

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

IN THE MATTER OF:)

J. A. S.)

) OAH No. 10-0399-CSS

) CSSD No. 001161689

DECISION AND ORDER

I. Introduction

The custodian of record, J. A. H., appeals an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in Mr. S.'s case on July 21, 2010. The obligee child is Q., who is 2 years old.

The formal hearing was held on September 2, 2010. Both parties appeared by telephone. Erinn Brian, Child Support Specialist, represented CSSD. The record closed on October 28, 2010.

Based upon the record and after careful consideration, Mr. S. is liable for child support based on shared custody in the amount of \$444.04 per month from May 2008 through December 2008; \$483.74 per month for 2009; \$436.48 per month for 2010 and \$329.80 per month for 2011, beginning on January 1, 2011.

II. Facts

A. Procedural History

Public assistance benefits began to be paid on Q.'s behalf in May 2008.¹ CSSD established paternity on December 1, 2009, then served an Administrative Child and Medical Support Order on Mr. S. on March 30, 2010.² He requested an administrative review and both parties provided supplemental information.³ On July 21, 2010, CSSD issued an Amended Administrative Child Support and Medical Support Order that set Mr. S.'s ongoing child support at \$389 per month, with arrears of \$16,505 for the period from May 2008 through July 2010.⁴

¹ Pre-hearing brief at pg. 1.

² Exh 2; Exh. 4 at pg. 15.

³ Exhs. 5 & 7.

⁴ Exh. 8.

Ms. H. filed an appeal on August 3, 2010, asserting the obligor has not had 50/50 custody during any year at issue.⁵

B. Material Facts

Mr. S. and Ms. H. are the parents of Q., 2 ½ years old. Although the parties currently have a shared custody agreement in place, which will be discussed below, there is significant disagreement regarding whether they have exercised shared custody, or Ms. H. has had primary custody, since Q.'s birth.

Mr. S. asserts that he and the custodian maintained more or less 50/50 custody of Q. soon after she was born in May 2008. Mr. S. is employed on the North Slope, where he works a two-week on, two-weeks off shift. At the time that Q. was born, Mr. S. lived in an apartment with a roommate, but he had moved back into his parent's home by about July 1, 2010. The obligor submitted a list of dates he asserts he had the child or, that his parents had custody of the child when he was away from home working. The list of these dates constitutes nearly 50% custody of the child.⁶

Ms. H. testified that the obligor could not have had custody as much as he claims because she breast-fed Q. for six to seven months and it would not have been possible for Mr. S. to have her overnights or for days at a time. Ms. H. claims he did not even have Q. overnight until she was at least seven or eight months old. Ms. H. said rather that the obligor occasionally stayed overnight at her house so he could spend more time with Q. Both parties testified that Q. had allergies and was put on a prescription formula when she was approximately six to seven months old. After the hearing, however, Mr. S. submitted a letter that stated Q. started on formula much earlier than their testimony suggested. The letter was accompanied by a receipt for the purchase of formula dated July 25, 2008, when Q. was just 2 ½ months old.⁷

In early 2010, Ms. H. was planning on moving to Arizona, so on March 28, 2010, she and Mr. S. executed a shared custody agreement that provided they each would have custody of Q.

⁵ Exh. 9.

⁶ Exh. 5 at pgs. 6-9.

⁷ Exh. 11 at pg. 8.

three months at a time, effective April 1, 2010.⁸ Mr. S. had custody of Q. from April 2010 through mid-July 2010. He returned Q. to Ms. H. in Arizona on July 13, 2010.⁹

Ms. H. was previously unemployed, but recently began working as a manager trainee for a company called E. M., in Tempe, Arizona. At the time of the hearing, she was being paid only on the basis of her commission sales, so she had not received any income yet. Her goal is to become a branch manager, which she hoped would occur in six to eight weeks. At that point, she would begin earning \$35,000 per year.

In addition to their hearing testimony, both parties submitted written documentation. Ms. H. filed statements from her best friend, mother, father and stepmother.¹⁰ Her parents and stepmother wrote that prior to her move to Arizona, Ms. H. was always the primary parent and that Mr. S. contributed to Q.'s parenting, but it is his parents who have had Q. most often because he now works on the North Slope.¹¹ Ms. H.'s friend's affidavit is the most negative about Mr. S., stating that he avoided Ms. H. during most of her pregnancy but that he has contributed since Q.'s birth.¹²

Mr. S.'s documentation contains specific dates he or his parents have had Q. since the month after her birth; and affidavits from his parents and former roommate, M. W..¹³

III. Discussion

The custodian, Ms. H., filed the appeal. She challenges CSSD's determination that the parties had 50/50 custody of Q. beginning in April 2010. The person requesting the hearing has the burden of proving that CSSD's Amended Administrative Child Support and Medical Support Order is incorrect.¹⁴

For his part, Mr. S. asserts that he and the custodian maintained more or less 50/50 custody of their child since soon after she was born in May 2008.

⁸ Exh. 5 at pg. 18.

⁹ Documents received from Mr. S. at the hearing on September 2, 2010, at pg. 13.

