

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

IN THE MATTER OF: )

M. M. W. )

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) OAH No. 10-0155-CSS

) CSSD No. 001159875

**DECISION AND ORDER**

**I. Introduction**

The obligor, M. M. W., appeals an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (“CSSD”) issued in his case on March 4, 2010. The obligee child is A., who is four years old. The custodian of record is H. M.

The formal hearing was held on April 29, 2010. Mr. W. participated in person; Ms. J. did not participate.<sup>1</sup> Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded and the evidentiary record closed on May 20, 2010.

Based upon the record and after careful consideration, Mr. W.’s child support is set at \$125 per month, based on 50/50 shared custody. Ms. J. has withdrawn from services, so any arrears owed to her should be suspended. Finally, Mr. W. has had custody of A. since January 2010 so his child support should be suspended as of February 1, 2010.

**II. Facts**

*A. Procedural History*

Ms. J. began receiving public assistance benefits for A. in January 2008.<sup>2</sup> On December 31, 2009, CSSD served an Administrative Child and Medical Support Order on Mr. W.<sup>3</sup> He requested an administrative review but did not provide income information.<sup>4</sup> On March 4, 2010, CSSD issued an Amended Administrative Child Support and Medical Support Order that set Mr. W.’s ongoing child support at \$525 per month, effective April 1, 2010, with arrears of \$14,175

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<sup>1</sup> Before the hearing, CSSD discovered that Ms. J. telephone numbers were no longer working and in a conversation with her sister learned that apparently Ms. J. had left the state. Based on this information, no attempt to contact her prior to the hearing was made.

<sup>2</sup> Exh. 4 at pg. 7.

<sup>3</sup> Exh. 1.

<sup>4</sup> Exh. 2.

for the period from January 2008 through March 2010.<sup>5</sup> Mr. W. filed an appeal on March 18, 2010, asserting the custody and income information was incorrect.<sup>6</sup>

*B. Material Facts*

Mr. W. and Ms. J. separated at the end of 2006, when A. was approximately 1 year old. Mr. W. then moved in with his brother in their boyhood home, and he still lives there at this time.

Public assistance benefits began to be paid on the child's behalf in January 2008. At that time, the parties exercised shared custody of A., as they had since the time they separated. Mr. W. testified he had custody of the child at least 60% in 2008 and 70% in 2009. He provided three affidavits regarding custody of A.<sup>7</sup> The first is from his brother, G. N., who stated that A. has lived with the obligor more than 50% of the time from 2008 to the present.<sup>8</sup> The second affidavit is from M. W., the obligor's sister. Michelle stated the child was in her brother's care "for a majority of 2008 and 2009," although there were weeks on and off in 2008 and 2009 in which the child was with her mother.<sup>9</sup> The final affidavit was prepared by I. S., M.'s boyfriend. I. stated he has been dating M. for almost 4 years, he lived in the home until February 2008, and since then still visits very often.<sup>10</sup> I. estimated Mr. W. has taken care of A. 75% of the time.<sup>11</sup>

Mr. W. is a laborer by trade, although he has been working primarily under the table doing odd jobs since the end of 2007.<sup>12</sup> He testified he earned about \$10,000 in 2008 and \$12,000 in 2009. Mr. W. and his girlfriend, E., have been together since February 2009 and have a four month old son living in the home with them. E. receives public assistance benefits for the child and Mr. W. is listed on her cash grant. They pay rent of \$400 per month to Mr. W.'s brother G.

Mr. W. presented medical records that indicate he has injured his hand twice since 2006.<sup>13</sup> Although Mr. W. did not work for between four and five months after his latest injury in

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<sup>5</sup> Exh. 4.

<sup>6</sup> Exh. 5.

<sup>7</sup> The affidavits were received on April 27, 2010, and have been marked as Exhibit A.

<sup>8</sup> Exh. A at pg. 4.

<sup>9</sup> Exh. A at pg. 3.

<sup>10</sup> Exh. A at pg. 2.

<sup>11</sup> *Id.*

<sup>12</sup> Exh. 6 at pg. 1.

<sup>13</sup> Documents received on April 29, 2010.

November 2007, he has worked a sufficient amount of time since then to calculate a child support obligation from his actual income.

### III. Discussion

A parent is obligated both by statute and at common law to support his or her children.<sup>14</sup> 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).<sup>15</sup> In this case, Ms. J. began receiving public assistance benefits in January 2008, so that is the first month Mr. W. is obligated to pay support in this administrative child support action.

The person requesting the hearing, in this case, Mr. W., has the burden of proving that CSSD's Amended Administrative Child Support and Medical Support Order is incorrect.<sup>16</sup>

Civil Rule 90.3(a)(1) provides that an Obligor's child support obligation is to be calculated based on his or her "total income from all sources." Because Mr. W. is not earning wages and has not filed a tax return for 2008 and 2009, the figures he estimated he earned for those two years should be used to calculate his child support obligation.

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.<sup>[17]</sup>

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.<sup>18</sup> 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.

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<sup>14</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

<sup>15</sup> 15 AAC 125.105(a)(1)-(2).

<sup>16</sup> 15 AAC 05.030(h).

<sup>17</sup> Civil Rule 90.3(f)(1).

<sup>18</sup> Civil Rule 90.3, Commentary V.A.

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 he or she has shared physical custody, in this case, Mr. W., has the burden of proof by a preponderance of the evidence.<sup>19</sup>

Mr. W. met his burden of proving that he and Ms. J. exercised shared custody of A., but his child support should be calculated based on 50/50 custody. Mr. W. provided affidavits stating he has had custody of A. a majority of the time, but the affidavits are not specific enough to identify the number of overnights she spent with him and thus the percentage of time he had shared custody over and above the 50% mark.

CSSD prepared revised child support calculations for 2008 and 2009 in its post-hearing brief. Those calculations indicate Mr. W. should pay child support of \$125 per month for 2008 and \$129 per month for 2009.<sup>20</sup> Since the second calculation is not more than 15% change from the 2008 figure, the amount of \$125 per month should be adopted for both years.<sup>21</sup>

Mr. W. assumed custody of A. in January 2010, so his support obligation should be suspended as of February 1, 2010.

#### **IV. Conclusion**

Mr. W. met his burden of proving that the Amended Administrative Child Support and Medical Support Order was incorrect, as required by 15 AAC 05.030(h). His child support should be calculated at \$125 per month, based on 50/50 shared custody with Ms. J. Mr. W. assumed custody of the child in January 2010, so his ongoing support obligation should be suspended as of February 1, 2010.

#### **V. Child Support Order**

1. Mr. W. is liable for child support for A. in the amount of \$125 per month for the period from January 2008 through January 2010, and ongoing;
2. Ongoing child support is suspended as of February 1, 2010, due to Mr. W. taking custody of A. in January 2010;

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<sup>19</sup> See 2 AAC 64.290(e).

<sup>20</sup> Exh. 8.

3. All other provisions of CSSD's March 4, 2010, Amended Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 9<sup>th</sup> 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 28<sup>th</sup> day of June, 2010.

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

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

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<sup>21</sup> See Civil Rule 90.3(h).