

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

In the Matter of:)

N D. D)

OAH No. 12-0916-CSS

CSSD No. 001177995

DECISION AND ORDER

I. Introduction

N D. D appealed an Amended Administrative Child Support and Medical Support Order that CSSD issued on September 24, 2012. The obligee child is L, 3. The hearing was held on December 1, 2012. Mr. D and his attorney appeared by telephone, but the other party, E L. J, could not be reached and did not participate.

At the end of the hearing, the only contested issue concerned a direct credit for child care payments made by Mr. D. CSSD was directed to file a revised child support calculation, which resulted in a monthly child support amount of \$439.40, to be charged from August 2012 forward.¹ The administrative law judge issued an interim order asking the parties to accept or object to the support amount. Mr. D accepted the revised support amount and Ms. J filed a partial objection to the child care credit and to Mr. D being considered to have primary custody in July 2012. A supplemental hearing was convened on February 21, 2013; the record closed on March 8, 2013.

II. Facts

Mr. D and Ms. J separated on February 27, 2012. There is no dispute that Mr. D had primary custody of L from March 2012 through June 2012. Sometime in July 2012, the parties began sharing physical custody of L, although the specific amounts of time each party had the child have not been established.

During July 2012, the amount of time Ms. J had custody of L increased to the point that by the end of July 2012, she and Mr. D were exercising 50/50 shared physical custody on a week-on, week-off basis. That arrangement continued into 2013. Following a custody hearing, the Superior Court awarded the parties 50/50 shared physical custody of L effective February 1, 2013.²

¹ CSSD's Submission dated December 27, 2012, Exh. 14, attached.

² See Ms. J's Supplemental Filings Regarding Child Care Credit and Child Support, with attached Superior Court Transcript of Proceedings before the Hon. Vanessa White, dated January 15, 2013, at pp. 23-29.

Mr. D enrolled L in No Name on September 5, 2012.³ He paid \$575 for September, \$475 for October, \$56 for November; and \$364 for January 2013, for a total of \$1,470.⁴ Any payments made for time periods after January 2013 are not at issue in this appeal because the court's support order went into effect as of February 1, 2013.⁵

III. Discussion

Two issues are presented for resolution in this appeal, whether the parties exercised shared custody in July 2012, and whether Mr. D is entitled to a credit for the child care expenses he paid to No Name.

Ms. J argues Mr. D did not have primary custody in July 2012 and that shared custody, for child support purposes, should begin with the month of July, not August of that year. Mr. D advocates for a finding he had primary custody in July 2012.

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. 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.^[6]

In order for a visitation day to count toward the required 30% of the year, the children must stay overnight with the respective parent.⁷ One year is equal to 365 days, so 30% of the year equals 110 overnights.⁸ This is the minimum number of overnights needed on an annual basis to reach the threshold definition of shared custody. Months are determined accordingly.

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 administrative child support cases rarely have one. In the absence of a written agreement, the parties' actual periods of overnight custody determine whether shared custody exists and, if so, what percentage of shared custody each party exercises.

³ No Name's Ledger History, received February 21, 2013.

⁴ *Id.*

⁵ Judge White Court Transcript at p. 30.

⁶ Civil Rule 90.3(f)(1).

⁷ Civil Rule 90.3, Commentary V.A.

⁸ $365 \times .30 = 109.5$ (rounded to 110).

Based on the evidence as a whole, Mr. D established by a preponderance of the evidence that child support for July 2012 should be calculated based on him having primary custody. Ms. J did not prove how much time the parties actually shared custody of L in July 2012. Absent evidence that shows how often L spent overnights with her, Ms. J cannot establish how many overnights to put into a shared custody calculation. One might be tempted to base the support obligation for July 2012 on a minimum 70/30 percent split, but the evidence is simply not in the record to support it.⁹

The second issue concerns Mr. D's request for credit for paying L's daycare expenses at No Name. Ms. J is opposed to the credit and argues that Mr. D enrolled L without Ms. J's consent and that his expenses were not necessary because family members were available to provide L's care. Furthermore, Ms. J claims she had free child care services available through her Native benefits.

Work-related child care expenses are an allowed deduction from the obligor parent's income under Civil Rule 90.3(a)(1)(E). The commentary states "[r]easonable child care expenses that are necessary to enable a parent to work, or to be enrolled in an educational program which will improve employment opportunities, are deductible." Neither the Rule nor the commentary define the word "necessary," especially to the extent that Ms. J argues – that the deduction is allowed only if no other option is available to the parents. There is simply no guidance for situations in which the parties disagree as to whether the child care is necessary and who should provide it. At a minimum, the Rule does not limit the deduction only to those parents who are free of conflict with the other parent about child care.

Mr. D enrolled L in No Name, a school daycare program, in September 2012. From September 2012 through January 2013, he paid \$1,470 for the program, which averages \$294 per month¹⁰ for the five months from September 2012 through January 2013 in which the parties exercised shared custody. Granted, he only paid for child care in four of those months, but averaging his costs for the five months that elapsed until the court's order took effect in February 2013 allows for a consistent support amount that does not go up and down with each month. It

⁹ Ms. J argues that this child support decision must not contradict the court's findings that Mr. D exercised primary custody only for the months of March 2012 through June 2012. *Custodian's Supplemental Filings* at p. 1. It does not. This decision simply does not utilize a shared custody calculation for July 2012 because evidence was not submitted as to how many overnights the parties had custody in July 2012. Absent specific shared custody percentages, the basis for support in July 2012 is primary custody – in Mr. D.

¹⁰ $\$1,470 \div 5 = \294 .

also discourages the temptation to calculate child support on a monthly basis instead of annually wherever possible.¹¹

The revised child support calculation CSSD prepared after the hearing should be adjusted. With the child care deduction removed, the support amount for August 2012 should be \$512.¹² Including the deduction from September 2012 through January 2013, Mr. D's child support should be set at \$468 per month.¹³ These figures are now correct.

IV. Conclusion

Mr. D met his burden of proving by a preponderance of the evidence that CSSD's Amended Administrative Child Support and Medical Support Order was incorrect. He is not liable for support for March 2012 through July 2012 because he had primary custody of L for the first four months and for July 2012 the shared custody percentages were not established. For August 2012 his support amount is \$512, based on 50/50 shared custody. From September 2012 through January 2013, his child support is \$468 per month. These figures were calculated pursuant to Civil Rule 90.3, without variation. They should be adopted.

Ongoing child support as of February 1, 2013 has been determined by the Superior Court in the parties' custody litigation.

V. Child Support Order

- Mr. D is not liable for child support for L in this administrative proceeding from March 2012 through July 2012;
- Mr. D is liable for child support in the amount of \$512 for August 2012, and \$468 per month for September 2012 through January 2013;
- The court has determined ongoing child support as of February 1, 2013;
- All other provisions of CSSD's Amended Administrative Child Support and Medical Support Order dated September 24, 2012 remain in full force and effect.

DATED this 28th day of March, 2013.

Signed

Kay L. Howard
Administrative Law Judge

¹¹ See Civil Rule 90.3(a).

¹² Attachments A & B combined. Attachment A determines what adjusted annual income figure should be inserted in his half of the shared custody calculation, Attachment B.

¹³ Attachments C & D combined. Attachment C determines what adjusted annual income figure should be inserted in his half of the shared custody calculation, Attachment D.

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 April, 2013.

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

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