

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

In the Matter of: )  
 )  
P H. T ) OAH No. 13-0951-CSS  
 ) CSSD No. 001190245  
\_\_\_\_\_ )

**DECISION AND ORDER**

**I. Introduction**

P H. T appealed an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on June 19, 2013. The obligee child is E, 5 years old. The other party to the case is K M. C.

The hearing was held on July 25, 2013. Mr. T appeared in person; Ms. C participated by telephone. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after careful consideration, Mr. T's child support is set at \$517 per month, effective February 2013 and ongoing. Mr. T's claims for a shared custody calculation and for a reduction of his child support obligation based on financial hardship are both denied.

**II. Facts**

*A. Procedural History*

Ms. C applied for child support services in February 2013.<sup>1</sup> CSSD initiated a child support action against Mr. T<sup>2</sup> and subsequently issued an Amended Administrative Child and Medical Support Order on June 19, 2013 that set his ongoing child support at \$534 per month, with arrears of \$2,670 going back to February 2013.<sup>3</sup> Mr. T appealed on or about June 27, 2013.<sup>4</sup>

*B. Material Facts*

Mr. T is employed by the No Name Company, a warehouse distributor.<sup>5</sup> He is paid \$19 per hour for straight time and \$28.50 for overtime work.<sup>6</sup> The Alaska Department of Labor and Workforce Development (DOL) reported that for the first two quarters of 2013 (January through June), Mr. T received wages of \$21,371.27.<sup>7</sup> In addition, Mr. T provided a statement of his time

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<sup>1</sup> Exh. 1.  
<sup>2</sup> Exhs. 2-7.  
<sup>3</sup> Exh. 8.  
<sup>4</sup> Exh. 9.  
<sup>5</sup> Exh. 16.  
<sup>6</sup> \$19 x 1.5 = \$28.50.  
<sup>7</sup> *Id.*

and attendance at work that indicates in July 2013 he worked 187.43 straight time hours and 20.11 overtime hours, for total income during that month of \$4,134.31.<sup>8</sup> CSSD added Mr. T's July 2013 income to his total for the first half of the year, which yields a year-to-date income amount of \$25,505.58 through July.<sup>9</sup> From that figure, CSSD determined Mr. T's average income is \$3,643.65 per month,<sup>10</sup> and multiplied that amount by twelve months to reach a total estimated income figure for 2013 of \$43,723.80.<sup>11</sup>

CSSD's estimate of Mr. T's 2013 income is consistent with, and comes within \$700 of his 2012 income of \$43,045.10, as reported by the DOL.<sup>12</sup> Accordingly, the 2013 figure CSSD estimated for Mr. T is a reliable amount and a correct measure of his income for 2013. This income amount results in a child support calculation of \$517 per month.<sup>13</sup>

Mr. T lives in a three-bedroom apartment by himself. He used to have a parent and niece living with him, but they have both moved out. Mr. T wants to be able to stay in the apartment so he can provide separate rooms for E and his other child, 13 year-old C, to stay in when they come to visit. Mr. T's rent is currently \$850, which he asserts is lower than it should be because his landlord reduced it based on his financial circumstances. In response to a suggestion that he get a roommate, Mr. T claims if he did so his rent would be increased.

Mr. T submitted a list of expenses totaling \$2,363 per month.<sup>14</sup> His household expenses are fairly straightforward and fairly standard for the Anchorage area. However, his finances are currently strained by payments totaling \$400 per month for debts owed to the state of Alaska for past UIB overpayments and to the IRS for a tax debt. In addition, he owes the court system \$286 for a past citation.

The parties do not exercise shared custody of E at this time, nor have they exercised shared custody at least since Ms. C filed her application for child support services in February 2013. In early 2012, Mr. T usually had E one night per week.<sup>15</sup> This increased to an occasional two nights per week mid-year. In September or October, Mr. T had E full-time for a week and a

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<sup>8</sup> Exh. 15 at pg. 4. *See also* CSSD's August 15, 2013 Notice of Filing Calculations at pg. 1.

<sup>9</sup> CSSD's August 15, 2013 Notice of Filing Calculations at pg. 1.

<sup>10</sup>  $\$25,505.58 \div 7 \text{ months} = \$3,643.65 \text{ per month.}$

<sup>11</sup> CSSD's August 15, 2013 Notice of Filing Calculations at pg. 1.

<sup>12</sup> Exh. 16.

<sup>13</sup> Exh. 18. This figure includes a deduction from income for paying support of \$436 per month for his older child, Denise.

<sup>14</sup> Exh. 19. This exhibit number was applied to Mr. T's form after submission. It was originally marked as Exhibit 10, but that was the number of the blank form sent to Mr. T in CSSD's Prehearing Brief.

<sup>15</sup> Exh. 12 at pg. 3.

half while Ms. C was out of state. Mr. T's time with E then increased to 2-3 overnights per week in November and December, while Ms. C's daycare provider was having difficulties with licensing. This pattern ended in late December when Ms. C obtained other care for E. In early 2013, Mr. T had E 1-2 nights per week, but this decreased to one night per week in February after Ms. C's provider resumed E's daycare.

