

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

IN THE MATTER OF:)

J. M. P.)

) OAH No. 11-0097-CSS
) CSSD No. 001167287
)

DECISION AND ORDER

I. Introduction

The obligor, J. M. P., appeals an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on January 31, 2011. The obligee children are S., 4; and A., 2. The custodian of record is M. J. P.

The formal hearing was held on April 4, 2011. Mr. P. appeared in person; Ms. P. participated by telephone. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after careful consideration, Mr. P. is entitled to a shared custody calculation of 65/35, meaning he had custody of S. and A. 65% of the time and Ms. P. had custody 35% of the time from May 2010 through July 2010. As of August 2010, the parties were awarded 50/50 shared custody by the Superior Court, and on March 23, 2011, Mr. P. was awarded primary custody and Ms. P. was granted visitation. The parties' child support obligations are based on the shared custody percentages.

II. Facts

A. Material Facts¹

J. and M. P. are the parents of S. and A. When this case arose in early May 2010, the parties began exercising shared custody of the children. Mr. P. kept contemporaneous records of his visitation time with the children; Ms. P. did not keep records of her visitations with S. and A. During the period from May 4, 2010 through July 31, 2010, a period of 92 days, Mr. P. had overnight custody of S. and A. a total of 60 days.² When reduced to a percentage, those 60 days

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

² Obligor's Exh. A.

equal 65% of the overnights during May through July of that year.³ Ms. P. thus had the children 35% of the overnights during that same time period.

The parties entered into an agreement for 50/50 shared physical custody of the girls on July 23, 2010.⁴ Their agreement was subsequently adopted by the court and apparently went into effect as of August 1, 2010.⁵

On March 18, 2011, the court held a hearing regarding custody of the children. Mr. P. was awarded legal and physical custody and Ms. P. was granted visitation for six hours per day on Monday, Wednesday and Friday of each week.⁶ Although this order was titled “Interim Custody Order,” which suggests it may be changed in the future, it is the latest order regarding custody of S. and A. and must be followed by CSSD.

In 2010, Mr. P.’s total income from all sources was \$46,531.91, and included \$40,065.91 in wages; \$1,281 for the PFD and \$5,185 in unemployment benefits.⁷ Mr. P.’s only dispute with the income calculations was for a monthly union dues deduction. CSSD included a deduction of \$20.50 per month in its subsequent calculations.⁸

Ms. P. is unemployed and receiving Supplemental Security Income (SSI) of \$698 per month, \$358 per month in Adult Public Assistance benefits and food stamps and Medicaid.⁹

After the hearing, CSSD used the parties’ updated income information plus their shared custody percentages to calculate child support in this matter. The results indicate that Mr. P.’s child support is \$306 per month for May through July 2010; \$529.80 per month for August through December 2010; and \$531.91 per month for January through March 2011.¹⁰ Ongoing child support is suspended because Mr. P. has been awarded legal and physical custody of S. and A.

³ $60 \div 92 = 65.22\%$.

⁴ Exh. 3 at pg. 5.

⁵ *Id.*

⁶ Obligor’s Exh. B.

⁷ *See* Exh. 4 at pg. 6.

⁸ *See, e.g.* Exh. 9 at pg. 3.

⁹ Exh. 12.

¹⁰ Exhs. 8-11.

III. Discussion

The shared custody percentages from August 1, 2010 forward are governed by court order, so the only custody percentage to be adjudicated in this administrative child support action is the time period from May through July 2010. Mr. P. claims he had the children S. and A. approximately 65% of the time during those months. For her part, Ms. P. claims that she had the children at least 90% of the time before May 2010 and at least 51% of the time from May through July 2010.

The person requesting the hearing – in this case, Mr. P. – has the burden of proving that CSSD’s Amended Administrative Child Support and Medical Support Order is incorrect.¹¹

A parent is obligated both by statute and at common law to support his or her children.¹² Where parents exercise shared custody, 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.^[13]

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.¹⁴ 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. If a period less than a year is being considered, the standard measure for shared custody is at least 9 overnights per month.¹⁵

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

¹¹ 15 AAC 05.030(h).

¹² *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹³ Civil Rule 90.3(f)(1).

¹⁴ Civil Rule 90.3, Commentary V.A.

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. P., has the burden of proof by a preponderance of the evidence.¹⁶

Mr. P. and Ms. P. did not enter into a written agreement, nor do they agree on the periods of time each had custody of S. and A. However, Mr. P. made contemporaneous records of his specific overnights with the children. These records are credible and corroborate his testimony. Ms. P. also submitted photographs that document her time with S. and A. – but the pictures do not provide any sort of a measure of the amount of time she spent with them. Similarly, Ms. P. testified that she could not supply specific evidence of the amount of time she spent with the girls.

Thus, based on the entire record, Mr. P. met his burden of proving he and Ms. P. exercised shared custody of their children prior to August 2010. The specific custody percentage indicated by Mr. P.'s records is 65% for Mr. P. and 35% for Ms. P. for May through July 2010. As of August 2010, the custody percentages are dictated by court order – 50/50 shared custody from August through March 2011, then primary custody in Mr. P. as of April 1, 2011.¹⁷

Accordingly, CSSD has correctly calculated Mr. P.'s child support obligation based on the above percentages at \$306 per month for May through July 2010; \$529.80 per month for August through December 2010; and \$531.91 per month for January through March 2011.¹⁸ Ongoing child support is suspended as of April 1, 2011 because Mr. P. has been awarded temporary legal and physical custody of S. and A.

IV. Conclusion

The parties have executed shared custody of S. and A. since May 2010. Based on the shared custody findings for May through July 2010 and the court's subsequent orders, Mr. P.'s child support should be set at \$306 per month for May through July 2010; \$529.80 per month for August through December 2010; and \$531.91 per month for January through March 2011.¹⁹

¹⁵ 110 annual overnights ÷ 12 months = 9.16 overnights per month, rounded to 9.

¹⁶ See 2 AAC 64.290(e).

¹⁷ Although the court's order was signed on March 23, 2011, for child support purposes the change should be made effective as of April 1, 2011, when the next month's payment became due.

¹⁸ Exhs. 8-11.

¹⁹ Exhs. 8-11.

Ongoing child support should be suspended as of April 1, 2011 because Mr. P. has been awarded temporary legal and physical custody of S. and A.

V. Child Support Order

1. Mr. P. is liable for child support for S. and A. of \$306 per month for May through July 2010; \$529.80 per month for August through December 2010; and \$531.91 per month for January through March 2011;

2. Ongoing child support is suspended as of April 1, 2011 because Mr. P. has been awarded temporary legal and physical custody of S. and A.;

3. All other provisions of CSSD's Amended Administrative Child Support and Medical Support Order dated January 31, 2011 remain in full force and effect.

DATED this 26th day of May, 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 13th day of June, 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.]