

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

IN THE MATTER OF: )

S. P. I. )

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) OAH No. 10-0494-CSS

) CSSD No. 001163855

**DECISION AND ORDER**

**I. Introduction**

The obligor, S. P. I., appeals an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on September 16, 2010. The obligee children are M., 6, and N., 4. The custodian of record is J. L. W..

The formal hearing was held on November 29, 2010. Both parties participated; Mr. I. is represented by Phyllis Shepherd. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after careful consideration, Mr. I. is entitled to a shared custody calculation based on the parties exercising shared custody of roughly 57% for Ms. W. and 43% for Mr. I. after they separated in 2009. An interim court order for 50/50 custody was entered by the court on November 12, 2010.

**II. Facts**

*A. Material Facts<sup>1</sup>*

Mr. I. and Ms. W. are the parents of M., 6, and N., 4. The parties ended their relationship in early 2007. At the time of their separation, they began exercising shared custody of the children in which Ms. W. would have them four overnights per week and Mr. I. would have them three overnights per week, resulting in a shared custody scenario of approximately 57% for Ms. W. and 43% for Mr. I. The parties did not strictly follow this arrangement every week – Mr. I. would occasionally return the children to Ms. W. early or not have them at all, or he would only have N. in his custody – but in general they exercised shared custody on a 57/43 basis.

The parties' custodial arrangement continued in this general pattern until July 5, 2009, when Ms. W. became the victim of a violent crime and suffered a gunshot wound to the head. She was in the hospital for a few weeks and then in August 2009 entered a two-week treatment program in Fairbanks. She also attended a treatment center in Seattle for 30 days beginning on

January 26, 2010. While Ms. W. was hospitalized and in treatment, Mr. I. had the children more than the earlier 57/43 arrangement but not exclusively full-time. Ms. W.'s mother took them on a three-week trip to Texas from July 26<sup>th</sup> through August 16<sup>th</sup> and her sister also assisted with taking care of them.<sup>2</sup>

After Ms. W. returned from Seattle in late February 2010, the parties' custody scenario returned to the 57/43 arrangement they had been following in early 2009. This lasted until November 12, 2010, when during a custody hearing the court entered an interim order for Mr. I. and Ms. W. to exercise 50/50 custody of M. and N.

In 2009, Mr. I. received earnings of \$26,950.29 working for M. F. Co., plus \$6,622 in unemployment benefits and the PFD of \$1,305, for total income of \$34,877.29.<sup>3</sup> He was laid off in late December 2009 and remained unemployed through March 2010. He is currently employed at J. T.S., where he earns \$11 per hour for 40 hours per week. His total income for 2010 was not known at the time of the hearing. He estimated his total earnings at \$23,919.43 for the year, to which he added the PFD of \$1,281 and UIB benefits of \$2,504, for total income of \$27,704.43.<sup>4</sup> This estimate appears to be fairly accurate and should be used for the 2010 child support calculation.<sup>5</sup>

Mr. I. and his wife, L., were married on November 21, 2009. They have one child together. L. is in the Army and currently holds the rank of E3 with three years of service. Her base pay is \$1,923 per month, to which is added housing and food allowances totaling \$1,888.87, plus COLA of \$556.83, for total gross income of \$4,368.70 per month.<sup>6</sup>

Ms. W.'s income earning potential is at the poverty level. She has been on public assistance since the inception of this case and currently is considered unable to work by the Alaska Department of Health and Social Services. In December 2010 she had just reached the end of a 12-month work deferment.<sup>7</sup>

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<sup>1</sup> The findings of fact are taken from the parties' testimony unless another source is cited.

<sup>2</sup> Alaska Airlines pre-flight information, contained in Custodian's post-hearing documents, received on December 2, 2010.

<sup>3</sup> Exh. 6 at pg. 1; Exh. 4 at pg. 7.

<sup>4</sup> Mr. I.'s Written Argument, received November 26, 2010.

