significant quality time with the children" (*Matter of Dubiel v. Schaefer*, 108 A.D.3d 1093, 1095, 969 N.Y.S.2d 311 [internal quotation marks omitted]; *see Cesario v. Cesario*, 168 A.D.2d 911, 911, 565 N.Y.S.2d 653). The order was modified.

The court modified that petitioner have visitation instead of "each and every Thanksgiving" and inserting in place thereof a direction that petitioner have visitation "in odd years on Thanksgiving," vacating that part of the third ordering paragraph directing that petitioner have visitation "each and every Christmas Day" and inserting in place thereof a direction that petitioner have visitation "in even years on Christmas Day.

Another Fourth Dept. case is *Cesario v. Cesario*, 168 A.D.2d 911, 911, 565 N.Y.S.2d 653, 653–54 (1990).

The award of visitation to defendant was excessive, however, as it deprived plaintiff of any significant "quality time" with the child. Under the visitation award, the defendant has the child every weekend from Friday after school until Sunday evening as well as one weekday evening each week. Under this visitation schedule, plaintiff prepares the child for school in the morning and spends three evenings a week with her. "Visitation is always to be premised upon a consideration of the best interests of the children" (*DePinto v. DePinto*, 98 A.D.2d 985, 470 N.Y.S.2d 234; *Parker v. Ford*, 89 A.D.2d 806, 806–807, 453 N.Y.S.2d 465; *Chirumbolo v. Chirumbolo*, 75 A.D.2d 992, 993, 429 N.Y.S.2d 112). In our view, the visitation provisions of the judgment should be modified to grant defendant visitation every other weekend together with the weekday evening, summer vacation and alternate holiday provisions of the judgment. We

conclude that such a modification is warranted in the best interests of the child (*cf., Trolf v. Trolf*, 126 A.D.2d 544, 510 N.Y.S.2d 666.

However, the Fourth Department disagreed in Cesario to adopt a second department case named *Trolf v. Trolf*, 126 A.D.2d 544, 510 N.Y.S.2d 666, 667 (2nd Dept. 1987). In this case, custody was awarded to the mother, and the father was given a liberal visitation schedule, affording him three nights a week.

The Second Department held "**an award of joint custody is only appropriate where the parties involved are relatively stable, amicable parents who can behave in a mature, civilized fashion**" (*see, Braiman v. Braiman*, 44 N.Y.2d 584, 589–590, 407 N.Y.S.2d 449, 378 N.E.2d 1019; *Matter of Sooy v. Sooy*, 101 A.D.2d 287, 475 N.Y.S.2d 920, affd. 64 N.Y.2d 946, 488 N.Y.S.2d 637, 477 N.E.2d 1091). They must be **capable of cooperating in making decisions** on matters relating to the care and welfare of the children (*see, Robinson v. Robinson*, 111 A.D.2d 316, 489 N.Y.S.2d 301, appeal dismissed 66 N.Y.2d 613, 498 N.Y.S.2d 1030, 489 N.E.2d 258; *Matter of Bishop v. Lansley*, 106 A.D.2d 732, 483 N.Y.S.2d 767). At bar, although the evidence adduced established that both of the parties are fit parents and love their children, the record is replete with examples of the hostility and antagonism between them and it has been demonstrated that they are unable to put aside their differences for the good of their children. Thus, an award of joint custody is not appropriate (*see, Bliss v. Ach*, 56 N.Y.2d 995, 453 N.Y.S.2d 633, 439 N.E.2d 349; *Matter of Patricia R. v. Thomas R*., 93 A.D.2d 105, 462 N.Y.S.2d 73, *appeal dismissed* 59 N.Y.2d 761; *Seago v. Arnold*, 91 A.D.2d 835, 458 N.Y.S.2d 427; *Bergson v. Bergson*, 68 A.D.2d 931, 414 N.Y.S.2d 593). Custody of the children shall remain with their mother. The plaintiff's job, which evidently consistently requires her to be away from home three days a week, offers a perfect opportunity for the defendant to keep the children overnight on a regular basis, and this opportunity should be utilized by the parties in reaching an agreement. We also believe it to be in the children's best interests to allow them to spend some vacation time, as well as certain holidays, with their father. *Trolf v. Trolf*, 126 A.D.2d 544, 510 N.Y.S.2d 666, 667 (2nd Dept. 1987).