¹⁰ Received October 22, 2010.

¹¹ *Id.*

¹² *Id.*

¹³ Received September 14, 2010.

¹⁴ 15 AAC 05.030(h).

A parent is obligated both by statute and at common law to support his or her children.¹⁵ 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).¹⁶ In this case, Ms. H. filed for public assistance in May 2008, so that is the first month Mr. S. is obligated to pay support in this administrative child support action.

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. Each parent's primary custody child support obligation to the other is determine, based on the income figures for that parent for the year in question. Then the resulting figure is inserted into the shared custody formula. 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.^[17]

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.¹⁸ 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. In this case, Mr. S. and Ms. H. did enter into a written agreement that took effect as of April 1, 2010.¹⁹ But the parties do not agree whether shared custody was in effect from the time Q. was born in May 2008 until April 1, 2010. Thus, the administrative law judge must determine whether shared custody existed from May 2008 through March 2010, and if so, what percentage

¹⁵ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁶ 15 AAC 125.105(a)(1)-(2).

¹⁷ Civil Rule 90.3(f)(1).

¹⁸ Civil Rule 90.3, Commentary V.A.

¹⁹ Exh. 5 at pg. 18.

of shared custody each party exercised. The parent asserting that he or she has shared physical custody, in this case, Mr. S., has the burden of proof by a preponderance of the evidence.²⁰

Mr. S. met his burden on the shared custody issue prior to April 1, 2010. The obligor provided specific dates either he or his parents had custody of the child beginning in May 2008.²¹ In addition, he provided two notarized statements in support of the time that he had custody of Q.²² Taken as a whole, when compared to Ms. H.'s evidence, the obligor's documentation is simply more complete and specific. Ms. H.'s parents acknowledged they did not keep track of visitation dates or schedules she had with Q., but Mr. S.'s parents stated in their affidavit that they kept track specifically so as to avoid problems in the future. Since their tracking was done contemporaneously with the visitations, it is considered very reliable. Accordingly, Mr. S.'s child support obligation should be based on this information.

Mr. S. had custody of Q. 34% of the time during 2008 and 50% in both 2009 and 2010. This means that Ms. H. had custody of Q. 66% of the time during 2008 and 50% of the time during 2009 and 2010.²³

Mr. S.'s income totaled \$34,532.22 in 2008; and \$51,572.60 in 2009.²⁴ In addition, based on his half-year 2010 income of \$24,273.70, CSSD estimated his total income in 2010 to be \$48,547.40.²⁵ Thus, if this were a primary custody case, Mr. S.'s support obligation would equal \$518 per month for 2008; \$695 per month in 2009; \$661 per month in 2010 and \$661 in 2011.²⁶

Ms. H.'s income in 2008 totaled \$5,243.65.²⁷ She did not have earned income reported for 2009, so her own income for that year was the PFD.²⁸ For 2010, CSSD attributed the minimum wage of \$7.25 to the custodian prior to her move to Arizona.²⁹ For 2011, CSSD estimated her annual income at \$15,080, based again on the minimum wage.³⁰ Thus, if this were

²⁰ See 2 AAC 64.290(e).

²¹ Exh. 11.

²² Received September 14, 2010.

²³ See CSSD's Post-Hearing Brief at pg. 1.

²⁴ Exh. 10 at pg. 1.

²⁵ Exh. 8 at pg. 12.

²⁶ Exh. 8 at pgs. 10-12.

²⁷ Exh. 13 at pg. 1.

²⁸ Exh. 13 at pg. 2.

²⁹ Exh. 13 at pg. 3.

³⁰ Exh. 13 at pg. 4.

a primary custody case, Ms. H.'s support obligation would be \$135 per month in 2008; \$50 per month in 2009; \$79 per month in 2010 and \$221 per month in 2011.³¹

When the parties' income and shared custody percentages information is inserted into the shared custody calculation, it results in Mr. S. having a child support obligation of \$444.04 per month for 2008 (from May through December); \$483.74 per month for 2009; \$436.48 per month for 2010 and \$329.80 per month for 2011.³²

Finally, the parties agreed at the hearing that Mr. S. gave Ms. H. \$300 in July 2010. He is entitled to a credit for that direct payment to her.

IV. Conclusion

The parties have executed shared custody of Q. since 2008. In addition, they executed a written 50/50 shared custody agreement that took effect on April 1, 2010. Mr. S. is thus entitled to a shared custody calculation. CSSD's post hearing calculations should be adopted.

V. Child Support Order

1. Mr. S. is liable for child support for Q. of \$444.04 per month from May 2008 through December 2008; \$483.74 per month for 2009; \$436.48 per month for 2010 and \$329.80 per month for 2011, beginning on January 1, 2011;
2. Mr. S. is entitled to a credit for a direct payment of \$300 for July 2010;
3. All other provisions of CSSD's July 21, 2010, Amended Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 3rd day of December, 2010.

By: Signed
Kay L. Howard
Administrative Law Judge

³¹ Exh. 13 at pgs. 1-3.

³² Exh. 14.

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 21st day of December, 2010.

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

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