<sup>5</sup> Before the hearing CSSD estimated Mr. I.'s 2010 income from earnings at \$28,545.96. Exh. 4 at pg. 8. Based on the hearing testimony, this estimate appeared to be too high. The division was directed to file a recalculation after the hearing but failed to do so. As a result, Mr. I.'s figures should be used.

<sup>6</sup> Obligor's Exh. H.

<sup>7</sup> Custodian's "Health Status Report Form; received on December 2, 2010.

### III. Discussion

#### A. Shared Custody

Mr. I. challenges CSSD's determination that this is a primary custody case. He claims he has had the children M. and N. at least 43% of the time, or as high as 50% of the time, since he and Ms. W. separated in early 2009. Mr. I. has also raised the issue of his 2010 income. For her part, Ms. W. claims that Mr. I. has had custody of the children less than the 57/43 arrangement they initially exercised after their relationship ended. The person requesting the hearing has the burden of proving that CSSD's Amended Administrative Child Support and Medical Support Order is incorrect.<sup>8</sup>

A parent is obligated both by statute and at common law to support his or her children.<sup>9</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>10</sup> In this case, Ms. W. filed for and began receiving public assistance benefits for the children in February 2009, so that is the first month Mr. I. is obligated to pay support in this administrative child support action.<sup>11</sup>

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 determined, based on the income figures for that parent during 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.<sup>[12]</sup>

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<sup>8</sup> 15 AAC 05.030(h).

<sup>9</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

<sup>10</sup> 15 AAC 125.105(a)(1)-(2).

<sup>11</sup> Exh. 4 at pg. 6.

<sup>12</sup> 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.<sup>13</sup> One year is equal to 365 days, so 30% of the overnights in one year equals 110 overnights. This is the minimum number of overnights needed on an annual basis to reach the threshold definition of shared custody. An informal method of determining the percentage of shared custody each party exercises is to work from the number of days per week each one has custody of the children, over an extended period of time. An example of this would be the scenario in which the parties have the children for 3 or 4 days per week, as asserted in this case. Three days per week equals 43% of the time and four days per week equals 57%.<sup>14</sup>

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 determine whether shared custody existed, and if so, what percentage of shared custody each party exercised. The parent asserting that he or she has shared physical custody, in this case, Mr. I., has the burden of proof by a preponderance of the evidence.<sup>15</sup>

Mr. I. and Ms. W. did not enter into a written agreement, nor do they agree on the periods of time each had custody of M. and N.. Their testimony was consistent in that their initial arrangement involved Ms. W. having the children 4 nights per week and Mr. I. having them 3 nights per week. Ms. W. added that their 4 night/3 night scenario resumed when she returned from treatment at the end of February 2010, but Mr. I. claims he had them much more than she did.

Based on the evidence as a whole, Mr. I. met his burden of proving he and Ms. W. exercised shared custody of their children. The specific custody percentage that should be attributed to each parent for the entire time at issue – up until the effective date of the 50/50 court order – is derived from their initial arrangement, 57% for Ms. W. and 43% for Mr. I. These percentages represent more of an average over the longer period of time rather than being a reflection of the specific dates each parent had the children. Mr. I. clearly had the children almost exclusively while Ms. W. was hospitalized after her gunshot wound in 2009, but she and

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<sup>13</sup> Civil Rule 90.3, Commentary V.A.

<sup>14</sup>  $3 \text{ days} \div 7 \text{ days} = .4285 \times 100\% = 42.85\%$ , which is rounded to 43%. Similarly,  $4 \text{ days} \div 7 \text{ days} = .5714 \times 100\% = 57.14\%$ , which is rounded to 57%.

<sup>15</sup> See 2 AAC 64.290(e).

her mother Tonya testified he had them full-time for about four weeks, much less than his claim that he had them full-time from three to four months. The shorter length is consistent with Ms. W.'s evidence that her mother took the children to Texas for three weeks beginning at the end of July 2009.<sup>16</sup>

Accordingly, Mr. I.'s child support obligation should be based on a 57/43 shared custody split. The specific amount is reached by making a determination of what each parent would have to pay if this were a primary custody case, then inserting these figures into the formula that makes the adjustment for the specific shared custody percentages.

