

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

IN THE MATTER OF: )

J. M. O. )

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) OAH No. 11-0032-CSS  
) CSSD No. 001166735  
)

**DECISION AND ORDER**

**I. Introduction**

The obligor, J. M. O., appeals an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on January 10, 2011. The obligee child is D., age 5. The custodian of record is S. S. O.

The formal hearing was held on February 17, 2011. Both parties appeared in person. Mr. O.'s father, M. O., also appeared and presented testimony. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based upon the record and after careful consideration, the parties have exercised shared custody of D. during most of the time period at issue. Mr. O. had 64% custody from May 2010 through January 2011 and he has been exercising approximately 50% custody as of February 2011. His child support obligation should be adjusted accordingly.

**II. Facts**

*A. Procedural History*

Public assistance benefits began to be paid on D.'s behalf in March 2010.<sup>1</sup> Mr. O. applied for child support services on July 23, 2010.<sup>2</sup> CSSD issued an Administrative Child and Medical Support Order on November 15, 2010.<sup>3</sup> He requested an administrative review and provided additional information.<sup>4</sup> On January 10, 2011, CSSD issued an Amended Administrative Child Support and Medical Support Order that set Mr. O.'s child support at \$278 per month, effective March 2010.<sup>5</sup> Mr. O. appealed, asserting shared custody.<sup>6</sup>

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1 Pre-hearing brief at pg. 1; Exh. 5 at pg. 7.  
2 Exh. 1.  
3 Exh. 3.  
4 Exh. 4.  
5 Exh. 5.  
6 Exh. 9.

*B. Material Facts*

J. and S. O.<sup>7</sup> are married and have one daughter, D., age 5. They began the process of separating at the end of March 2010 when J. left town for a few days and S. applied for public assistance benefits. J. vacated the home on about March 31<sup>st</sup>, at which time he moved in with his parents. S. and D. remained in their apartment at the J. L. V., where the family had been living. S. encountered financial difficulties, so she and J. agreed that he would pay the apartment rent, utilities and related costs for April and May, and that in return he would receive a credit against his child support obligation of \$300 per month for April and May, a total of \$600.<sup>8</sup> J. borrowed \$1,316.07 from his parents, which he paid directly to the J. L. V. on May 20, 2010.<sup>9</sup>

S. had primary custody of D. in April 2010. However, beginning in late April, D. began spending almost continuous overnights at her grandparents' home. J. and his father worked during the day and F. stayed home with D. M. and F. also paid for D. to attend preschool three hours per day Monday – Thursday and they maintained contemporaneous records of D.'s overnight visits up to and including January 2011.<sup>10</sup> The records are reliable and S. does not dispute them. Thus, D. stayed overnight with her father and grandparents as follows:

<u>MONTH</u>	<u># OF OVERNIGHTS</u>	<u>% OF TIME</u>
April 2010	07	23
May	13	42
June	15	50
July	15	48
August	22	71
September	20	67
October	25	81
November	29	97
December	19	61
January 2011	<u>17</u>	<u>55</u>
TOTALS	182	AVE. 64% (May – Jan 2011) <sup>11</sup>

D.'s time at M. and F.'s in 2010 can be divided into three distinct periods: May through July, August through November and December through January 2011. From May through July,

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<sup>7</sup> The parties' first names are used to alleviate confusion between them and Jeremy's parents, M. and F. ("F.")

<sup>8</sup> Obligor's Attachment B at pg. 1.

<sup>9</sup> Obligor's Attachment B at pg. 2.

<sup>10</sup> Obligor's Attachment D.

<sup>11</sup> The average percentage of time figure was reached by adding the values for May through January 2011, which totaled 572, and dividing by 9 months, for an average of 63.5, or 64%. Summer had primary custody in April.

D. spent a sufficient amount of overnights at her grandparents' house such that J. and S. were sharing custody fairly equally. D. was with J. 43 nights during those three months, all of which averages out at 47% custody (53% for S.).<sup>12</sup>

From August through November 2010, D. stayed overnight at the O. home even more often. A series of emails from this period indicates S.'s counselor recommended that D. not stay at home with her mother because S. was struggling with depression.<sup>13</sup> In addition, S. was evicted from her apartment at the end of October. As a result, she left D. with the O.s much of that time. With the exception of September, in which J. had her 20 of 30 possible overnights (67% of the time), D. was in her father's custody 22 or more overnights during each month in that period.<sup>14</sup> This number of overnights constitutes an average of 79% of the time, more than enough to equal primary custody.<sup>15</sup> S. moved in with her sister and family in November 2010, but D. remained at her father's for all but one overnight that month.

The final period of time discussed here is December through January 2011. S. testified that D. "came back to live" with her on December 8<sup>th</sup>.<sup>16</sup> Although D. began staying with her mother again at that time, J. still had custody of their daughter more than half of the time that month. According to M. and F.'s records, D. did stay overnight with her mother on December 7<sup>th</sup>, but for only one night, followed by 11 other overnights the rest of that month and 14 total overnights in January 2011.<sup>17</sup> On a percentage basis, his 61% custody in December and 55% in January 2011 average out to be 58% for those two months. That leaves S. with 42% of the overnights during that time period.

