

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

IN THE MATTER OF)	
C M)	OAH No. 10-0639-CSS
)	
_____)	CSSD No. 00116407

DECISION AND ORDER

I. Introduction

This case is C M M’s appeal of an order issued by the Alaska Child Support Service Division (Division). That order established his child support obligation for his children, C and R. On January 3, 2011, a formal hearing was held on Mr. M’s appeal.¹ The custodial parent, R Q, did not participate in the hearing.² Mr. M participated. Erinn Brian, Child Support Services Specialist, represented the Child Support Service Division (Division). The hearing was audio-recorded. The record closed on February 10, 2011.

Having reviewed the record in this case and after due deliberation, I concluded that the ongoing child support amount set in the Division’s Amended Administrative Child and Medical Support Order should be affirmed. Collection of ongoing child support from Mr. M is suspended because he has had primary custody of the children by court order since December of 2009. I also concluded that Mr. M’s child support arrears for October through December of 2009 should be set at \$0 per month. Mr. M’s ongoing child support set at \$1,328 per month is suspended. Mr. M’s total child support arrears from October 2009 through February of 2011 are set at \$0.

II. Facts

Ms. Q applied for public assistance for her children, C and R, in October of 2009. Paternity is not in dispute. Mr. M’s is named as C and R’s father on the children’s birth certificates.³

Mr. M works two-weeks on two weeks off on the North Slope. Ms. Q developed an addiction to methamphetamines. Ms. Q first left the children with Mr. M and removed money

¹ The hearing was held under Alaska Statute 25.27.170.

² Ms. Q did not appear at the hearing or provide a phone number as directed by the notice sent to her at her address of record. Ms. Q did not answer her phone number of record at the time set for the hearing. The record was held open after the hearing and a post hearing was issued giving the parents until February 10, 2011 to submit additional information. Ms. Q did not file anything.

from the family bank account. Then shortly before Mr. M was scheduled to return to work on the North Slope, Ms. Q went to court and obtained an ex parte domestic violence restraining order.⁴ Mr. M rather than Ms. Q however is the victim of domestic violence.⁵ Ms. Q filed for an ex parte domestic violence restraining order, but Mr. M was able to get this order amended so that they were to share custody of the children, so he would have the children when he was not on his regular scheduled work on the North Slope. The plan was for Ms. Q to find another place to live and move out of the family home. The children first stayed with Ms. Q from October 11, 2009 through October 22, 2009.⁶

While they were in Ms. Q's custody Mr. M prepaid the family's bill and provided Ms. Q with groceries and gas credit, but did not give her cash because of her drug problem. Ms. Q's drug problem continued to get worse. She failed to care for the children when they were in her care and she sought illegal means to get money to support her drug problem, including filing fraudulent applications for public assistance.⁷

Mr. M had to have the children stay with friends even when he was at work. Mr. M had the children 19 days in November of 2009, and 18 days in December of 2009.⁸ Finally on December 23, 2009, the court ordered that Mr. M should have temporary custody and that Ms. Q should not be allowed any visitation with the children. The court found that Ms. Q had committed a crime of domestic violence against Mr. M. The court concluded that Ms. Q represented a credible threat of physical harm. Ms. Q was only allowed telephone contact with the children during a two-hour window once per week. Ms. Q was prohibited from coming within 250 feet of the family home, where Mr. M and the children were living.⁹ Despite the fact that she was allowed only limited telephone contact with the children, Ms. Q applied for and received public assistance for the children's support for January and February of 2010.¹⁰

Ms. Q repeatedly petitioned the court to amend this custody and long term domestic violence order throughout 2010, making serious allegations against Mr. M in her petitions.

³ Division's Pre-hearing Brief, page 1 & Recording of Hearing.

⁴ Recording of Hearing – Testimony of Mr. M.

⁵ Exhibit 4.

⁶ Recording of Hearing – Testimony of Mr. M.

⁷ Exhibit 4 & 5 & Recording of Hearing – Testimony of Mr. M.

⁸ Mr. M's post hearing submission of calendars showing where children were & Recording of Hearing – Testimony of Mr. M.

⁹ Exhibit 4 pages 1-6.

¹⁰ Exhibit 6 page 9 and Recording of Hearing.

