

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

H. B. W.,)	
)	
Appellant,)	
v.)	
)	
CHILD SUPPORT SERVICES DIVISION,)	
)	OAH No. 04-0061-CSS
Respondent.)	CSSD No. 001127454
		DOR No. 040547

DECISION AND ORDER

I. Introduction

This matter involves the Obligor H. B. W.'s appeal of the Amended Administrative Child and Medical Support Order CSSD issued on July 30, 2004. The Obligee child in this case is C., DOB 00/00/98.

The formal hearing was held on September 16, 2004.¹ The Obligor and his attorney, J. Robert Woofter, Jr., appeared in person; the Custodian of record, T. L. W., did not participate. Andrew Rawls, Child Support Specialist II, represented CSSD. The record closed on October 21, 2004.

Kay L. Howard, Administrative Law Judge for the Alaska Office of Administrative Hearings, was appointed to hear this appeal by the Chief Administrative Law Judge, Terry L. Thurbon. Having reviewed the record in this case and after due deliberation, I have concluded that the Obligor's appeal should be granted and that his child support should be based on 50/50 shared custody using his actual income, except he should not be liable for support for the time period Ms. W. did not live in the same home with C..

Facts

A. History

On March 25, 2004, CSSD served an Administrative Child and Medical Support Order on the Obligor.² He requested an administrative review.³ On July 30, 2004, CSSD issued an

¹ The hearing was held under Alaska Statute 25.27.170.

² Exhs. 1 - 3.

³ Exh. 4.

Amended Administrative Child and Medical Support Order that set ongoing child support at \$599 per month, with arrears of \$5,380 for the period from December 2003 through August 2004.⁴ The Obligor filed an appeal on August 6, 2004.⁵

At the hearing, Mr. W. testified he and Ms. W. have exercised 50/50 shared custody of C. since they separated in 2002, with the exception of the period from November 2003 through May 2004, when she lived with her maternal grandparents in Wasilla. Mr. W. also addressed income and health insurance issues, asserting leave time he sold back to his employer should not be counted as income, and claiming he pays \$62 per month for health insurance premiums for C. His girlfriend, W. R., confirmed the Obligor's testimony regarding the custody issue.

CSSD argued Mr. W. should be liable for support based on primary custody for all the time periods involved in this matter because Ms. W. filed an application for services in which she stated C. lived with her. CSSD asserted without more information from Ms. W. or C.'s maternal grandparents on the shared custody issue, the agency must charge Mr. W. with support even for the months C. may have been living in Wasilla with her grandparents.

At the close of testimony, Mr. W.'s attorney requested, and CSSD agreed, that the agency would contact C.'s grandparents in Wasilla regarding this matter. CSSD subsequently filed a Post-Hearing Brief that states Ms. C. W., C.'s grandmother, confirmed the child lived in Wasilla with her from December 2003 through early June 2004, and that her daughter T. also lived there with them from December 2003 through mid-February 2004. However, when T. left the home in mid-February, C. remained with her grandparents in Wasilla. According to C. W., she and her husband supported C. while she lived with them. CSSD indicated the grandmother reported having difficulties obtaining insurance information from Mr. W. so they could obtain medical care for her that was covered by health insurance. CSSD also filed a copy of Ms. W.'s December 19, 2003, application for child support services in which she wrote that C. lived with her.⁶

CSSD's Post-Hearing Brief contains revised child support calculations for 2003 and 2004. The 2003 calculation of \$459 per month is based on primary custody, and on Mr. W.'s total income from his employment with the State of Alaska, as reported by the Alaska

⁴ Exh. 6.

⁵ Exh. 8.

⁶ Exh. 11 at pg. 1.

Department of Labor.⁷ CSSD applied this support amount to the months of December 2003 through May 2004.⁸ The 2004 support amount of \$170.25 per month, made effective June 2004, is based on 50/50 shared custody as between Mr. W. and Ms. W.⁹ As directed at the hearing, in the absence of income information for Ms. W., CSSD used the minimum wage for her portion of the calculation.¹⁰

In his reply to CSSD's brief, Mr. W. acknowledged CSSD used the shared custody calculation, but he claimed he was not given credit for the health insurance premiums he pays for C. He also challenged the credibility of both Ms. W. and her mother C. W., and complained that CSSD continues to refer to Mr. W. as the non-custodial parent, while calling Ms. W. the "Custodian of record."

B. Findings

Based on the evidence in the record and after due consideration, I hereby find:

1. The Obligor and the Custodian of record, T. W., exercised 50/50 shared custody of the Obligees C. from the time they separated in 2002 until the present, with the exception of the time period from November 2003 through May 2004, when C. lived in Wasilla at the home of her maternal grandmother, Ms. C. W.;
2. T. W. lived in Wasilla with her parents and C. from December 2003 through mid-February 2004.
3. In the absence of any income information from T. W. or Alaska Department of Labor wage records in her name, the minimum wage is the correct measure of the Custodian's ability to pay support.