Rivera v. Fowler, 112 A.D.3d 835, 836–37, 978 N.Y.S.2d 48, 51 (2nd Dept. 2013)

The Second Dept held that the Family Court improvidently exercised its discretion in providing that the father have visitation every weekend, beginning Saturday at noon and ending Sunday at 8:00 p.m. The extent to which the noncustodial parent may exercise parenting time is a matter committed to the sound discretion of the hearing court, to be determined on the basis of the best interests of the child (consistent with the concurrent right of the child and the noncustodial parent to meaningful time together (*see Chamberlain v. Chamberlain*, 24 A.D.3d 589, 808 N.Y.S.2d 352; *Matter of Grossman v. Grossman*, 5 A.D.3d 486, 487, 772 N.Y.S.2d 559; *Matter of Ritz v. Otero*, 265 A.D.2d 560, 697 N.Y.S.2d 123; *Matter of Mackey v. Mackey*, 265 A.D.2d 329, 696 N.Y.S.2d 695; *Matter of Bradley v. Wright*, 260 A.D.2d 477, 686 N.Y.S.2d 327).

A visitation schedule that deprives the custodial parent of "any significant quality time" with the child is, however, excessive (*Matter of Felty v. Felty*, 108 A.D.3d 705, 708, 969

N.Y.S.2d 557; *Chamberlain v. Chamberlain*, 24 A.D.3d at 593, 808 N.Y.S.2d 352; *Cesario v. Cesario*, 168 A.D.2d 911, 911, 565 N.Y.S.2d 653 [internal quotation marks omitted]). Here, the schedule established by the Family Court effectively deprived the mother of any significant quality time with the children during each weekend. Moreover, the Family Court improvidently exercised its discretion in failing to specify the period of the mother's visitation with the children during their summer vacation.

CHILD TAX DEDUCTION

When there is a true 50/50 split in custody between two parents, the IRS considers other factors, such as whether both parents are true biological parents and which parent has a higher adjusted gross income. If neither party is a biological parent, the amount of adjusted gross income is often a deciding factor.

An IRS Form 8332 can enable parents to alternate the tax years that each parent claims a dependent child in order to share the tax benefits that each ex-spouse is entitled to. This form is also used to enable a non-custodial parent to claim a child on individual filed taxes. One circumstance that may justify the use of this form is if the parent who is eligible to claim the dependent chooses not to and wants to allow the other parent to claim the child for tax purposes.

The IRS allows you to amend a tax return that you have filed within the last three years or within the last two years of paying the relevant tax if you claimed a dependent child in error. If you can prove that the error was unintentional, the IRS may waive the penalty fee. However, you also may be responsible for paying an additional tax for that year based upon who should have legally claimed the dependent child.

In general, in cases of equal income, the “custodial parent” is the parent with 183 overnights or more. When parents share parenting time equally (50/50), one of the two parents must have at least one more overnight than the other because there are an odd number of days in a year (365). In most cases, one parent will have 183 overnights and the other will have 182 overnights. The one with 183 overnights is the parent who is entitled to federal and state tax deductions and exemptions.

Under the IRS’ regulations, there is no such thing as “dual-custodial parents” when you have equal or joint custody. Therefore, one or the other parent must claim the tax benefits, but not both.

If custody is almost 50/50 and parents cannot decide what to do, the IRS will give credit to the parent with the highest adjusted gross income. This is the option they will choose in every case if parents do not decide independently, so it can be helpful to discuss your decision with your co-parent before the IRS forces your hand.

It is Better to Agree on Who Will Claim the Tax Benefit

Even though you may think you have 183 overnights in a year, a long vacation or a strange circumstance concerning holiday parenting time may cause the other parent to have more

parenting time in a particular year. Because of this unique nuance in the law, it is often best for parents to decide who will claim the child on their taxes for each tax year.

Many parents who have equal parenting time will simply divide the tax benefits and alternate years where one parent will claim the child the first year, and the other parent the second year. Parents with multiple children will sometimes allocate the child credits where one parent claims the same child every year and another parent claim another child. Parents with three children will often allocate one child to one parent, allocate a second child to the other parent, and then alternate years for the third child.

