BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF REVENUE

In the Matter of	)	
	)	
M S. L	)	OAH No. 16-0679-CSS
	)	Agency No. 001139567

DECISION AND ORDER

I. Introduction

M S. L appeals a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on May 23, 2016. The modified order increased his child support obligation for his daughter A to $903 per month, effective May 1, 2016.

Based on the record and after careful consideration, Mr. L did not meet his burden to show that CSSD's modified child support order was incorrect. He did not establish that he currently exercises shared custody of A, or that he has done so over the past year. As a result, his child support amount was properly calculated under the primary custody formula.

II. Facts

Mr. L and K C are the parents of A, who is 11. In March 2014, CSSD set Mr. L's support obligation for A at $370 per month.[1] Following a request from Ms. C, CSSD sent the parties a notice on April 26, 2016, informing them that it had begun a modification review.[2] Mr. L provided his income information, including his 2015 W-2 form and recent paycheck statements.[3]

On May 23, 2016, CSSD granted the modification request, and it issued the Modified Child Support and Medical Support Order that is the subject of this appeal.[4] CSSD calculated Mr. L's obligation based on primary custody. It relied on his 2015 gross income of $68,387.25, as reported on his W-2 form, which resulted in an ongoing support amount of $903 per month.

Mr. L appealed.[5] He asserted that he had cared for his daughter at least 50% of the time over the past two years, so CSSD should have calculated his support obligation under the shared custody formula. A formal hearing took place on July 6, 2016. Mr. L and Ms. C both appeared in person and represented themselves. Child Support Specialist Delinda Cain also appeared in person and represented CSSD. The hearing was recorded. All offered exhibits were admitted into the record. The record closed at the end of the business day on July 6, 2016.

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[1] Exhibit 1.
[2] Exhibit 2.
[3] Exhibit 3.
[4] Exhibit 4; Exhibit 5.
[5] Exhibit 6.

III. Discussion

The sole issue in this appeal is whether Mr. L's support obligation should be calculated based on primary custody or shared custody. As the person who filed the appeal, Mr. L has the burden of proving by a preponderance of the evidence that CSSD's support order is incorrect.[6]

Civil Rule 90.3 provides the formula for calculating child support awards under different custody arrangements. When parents exercise shared custody, the child support amount is calculated differently than when 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 he or she would in a primary custody situation.

Civil Rule 90.3(f)(1) defines shared custody as follows:

> A parent has shared physical custody (or shared custody) of children for purposes of this rule if the children reside with that parent for a period specified in writing in the custody order of at least 30, but not more than 70, percent of the year, regardless of the status of legal custody.

In order for a visitation day to count toward the required 30% of the year, the child normally must stay overnight with the respective parent.[7] Therefore, a day or an evening of visitation, by itself, does not count toward the total time necessary to establish shared custody. Visitation from Saturday morning through Sunday evening would count as one overnight.[8]

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. However, the parties to child support actions often do not have one. In the absence of a written agreement, the parties' actual history regarding periods of overnight custody will determine whether shared custody exists and, if so, what percentage of shared custody each party exercises.

Mr. L and Ms. C do not have a written agreement for shared custody. As a result, Mr. L must prove that he has cared for A at least 30% of the time, on an ongoing basis, in order to meet the minimum requirements for a shared custody calculation. One year is equal to 365 days, so

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6 15 AAC 05.030(h).

7 Civil Rule 90.3, Commentary V.A.

8 *Id.*

30% of the year equals 110 overnights.[9] This is the minimum number of overnights needed on an annual basis to reach the threshold definition of shared custody.

In his appeal statement, Mr. L asserted that he has had physical custody of A for "a minimum of half the time" and in some cases 60% of the time.[10] At the hearing, Mr. L clarified that he typically has provided overnight care for A twelve to thirteen nights a month over the last two years, which would be 39% to 42% of the time. He usually also cared for A's older brother, who is not Mr. L's child.

Both parties testified to their child care history over the past year based almost exclusively on their recollection.[11] Mr. L recalled that, until recently, the parties had a fairly reliable schedule, in which he typically cared for A Friday night through Monday morning for two weeks every month. The other two weeks of the month, he cared for her Saturday night through Tuesday morning. This totals 12 nights per month, or 39-40% of the time. Mr. L also stated that he has seen A and her brother less frequently in recent months, because Ms. C has wanted more weekend time with the children. This is related to Ms. C's new work schedule, which gives her weekends off, as well as her desire to coordinate weekend time between her children and her boyfriend's child. Mr. L expressed some concern that his visitation frequency has decreased further in the last month because of this case.

Ms. C acknowledged that Mr. L is very involved in A's life, and he frequently has cared for her eight nights per month, or 25% of the time, over the last year. However, she indicated that the parties' schedule has fluctuated over different periods of time, and Mr. L has cared for A more in some months, but less in others. She submitted five calendars that summarized her recollection of the parties' actual schedule starting in June 2015.[12] According to Ms. C's calendars, for June through mid-July 2015, Mr. L had A an average of 8 nights per month.[13] From mid-July 2015 through mid-October 2015, he had A every weekend on Friday and Saturday nights. This is 8, sometimes 9, nights per month. From mid-October 2015 through the end of the school year in May 2016, he had A 5 to 6 nights per month.[14] In May 2016, Mr. L had A Friday and Saturday night one week, Saturday and Sunday night another week, and Monday and Tuesday night a third

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[9] 365 x .30 = 109.5 (rounded to 110). *See also* Civil Rule 90.3, Commentary V.A.

