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Courts Must Report Convictions Connected to Domestic Violence

By Joel Stashenko

The state legislature has directed the courts to flag misdemeanor convictions involving domestic violence, the latest among several kinds of data legislators demand from the judiciary. Consequently, since Nov. 29, 2011, information about four offenses has been funneled to the National Instant Background Check System, a federally administered program created under the Brady Handgun Prevention Act to discourage people convicted of violent crimes from buying guns.

Amy Barasch, the executive director of the New York state Office for the Prevention of Domestic Violence, said the presence of a gun in a household where domestic violence occurs increases the chances of fatalities by six times. "This new law will help us ensure that the federal prohibition against qualifying misdemeanor domestic violence offenders' eligibility to access a firearm is strongly enforced," Ms. Barasch said.

Administrative Headache?

The judiciary already reports to the governor and the legislature information about foreclosures, criminal caseloads, the composition of jury pools and other issues. The latest requirement comes at a time when

continued on page 6

Split and Shared Custody Arrangements

A Call for Modification of the CSSA

Part One of a Three-Part Article

By Jerome A. Wisselman and Lloyd C. Rosen

The Child Support Standards Act (CSSA), as we know it and as codified in Domestic Relations Law § 240 and Family Court Act § 413, went into effect Sept. 15, 1989, and recently celebrated its 22nd birthday. While the language of the statute has been modified, amended and polished over the course of the past two decades, it has yet to address specifically circumstances involving split or shared custody.

As the legislative notes state, the purpose of the statute and the formula guidelines contained therein was to "establish minimum and meaningful standards of obligations that are based on the premise that both parents share the responsibilities for child support." In 1989, when the law first went into effect, it could be argued (at the risk of making sweeping generalizations) that the typical custodial/noncustodial relationship was comprised of a post-divorce non-working or part-time employed mother in the role of custodial parent, with the father relegated to the role of a "visiting" parent and support payor. The father would pay child support to the mother, and the father would enjoy periods of visitation with the children, while the children resided primarily with the mother and spent the majority of their time with her. Deviations from this general arrangement were not addressed by the legislature in the statute.

Atypical Custody

In recent years, we have seen a much higher incidence of atypical custody and visitation arrangements, where both parents spend a great deal of time with their children. Two increasingly common arrangements can be described as split custody (where the parties have more than one child and agree that each parent is deemed the primary custodial parent of at least one of their children), and shared custody (where the parents agree that the children's residential time will be

continued on page 2

In This Issue

The CSSA

continued from page 1

shared relatively equally between the parties' two households). This changing landscape of custodial arrangements calls for our legislature to revisit the language of the Child Support Standards Act, and address the financial realities experienced by parents in split custody and shared custody arrangements.

The Child Support Standards Act

The CSSA, promulgated in near-duplicate fashion in both DRL § 240 and FCA § 413, describes a three-step process in calculating child support. The first step is to determine the combined parental income, as defined by the statutes. In the second step, that figure (up to $130,000) is multiplied by the appropriate percentage, depending on the number of children (17% for one child, 25% for two, etc.), and to determine what amount above $130,000 should be used for support purposes. The third step is to apportion support based on the respective income of the parties. Where appropriate, the court is to make a determination of child support on the combined parental income in excess of $130,000 based upon the factors set forth in DRL § 240 (1-b)(f) and/or FCA § 413 (1)(f).

Both versions of the CSSA provide that "the court shall order the non-custodial parent to pay his or her pro rata share of the basic child support obligation." *See* DRL § 240 (1-b)(f)(10) and FCA § 413 (1)(f)(10). However, the terms "custodial" and "non-custodial" are not defined within the text of the statute. The Court of Appeals in *Bast v. Rossoff*, 91 NY2d 723 (1998), has held that, notwithstanding any parental agreement, "for purposes of child support, the court can still identify the primary custodial parent" and that "in most instances, the court can determine the custodial parent for purposes of child support by identifying which parent has physical custody the majority of the time." As we shall see, this language has caused some rather unfortunate and illogical results.