EDUCATION LAW

Education Law Section 3202(1) provides for the residency requirements for school district purposes. The school district only has one residential parent even with true- 50-50 custody. The education Law goes by the Pillow test, which is the number of nights the student sleeps the most with, from Sunday to Thursday, is the residential parent for school district purposes.

D. *DEVIATION FROM CSSA IN SHARED CUSTODY ARRANGEMENTS*

It is well-settled that when a child spends fifty percent (50%) of their time with each parent, and where a court determines that support should be calculated in accordance with the Child Support Standards Act guidelines in a *pendente lite* scenario, it must still be calculated in accordance with DRL §240 [1-b][c][1]-[3]. However, this does not mean that the spouse having the higher income must pay the guideline amount of child support dictated by strict application of the Child Support Standards Act. To the contrary, while the statutory formula must be calculated since there is no exemption articulated within the statute for shared custody, if "the statutory formula yields a result that is unjust or inappropriate, the trial court can resort to the paragraph (f) factors and order payment of an amount that is just and appropriate". *Baraby v. Baraby*, 250 A.D.2d 201, 681 N.Y.S.2d 826 (3d Dep't, 1998, (citing *Bast v. Rossoff*, 675 N.Y.S.2d 19 (1998); DRL §240[1-b][f][g]. Though the Guideline award must be calculated first, the unjust nature of strict CSSA application under the instant set of circumstances can be addressed by an articulated deviation pursuant to the enumerated factors for deviation.

Courts throughout this State have appropriately afforded a deviation from the CSSA in "equal access" circumstances after computation of the presumptive award, when a demonstration has been made that strict application of the guidelines would be unjust or inappropriate. In *Carlino v. Carlino*, 277 A.D.2d 897 (4th Dept., 2000) where the parties shared an equal access schedule, the Appellate Division vacated a support award of strict guidelines application, stating "*Pursuant to Family Court Act § 413 (1)(f), the court must order the noncustodial parent to pay his or her pro rata share of the basic child support obligation unless it finds that the pro rata share is unjust or inappropriate, based upon consideration of factors such as (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof.*" *Id.* at 898. In determining that the parties shared an equal access schedule, the Court concluded that such a custody-sharing situation constituted

"extended visitation" warranting a deviation from CSSA and a proper modification to the child support award.

In *Hughes v. Hughes*, 200 A.D.3d 1404, 161 N.Y.S.3d 350, 355, where the parties had a *de facto* pure shared custody arrangement, the Court upheld a downward deviation by 60% from the presumptively correct amount of child support under the CSSA. Instead of $1,329 per month under the formula, the wife was directed to pay $500 per month. The court also considered that, (a) the wife was directed to continue to maintain medical and dental insurance for the children and be responsible for 100% of the premium, and (b) the wife had to maintain a household while managing significant debt which would have been exacerbated if she were required to pay support based on the statutory formula.

Similarly, the court in *Elizabeth B. v. Scott B.*, 189 A.D.3d 1833, 137 N.Y.S. 3d 574 (3d Dept. 2020) upheld a downward deviation of the father's basic child support obligation in light of the parties' equally shared physical custody arrangement, and the nonmonetary contributions that the father would make toward the care and well-being of the child. *See also*, *Hunt v. Hunt*, 134 A.D.3d 991, 20 N.Y.S.3d 907 (2d Dept. 2015).

STUDIES AND ARTICLES

A) ***Joint versus sole physical custody: Outcomes for children independent of family income or parental conflict*** - Linda Nielsen, Pages 35-54 | Published online: 24 Jan 2018

- In the 60 studies published in English in academic journals or in government reports, 34 studies found that JPC children had better outcomes on all of the measures of behavioral, emotional, physical, and academic well-being and relationships with parents and grandparents.
- In the 19 studies that included parental conflict, JPC children had better outcomes on all measures in 9 studies, equal to better outcomes in 5 studies, equal outcomes in 2 studies, and worse outcomes on one measure but equal or better outcomes on other measures in 3 studies. In sum, independent of family income or parental conflict, JPC is generally linked to better outcomes for children.

