

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF REVENUE**

IN THE MATTER OF:)

R. L. A.)

OAH No. 10-0100-CSS

CSSD No. 001155683

DECISION AND ORDER

I. Introduction

The obligor, R. L. A., appeals an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (“CSSD”) issued in his case on January 12, 2010. The obligee children are B., 6 years old, and C., 3 years old.

The formal hearing was held on March 23, 2010, and a supplemental hearing was convened on April 20, 2010. Mr. A. appeared telephonically for both sessions. The custodian of record, K. L. S. (aka K. L. V.), appeared by telephone for the second hearing session. Erinn Brian, Child Support Specialist, represented CSSD. The record closed on May 10, 2010.

Based upon the record and after careful consideration, Mr. A.’s child support is set at \$233 per month from September 2008 through December 2008; \$196 for January 2009; and \$114.93 per month for the period from February 2009 through August 2009. His request for a shared custody calculation prior to February 2009 is denied. Ongoing child support as of September 1, 2009, has been set by the court and CSSD must enforce that order. Finally, Mr. A. is entitled to a credit for direct child support paid to Ms. S. in the total amount of \$2,400 from April 2008 through September 2008, an average of \$400 per month.

II. Facts

A. Procedural History

Ms. S. applied for or began receiving Medicaid benefits for B. and C. during September 2008.¹ On May 20, 2009, CSSD served an Administrative Child and Medical Support Order on Mr. A.² He requested an administrative review.³ On September 3, 2009, the Alaska Superior Court issued a final child custody and support order in the parties’ divorce that awarded Ms. S. 57% shared custody and Mr. A. 43% shared custody of the children, and ordered Mr. A. to pay

¹ Exh. 3 at pg. 9.

² Exh. 3 at pg. 13.

child support in the amount of \$114.93 for two children, effective September 1, 2009.⁴ CSSD received the order soon thereafter. On January 12, 2010, CSSD issued an Amended Administrative Child Support and Medical Support Order that, in light of the court's order, set Mr. A.'s arrears for the period from September 2008 through August 2009 at \$2,704.51.⁵ Mr. A. filed an appeal on February 9, 2010.⁶

B. Material Facts

Both Mr. A. and Ms. S. have child support appeals before the Office of Administrative Hearings (OAH). The hearings were held simultaneously and both decisions are being issued at the same time. Although somewhat different in their procedural history, each appeal involves the same set of facts, so this subsection of their respective decisions is identical.⁷

The parties were previously married and cohabitated with the children through the beginning of 2008.⁸ They separated at the end of March 2008. On March 18, 2008, Mr. A. applied for and obtained a domestic violence protective order against Ms. S.⁹ This order gave Mr. A. temporary custody of the children. It was during this time period that he applied for and began receiving public assistance benefits. However, Mr. A. moved the court to dissolve the protective order only nine days later on March 27, 2008,¹⁰ and soon thereafter, Ms. S. assumed primary custody of the children.

From April 2008 forward, B. and C. were in the primary custody of Ms. S. Mr. A. had visitation on weekends, usually on Friday and Saturday nights. This arrangement continued throughout 2008. In October 2008, Ms. S. filed for divorce. Custody of the children was a contested issue in that litigation, so on February 19, 2009, the Alaska Superior Court issued an interim custody order granting the parties shared physical custody of the children. Each week,

³ Exh. 4.

⁴ Exh. 6.

⁵ Exh. 7 at pg. 1. The total arrears amount reflects monthly calculations of \$426 for September 2008 through December 2008; \$196 for January 2009; and \$114.93 for February 2009 through August 2009. Exh. 7 at pg. 8. The last figure is the same as the child support amount entered by the court in the parties' divorce effective September 1, 2009. See Exh. 6 at pg. 2.

⁶ Exh. 8.

⁷ It may be necessary at times to cite to an exhibit from Ms. S.'s appeal, OAH No. 10-0101-CSS. In such a situation, the reference will be, for example, to "S. Exh. X."

⁸ The material facts in this case are taken from the parties' testimony, unless otherwise indicated.

⁹ S. documents received on April 13, 2010, at pg. 3.

