

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

IN THE MATTER OF:)	
)	OAH No. 11-0247-CSS
O T)	CSSD No. 001165300
_____)	

DECISION AND ORDER

I. Introduction

The obligor, O T, appeals an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on June 1, 2011. The obligee children are S, 6; A, 4; and O, 2. The custodian of record is I T.

The formal hearing was held on July 25, 2011. Mr. T appeared personally with counsel, Alicia Porter; Ms. T did not participate. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after careful consideration, Mr. T is not liable for support prior to December 2010, as the parties and children were an intact family until then. Mr. T is liable for support from December 2010 forward, although his ongoing obligation is currently suspended due to Ms. T's withdrawal from services in April 2011. For the time period during which he is liable for paying support, Mr. T is entitled to a shared custody calculation based on him having 33% shared custody of the children. Finally, the parties have older children currently living with a third party in Gambia. Although Mr. T regularly sends funds to the third party for their support, he is not entitled to a credit in this matter for those payments. Rather, his child support obligation is calculated pursuant to the third party provisions of Civil Rule 90.3(i), which factors in all of the parties' children, including the ones living in Gambia.

II. Facts

O and I T are the parents of seven children. Their two oldest have emancipated and are not a part of this appeal. Of their five other children, the two oldest, B and I, live in Gambia with a third party. Mr. T regularly sends money to Gambia for their support.

O and I T and the three youngest children, S, 6; A, 4; and O, 2, were an intact family until December 2010. Mr. T had traveled to Gambia late in 2009 and returned in February 2010. During his absence, Ms. T applied for public assistance benefits, but she terminated services soon after his return. CSSD originally charged Mr. T with support for January through March

2010, but the agency now concedes that the Ts were an intact family even during Mr. T's travels and has withdrawn its assessment of support for that period of time.

The parties separated in December 2010 and are currently involved in divorce litigation. Ms. T applied for public assistance again that month and CSSD has charged Mr. T with support beginning as of December 2010.

After he and his wife separated, Mr. T began keeping the children overnight part of the time. Beginning in January 2011, he marked his calendar to show when he had the children overnight.¹ From January 2011 through July 13, 2011, a period of 194 days, Mr. T had the children for a total of 64 overnights, an average of 33% shared physical custody.²

In 2010, Mr. T's total income from all sources was \$21,906.28, and included wages of \$20,625.28, plus the PFD of \$1,281.³ CSSD estimated Mr. T's 2011 income at \$27,533.90.⁴ This includes wages of \$26,252.98, and the PFD of \$1,281.⁵ CSSD arrived at this estimate based on Mr. T's year-to-date earnings as of August 5, 2011.⁶

In 2010, Ms. T received total income from all sources of \$11,858.11.⁷ This figure includes wages of \$70.11, the PFD of \$1,281, and unemployment benefits of \$10,507.⁸ For 2011, CSSD estimated Ms. T would have total income of \$4,799, which includes the PFD of \$1,281, and unemployment benefits of \$3,518.⁹

Based on the parties' 2010 actual income figures and their estimated incomes for 2011, CSSD calculated Mr. T's child support obligation at \$256 for December 2010; and \$416 per month for 2011, beginning in January. CSSD suspended ongoing child support as of April 2011, based on the custodian's withdrawal from services.¹⁰

1 See Obligor's Pre-hearing Brief, Exh. A.

2 CSSD's Submission to Record at pg. 1.

3 See Exh. 9 at pg. 1; Exh. 11.

4 Exh. 13.

5 *Id.*

6 Obligor's supplemental information received August 5, 2011.

7 Exh. 12.

8 Exh. 10; Exh. 12.

9 Exh. 14.

10 See Exh. 17 at pg. 3.

III. Discussion

The person requesting the hearing – in this case, Mr. T – 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 a minimum average of 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 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. T, has the burden of proof by a preponderance of the evidence.¹⁶

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.

¹⁵ $110 \text{ annual overnights} \div 12 \text{ months} = 9.16 \text{ overnights per month, rounded to 9.}$

¹⁶ *See* 2 AAC 64.290(e).

Mr. T and Ms. T did not enter into a written agreement regarding shared custody, but Mr. T made contemporaneous records of his specific overnights with the children. These records are credible and corroborate his testimony. Also, CSSD has accepted them and based the calculation of his support obligation on the records.

Thus, based on the entire record, Mr. T met his burden of proving he and Ms. T exercised shared custody of their children beginning in January 2011. The specific custody percentage indicated by Mr. T's records is 33% for him and 67% for Ms. T. The child support amount for December 2010 remains calculated based on primary custody in Ms. T because there are no records documenting shared custody until January 2011. Accordingly, CSSD has correctly calculated Mr. T's child support obligation based on the above percentages at \$416 per month for January 2011 forward.¹⁷

Mr. T requested a deduction for paying support for his older children in Gambia, but that deduction is not applicable in his case because those children are also Ms. T's children. Civil Rule 90.3(a)(1)(C) requires that any deduction for prior children only be for children from a different relationship.¹⁸ In the alternative, Mr. T's child support obligation should be calculated first by using the third-party custody calculation under Civil Rule 90.3(i)(2), which calculates his obligation for all of the parties' minor children. Then, the support obligation for the three younger children at issue in this case is allocated equally among all the children. Although not a specific deduction for supporting his prior children, this method of calculation is a substitute for that deduction. It effectively reduces his obligation for the children in this appeal, in much the same way as a deduction for supporting older children would operate.

Ongoing child support is suspended as of April 1, 2011 because Ms. T has withdrawn from services. Mr. T is still obligated to support the children, however, so he should be prepared to document his support for them in the event Ms. T applies for services again in the future.

IV. Conclusion

Mr. T met his burden of proving by a preponderance of the evidence that CSSD's Amended Administrative Child and Medical Support Order was incorrect.

Based on the record and after careful consideration, Mr. T is not liable for support prior to December 2010, as the parties and children were an intact family until then. He is liable for

¹⁷ Exhs. 15-17.

support from December 2010 forward, although his ongoing obligation is currently suspended due to Ms. T's withdrawal from services in April 2011. For the time period during which he is liable for paying support, Mr. T is entitled to a shared custody calculation based on him having 33% shared custody of the children. Finally, the parties have older children currently living with a third party in Gambia. Although Mr. T regularly sends funds to the third party for their support, he is not entitled to a deduction in this matter for those payments. Rather, his child support obligation is calculated pursuant to the third party provisions of Civil Rule 90.3(i), which factors in all of the parties' children, including the ones living in Gambia.

CSSD's calculations contained in its August 24, 2011, Submission to Record are correct and should be adopted.

V. Child Support Order

1. Mr. T is liable for child support for S, A, and O, of \$256 for December 2010; and \$416 per month for January 2011, and ongoing;

2. Ongoing child support is suspended as of April 1, 2011 because Ms. T has withdrawn from services; if she reapplies for child support in the future, Mr. T should be prepared to document his support for the children from April 2011 forward;

3. All other provisions of CSSD's Amended Administrative Child Support and Medical Support Order dated June 1, 2011, remain in full force and effect.

DATED this 8th day of September, 2011.

By: Signed
Kay L. Howard
Administrative Law Judge

18 Civil Rule 90.3(a)(1)(C).

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 26th day of September, 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.]