

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

IN THE MATTER OF:)

S. C. D.)

) OAH No. 10-0119-CSS

) CSSD No. 001158190

DECISION AND ORDER

I. Introduction

The obligor, S. C. D., appealed an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on November 2, 2009. The obligee child is C., 2 years of age. The other parent is H. D-C.

The formal hearing was held during three sessions in 2010: April 1st, April 29th and July 20th. Mr. D. appeared in person for the first session and telephonically for the second but he did not participate in the third. Ms. D-C. appeared by telephone for the first session but not for the subsequent two. Andrew Rawls, Child Support Specialist, represented CSSD. All sessions of the hearing were recorded. The record closed on August 3, 2010.

Based on the record as a whole and after careful consideration, Mr. D.'s child support is set at \$483 per month for July 2008 through December 2008; \$258.70 per month for January and February 2009; and \$226.04 per month from March 2009 forward.

II. Facts

A. History

Ms. D-C. began receiving public assistance benefits on C.'s behalf beginning in July 2008.¹ On September 8, 2009, CSSD issued an Administrative Child Support and Medical Support Order that was served on Mr. D. on October 21, 2009.² He requested an administrative review and provided income information.³ Following the administrative review, CSSD issued an Amended Administrative Child Support and Medical Support Order on November 2, 2009, that set Mr. D.'s ongoing support at \$455 per month, effective December 1, 2009, with arrears of

¹ Pre-hearing brief at pg. 1.

² Exh. 4.

³ Exh. 5.

\$8,887 for the period from July 2008 through November 2009.⁴ Mr. D. appealed and requested a hearing on January 22, 2010.⁵

The initial hearing in this matter was held on April 1, 2010. Both parties appeared and provided testimony. At the close of the hearing, the administrative law judge directed CSSD to prepare new draft calculations for consideration. A supplemental hearing was calendared for April 29, 2010, for the purpose of having CSSD explain the calculations in detail.

The supplemental hearing was convened on April 29, 2010. Mr. D. appeared by telephone but the custodian could not be reached for the hearing.⁶ CSSD went over its calculations, shown in its April 20, 2010, Submission to Record.

When asked to give his response to CSSD's most recent calculations, Mr. D. stated he could file his 2009 tax return by May 10, 2010. Mr. D.'s explanation was that he had spoken with his accountant on April 28th, and the accountant had promised the tax returns within 10 days. CSSD did not object to the extension of time, so Mr. D.'s request was granted. He was given until May 13, 2010, to file his tax returns and CSSD had until June 3, 2010, to issue its final draft calculations. A final hearing was held on July 20, 2010, for CSSD to explain its calculations in detail. The division's explanations were put on the record on that date, but neither party appeared.

B. Material Facts

Mr. D. is self-employed and operates a landscaping and snow removal business. In 2008, Mr. D. reported gross income in the amount of \$230,484, but net profit of only \$6,540.⁷ CSSD adjusted the deductions on his tax return so that his gross income for child support purposes totaled \$66,672.⁸ CSSD derived these numbers primarily by disallowing deductions for meals and entertainment, charitable contributions, and a loss of \$54,000 on a tow truck.⁹ For the 2009 calendar year, Mr. D. had gross income of \$142,522, but net profit of only \$4,851.¹⁰ Again, after

⁴ Exh. 10.

⁵ Exh. 12. Mr. D.'s appeal was apparently delayed elsewhere in CSSD, as it was not routed to the formal hearing team until March 3, 2010, at least five weeks after he filed it. The 120-day deadline to issue the decision was extended to September 1, 2010, by the chief administrative law judge.

⁶ Ms. D-C. withdrew from CSSD's services on February 10, 2010. Exh. 13.

⁷ Exh. 2 at pg. 10.

⁸ Exh. 21 at pg. 3.

⁹ Exh. 21 at pg. 4.