At the hearing held on February 17, 2011, S. testified that she would be getting her own apartment on February 21<sup>st</sup>. She also said she was working with Nine Star Education and Employment Services to find a job and that she soon would be attending college full-time in an online program to obtain a degree in Criminal Justice. Regarding custody, her stated plan was for J. to have D. 2 overnights per week. On an annual basis, 2 overnights per week equal about

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<sup>12</sup>  $43 \div 92 = 46.7$ , which is rounded to 47%.

<sup>13</sup> Obligor's Attachment E.

<sup>14</sup> Obligor's Attachment D.

<sup>15</sup> Civil Rule 90.3(f)(2).

<sup>16</sup> Testimony of S. S. O.

<sup>17</sup> Obligor's Attachment D at pg. 9.

28% custody and do not equate to shared custody, which requires at least 30% of the overnights in one year.<sup>18</sup>

### III. Discussion

#### A. Shared Custody

J.'s appeal challenges CSSD's determination that S. had primary custody of D. beginning in March 2010. He does not dispute the calculation that his primary custody support obligation is \$278 per month and he understands that if shared custody is applied to any of the months at issue, his child support would be adjusted accordingly. The person requesting the hearing has the burden of proving by a preponderance of the evidence that CSSD's Amended Administrative Child Support and Medical Support Order is incorrect.<sup>19</sup>

A parent is obligated both by statute and at common law to support his or her children.<sup>20</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>21</sup> In this case, S. applied for and began receiving public assistance toward the end of March 2010 and presumably received benefits for the entire month. But J. did not move out of the family home until March 31, 2010, so the parties agree that he does not owe support for March and charges for the month will be vacated. J. is thus obligated to pay support through CSSD as of April 2010.

Where parents exercise shared custody of their children, Civil Rule 90.3 provides that child support is to be calculated differently than where one parent has primary custody. Each parent's primary custody support obligation to the other is determined, 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

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<sup>18</sup> See Civil Rule 90.3(f)(1).

<sup>19</sup> 15 AAC 05.030(h).

<sup>20</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

<sup>21</sup> 15 AAC 125.105(a)(1)-(2).

specified in writing of at least 30 percent of the year, regardless of the status of legal custody.<sup>[22]</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>23</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.

In cases where a shorter time period is being analyzed, the percentage of overnights in one month might be the measured. Also, another simplified method is to work from the number of days per week each parent has custody of the child, over an extended period of time. An example of this would be where the parties each have the child for 3 or 4 days per week. Three days per week equals 43% of the time and four days per week equals 57%.<sup>24</sup> However, a parent who has the child just two nights per week would not be exercising shared custody because that number does not reach the 30% threshold.<sup>25</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 cases through CSSD 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, J., has the burden of proof by a preponderance of the evidence.<sup>26</sup>

J. met his burden on the shared custody issue. Shared custody is not indicated for April 2010 because J. had D. only 7 overnights toward the end of the month, but from April 2010 to the present, shared custody has been continuous. Moreover, S. does not dispute M. and F.'s records because she did not keep track of the times that either she or J. had D. overnight.

Even though she did not keep her own records, S. challenges a shared custody finding, arguing that J. actually spent very little time with D. when the child was at M. and F.'s home. Presumably she means that he should not be credited with shared custody because his mother

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<sup>22</sup> Civil Rule 90.3(f)(1).

<sup>23</sup> Civil Rule 90.3, Commentary V.A.

<sup>24</sup>  $3 \text{ days} \div 7 \text{ days} = 42.85\%$ , which is rounded to 43%. Similarly,  $4 \text{ days} \div 7 \text{ days} = 57.14\%$ , which is rounded to 57%.

<sup>25</sup>  $2 \div 7 = .285 = 28.5\%$ .

<sup>26</sup> See 2 AAC 64.290(e).

provided most of the child care for D. S.'s argument is not persuasive in the shared custody context. D. was staying overnight in the same home where J. was living. This essentially made him a custodial parent each of those days and for any month in which D. was there more than 9 overnights;<sup>27</sup> J. was exercising shared custody of his daughter.

The facts section of this decision went into much detail about the three distinct time frames from May 2010 through January 2011 during which J. and S. exercised varying levels of shared custody. But for child support purposes it is best to treat that time period as a whole so as to avoid multiple calculations and support amounts. Viewed this way, on average J. had D. 64% of the overnights from May 2010 through January 2011 and S. had her 36% of the time.<sup>28</sup>

CSSD determined J.'s total income from all sources to be \$19,187.06 in 2010, including the PFD.<sup>29</sup> This income figure results in a primary custody support obligation of \$278 per month for one child.<sup>30</sup> This amount should be applied to the month of April 2010, when S. still had primary custody.

