

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

IN THE MATTER OF:)

J A. L)

OAH No. 12-0101-CSS

CSSD No. 001175925

DECISION AND ORDER

I. Introduction

The custodian of record, K J. M, appeals an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in Mr. L's case on March 14, 2012. The obligee children are S, 4, and J, 3.

The formal hearing was held on May 8, 2012, and a supplemental hearing was convened on June 7, 2012. Both parties participated in the first hearing; only Ms. M appeared for the supplemental hearing. Erinn Brian, Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based upon the record and after careful consideration, Mr. L's child support is set at \$50 per month for August 2011 through December 2011; and \$226 per month for January 2012 through June 2012, and ongoing. The parties exercise shared custody, but when both parents' times with each child are considered, the result is a 70/30 shared custody split, with Ms. M having 70% custody and Mr. L having 30% custody of S and J.

II. Facts

A. Procedural History

Ms. M began receiving benefits under the NTANF¹ program for S and J in August 2011.² CSSD initiated a child support action on behalf of the children, which resulted in the division issuing an Amended Administrative Child and Medical Support Order on August 29, 2011.³ That order set Mr. L's ongoing child support at \$79 per month, with arrears totaling \$237 from

¹ Native Temporary Assistance Program.

² Exh. 3 at pg. 9.

³ Exh. 5.

August 2011 through March 2012, based on the parties exercising 50/50 shared custody.⁴ Ms. M appealed, asserting that she and Mr. L do not exercise shared custody.⁵

B. Material Facts

Mr. L and Ms. M have two children, S and J. The parties apparently separated just prior to, or in, August 2011, as that is the month Ms. M applied for Native temporary assistance benefits.

Ms. M exercised primary custody of S and J from the time the parties separated until December 2011. In January 2012, Mr. L began having overnight visitations with J. He did not have any significant overnights with S. In general, Ms. M testified that she had primary custody of both children through the end of January 2012; in February and March, she had primary custody of S and they shared 50/50 custody of J; in April, she had primary custody of S and Mr. L had primary custody of J; and in May, she had primary custody of S and they shared custody of J (Mr. L had 17 overnights with J). Mr. L testified that he had J for 13 overnights in January, so the shared custody time period began in January 2012.

There are 152 overnights in the period from January 2012 through May 2012. With two children being considered, the total is 304 overnights.⁶ Based on the testimony of both parties, it is more likely than not that Ms. M had 152 overnights with S and 60 overnights with J, for a total of 212 overnights out of the 304 available. This equals 70% of the time available. Mr. L had 0 overnights with S and 92 overnights with J, which equals 30% custody.

In 2011, Mr. L's total gross income, including the PFD, was \$2,171.⁷ A child support amount based on this income is \$50 per month.⁸

For the 2012 and ongoing calculation, it should be noted that neither party is working full-time; Ms. M is a student on public assistance and food stamps. CSSD imputed income to both of them, but in the amount of \$11 per hour for Mr. L and the minimum wage of \$7.75 to Ms. M.⁹ Neither Mr. L nor Ms. M established that they cannot earn income in those amounts, so CSSD should be allowed to impute income to them. However, there is nothing in the record to

⁴ *Id.*

⁵ Exh. 6.

⁶ $152 \times 2 = 304$.

⁷ Exh. 5 at pg. 9.

⁸ *Id.*

⁹ *See* Exh. 5 at 12-13.

suggest Mr. L is capable of earning more per hour than Ms. M, so only the minimum wage should be imputed to each party.

III. Discussion

A. *Shared Custody*

A parent is obligated both by statute and at common law to support his or her children.¹⁰ 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).¹¹ In this case, Ms. M applied for or began receiving Native temporary assistance in August 2011, so Mr. L is thus obligated to pay support through CSSD beginning as of that month.

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 specified in writing of at least 30 percent of the year, regardless of the status of legal custody.^[12]

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.¹³ 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.

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

¹⁰ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹¹ 15 AAC 125.105(a)(1)-(2).

¹² Civil Rule 90.3(f)(1).

¹³ Civil Rule 90.3, Commentary V.A.

custody existed, and if so, what percentage of shared custody each party exercised. Shared physical custody must be proven by a preponderance of the evidence by the party asserting it has occurred.¹⁴

Ms. M met her burden on the shared custody issue in this appeal. There was no dispute that she exercised primary custody of S and J through the end of 2011. As a result, Mr. L's support obligation for that year reflects Ms. M having primary custody, although at the minimum amount of \$50 per month, his arrears for the year total only \$250, plus interest.

Beginning in 2012, when the parties' overnights with both children are considered, the parties essentially exercised 70/30 shared custody, although Mr. L's total time with J just barely reached 30% shared custody, the minimum amount of time necessary to equal shared custody.¹⁵ The parties clearly have much to work through, especially since it appears that they are currently in custody litigation. Mr. L has had overnight custody a sufficient amount of time to warrant a shared custody calculation, and it would be unjust to find that Ms. M exercises primary custody all of the time.

B. Income Issues

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." An obligor parent has the burden of proving his or her earning capacity.¹⁶

Neither party raised income issues at the hearing. CSSD calculated shared custody in its amended order based on income imputed to both of them for full-time employment, but the division used \$11 per hour for Mr. L, as compared to \$7.75, the minimum wage, for Ms. M. There is no evidence in the record to support assigning a higher hourly wage to the obligor, so the minimum wage should be used for both parties. This results in a child support obligation each owes the other of \$377 per month for two children.¹⁷ Inserting this figure into the shared custody formula, which applies the parties' different shared custody percentages, results in a child support obligation for Mr. L of \$226 per month, effective January 2012.¹⁸

¹⁴ See 2 AAC 64.290(e).

¹⁵ See Civil Rule 90.3(f)(1).

¹⁶ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

¹⁷ Exh. 5 at pg. 13.

¹⁸ Attachment A.

IV. Conclusion

Ms. M exercised primary custody of S and J from August through December of 2011. Beginning January 2012, Mr. L and Ms. M began exercising 70/30 shared custody, with Ms. M having the children 70% of the time. The minimum wage has been imputed to both parents, so the resulting shared custody calculation results in a support obligation for Mr. L in the amount of \$226 per month. This figure should be adopted.

V. Child Support Order

1. Mr. L is liable for child support for S and J in the amount of \$50 per month for August 2011 through December 2011; and \$226 per month for January 2012 through June 2012, and ongoing;
2. All other provisions of the Amended Administrative Child Support and Medical Support Order dated March 14, 2012, remain in full force and effect.

DATED this 27th day of June, 2012.

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 16th day of July, 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.]