¹⁰ Exh. 23 at pg. 7.

analyzing his tax return, CSSD determined his gross income for child support purposes totaled \$32,524.07.¹¹ To make this determination, CSSD included Mr. D.'s business income from his 2009 tax return, the PFD and various other tax credits. The largest portion of the above number was derived from CSSD disallowing Mr. D.'s section 179 depreciation expenses, a net operating loss and expenses related to his personal residence.¹² Because Mr. D.'s year-end financial information is not yet available for 2010, CSSD used the 2009 figures for the 2010 calculation.¹³

Mr. D. has an 11 year old son named E., who is older than C. Mr. D. had primary custody of E. through February 2009. As of March 1, 2009, Mr. D. and E.' mother began sharing custody of the child on a 50/50 basis.¹⁴ In addition to being awarded shared custody of E., Mr. D. was order to pay child support for the child in the amount of \$480.23 per month.¹⁵

Ms. D-C. is not currently employed. She is a full-time student at the University of Alaska Anchorage, where she has nearly completed an associate's degree in Human Services. Ms. D-C. plans to continue her studies and estimates it will take her another two to three years to obtain her bachelor's degree. She has two other children older than C. in the home: Y., who is 13, and Z., who is 11.

The parties have shared custody of C. on a 50/50 basis since his birth. Both testified at the hearing that they intend to continue their arrangement.

III. Discussion

A parent is obligated both by statute and at common law to support his or her children.¹⁶ This obligation begins when the child is born.¹⁷ By regulation, CSSD collects support from the date the custodial parent requested child support services, or the date public assistance or foster care services were initiated on behalf of the child(ren).¹⁸ Ms. D-C. began receiving public assistance on C.'s behalf in July 2008, so that is the first month for which Mr. D. is liable for paying child support through CSSD.

¹¹ Exh. 25 at pg. 2.

¹² Exh. 24 at pg. 2.

¹³ See Exh. 27 at pg. 2.

¹⁴ Exh. 19 at pg. 2.

¹⁵ *Id.*

¹⁶ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁷ *CSSD v. Kovac*, 984 P.2d 1109 (Alaska 1999).

¹⁸ 15 AAC 125.105(a)(1)-(2).

The person who filed the appeal, in this case, Mr. D., has the burden of proving by a preponderance of the evidence that the agency's calculations are incorrect.¹⁹

A. *Shared Custody*

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.^[20]

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.²¹ One year is equal to 365 days, so 30% of the overnights in one year equal 110 overnights. This is the minimum number of overnights needed on an annual basis to reach the threshold definition of shared custody.

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. Also, it is fairly common for one of the parties not to appear at the hearing so the testimony regarding the shared custody issue is often one-sided. 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.

In this case, however, both Mr. D. and Ms. D-C. attended the hearing and each testified that they exercise shared custody of C. on a 50/50 basis and that they have done so since the time of his birth. As a result, the shared custody formula will be utilized for all of the child support calculations in this appeal.

¹⁹ 15 AAC 05.030(h).

²⁰ Civil Rule 90.3(f)(1).

²¹ Civil Rule 90.3, Commentary V.A.

B. Mr. D.'s Self Employment Income

Civil Rule 90.3(a)(1) provides that an Obligor's child support obligation is to be calculated from his or her "total income from all sources," minus mandatory deductions. The Rule does not have a specific formula for determining the income of a self-employed Obligor, but the Commentary to the Rule does provide this guidance:

Self Employment Income. Income from self-employment, rent, royalties, or joint ownership of a partnership or closely held corporation includes the gross receipts minus the ordinary and necessary expenses required to produce the income. Ordinary and necessary expenses do not include amounts allowable by the IRS for the accelerated component of depreciation expenses, investment tax credits, or other business expenses determined by the court to be inappropriate. Expense reimbursements and in-kind payments such as use of a company car, free housing or reimbursed meals should be included as income if the amount is significant and reduces living expenses.^[22]

Mr. D. is appealing the Amended Administrative Child and Medical Support Order that CSSD issued on November 2, 2009. That order set Mr. D.'s child support at \$667 per month for July 2008 through December 2008; \$395 per month for January and February 2009; and \$455 per month from March 2009 forward.²³

CSSD estimated Mr. D.'s income for child support purposes from his tax returns. CSSD allowed the obligor's deductions for such line items as legal and professional services, straight line depreciation, day labor and subcontractors.²⁴ CSSD disallowed deductions for meals and entertainment and a loss connected to his tow truck.²⁵ All of the child support calculations in the amended order utilize the shared custody formula and incorporate an additional deduction for Mr. D.'s older child, E., in the home. Ms. D-C. did not have any reported income in 2008, so her portion of the child support calculation was \$50 per month for 2008 and \$176 per month for 2009 and 2010.²⁶

²² Civil Rule 90.3, Commentary III.B.