B) ***Early child development research demonstrates that overnight stays with fathers after a divorce are important for very young*** children By Child & Family Blog Editor | October 2018

- Warshak presents six categories of evidence from fatherhood research that, together, strongly support the idea that overnight stays with both parents from infancy are, in general, a good thing for early child development.
- Warshak noted from the research that when father–infant contacts include overnights after parents separate, we see a lower incidence of father absenteeism when compared to father–infant contacts that were restricted to the daytime. As the evidence above shows, father dropout is a significant early child development issue.

C) Children in joint physical custody arrangements suffered from less psychosomatic problems than those living mostly or only with one parent, but reported more symptoms than those in nuclear families.
   - From the article: ***'50 Moves a year: Is there an association between joint physical custody and psychosomatic problems in children***' – Reported in the Journal of Epidemiology and Community Health – April 2015
   - TIME Article referencing study: This Divorce Arrangement Stresses Kids Out Most (April 2015)

D) Children in joint custody arrangements had less behavior and emotional problems, had higher self-esteem, better family relations and school performance than children in sole custody arrangements.
   - Article from American Psychological Association: ***Children Likely to Be Better Adjusted in Joint vs Sole Custody Arrangements in Most Cases, According to Review of Research*** (2002)
   - Based on meta-analysis of 33 studies between conducted in Maryland between 1982-1999, by psychologist Robert Bauserman, Ph.D
   - Joint custody defined as either equal or substantial time with both parties or shared legal custody where both parents involved in all aspects of the child's life.
   - These children were as well-adjusted as intact family children on the same measures, probably because joint custody provides the child with an opportunity to have ongoing contact with both parents.
   - Child actually do not need to be in a joint physical custodial arrangement to show better adjustment but just need to spend substantial time with both parents, especially their fathers.
   - Joint custody couples reported less conflict, possibly because both could participate in their children's lives equally.
   - Sole custodial parents reported higher conflict.

E) Overnight stays with both parents from infancy are, in general, a good thing and support early child development.
   - From Article – ***Early child development research demonstrates that overnight stays with fathers after a divorce are important for very young children***. (ChildandFamilyBlog.com, October 2018)
   - Referencing research paper by Richard A. Warshak, Clinical Professor of Psychology at the University of Texas Southwestern Medical Center.
   - Some quoted statements from the article referencing the Warshak research: statements based on fatherhood research referenced:
     - Strong evidence shows that, on average, fathers' emotional investment in, attachment to, and positive parenting of their children predicts better psychological outcomes across a wide range of social, emotional, and cognitive development.

- Compared with children whose parents are married, other children have a higher incidence of adjustment difficulties that extend into adolescence and early adulthood, including high school dropout and suspension, externalizing behavior problems such as aggression, substance abuse, and poor relationships with both parents.
- In the US National Survey of Children's longitudinal study of young adults 14 years after their parents' divorce, the majority of children from divorced homes scored within normal limits in most developmental domains, with one exception: two out of three suffered chronically poor relationships with their fathers.
- Children whose parents divorced when the child was younger than six years are more likely to suffer problems than children of later-divorcing parents. The father-child relationship (but not the mother-child relationship) is likely to be worse for these children. These data point to the need for particular support for the father-child relationship for younger children when parents separate.
- When father–infant contacts include overnights after parents separate, we see a lower incidence of father absenteeism when compared to father–infant contacts that were restricted to the daytime. As the evidence above shows, father dropout is a significant early child development issue.
- Divorced fathers who feel enfranchised rather than marginalized as parents maintain greater contact with their children and are more apt to pay child support. Depriving a father of the experience of having his child spend the night in his home is likely to diminish the father's sense of being a fully enfranchised parent.

F) Equal parenting is the optimal arrangement for most children of divorce.

- Article: ***Equal Parenting and the Quality of Parent-Child Attachments*** (Psychology Today, March 2013, by Edward Kruk, Ph.D – Associate Professor Social Work at the University of British Columbia, specializing in child and family policy.
- Referencing research by Fabricus, (2011(and Bauserman (2012)
- The quality of attachment relationships is a major factor associated with the well-being of very young children.
- Attachment bonds are formed through mutual participation in daily routines, including bedtime and waking rituals, transitions to and from school, and extracurricular and recreational activities.
- There is a direct correlation between quantity of time and quality of parent-child relationships, as high quality relationships between parents and children are not possible without sufficient, routine time to develop and sustain a quality relationship.
- Parent well-being is furthered with equal or shared parenting, as neither parent is threatened with the loss of his or her children (Bauserman).

