

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

IN THE MATTER OF:)

N S. L)

) OAH No. 14-1065-CSS

) CSSD No. 001194482

DECISION AND ORDER

I. Introduction

On May 9, 2014, the Child Support Services Division (CSSD) issued an Amended Administrative Child Support and Medical Support Order using a primary custody calculation to establish the amount of ongoing support and arrears. The obligor, N S. L, believes CSSD should have used a shared custody calculation to establish child support from September 2013 through February 2014. Mr. L limits his appeal to this single issue and does not challenge any other aspect of CSSD’s May 9, 2014 order.

G L is the custodian of record. The Ls have four children, but only three reside with Ms. L. Ms. L seeks support for A (age 14), B (age 6) and C (age 3). The fourth child, D (age 10), lives in Gambia.

The formal hearing was held on August 12, 2014. Both parties appeared in person. Mr. L was represented by attorney Andrew J. Fierro. James W. Pendergraft, Child Support Specialist, represented CSSD.

As the person who requested the hearing, Mr. L has the burden of proving that CSSD was incorrect when it used a primary custody calculation.¹ Mr. L has not met his burden and CSSD’s May 9, 2014 Order is affirmed.

II. Facts

There is a single issue in dispute regarding a finite period of time – whether Mr. L’s child support obligation should be calculated using a shared custody calculation from September 2013 – February 2014.

Mr. and Ms. L are married, but they are currently involved in divorce litigation. They separated in September 2013 when Ms. L moved out of the family home and into an apartment. The Ls have four children. However, only three are residing in Alaska.

¹ 15 AAC 05.030(h).

Ms. L applied for child support services in September 2013.² On November 22, 2013, using financial information received from the parties, CSSD issued an Administrative Child Support and Medical Support Order that applied a primary custody calculation. Using this calculation, Mr. L's monthly support obligation for three children was \$1,668.³ Mr. L requested an administrative review, contending that CSSD should have used a shared custody calculation.

CSSD conducted an administrative review and denied Mr. L's request to apply a shared custody calculation. On May 9, 2014, CSSD issued an Amended Administrative Child Support and Medical Support Order. Using current income information and a primary custody calculation, Mr. L's child support obligation was reduced to \$1,208 per month for three children.⁴

Mr. L requested an Administrative Hearing. The hearing was held on August 12, 2014. Mr. and Ms. L testified and each provided testimony of a corroborating witness. The only material facts the parties could agree upon are the relevant time period (September 2013 – February 2014), that they had no written agreement for custody during that period, that the children's physical address was Ms. L's address, and that the support was for three children.

Mr. L testified that the parties had a verbal agreement to share custody 50/50. He explained that prior to the separation Ms. L would work days and he would work nights so the children did not have to go to day care. It is his testimony that this arrangement continued after the separation. Ms. L would take the children to Mr. L in the morning. He would feed them breakfast, make sure they were ready for school, and after school he would make sure they completed their homework. Mr. L would return the children to their mother at 6:45 p.m. before he went to work.

Mr. L estimated that spent \$700 - \$800 on food for Ms. L and the children from September 2013 to mid-November 2013. He also paid for school activities and lunches. Mr. L explained that he lives in the marital home and continues to pay the mortgage so he will have a proper home for the children. Mr. L is opposed to day care and watches the youngest child all day. On those nights when he does not work Mr. L claimed that the children would spend the

² Exh. 1.
³ Exh.3.
⁴ Exh. 10.

night. Mr. L's witness corroborated his testimony that the children would come and visit before and after school.

Ms. L denies that the parties had any agreement regarding the children. She testified that the children did not go to their father's during the day, but would go to day care and there were no overnight visits. Ms. L agreed that Mr. L would bring food, but she told him to stop. Finally, Ms. L was adamant that there were no payments made in lieu of child support. Ms. L's witness corroborated Ms. L's testimony that Mr. L did not have the children during the day and that there were no overnight visits.