²³ Exh. 10 at pg. 15. The separate calculation for January and February 2009 is made necessary by the fact that Mr. D. had primary custody of his son, E., through February 2009, then as of March 2009, he began exercising shared custody of, and paying support for his older son. Thus, a different calculation is necessary for the remainder of 2009, beginning in March of that year.

²⁴ Exh. 10 at pg. 4.

²⁵ *Id.*

²⁶ Exh. 10 at pgs. 8, 11 and 13.

During the hearing process it became apparent that Mr. D.'s child support obligation should be recalculated, primarily to correct the deductions for Mr. D.'s older child, E., but also to review the obligor's 2009 financial information. This had to be done in a two-step process because the obligor was not able to file his 2009 tax return until May 10, 2010. CSSD's final calculation for 2008 is contained in its Submission to Record dated April 20, 2010, and the final calculations for 2009 and 2010 are contained in CSSD's Second Submission to Record, which was received on July 1, 2010. A final hearing was held on July 20, 2010, for CSSD to explain its calculations in detail. The division's explanations were put on the record on that date, but neither Mr. D. nor Ms. D-C. appeared.

Mr. D. had primary custody of his son E. through February 2009. As of March 1, 2009, the obligor and E.' mother each were awarded 50/50 shared custody of their son and Mr. D. was ordered to pay child support of \$480.23 per month in addition to the shared custody.²⁷ In its amended order, CSSD correctly gave Mr. D. a deduction from income to reflect E.' residence with the obligor,²⁸ then adjusted that deduction to \$480.23 per month as of March 1, 2009, based on the child support order.²⁹ CSSD subsequently changed its position on the March 2009 and ongoing prior child deduction by asserting that in addition to the child support he pays for E., the obligor is entitled to a deduction for having E. in his home 50% of the time. CSSD crafted the additional amount from one half of a standard deduction for supporting a prior child in the home.³⁰

CSSD's final calculations of Mr. D.'s child support obligation are correct at \$483 per month for July 2008 through December 2008; \$258.70 per month for January and February 2009; and \$226.04 per month from March 2009 forward. The calculations reflect the best estimate of Mr. D.'s income for child support purposes, as determined from his 2008 and 2009 tax returns, and Ms. D-C.'s income, which is currently at federal poverty levels due to her full-time attendance at the university. The calculations also correctly attribute the prior child deductions to Mr. D. for all time periods relevant to this appeal. The fact that Mr. D.'s custody of his son E.

²⁷ Exh. 19 at pg. 2.

²⁸ Exh. 10 at pgs. 9, 12.

²⁹ Exh. 10 at pg. 14.

³⁰ Exh. 25 at pg. 2.

changed as of March 2009 required an adjustment to the prior child deduction, which is now correct.

IV. Conclusion

Mr. D. met his burden of proving by a preponderance of the evidence that CSSD's November 2, 2009, Amended Administrative Child and Medical Support Order was incorrect. CSSD's calculations have been revised and now correctly reflect the parties' shared custody of C., and Mr. D.'s support obligation for his prior child. The corrected calculations should be adopted.

V. Child Support Order

- Mr. D. is liable for child support in the amount of \$483 per month for July 2008 through December 2008; \$258.70 per month for January and February 2009; and \$226.04 per month from March 2009, forward;
- All other provisions of CSSD's November 2, 2009, Amended Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 24th day of August, 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 13th day of September, 2010.

By: Signed
Signature
Kay L. Howard
Name
Administrative Law Judge
Title

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