

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 12, 2012

512827

SCOTT A. SMITH,

Appellant,

v

MEMORANDUM AND ORDER

COLLEEN SMITH,

Respondent.

Calendar Date: May 24, 2012

Before: Mercure, J.P., Kavanagh, Stein, McCarthy and
Egan Jr., JJ.

Friedman & Molinsek, Delmar (Michael P. Friedman of
counsel), for appellant.

Michael T. Horan, Schenectady, for respondent.

Mary Cosgrove Militano, Scotia, attorney for the children.

Stein, J.

Appeal from a judgment of the Supreme Court (Brown,
J.H.O.), entered June 6, 2011 in Saratoga County, granting, among
other things, plaintiff a divorce, upon a decision of the court.

Plaintiff and defendant were married in 1996 and are the
parents of twin sons (born in 1996) and a daughter (born in
2004). In 2009, plaintiff commenced this action for divorce
seeking, among other things, an order of custody and child
support. During the pendency of the action, Supreme Court
(Williams, J.) issued a temporary order after a hearing, awarding
the parties joint legal custody of the children, with the
children's primary residence to be with plaintiff, subject to a

set schedule of custodial time, and ordered that neither party would pay child support to the other pending a final order of the court.

Ultimately, after a trial, Supreme Court (Brown, J.H.O.) issued findings of fact and conclusions of law which provided, among other things, that it was in the best interests of the children that the parties have "joint custody with shared parenting as set forth in the existing temporary order . . . [which order] shall become the permanent order of the [c]ourt." Supreme Court also "deemed [plaintiff] to be the non-custodial parent by virtue of his greater income for purposes of child support," and directed plaintiff to pay an amount of support to defendant pursuant to Domestic Relations Law § 240 (1-b). The parties' marriage was thereafter dissolved by judgment of divorce which, among other things, incorporated the findings of fact and conclusions of law.¹ Plaintiff now appeals.

As limited by his brief, plaintiff's appeal centers on Supreme Court's child support determination. Specifically, plaintiff argues, among other things, that Supreme Court erroneously designated him as the noncustodial parent and required him to pay child support. We agree. It is well established that the Child Support Standards Act (see Domestic Relations Law § 240 [1-b]) is applicable to cases involving joint custody (see Bast v Rossoff, 91 NY2d 723, 726 [1998]; Riemersma v Riemersma, 84 AD3d 1474, 1475-1476 [2011]). Generally, the custodial parent for purposes of child support is the parent who has physical custody of the children for the majority of the time (see Bast v Rossoff, 91 NY2d at 728; Riemersma v Riemersma, 84 AD3d at 1475-1476). In such cases, the court may determine which parent is the custodial parent based on the "'reality of the situation'" (Riemersma v Riemersma, 84 AD3d at 1476, quoting Bast v Rossoff, 91 NY2d at 728). It is only when "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" that the parent with the greater pro

¹ The judgment, however, specifically provided that the children's primary residence would be with plaintiff.

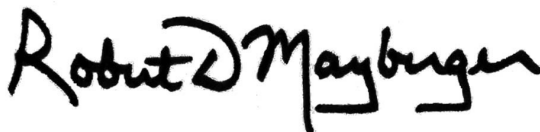
rata share of the child support obligation as calculated pursuant to the Child Support Standards Act should be identified as the noncustodial parent (Baraby v Baraby, 250 AD2d 201, 204 [1998]).

Here, Supreme Court's judgment provides that the children's primary physical residence is to be with plaintiff and sets a parenting schedule that undisputedly results in the children being with plaintiff 18 nights out of every 28 nights and with defendant 10 nights out of every 28 nights during the school year. For the remainder of the year, including school recesses and holidays, the parties share parenting time equally. Inasmuch as "shared" custody is not synonymous with "equal" custody and plaintiff clearly has physical custody for a majority of the time during the greater part of the year, Supreme Court incorrectly determined that plaintiff was the noncustodial parent for child support purposes by virtue of his higher income, and erred in directing plaintiff to pay child support to defendant (see Bast v Rossoff, 91 NY2d at 728; Matter of Cassano v Cassano, 85 NY2d 649, 652 [1995]; Riemersma v Riemersma, 84 AD3d at 1475-1476). In our view, the court should determine, in the first instance, the appropriate amount of child support to be paid by defendant to plaintiff, if any. Accordingly, we remit the matter to Supreme Court for such purpose.

Mercure, J.P., Kavanagh, McCarthy and Egan Jr., JJ.,
concur.

ORDERED that the judgment is modified, on the law, without costs, by reversing so much thereof as directed plaintiff to pay child support to defendant; matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

ENTER:

A handwritten signature in black ink, reading "Robert D. Mayberger". The signature is written in a cursive, flowing style with a large, stylized 'R' and 'M'.

Robert D. Mayberger
Clerk of the Court