Finally she was granted a hearing on August 10, 2010, at which she testified. The court rejected her request to amend the order, and she was not allowed visitation. The court concluded Ms. Q was then facing criminal charge with violating the domestic violence order and the court did not believe that the custody and domestic violence order could be modified while providing for the safety of Mr. M.¹¹

Ms. Q was later arrested on a felony charge and has been incarcerated since her arrest. The court renewed the December 2009 domestic violence order giving temporary primary custody to Mr. M and no visitation effective December 29, 2010. This new order also requires Ms. Q to pay \$50 per month in child support to Mr. M.¹²

The Division did not issue an Administrative Child and Medical Support Order until December 15, 2009.¹³ By that time, the children were already in Mr. M's primary custody and would remain his primary custody under the domestic violence restraining orders. Mr. M requested an administrative review.¹⁴ Mr. M provided the Division with copies of the domestic violence restraining order granting him primary custody.

The Division issued an Amended Administrative Child and Medical Support Order on December 9, 2010. In this order, the Division set Mr. M's ongoing child support at \$1,328 per month effective January 1, 2011, because the December 2009 custody order was only effective until that date. The order also set monthly arrears of \$1,688 per month for the months of October of 2009 through December of 2010.¹⁵ However, during the first year of arrears covered by this order, October, 1, 2009 through October 1, 2010, Ms. Q had custody of the children only about 25 overnights.¹⁶

Mr. M requested a formal hearing.¹⁷ Mr. M provided additional information about the family expenses he paid and the custody situation from October of 2009 through December of 2010.¹⁸

¹¹ Exhibit 6.

¹² Mr. M's provided the new court order with his post hearing.

¹³ Exhibit 1.

¹⁴ Exhibit 6.

¹⁵ Exhibit 7.

¹⁶ Mr. M's post hearing submission of calendars showing where children were & Recording of Hearing – Testimony of Mr. M.

¹⁷ Exhibit 7.

¹⁸ Exhibit 5.

Based on the evidence in the record, I find that it is more likely than not that the Division's calculations are correct and that the income used in these calculations is correct as to the amount that should be used to set Mr. M's ongoing child support.¹⁹ I also find that the children were in the primary custody of Mr. M during the first twelve months covered by this order. Furthermore, Mr. M showed by clear and convincing evidence that it would be manifestly unjust to set his arrears for October through December of 2009 above \$0 per month.²⁰

III. Discussion

Mr. M argued that his child support order should be lower than the amount set by the Division. 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.²¹ Mr. M met his burden to show that his child support order arrears should be adjusted.

Shared custody exists when a child resides with a parent at least 30, but no more than 70, percent of the year.²² In calculating the percentage of the time a child is with a parent only overnights count. This means a child must spend at least 110 overnights in the year in order for there to be shared custody.²³ When one parent has primary or shared custody of a child for less than a year and receives public assistance, it could create a child support obligation for the other parent. It may not be appropriate to establish child support arrears against the parent who had primary custody for months when some visitation has occurred during a twelve month period that totals less than 110 overnights.

The fact that public assistance was fraudulently obtained by the noncustodial parent does not make it more appropriate to establish child support arrears against the custodial parent. In this case, viewing Ms. Q as exercising shared custody during three months, October through December of 2009, is not appropriate. That characterization looks at those three months in isolation rather than as the beginning of the first year when the parents separated and the custody situation was evolving into Mr. M's sole custody of the children. Even during those three months, the primary reason that the children were not always with him instead of mostly with him is that he had to maintain his job so that he could continue to support the children and Ms.

¹⁹ Recording of Hearing & Exhibits 11, 12 & 13.

²⁰ Exhibit 6 & Recording of Hearing.

²¹ Alaska Regulation 15 AAC 05.030(h).

²² Alaska Civil Rule 90.3(f).

²³ Alaska Civil Rule 90.3 Commentary V.

Q. Mr. M would not have been living with the children during those periods even if the family had remained intact.

Mr. M provided in-kind contributions of child support to Ms. Q for the short periods she had the children during those three months. Ms. Q provided no support and had no custody during the last eight months of the first year of separation. This is not a case where the family was intact except for three months when the obligor was living away from the children. This is a case where the children were in Mr. M's custody for more than 90% of the overnights during the first year of separation and lived with Ms. Q less than 10% of the overnights.²⁴

Another reason that it would be inconsistent with Alaska Civil Rule 90.3 to charge Mr. M's household child support for arrears for those three months is that Mr. M's household includes the children of this order and there are other unusual circumstances that would require that support be set at \$0 to avoid an injustice even if the time that the children spent with their mother in 2009 created a shared custody child support obligation for Mr. M.²⁵