¹⁰ Apparently that motion was granted.

the children would be with Mr. A. from Saturday morning until Tuesday morning, a period of three overnights per week; and with Ms. S. from Tuesday morning through Saturday morning, a period of four overnights per week.¹¹ On September 3, 2009, the Alaska Superior Court issued a final child custody and support order in the parties' divorce that awarded Ms. S. 57% shared custody and Mr. A. 43% shared custody of the children, and ordered Mr. A. to pay child support in the amount of \$114.93 for two children, or \$94.56 per month for one child, effective September 1, 2009.¹²

Ms. S. is currently married to J. S. They met in February 2008. Mr. S. was present when Ms. S. was served with the domestic violence petition and the children were removed from her custody by the police.¹³ In May 2008, Ms. S., B. and C. moved in with her future husband and his three children from a prior relationship. Ms. S. was not employed when they first began living together, so Mr. S. paid her \$600 per month to provide child care for his children while he was at work.¹⁴ This financial arrangement continued for seven months, so Mr. S. paid Ms. S. a total of \$4,200, which is considered income to Ms. S.¹⁵ Ms. S. has been a stay-at-home mom since that time, but in 2010 she has been seeking employment and at the time of the hearing she expected to go to work for a local business as a secretary.

Mr. A. testified he applied for public assistance in 2008 because of a back injury he suffered in 2007. He formerly was a painter but he is currently working with Vocational Rehabilitation so that he can acquire a new career. Mr. A. is now a full-time student working toward a degree in Engineering, which he expects to finish in approximately 2½ years. He is paying for school primarily with student loans along with gas vouchers and other minor assistance from Vocational Rehabilitation.

In 2008, Mr. A. had income from wages of \$7,373.68, plus the PFD and unemployment benefits, for total gross income of \$11,190.68.¹⁶ A primary custody child support amount calculated from this income figure equals \$233 per month.¹⁷

¹¹ S. Exh. 5 at pg. 2. The shared custody order was effective as of February 12, 2009.

¹² S. Exh. 7.

¹³ J. S. letter received April 28, 2010.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ A. Exh. A.

¹⁷ CSSD combined Exh. 10 at pg. 1.

In 2009, Mr. A. received wages of \$6,035.26, plus unemployment benefits and the PFD, for total income of \$9,192.26.¹⁸ A primary custody child support obligation calculated from this income amount equals \$196 per month for two children and \$145 per month for one child.¹⁹

Mr. A. paid Ms. S. direct child support payments in the total amount of \$2,400 during the period from April 2008 through September 2008, an average of \$400 per month. He is entitled to credit for these payments in this administrative child support action.

III. Discussion

A parent is obligated both by statute and at common law to support his or her children.²⁰ Civil Rule 90.3(a)(1) provides that an Obligor's child support amount is to be calculated based on his or her "total income from all sources." By regulation, CSSD collects support from the date the custodial parent requested child support services, or the date public assistance or foster care was initiated on behalf of the child(ren).²¹ In this case, Ms. S. applied for and began receiving Medicaid benefits on behalf of B. and C. in September 2008, so that is the first month Mr. A. is obligated to pay support in this administrative child support action. His support obligation, at least as determined pursuant to CSSD's authority, ends as of August 31, 2009 because the court's final custody and support order took effect on September 1, 2009.

The person requesting the hearing, in this case, Mr. A., has the burden of proving that CSSD's Amended Administrative Child Support and Medical Support Order is incorrect.²²

Where parents exercise shared custody of their children, Civil Rule 90.3 provides that child support is to be calculated differently than in a situation in which one parent has primary custody. In general, and depending on the percentage of time each parent has overnight visitation, the parent obligated to pay child support will have a somewhat lower monthly support amount than in a primary custody scenario. The rule defines shared custody as follows:

A parent has shared physical custody of children for purposes of this rule if the children reside with that parent for a period specified in writing of at least 30 percent of the year, regardless of the status of legal custody.^[23]

18 A. Exh. A.

19 A. Exh. 7 at pg. 7.

20 *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

21 15 AAC 125.105(a)(1)-(2).

22 15 AAC 05.030(h).

