

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

IN THE MATTER OF: )

C M. B )

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OAH No. 11-0369-CSS

CSSD No. 001175503

**DECISION AND ORDER**

**I. Introduction**

The obligor, C M. B, appeals an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on August 31, 2011. The obligee children are H, 16, and J, 11. The other party is T W-B.

The formal hearing was held on October 11, 2011. Both parties appeared in person with counsel. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based upon the record and after careful consideration, Mr. B's child support is set at \$953 per month for two children, effective April 1, 2011, and ongoing.

**II. Facts**

*A. Procedural History*

Ms. W-B applied for child support services in April 2011.<sup>1</sup> CSSD requested financial information from Mr. B on May 5, 2011, then issued an Administrative Child Support and Medical Support Order on June 3, 2011 that set his child support at \$890 per month.<sup>2</sup> He requested an administrative review and provided additional financial information.<sup>3</sup> On August 31, 2011, CSSD issued an Amended Administrative Child Support and Medical Support Order that set Mr. B's child support at \$1,160 per month with arrears of \$3,992.71 for the period from April 2011 through August 2011.<sup>4</sup> Mr. B filed an appeal and requested a hearing on September 19, 2011.<sup>5</sup>

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<sup>1</sup> Exh. 1.

<sup>2</sup> Exhs. 2 & 3.

<sup>3</sup> Exhs. 4-6.

<sup>4</sup> Exh. 8.

<sup>5</sup> Exh. 9.

*B. Material Facts*

Mr. B and Ms. W-B are married, but they are currently involved in divorce litigation. They separated in late March 2011 when Mr. B moved out of the family home in No Name and into an apartment. Ms. W-B and their children, H and J, remained in the home until June 2011, at which time they moved to No Name.

Primary custody of H and J remained with Ms. W-B. From April through September 2011, Mr. B had the children for overnight visitation. He wanted the parties to exercise 50/50 shared custody during the summer, and it appears they did agree to a 50/50 split at least for June, but Mr. B had the children much less than 50% of the time during the other months. According to the obligor, he had overnight visits with H and J as follows:

<u>Month</u>	<u>Time period</u>	<u>Total # of overnights</u>
April	1-2 weekends	4 overnights
May	1-2 weekends	4 overnights
June	2 weeks	14 overnights
July	1 week	7 overnights
August	0 days	0 overnights
September	2 weekends	<u>4 overnights</u>
Total		33 overnights

During the period from September 1<sup>st</sup> through mid-October, Mr. B had visitation with the children approximately two weekends per month. The obligor does not contest that Ms. W-B has had primary custody since September 1<sup>st</sup>. Further, Mr. B acknowledged that the correct child support amount as of September 2011 is \$953 per month, as calculated by CSSD before the hearing.<sup>6</sup>

**III. Discussion**

Mr. B has appealed CSSD's determination of his child support obligation. As the person who requested the hearing, Mr. B has the burden of proving that CSSD's Amended Administrative Child Support and Medical Support Order is incorrect.<sup>7</sup>

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<sup>6</sup> See Exh. 10. Ms. W-B does not object to this calculation. It is lower than the amount set in the Amended Administrative Child and Medical Support Order, apparently because CSSD removed from Mr. B's income the annual leave he cashed in during 2011 to pay bills. See Exh. 9 at pg. 2.

<sup>7</sup> 15 AAC 05.030(h).

A parent is obligated both by statute and at common law to support his or her children.<sup>8</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 children.<sup>9</sup> In this case, Ms. W-B applied for child support services in April 2011, so that is the first month Mr. B is obligated to pay support in this administrative child support action.

Civil Rule 90.3(a)(1) provides that an obligor's child support amount is to be calculated based on his or her "total income from all sources." 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. In general, and depending on the percentage of time each parent has overnight visitation, the parent obligated to pay child support in a shared custody situation would have a somewhat lower monthly support amount than where one parent exercises primary custody. 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>[10]</sup>

In order for a visitation day to count toward the required 30% of the year, the children must stay overnight with the respective parent.<sup>11</sup> One year is equal to 365 days, so 30% of the year equals 110 overnights.<sup>12</sup> This is the minimum number of overnights needed on an annual basis to reach the threshold definition of shared custody. If the disputed period begins mid-year,<sup>13</sup> the standard measure for 30% shared custody is an average of at least 9 overnights per month.<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. In the absence of a written agreement, the parties' actual periods of overnight custody

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<sup>8</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

<sup>9</sup> 15 AAC 125.105(a)(1)-(2).

