

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

IN THE MATTER OF)	OAH No. 10-0135-CSS
F. M.)	CSSD No. 001146357
)	
_____)	

DECISION AND ORDER

I. Introduction

On April 13, 2010, a formal hearing was held to consider the child support obligation of F. M. (Obligor) for the support of his child, N. (Obligee).¹ Mr. M. participated in the hearing. He was provided with a Spanish speaking translator. N.'s mother, S. M. B., did not participate.² Andrew Rawls, Child Support Services Specialist, represented the Child Support Service Division (Division). The hearing was audio-recorded. The record closed at the end of the hearing.

This case is Mr. M.'s appeal of the Division's order establishing his monthly child support obligation for his child, N. Because Mr. M. has had primary custody of N. or lived with her since February of 2007, Mr. M.'s child support arrears should be set at \$0 per month. Beginning in May of 2010, Mr. M.'s monthly ongoing child support should be set at \$476 per month, as set in the Division's order, but ongoing child support should be suspended while he has custody of N., or a new court order changes the current custody situation.

II. Facts

Ms. B. requested public assistance for her child, N., beginning in February 2007.³ Paternity is not in dispute.⁴ Mr. M. is named as N.'s father on her birth certificate.⁵

¹ The hearing was held under Alaska Statute 25.27.170.

² Ms. Bustillos did not appear, nor did she provide a phone number to call at her for the hearing as directed by the notice sent to her at his addresses of record. There was no answer when her phone number of record was called at the time set for the hearing.

³ Division's Pre Hearing Brief, page 1.

⁴ Division's Pre Hearing Brief, page 1 & Recording of Hearing.

The Division served Mr. M. with an Administrative Child and Medical Support Order on December 8, 2009.⁶ Mr. M. requested an administrative review of that order.⁷

The Division issued an Amended Administrative Child and Medical Support Order on January 27, 2010.⁸ The Division set Mr. M.'s monthly ongoing child support for N. at \$476. The order also established arrears in that monthly amount beginning in April of 2007. Mr. M. requested a formal hearing.⁹

At the hearing, Mr. M. provided the history of his and Ms. B.' custody of N.¹⁰ After the hearing, as requested, Mr. M. provided a copy of the Alaska Superior court's modified protective order and custody order.¹¹

Based on the evidence in the record, I find that it is more likely than not that the Division's latest calculations at exhibit 5, page 8 and the information used in these calculations are correct and most accurately reflect Mr. M. 2009 income and his current earning capacity.¹² I also find that it is more likely than not that Mr. M. has either lived with or had primary custody of N. since January 2007 and presently has primary custody by court order.¹³

III. Discussion

In a child support hearing, the person who filed the appeal, in this case Mr. M., has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.¹⁴

Mr. M. showed that N. has been in his primary custody or that he lived with N. during the period covered by this order. Mr. M.'s memory was clear, and was not contradicted by Ms. B., who did not appear at the hearing. Records showing that Ms. B. had applied for public assistance in Alaska indicated that there were significant periods of time when Mr. M. was not living with N., but this evidence was less persuasive on the issue of when N. was living with Mr. M. than the evidence that he provided through his testimony. Furthermore it is possible as Mr.

⁵ Division's Pre Hearing Brief, page 1.

⁶ Ex. 2.

⁷ Ex. 3.

⁸ Ex. 5.

⁹ Ex. 6.

¹⁰ Recording of Hearing.

¹¹ Recording of Hearing & Ex. A.

¹² Recording of Hearing & Ex. 14.

¹³ Recording of Hearing.

¹⁴ Alaska Regulation 15 AAC 05.030(h).

M. pointed out that these records may relate to periods when Ms. B. was applying for public assistance for one of her other children.

At the hearing, the Division agreed that Mr. M. should not be charged child support arrears for the periods covered by this order.

Child support is calculated using the shared custody formula when a child resides with a parent at least 30, but no more than 70 percent of the overnights.¹⁵

At the hearing Mr. M. explained that Ms. B. had N. with her when Mr. M. was not living with them only for two periods for a month or less since February 2007, when the period covered by this order began. The first of these periods was in July of 2008, and the second was in the fall of 2009. This is less than 30 percent of the overnights in 2008 and 2009. Mr. M. had custody of N. for almost all of both these years.

In November of 2009, Mr. M. was awarded primary custody of N. by court order. That custody arrangement was confirmed in another court order dated January 15, 2010.

If the custody situation changes, the parties should request a modification. A written or court ordered custody agreement, or a carefully documented history of shared custody would help establish that a shared custody calculation is appropriate.

In this case, there was no shared custody in 2007 through 2009. It is too late for Mr. M. to request that the Division collect child support arrears for him for the months in 2007 when N. was in his primary custody, because CSSD only establishes child support back to the date of the application for services or public assistance. Child support should be calculated on an annual basis. In this case it would clearly be unfair to Mr. M., in whose home N. presently lives to charge him any child support arrears for 2007, 2008 or 2009.

V. CHILD SUPPORT ORDER

The Division's Amended Administrative Child and Medical Support Order issued on January 27, 2010 is amended as follows, but all other provisions of that order remain in effect:

1. Mr. M.'s ongoing child support for N. is set in the monthly amount of \$476 effective May 1, 2010, but he owes no duty to pay while he has custody of N., or until a new court order transfers primary custody of N. to someone other than Mr. M.

2. Mr. M.'s child support arrears for N. are set in the monthly amount of \$0 for February 2007 through April of 2010, and \$0 per month based on his having primary custody of N., or living with her for all of that period.
3. The Division shall give parties the appropriate credit or debit for any out-of-pocket expenses for providing health insurance coverage for N.

DATED this 16th day of April, 2010.

By: Signed
Mark T. Handley
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 11th day of May, 2010

By: Signed
Signature
Mark T. Handley
Name
Administrative Law Judge
Title

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

¹⁵Alaska Civil Rule 90.3(f).