Mr. I.'s 2009 income totaled \$34,877.29, including unemployment benefits and the PFD.<sup>17</sup> In 2010, his total income was estimated at \$27,704.43, including unemployment benefits he received early in the year, plus the PFD.<sup>18</sup> Thus, his primary custody support obligation is \$659 per month for 2009<sup>19</sup> and \$527 per month for 2010.<sup>20</sup>

Ms. W. was on public assistance in 2009, suffered a gunshot wound and has been released from work since the end of December 2009. As a result, her income earning potential is currently at the poverty level and her primary custody child support obligation would be \$50 per month for both 2009 and 2010.

When the parties' income and shared custody percentages information is inserted into the shared custody calculation, it results in Mr. I. having a child support obligation of \$531 per month for 2009;<sup>21</sup> and \$418 per month for January 2010 through October 2010.<sup>22</sup> It is not known whether the court intended for CSSD to calculate Mr. I.'s child support as of November 12, 2010, the effective date of the 50/50 child custody order. A 50/50 calculation will be presented here, using these findings of fact as a guide, but it is not mandatory because the record is not clear as to whether one was to be determined in this administrative proceeding. A suggested child support amount for Mr. I. as of November 12, 2010, is \$358 per month.<sup>23</sup>

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<sup>16</sup> See Custodian's post-hearing documents, received on December 2, 2010.

<sup>17</sup> Exh. 4 at pg. 7.

<sup>18</sup> Mr. I.'s Written Argument, received November 26, 2010.

<sup>19</sup> Exh. 4 at pg. 7.

<sup>20</sup> Attachment A.

<sup>21</sup> Attachment B.

<sup>22</sup> Attachment C.

<sup>23</sup> Attachment D.

*B. Financial Hardship Variance*

Mr. I. claims he cannot afford to pay the child support calculated. Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. To obtain a reduction in the amount calculated, he or she must show that "good cause" exists for the reduction. In order to establish good cause, the parent must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."<sup>24</sup> It is appropriate to consider all relevant evidence, including the circumstances of the custodian and obligee child to determine if the support amount should be set at a different level than provided for under the schedule in Civil Rule 90.3(a).<sup>25</sup>

Based on the totality of circumstances, Mr. I.'s case does not present "good cause" for a variance from the amounts calculated from his actual income. Mr. I. did not prove by clear and convincing evidence that manifest injustice would result if his child support obligation were not reduced from the amount calculated.

The obligor's financial situation is strained at this time, but his wife is fully employed so Mr. I. gets financial help and is not wholly responsible for the household. He may have to make some difficult financial decisions – Mr. I. may even need to get a part-time job – but the bottom line is that his child support obligation takes priority over other debts and obligations, especially consumer debt, such as the loans he has for four vehicles.

**IV. Conclusion**

The parties have executed shared custody of M. and N. a 57/43 basis since early 2009 – Ms. W. has had them 57% of the time and Mr. I. has had custody 43% of the time. Mr. I. is thus entitled to a shared custody calculation, which results in child support amounts of \$531 per month for 2009, \$418 per month for 2010, through the date of the court's November 12, 2010, custody order. A suggested child support amount based on 50/50 custody is \$358 per month, effective November 12, 2010, and ongoing. These calculations are correct.

**V. Child Support Order**

1. Mr. I. is liable for child support for M. and N. of \$531 per month from February 2009 through December 2009; and \$418 per month for January 2010 through November 11, 2010;

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<sup>24</sup> Civil Rule 90.3(c).

<sup>25</sup> Civil Rule 90.3, Commentary VI.E.1.

2. In the event this decision was intended to set Mr. I.'s support amount based on the court's 50/50 shared custody order, he is liable for child support of \$358 per month, effective November 12, 2010, and ongoing;
3. In the event the court will be setting Mr. I.'s child support as of November 12, 2010, this administrative child support order should only be effective through November 11, 2010;
4. All other provisions of CSSD's September 16, 2010, Amended Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 3<sup>rd</sup> day of February, 2011.

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 22<sup>nd</sup> day of February, 2011.

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

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