'Discretion'

Although the child support statute gives the courts "discretion" for deviation in application of the Child Support Guidelines, it does not specifically provide guidance to the court for making a child support determination in split and shared custody circumstances. The courts have instead imposed their own judgment and discretion in such instances. Both DRL § 240 (1-b)(f) and FCA § 413 (1)(f) provide the court with specific factors in making a finding that the basic amount of support calculated under CSSA would be unjust or inappropriate. The specific enumerated factors are as follows:

> "(1) The financial resources of the custodial and non custodial parent, and those of the child;
> (2) The physical and emotional health of the child and his/her special needs and aptitudes;
> (3) The standard of living the child would have enjoyed had the marriage or household not been dissolved;
> (4) The tax consequences to the parties;
> (5) The non monetary contributions that the parents will make toward the care and well being of the child;
> (6) The educational needs of either parent;
> (7) A determination that the gross income of one parent is substantially less than the other parent's gross income;
> (8) The needs of the children of the non custodial parent for whom the non custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income [...], and the financial resources of any person obligated to support

continued on page 6

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Family Courts Open

continued from page 5

kind of information that I as a judge want my community to know about, so they can do what is necessary to take care of these problems," Judge Rosa said. "It is only when the community knows about the people who come in our doors that we as a society will be able to help everybody. I wish [the media] was here every day to report on what we do."

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The CSSA

continued from page 2

such children, provided, however, that this factor may apply only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action;

(9) Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non custodial parent in exercising visitation, or (ii) expenses incurred by the non custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and

(10) Any other factors the court determines are relevant in each case."

Custodial Arrangements

Notably absent from these specific factors is any reference to the custodial arrangement or the specific amount of time the children spend in the direct care of the noncustodial parent. Though the ninth factor appears tangentially to touch upon the authority to deviate, it does not directly address split and shared custodial arrangements. The issue of direct costs incurred by a "noncustodial" parent in these shared arrangements is simply not covered. This presents a dilemma for a parent who wishes to spend as much time with his or his or her children as possible. The blind application of the formula may make it financially unfeasible for the "noncustodial" parent to have the children a great deal of the time because the costs attendant to direct residential care of the children, plus the normal support award, may be too much for that parent to bear.

In the second and third parts of this article, we will take a closer look at the inequities that can occur when the courts adhere to the CSSA guidelines in a number of shared- and split-custody situations.

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Domestic Violence

continued from page 1

layoffs and early retirements have left fewer people available to compile such data. "Anything extra that is given to us, 'burden' is not the word, but it does stretch our resources," said Justice Fern A. Fisher, administrative judge for the courts in New York City. "We will comply with it."

Warwick Town Court Justice Peter D. Barlet, the head of the New York State Magistrates Association, said he is worried that another reporting requirement will create problems for some town and village court justices, especially, those without adequate staff. There are about 2,100 town and village justices in 1,750 courts around the state. Mr. Barlet said that the crimes to be reported to the state are an "everyday" occurrence in those communities. "I would say that taken singularly, this is probably something we could handle," Mr. Barlet said. "But it seems like any additional reporting requirements for us could be burdensome."

Judge Melissa Jackson the supervising judge for Manhattan Criminal Court, said she believes her court could properly identify or "stamp" cases involving domestic violence without undue burden. "I don't think there is anybody who doesn't understand what a domestic violence case is," Judge Jackson said. "The only thing that has broadened with recent changes is what the definition[s] of 'intimate relationships' are."

WHAT IS BEING REPORTED UNDER THE NEW DIRECTIVE?

Offenses covered by the new reporting system are third-degree assault (PL 120.00); criminal obstruction of breathing or blood circulation (PL 121.11); second-degree menacing (PL 120.14); and forcible touching (PL 130.52). According to the state Division of Criminal Justice Services, about 8,600 convictions for those crimes occurred as of Nov. 22, 2011. But the division does not know how many of those cases involved domestic violence.

The new statute defines potential victims of domestic violence as members of the same "family or household" as spelled out under CPL.530.11(1). They include married couples, formerly married couples, people with a child in common, people who have never been married but who have had an "intimate relationship," and people who have lived together previously.

Under the new procedures, local district attorneys are to notify defendants within 45 days of their arraignments that they have been identified as having committed a domestic violence crime. Upon conviction for one of the offenses enumerated in the law, they would be offered a hearing. Judge Jackson said she expects most defendants would not choose to have hearings.

Court clerks will send the information to the Division of Criminal

continued on page 8

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