- Equal parenting is a viable option to the present destructive adversarial "winner-take-all" “primary parent” divorce system, for both young and older children, and for those in high conflict as well as cooperative households.
- Parental conflict goes down with joint custody.
- Meaningful relationships are developed and sustained through emotional connectedness, and this is made possible through the emotional stability and security of meaningful (fair and equal) parenting time.
- The highest and lowest levels of parental satisfaction with parenting arrangements after divorce are found in sole custody / primary residence families: custodial or primary residential parents report the highest levels of satisfaction with parenting after divorce arrangements while non-custodial/non-residential parents report the lowest. Between these extremes lies equal parenting, where both mothers and fathers report satisfaction.

G) Sufficient evidence does not exist to support postponing the introduction of regular and frequent involvement, including overnights, of both parents with their babies and toddlers.

- ***Social science and parenting plans for young children: A consensus report*** - Warshak, Richard (2014) Psychology, Public Policy and Law. APA.com

H) Joint physical custody might counteract the potential negative effects of parental separation.

- Scandinavian Journal of Public Health
- From - ‘***Does Shared Parenting Help or Hurt Children in High Conflict Divorced Families?***’ (March 2021)
- Reviewed 11 studies of the relations between parenting time and the quality of parenting with children’s adjustment in high conflict divorced families.
- Higher levels of shared parenting were related to poorer child adjustment in samples with high conflict many years following the divorce, but typically not in samples that assessed conflict during the divorcing process or in the two or three years following the divorce.
- Referencing four studies that found that more contact with the father was associated with more child adjustment problems when there were high levels of chronic, persistent interparental conflict, these studies did not provide guidance for decision made at the time of the divorce.
- There is no consistent set of findings that support a policy against shared parenting based on having a conflictual relationship at the time of the divorce.
- The current evidence provides guidance as to the factors that should be considered in making decision about parenting time for high conflict divorce including considering the nature of the interparental conflict in terms of severity, frequency, child exposure, and the role each parent plays in maintaining the conflict.
- It is also critical to assess the potential of both parents to provide moderate to high quality parenting in terms of a warm and close relationship with the child.

- High quality parenting is most likely to be beneficial if children have adequate time with their parent (Sandler et al., 2013)

I) **Article – '*New Observations on Sole and Joint Custody for Children – New perspective from 40 years of research says sole custody is better for kids*' – by Christine B.L. Adams, MD, Child psychiatrist in private practice in Louisville, KY.**
- People who get divorced have already established they cannot get along with one another and therefore do not collaborate well with one another.
- Consistency in parenting does not take place in joint custody.
- As long as children live with married parents, they are buffered and protected from the care-consumer parent by the other parent who better meets their needs.
- The author finds that joint custody does not work due to the effects of emotional conditioning received in childhood that result in dissimilar personalities and different parental roles in the adults.
- Sole custody works best provided the correct parent is the custodian – the emotionally caregiving parent (not the care-consuming parent), and neither fathers nor mothers predominate as emotional caregivers.
- The author suggested relying on custody evaluators to help determine who the emotional care-giving parent is and in spotting parental alienation.

J) From '***Shared Physical Custody: Summary of 40 Studies on Outcomes for Children***' – (2014) by Linda Nielsen, Dept. of Education, Wake Forest University
- Reviewed U.S. and international studies.
- Generally speaking, the 40 studies reached similar conclusions.
- 1) Shared parenting was linked to better outcomes for children of all ages across a wide range of emotional, behavioral, and physical health measures;
- 2) There was not any convincing evidence that overnighting or shared parenting was linked to negative outcomes for infants or toddlers;
- 3) The outcomes are not positive when there is a history of violence or when the children do not like or get along with their father;
- 4) Even though shared parenting couples tend to have somewhat higher incomes and somewhat less verbal conflict than other parents, these two factors alone do not explain the better outcomes for children.