23 Civil Rule 90.3(f)(1).

In order for a visitation day to count toward the required 30% of the year, the child(ren) must stay overnight with the respective parent.²⁴ One year is equal to 365 days, so 30% of the overnights in one year is 110 overnights. This is the minimum number of overnights needed on an annual basis to reach the threshold definition of shared custody. On a monthly basis, this would equal about 9 overnights per month.²⁵

If there is no court order regarding custody, a finding of shared custody under Civil Rule 90.3(f)(1) should be based on a written agreement, but the parties to child support actions rarely have one. Thus, the administrative law judge must make findings of fact regarding whether shared custody exists and, if so, what percentage of shared custody each party exercises. The parent asserting that they share physical custody, in this case, Mr. A., has the burden of proof by a preponderance of the evidence.²⁶

Mr. A. did not meet his burden on the shared custody issue. During his testimony, the obligor proposed several different combinations of shared custody percentages that he and Ms. S. were to have exercised from September 2008 through January 2009. In contrast, Ms. S. gave specific testimony and also provided affidavits from her husband, J.; his mother, D. S.; and C. O., a family friend. All three affidavits corroborate Ms. S.'s testimony that she had primary custody of the children from the time she met J. S. in February 2008 until the court issued its interim shared custody order on February 19, 2009.²⁷ Also of significance on this issue is the direct child support Mr. A. paid Ms. S. from April 2008 through September 2008. It is unlikely Mr. A. would have paid her \$400 per month starting in April 2008 if the parties exercised shared custody of the children.

Accordingly, Mr. A.'s child support should be based on primary custody in Ms. S. for all the relevant time periods in this case – from September 2008 through January 2009. As of February 2009, the court awarded the parties interim shared custody of B. and C., which continued after the court issued the final custody and support order in September 2009.

²⁴ Civil Rule 90.3, Commentary V.A.

²⁵ $110 \div 12 = 9.17$

²⁶ See 2 AAC 64.290(e).

²⁷ S. documents received March 25, 2010.

In 2008, Mr. A. had income from wages of \$7,373.68, plus the PFD and unemployment benefits, for total gross income of \$11,190.68.²⁸ A primary custody child support amount calculated from this income figure equals \$233 per month.²⁹ This amount should be applied to Mr. A.'s case for the period from September 2008 through December 2008.

In 2009, Mr. A. received wages of \$6,035.26, plus unemployment benefits and the PFD, for total income of \$9,192.26.³⁰ A primary custody child support obligation calculated from this income amount equals \$196 per month for two children and \$145 per month for one child.³¹ CSSD applied this support amount to Mr. A.'s obligation only for the month of January 2009. For the period from February 2009 through August 2009, CSSD applied the shared custody figures calculated by the court in its final custody and support order. CSSD's utilization of the court's numbers is not unreasonable, so the agency's determination should be adopted.

IV. Conclusion

Mr. A. did not meet his burden of proving he exercised shared custody of B. and C. prior to February 2009, so his child support should be calculated using the primary custody formula. CSSD's calculations for 2008 and 2009 are correct and should be adopted. Ongoing child support has been determined by the court as of September 1, 2009.

Mr. A. paid Ms. S. direct child support payments in the total amount of \$2,400 during the period from April 2008 through September 2008, an average of \$400 per month. He is entitled to credit for these payments in this administrative child support action.

V. Child Support Order

- Mr. A. is liable for child support for B. and C. in the amount of \$233 per month from September 2008 through December 2008; \$196 for January 2009; and \$114.93 per month for the period from February 2009 through August 2009;
- Mr. A. is entitled to a credit for direct child support paid to Ms. S. in the total amount of \$2,400 during the period from April 2008 through September 2008, an average of \$400 per month;

²⁸ A. Exh. A.

²⁹ CSSD combined Exh. 10 at pg. 1.

³⁰ A. Exh. A.

- Ongoing child support has been determined by the court effective September 1, 2009;
- All other provisions of CSSD's January 12, 2010, Amended Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 17th day of June, 2010.

By: Signed _____
Kay L. Howard
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Under AS 25.27.062 and AS 25.27.250, the obligor's income and property are subject to withholding. Without further notice, a withholding order may be served on any person, political subdivision, department of the State, or other entity.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 25.27.210 and Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 6th day of July, 2010.

By: Signed _____
Signature
Christopher Kennedy _____
Name
Deputy Chief Administrative Law Judge
Title

[This document has been modified to conform to technical standards for publication.]

³¹ A. Exh. 7 at pg. 7.