III. Discussion

Mr. L, as the person who requested the hearing, has the burden of proving that CSSD's Amended Administrative Child Support and Medical Support Order is incorrect.⁵ The time period in dispute is September 1, 2013 – February 28, 2014. Mr. L contends CSSD should have calculated his support obligation for this period of time using a shared custody calculation, because of the parties' verbal agreement and because the standard overnight visitation is not an accurate representation of the expenses he incurs caring for the children.⁶

The parties presented opposing testimony, but for purposes of resolving the issue presented it is not necessary to determine which version is more likely than not true, because viewing the facts in a light most favorable to Mr. L, the evidence is insufficient to support a shared custody calculation.

A. What is Shared Custody

Shared custody is defined as:

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.^[7]

⁵ 15 AAC 05.030(h).

⁶ Where parents exercise shared custody of their children, child support is calculated differently than where one parent has primary custody. Civil Rule 90.3(a)(3). 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.

⁷ Civil Rule 90.3(f)(1).

It is “solely dependent upon the time that the decree or agreement of the parties which has been ratified by the court specifies the children will spend with each parent.”⁸ If there is no court decree 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, this tribunal considers the evidence presented as to the actual periods of time the children reside with a parent to determine whether the 30% threshold has been met and, if so, what percentage of shared custody each party exercises.

The children must normally remain overnight with a parent before a day of visitation will be counted towards the required threshold.⁹ “Thus, a day or an evening of visitation by itself will not count towards the total of time necessary for shared custody.”¹⁰ If the overnight rule does not accurately reflect the ratio of expenditures by the parent, another method of calculating the percentages of custody may be used.

B. *The Rationale of a Shared Custody Calculation*

The shared custody calculation recognizes that if the obligor is spending a substantial amount of time with the children, then the obligor probably is paying directly for a substantial amount of the expenses, and that the total funds necessary to support a child is substantially greater when the support is shared because each parent will have to provide housing for the children.¹¹ The definition builds on this reasoning by defining shared custody as where the child resides for at least 30% of the time.

C. *The Overnight Rule Applies.*

To avoid application of the overnight rule, Mr. L must establish that the overnight rule does not accurately reflect the ratio of expenditures by the parent. He has not established that his expenditures exceed the normal and customary expenses of a parent who does not exercise shared custody.

The interpretive guide to Alaska Rule Civil Procedure 90.3, the Commentary, recognizes that a day of visitation does not require the same expense as maintaining the children’s residence. Mr. L, according to his testimony, is an involved and caring father who has his children visit

⁸ Civil Rule 90.3, Commentary V.A.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Civil Rule 90.3, Commentary V.B.

during the day. He testified that Ms. L's address in the primary physical location where the children live. This is where they go to sleep. She is the person who is ensuring food and shelter for the children. The children reside at Ms. L's; Mr. L's is where they go before and after school.

Moreover, if the parties had a verbal shared custody arrangement, the actual expenditures are not compelling. A primary custody calculation is an accurate representation of the ratio of expenditures. The overnight rule accurately reflects the ratio of expenditures by Mr. L and should be applied regardless of any agreement to the contrary.

D. *Variance*

In the alternative, Mr. L seeks a variance from the amount of support ordered. For the reasons set forth above, his request for a variance is denied. He has not established that it would be manifestly unjust if his monthly support obligation were not varied.

IV. Conclusion

Mr. L did not meet his burden of proving by a preponderance of the evidence that CSSD's Modified Administrative Child Support and Medical Support Order was incorrect. As a result, his child support should remain at \$1,208 per month, as set by CSSD during the administrative review process. CSSD's order should be affirmed. This is not a variance under Civil Rule 90.3(c).

V. Child Support Order

- CSSD's Amended Administrative Child Support and Medical Support Order dated May 9, 2014, is affirmed;
- Mr. L's child support obligation for three children shall remain at \$1,208 per month, as set by CSSD in Amended Administrative Child Support and Medical Support Order

DATED this 2nd day of September, 2014.

By: Signed
Rebecca L. Pauli
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 19th day of September, 2014.

By: Signed
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

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