K) From ***Presumptive Joint Custody: What the Research Demonstrates*** (2019 – from Michigan Coalition to End Domestic and Sexual Violence.
- Joint custody has not been shown to positively impact children when not agreed to by parents.
- Presumptive joint custody improperly shifts the focus to the parents' interests rather than the best interests of the child.
- Presumptive joint custody imposes a one-size-fits-all solution to complex family dynamics, neglecting the individual circumstances and need of the children and parents.

- Studies between 1984 and 2009 are cited.

Examples of 50/50 Custody Schedules

1) Week on/week off - with or without a day in between;
2) Two weeks on/two weeks off - with or without parenting time in between;
3) 3-4-4-3 Schedule - 3 days with one parent; then 4 with the other; then it switches/reverses, 4 with the first parent, 3 with the other parent.
4) 2-2-5-5- 2 days with each parent then 5 days with each parent;
5) 2-2-3 - 2 days of the mid-week with one parent (Monday-Wednesday; then 2 days of the mid-week with the other (Wednesday -Friday); then the weekend (Friday – Monday) with the first parent.
6) Alternating every 2 days.

General Pros and Cons Relating to 50/50 Parenting Plans

PROS

1. Children will have two involved Parents.
   a. Children may draw on the different strengths of their parents, such as the resources and connections of extended families.
2. Children can maintain a stable relationship with both parents.
   a. Children benefit from having both parents involved in their lives and a 50/50 custody arrangement allows for this.
3. Double the household resources
   a. Living across two households makes for a varied upbringing.
   b. Anything that one household lacks the other may provide.
4. Possible improved living standards
   a. Living across two households may improve a child's living standards generally.
5. Parents may get a much-needed rest break
   a. Not only do parents get rest breaks, but they can have a life beyond looking after children.
6. Reduction in Stress: When children are constantly shuttling between two homes with different rules, routines, and expectations, it can lead to stress and confusion. A 50/50 custody arrangement eliminates this stress, as children know where they will be and when they will be there.
7. Enhanced Development: Children of all ages require stable environments to thrive. A 50/50 custody arrangement allows children to develop close bonds with both parents, leading to emotional and social development.
8. Children tend to have higher self-esteem and better school performance when both parents play a significant role in their upbringing.
9. This level of co-parenting encourages parents to work as a team.
10. Both parents spending equal time with their child reduces gender assumptions about parenting.

CONS

1. It can be difficult logistically, especially if parents do not live in close proximity of each other.
2. Shared parenting may have children travelling more, though in many 50/50 custody schedules the time changeovers can occur through school so there is no extra travel involved.
3. 50/50 may not necessarily be suitable for very young child who my need a home base.
4. Frequent exchanges mean that parents have regular in-person contact, which can create conflict that negatively impacts children.
5. Some children may struggle to adapt to frequently moving between homes.
6. 50/50 parenting time can reduce or possibly eliminate child support payments, which may leave children without adequate financial support.

Some Variables to Consider in Every Case:

- The child's personality
- Atmosphere in each home
- The distance between homes
- How organized everyone can be
- Does child have learning disabilities or problems?
- How will it affect the child's education development?
- Are transitions from parent to parent difficult for the child?
- Are there health or mental health issues?

Equal or Shared Parenting Law in Other States

In recent years, state legislatures across the U.S. have passed laws designed to encourage equal shared parenting.

- For example, Kentucky law assumes equal custody unless evidence proves a different arrangement is necessary. Arizona family courts must maximize each parent's time with the child. In Missouri custody trials, judges who don't order shared legal custody must justify their decision, and parents who don't ask for it in a settlement must explain why it wouldn't work.

2022 National Child Support and Shared Parenting Report

New York is one of only 9 states lacking a presumptive parenting time adjustment formula; instead it relies on unnecessarily costly and lengthy court deviation procedures generally inaccessible to lower income parents. The lack of a presumptive PTA as an integral component of mandated presumptive child support guidelines arguably violates federal regulatory requirements.

- Grade: F
- https://static1.squarespace.com/static/5e28a95cdc8bed16729b93de/t/6222401f3db1a36e6ae1a00a/1646411808645/2022+Child+Support+and+Shared+Parenting+Report+Card.pdf