A parent may obtain a reduction in the amount calculated in a shared custody calculation if he or she shows 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."²⁶ A finding that "unusual circumstances" exist in a particular case may be sufficient to establish "good cause" for a variation in the support award:

Good cause may include a finding . . . that unusual circumstances exist which require variation of the award in order to award an amount of support which is just and proper for the parties to contribute toward the nurture and education of their children^[27]

Civil Rule 90.3 also states that when establishing support arrears, the court or tribunal should consider all the relevant factors in the case. The Commentary provides:

It will sometimes be necessary for the court to establish support for a time when no complaint or petition for support had yet been served, and there was no other court or administrative order in effect. The court has determined that Civil Rule 90.3 applies to such calculations. Vachon v. Pugliese, 931 P.2d 371, 381-382 (Alaska 1996). However, in some circumstances unfairness may

²⁴ Alaska Civil Rule 90.3 Commentary IV & V define primary and shared custody based on the time each parent has custody during a year rather than a month or a few months.

²⁵ Under Civil Rule 90.3(c)(1).

²⁶ Alaska Civil Rule 90.3(c).

²⁷ Civil Rule 90.3(c)(1)(B) the minimum monthly amount is when there is shared custody is \$0 rather than \$50.

result from rigid application of the rule. The court should consider all relevant factors in such a situation, including whether the obligor was aware of the support obligation, especially if the obligor had children subsequent to that child. See also Commentary VI.B.2.^[28]

In applying the above language to Mr. M's arrears, several factors must be taken into consideration. The children are now living with Mr. M, so any child support the obligor has to pay on this case would deprive the children of the support they should have as a member of Mr. M's household. This essentially makes the children bear the current burden of those arrears. Some of the underlying debt is owed to Ms. Q who did not provide support for the last four months of the first year of separation, who has substance abuse problems and who is now in jail on felony charges. Also, Mr. M must now support the children in his household full-time as a single parent with no assistance from Ms. Q, and he has unusual expenses because he must provide for their care while he is away on his regular job rotation.

The Alaska Supreme Court holds that factors such as these, which relate to the well being of the children, are especially important in determining whether there is good cause to vary the child support amount. The court has stated:

The meaning of the term "good cause," however, is to "be determined by the context in which it is used."²⁹ That context, for Civil Rule 90.3 purposes, must focus first and foremost on the needs of the children. See Civil Rule 90.3, commentary at sec. I(B).^[30]

Furthermore, Mr. M was fully supporting both the children financially during the last three months of 2009 and Ms. Q appears to have obtained public assistance during those months through fraud in order to support her drug habit.

Based on all the evidence, this case presents unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. M proved by clear and convincing evidence that manifest injustice would result if he were required to pay the full arrears in this case. It makes little sense and it would be unjust to burden Mr. M's household by adding child support debt to his current obligation to support the children in the home. Setting Mr. M's shared custody child support arrears at \$0 per month is the only way to avoid an injustice under Civil Rule 90.3(c).

²⁸ Civil Rule 90.3, Commentary VI.E.1.

²⁹ Citing *Coats v. Finn*, 779 P.2d 775, 777 (Alaska 1989).

There is no ongoing support due because Mr. M has custody of the children by court order. However, an ongoing child support amount will remain in this order, but it will not be collected. It will remain in place so in the event Mr. M becomes liable for paying support in the future, the Division can begin income withholding much sooner than if the Division has to initiate a modification procedure.

IV. CHILD SUPPORT ORDER

1. Mr. M's ongoing child support for C and R is set at \$1,328 per month effective April 1, 2011.
2. Mr. M is liable for child support arrears for C and R in the monthly amounts of \$0 for the month of October 2009 through March 2011.
3. The Division is not collecting child support for periods after December of 2009 because the children have been in Mr. M's custody by court order since that time.
4. The Division should give the parties the appropriate debit or credit for their out-of-pocket expenses for providing health insurance coverage for C and R.
5. All other provisions of the Amended Administrative Child and Medical Support Order issued on December 9, 2010 remain in effect.

DATED this 8th day of March, 2011.

By: Signed _____
Mark T. Handley
Administrative Law Judge

³⁰ *Doyle v. Doyle*, 815 P.2d 366 (Alaska 1991).

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 28th day of March, 2011

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

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