<sup>10</sup> Civil Rule 90.3(f)(1).

<sup>11</sup> Civil Rule 90.3, Commentary V.A.

<sup>12</sup>  $365 \times .30 = 109.5$  (rounded to 110).

<sup>13</sup> In general, Civil Rule 90.3 prefers addressing child support on an annual basis, but shorter periods of time occasionally must be addressed.

<sup>14</sup>  $110 \text{ annual overnights} \div 12 \text{ months} = 9.16 \text{ overnights per month, rounded to 9.}$

determine whether shared custody exists and, if so, what percentage of shared custody each party exercises.

The parent asserting that shared physical custody exists has the burden of proof by a preponderance of the evidence.<sup>15</sup> Mr. B and Ms. W-B did not execute a written agreement for shared custody, so Mr. B must prove that he had the children at least 30% of the time in order to meet the minimum requirements for a shared custody calculation.

There is no significant dispute about the amount of time the children spent with Mr. B during the six-month period from April through September 2011. Both parties testified that H and J spent 1-2 weekends with Mr. B in both April and May,<sup>16</sup> two weeks with him in June, one week in July, zero time during August and, beginning in September, about every other weekend. The total equals roughly 33 overnights for Mr. B during the six months from April to September. This clearly does not constitute shared custody.

Mr. B claims that he and Ms. W-B had an agreement that they would share custody of the children on a 50/50 basis during June, July and August. He did have two weeks' visitation in June, but nothing close to that thereafter. Ms. W-B acknowledged that she and Mr. B agreed on 50/50 custody for July, but she denied they agreed to a 50/50 split for August.

Regardless of whether the parties had a verbal agreement for all three months of the summer or only one or two of those months, the children did not spend 50% of the time, or even 30% of the time, with Mr. B from June through August. Granted, he had them for half of June, but by itself, two weeks of overnight visitation does not equal shared custody. Indeed, two weeks would not even entitle Mr. B to an extended visitation credit, which requires a minimum of 27 consecutive overnights.<sup>17</sup>

Mr. B insists Ms. W-B caused the failure of their agreement by withholding H and J from him so that he could not complete the two weeks in July. He asserts that, as a result, he should be entitled to a 50/50 shared custody calculation for those three months. He believes in the alternative that he should not have to pay support for months during which he claims Ms. W-B denied his access to the children.

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

<sup>16</sup> Mr. B testified he had the children one or two weekends in April. Ms. W-B testified he had them one weekend in April. For purposes of this discussion, Mr. B is considered to have had the children overnight for two weekends in both April and May.

<sup>17</sup> Civil Rule 90.3(a)(3).

An obligor is not entitled to a 50/50 shared custody calculation in the absence of a written agreement with the other party or proof of actual shared custody being exercised. Neither may he or she withhold support during a custody dispute with the other party. CSSD's regulations do not provide for such self-help measures, nor do they allow the administrative law judge to waive an obligor parent's support obligation under these circumstances. Rather, Mr. B must seek relief from the court. Mr. B is obligated to pay child support for H and J until the court rules otherwise in the parties' divorce and custody litigation.

Mr. B did not meet his burden on the shared custody issue so he is not entitled to a shared custody calculation. Therefore, his child support obligation should be based on primary custody in Ms. W-B for all the relevant time periods.

#### **IV. Conclusion**

Mr. B did not meet his burden of proving he exercised shared custody of H and J, so his child support should be calculated using the primary custody formula. CSSD's calculation of \$953 per month for 2011 is correct and should be adopted for all of the time periods in this appeal. The issue of insurance credits or debits should be referred to Mr. B's caseworker so that any future adjustments may be made without the necessity of a modification action.

#### **V. Child Support Order**

- Mr. B is liable for child support for H and J in the amount of \$953 per month for two children (\$706 per month for one child) for the period from April 2011 through December 2011, and ongoing;
- CSSD's application of credits for support paid to Ms. W-B in the amount of \$1,877.29 for the period from April 2011 through June 2011 is affirmed;
- All other provisions of CSSD's Amended Administrative Child Support and Medical Support Order dated August 31, 2011, remain in full force and effect.

DATED this 21<sup>st</sup> day of December, 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 9<sup>th</sup> day of January, 2012.

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

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