[10] Exhibit 6, p. 1.

[11] Ms. C reconstructed the parties' May 2016 schedule based on her text message history.

[12] Exhibit A (consisting of 6 pages, a summary page and 5 calendar pages).

[13] This included Saturday and Sunday nights for two weeks of the month, then Sunday and Monday nights for two weeks. Exhibit A, p. 6.

[14] This included Friday and Saturday nights for two weekends of the month, plus one additional Friday night. Exhibit A, p. 4.

week.[15] This is 6 nights. In June 2016, he had A 8 or 9 nights; but each week's schedule was different.[16]

Ms. C and Mr. L have somewhat different recollections regarding their actual custody schedule over the last year or so. However, they agree that their schedule is fairly fluid, and it can change from week to week to accommodate A's needs or either parent's schedule. For instance, because Ms. C's work schedule has changed so that she now has weekends off, she has had more weekend time with A in recent months.

Based on the totality of the evidence in the record, Mr. L has not met his burden to show that he has cared for A at least 30% of the time on an ongoing basis. He testified based on his memory of his schedule over the last two years. He established that he sometimes dropped A at school on Monday mornings, so he clearly had her on some Sunday nights. He also showed that at least one medical provider keeps A's information in a separate file for him. This may show concerned parenting, but it is unrevealing about his visitation schedule. Mr. L did not provide specific information to show that he has cared for A, on an ongoing basis, for an average of at least 9 to 10 nights a month. It is clear that his claim of providing care 50% to 60% of the time is inaccurate, and this calls into question the reliability of his recollection.

Ms. C provided more specific information regarding the parties' actual care history, and this information is deemed to be more reliable. The calendars Ms. C provided show that the parties have a general visitation schedule, but it is flexible and often revised. They also reflect that Mr. L has cared for A more often in some time periods than in others. In some months, he provided care 25% to 29% of the time; however, in other months, he provided care 16% to 19% of the time. This does not reflect a shared custody situation. Moreover, in recent months, Mr. L noted that he has seen A less often, and it is evident that he does not presently provide care more than 9 nights per month. As a result, the parties' current schedule does not constitute a shared custody arrangement.

Both parties submitted sworn statements supporting their different viewpoints. However, those submitted by Ms. C came from people who are more personally involved with A and her family system.[17] Those individuals are therefore more likely to be aware of A's typical schedule, and their testimony is given more weight. As Mr. L pointed out, several of Ms. C's affidavits

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[15] Exhibit A, p. 3.

[16] Ms. C's June 2016 calendar shows that Mr. L had A for 8 nights. Exhibit A, p. 2. However, her summary page indicates that he had her for 9 nights. Exhibit A, p. 1.

[17] *See* Exhibits B – I (affidavits from J. C, L J, K M, T C, E F S, N C and T G, K M, and B Q G).

include inconsistent statements regarding the specifics of the parties' visitation schedule; for instance, one individual may indicate that Mr. L has A every other weekend, and another may refer to a two-weekend-on, two-weekend-off schedule. Despite this, the statements attest to a general weekend visitation plan, with some variations. This is consistent with the parties' general history as well as their pattern of revising the schedule during different time periods.

Mr. L indicated that T C's statement most accurately reflects the parties' history. T C is K C's sister. She often provides morning care and takes A to school, so her observations are based on frequent interaction. She stated that Mr. L typically has A on Friday and Saturday nights, and sometimes Sunday nights; however, she also added that the schedule has not been consistent. In total, T C concluded, Mr. L provides care for A less than 30% of the time.[18]

In contrast, each of the three affidavits that Mr. L submitted summarily states that Mr. L has cared for A at least 50% of the time over the last two years.[19] One affidavit is from N L, a co-worker and friend who spends some time at Mr. L's home, though it is not clear how often she sees A. Ms. L does not explain the basis for her conclusion. The other two statements are from Mr. L's co-workers, who would have a limited opportunity to observe his time with A. The statements from these individuals are not persuasive, both because of their conclusory nature and because Mr. L clarified at the hearing that, on an ongoing basis, he has not provided care 50% of the time.

IV. Conclusion

Mr. L did not meet his burden of proving by a preponderance of the evidence that he exercises shared custody of A, either currently or in the past year. Therefore, he did not show that the Modified Administrative Child Support and Medical Support Order, issued on May 23, 2016, is incorrect. Based on the evidence, the modified order correctly calculated Mr. L's child support obligation under the primary custody formula. This resulted in a support amount of $903 per month, effective May 1, 2016, and that figure should be adopted. This calculation was made pursuant to Civil Rule 90.3, without variation under Civil Rule 90.3(c).

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[18] *See* Exhibit E (affidavit of T C).

[19] Exhibit 6, pp. 2-4.

V. Child Support Order

- The Modified Administrative Child Support and Medical Support Order dated May 23, 2016, is affirmed and remains in full force and effect;

DATED this 8th day of July, 2016.

Signed
Kathryn A. Swiderski
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 26th day of July, 2016.

By: *Signed*
Signature
Kathryn A. Swiderski
Name
Administrative Law Judge
Title

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