S. was on public assistance in 2010 so presumably her only income for the year was the PFD.<sup>31</sup> Thus, S.'s income was below the poverty level and her primary custody support obligation for D. in 2010 is \$50 per month.<sup>32</sup>

When the parties' primary custody support amounts and shared custody percentages are inserted into the shared custody calculation, it results in J. having a child support obligation of \$102 per month from May 2010 through January 2011.<sup>33</sup>

The determination of ongoing support from February 2011 forward is not so easily done. S. testified on February 17<sup>th</sup> that she was going to get her own apartment in four days' time and that D. would then be staying with J. only 2 overnights per week. S. is apparently aware that visitation of only 2 nights per week equals only 28% custody and does not rise to the level of

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<sup>27</sup> Shared custody under Civil Rule 90.3(f)(1) requires at least 110 overnights per year, which on a monthly basis equals 9 overnights to reach the minimum number ( $110 \div 12 = 9.16$ , which is rounded to 9).

<sup>28</sup> See n.11.

<sup>29</sup> Exh. 5 at pg. 6.

<sup>30</sup> *Id.*

<sup>31</sup> Civil Rule 90.3, Commentary III.A.

<sup>32</sup> Civil Rule 90.3(c)(3).

<sup>33</sup> Attachment A.

shared custody.<sup>34</sup> S. also stated that she was enrolling in a full-time online college degree program and would be looking for work.

After careful consideration of the entire record in this appeal, ongoing child support as of February 2011 should not be based on S. having primary custody of D. The evidence strongly suggests that S. and J. will continue to share custody of D. into the future, more likely than not at about a 50/50 level. S. seemed to believe that if she got an apartment that D. would be coming back to live primarily with her. Yet the record shows that in 2010 S. had an apartment until the end of October, but that she did not have primary custody of D. after April of that year. In fact, J. had the child more than S. did. It should be noted that S. struggled with depression after the parties' separation and there is no indication she still has that problem today. Nonetheless, the record simply does not support a finding that D. would be returning to S.'s primary custody on a full-time basis after the hearing in February 2011. As a result, ongoing child support as of February should be calculated once again based on shared custody.

M. and F.'s journaling shows that from November 2010, the amount of time D. stayed overnight with her mother steadily increased from a low of 3% up to 39% in December and 45% in January 2011. With S. getting her own apartment again, it is more likely than not that her custody time would continue to increase and would gradually even out to about a 50/50 shared custody scenario with J. Ongoing child support should be based on this time allocation.

For ongoing child support purposes, CSSD and J. suggested that income be imputed to S. in the amount of \$10 per hour and she agreed to that hourly wage. However, S. will be taking online college courses, so she most likely won't be able to work full-time. Thus, her primary custody child support should be based on \$7.75 per hour, the current minimum wage in Alaska, for half-time employment. When that hourly wage is multiplied times 1,040 hours, one-half of a work year, it results in estimated income of \$8,060, plus the PFD of \$1,281 (taken from the 2010 amount), for total income of \$9,341.<sup>35</sup> Inserting this income figure into the child support calculator results in a primary custody support amount of \$147 per month for one child.<sup>36</sup> Finally, combining that figure with J.'s primary custody support obligation of \$278 per month

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<sup>34</sup> See n.18.

<sup>35</sup> Attachment B.

<sup>36</sup> *Id.*

yields a 50/50 shared custody amount of \$98 for J.<sup>37</sup> This figure should be adopted as of February 2011.

*B. Credit for Direct Payments*

J. has asked for credit for the \$600 he paid toward S.'s rent for April and May 2010. CSSD may give the obligor credit for direct payments made "before the time the obligor is ordered to make payments through the agency," so long as the direct payment was not made before the first date support is due in the administrative child support action.<sup>38</sup> An obligor who requests such credit must prove by clear and convincing evidence that he or she actually made the payments.<sup>39</sup>

Based on his testimony and documentary evidence produced at the hearing, J. has met his burden and is entitled to the direct credit totaling \$600. CSSD typically resists granting a credit where the payment has gone to someone other than the custodian, but J. and S. agreed that he would pay S.'s rent for two months so she and D. would not be evicted from the apartment that had been the family home. Clearly the payment was for the child's benefit and should be credited to him.

**IV. Conclusion**

J. has met his burden of proving by a preponderance of the evidence that he exercised shared custody of D. Although S. still had primary custody in April 2010, J. had shared custody of the child an average of 64% of the overnights from May 2010 through January 2011, and more likely than not would have 50% shared custody from February 2011, and ongoing. The resulting child support amounts should be adopted.

**V. Child Support Order**

1. J. O. is liable for child support for D. in the amount of \$278 for April 2010; \$102 per month from May 2010 through January 2011; and \$98 per month for February 2011, and ongoing;
2. J. O. is not liable for support for March 2010 because he was a custodial parent during that month;

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<sup>37</sup> Attachment C.

<sup>38</sup> AS 25.27.020(b).

<sup>39</sup> *Id.*



3. J. O. is entitled to a direct credit in the total amount of \$600, which reflects the direct payments he made in April and May 2010;
4. All other provisions of the Amended Administrative Child Support and Medical Support Order dated January 10, 2011, remain in full force and effect.

DATED this 29<sup>th</sup> day of March, 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 15<sup>th</sup> day of April, 2011.

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

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