### **III. Discussion**

The person who filed the appeal, in this case, Mr. T, has the burden of proving by a preponderance of the evidence that CSSD's support order is incorrect.<sup>16</sup>

A parent is obligated both by statute and at common law to support his or her children.<sup>17</sup> In cases established by CSSD, the agency collects support from the date the custodial parent requests child support services, or the date public assistance or Medicaid benefits are initiated on behalf of the child.<sup>18</sup> Ms. C applied for services in February 2013, so that is the month in which Mr. T's obligation to support E through CSSD should begin.

#### *A. CSSD Correctly Calculated Mr. T's Child Support*

CSSD has correctly estimated Mr. T's expected 2013 income at \$43,723.80, which results in a child support calculation of \$517 per month.<sup>19</sup> Mr. T disputes the income figure CSSD estimated because he works overtime and on holidays regularly. He suggested that only his base pay should be used for the child support calculation. However, 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." There is no provision in Civil Rule 90.3 for leaving overtime pay out of a parent's income for the child support calculation. The total income must therefore include all of Mr. T's pay, including his overtime and holiday hours.

#### *B. The Parties Do Not Exercise Shared Custody*

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

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<sup>16</sup> 15 AAC 05.030(h).

<sup>17</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

<sup>18</sup> 15 AAC 125.105(a)(1)-(2).

<sup>19</sup> Exh. 18.

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>[20]</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>21</sup> One year is equal to 365 days, so 30% of the year equals 110 overnights.<sup>22</sup> 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 actions 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.

The parent asserting shared custody has the burden of proof by a preponderance of the evidence.<sup>23</sup> Mr. T and Ms. C have not executed a written agreement for shared custody, so Mr. T must prove that he has had the child at least 30% of the time, and on an ongoing basis, in order to meet the minimum requirements for a shared custody calculation.

Based on all of the evidence presented, Mr. T did not meet his burden of proving he exercises shared custody of E. Mr. T claimed that he had E three overnights per week at the time Ms. C applied for child support services.<sup>24</sup> However, Ms. C submitted much more specific, and therefore, reliable evidence. First, she filed a letter that describes the parties' custody arrangements very specifically, beginning in early 2012.<sup>25</sup> In that letter, Ms. C stated that the most time Mr. T had E even close to the amount of time he alleged occurred in November 2012, but that arrangement ended one month later. Also, Ms. C's sister, K, who is a night shift nurse manager at a local medical facility, submitted an extensive letter that states, in essence, she

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<sup>20</sup> Civil Rule 90.3(f)(1).

<sup>21</sup> Civil Rule 90.3, Commentary V.A.

<sup>22</sup>  $365 \times .30 = 109.5$  (rounded to 110).

<sup>23</sup> See 2 AAC 64.290(e).

<sup>24</sup> Mr. T submitted letters in support of his claim, but none of them specifically addressed the amount of time Mr. T has E overnight. The letters primarily declared that Mr. T has taken care of E since the child's birth and that Mr. T is a good father. Exhs. 5-6. However, the quality of Mr. T's care of his son is not an issue, and would not be in a child support matter.

<sup>25</sup> Exh. 12 at pgs. 3-4.

usually has E on the weekends while Ms. C works. The weekend is the time period Mr. T claimed he has E, so the weight of the evidence clearly favors Ms. C's side of the dispute. As a result, child support in this matter will be calculated pursuant to Ms. C having primary custody of E.

### *C. Financial Hardship*

Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. The parent may obtain a reduction in the amount calculated, but only if he or she shows that "good cause" exists for the reduction. In order to establish good cause, the parent must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."<sup>26</sup> It is appropriate to consider all relevant evidence, including the circumstances of the custodian and obligee child, to determine if the support amount should be set at a different level than provided for under the schedule in Civil Rule 90.3(a).<sup>27</sup>

Based on the evidence in its entirety, Mr. T did not prove by clear and convincing evidence that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 were not varied. Most notably, Mr. T has only average living expenses, but two significant debts to Alaska and the IRS. However, he has not shown that he cannot adjust his financial obligations. It may be possible for Mr. T to lower his payments for the UIB and IRS debts. He may have to get a roommate or downsize to a smaller apartment. But even if he cannot do these things, Mr. T's primary legal obligation is to support his biological child, E, and this duty takes priority over other debts and obligations.<sup>28</sup> Therefore, Mr. T's child support amount calculated pursuant to Civil Rule 90.3 should not be lowered.

## **IV. Conclusion**

Mr. T did not meet his burden of proving by a preponderance of the evidence that CSSD's Amended Administrative Child Support and Medical Support Order was incorrect. The calculated child support amount has been adjusted slightly to reflect his most recent income figures. But no substantial changes in the amended order were warranted, including Mr. T's request for a shared custody calculation and an adjustment based on a financial hardship. CSSD

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<sup>26</sup> Civil Rule 90.3(c).

<sup>27</sup> See Civil Rule 90.3, Commentary VI.E.1.

<sup>28</sup> See *Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

has correctly calculated Mr. T's child support at \$517 per month pursuant to Civil Rule 90.3, and that figure should be adopted, without variation under Civil Rule 90.3(c).

**V. Child Support Order**

- Mr. T is liable for child support for E in the amount of \$517 per month, effective February 2013, and ongoing;
- All other provisions of the Amended Administrative Child Support and Medical Support Order dated June 19, 2013 remain in full force and effect.

DATED this 2<sup>nd</sup> day of October, 2013.

*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 4<sup>th</sup> day of November, 2013.

By: *Signed* \_\_\_\_\_

Signature

Angela M. Rodell

Name

Acting Commissioner

Title

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