III. Discussion

A. Obligor's Income

Mr. W. argued the funds he received from selling leave back to his employer should not be included in his income for child support purposes because it was not derived from wages, so it is a different category than "renewable income."

⁷ Exh. 12 at pg. 2.

⁸ Exh. 12 at pg. 1.

⁹ Exh. 12 at pg. 3.

¹⁰ Exh. 12 at pg. 4.

CSSD responded the money Mr. W. received from selling back leave to his employer was reported to the Alaska Department of Labor as earnings, so it should be included in the income amounts used for his support calculation.

A parent is obligated both by statute and at common law to support his or her children.¹¹ 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." The Commentary to the Rule explains that this phrase is to be interpreted broadly to include all the benefits that would have been available for support if the Obligee(s) lived in an intact family with the Obligor. The Commentary specifically includes in a parent's income, among other things, items similar to leave cash-outs such as overtime and tip income; severance pay; bonuses and profit sharing.¹² The leave time is an employment benefit that Mr. W. converted to cash, so it should be used in the calculation of his income. Had C. been living in his household at the time he converted the leave to cash, those funds would have been available to C. for her support along with the rest of the family.

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), up to six years prior to service on the Obligor of notice of the action.¹³ Ms. W. requested CSSD services on December 19, 2003, so the support obligation should begin that month.

B. Custodian's Income

CSSD stated in its Post-Hearing Brief that Ms. W. did not receive any reported wages in 2004, only unemployment benefits of \$224 per week from January 17, 2004 through June 12, 2004. Yet neither did she show any reason for not working or for being unable to work during the period of time at issue.

A party to a child support action has the burden of proving his or her earning capacity.¹⁴ If a parent does not provide the income information necessary to calculate his or her child support obligation, or if the agency does not have sufficient information from which to calculate support, the tribunal is authorized to use the "best information available," which may mean imputing annual income to the Obligor based on the Alaska Department of Labor's average

¹¹ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹² Civil Rule 90.3, Commentary III.A.

¹³ 15 AAC 125.105(a)(1)-(2).

annual wage statistics for individuals in the parent's age bracket, or "other information appropriate in a particular case."¹⁵

CSED, as directed, used the Alaska minimum wage in Ms. W.'s portion of the shared custody calculation. Given her lack of communication and the absence of any wage information, this was the appropriate income amount to use.

C. Shared Custody

Mr. W. presented credible testimony that was verified by his girlfriend, W. R., that he and the Custodian of record, T. W., have exercised 50/50 shared custody of the Obligee C. since they separated in 2002. The only evidence offered by Ms. W. on this matter is her application for child support services that states C. lived with her at the time of her December 19, 2003 application.

CSSD maintains that without additional evidence from Ms. W. on this issue, Mr. W. should be charged child support based on primary custody. Apparently, the agency desires that the parties agree they exercise shared custody prior to using the shared custody calculation.

Where the parents exercise shared custody of their children, Civil Rule 90.3 provides that child support is to be calculated differently than in the situation 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.

Civil Rule 90.3(f)(1).

The problem with CSSD's approach is that the party who does not agree shared custody exists obtains what amounts to an almost insurmountable veto power over whether the shared custody calculation is used. Had Mr. W. not appealed and presented his own and Ms. R.'s credible testimony on this issue, the Custodian's silence would have denied him the shared

¹⁴ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

¹⁵ 15 AAC 125.050.

custody calculation.¹⁶ Yet at the hearing, Mr. W. met his burden of proof on this issue, and he is entitled to the shared custody calculation.¹⁷

According to CSSD, C. W. reported her daughter T. lived in Wasilla with her parents and C. from December 2003 through mid-February 2004. Both Mr. W. and Ms. R. contradicted this evidence, claiming Ms. W. must have stayed in Anchorage the entire time because she called them often and their caller ID indicated she was at an Anchorage number.

Mr. W. has not met his burden of proof on this issue. It is not known whether Ms. W. was calling from a cell phone or residential phone, but more compelling is the fact that C. W. stated T. left the Wasilla home in mid-February, even though the information was against her daughter's financial interest. It is reasonable to conclude that if C. W. was going to misrepresent T.'s whereabouts, she would have said T. was in the home the entire time - from December 2003 through May 2004, not just through mid-February. Thus, the balance tips in Ms. W.'s favor: since she lived in her parent's Wasilla home with C., Mr. W. is liable for child support based on primary custody from December 2003 through February 2004.

Mr. W. is not liable for support in this administrative action for March 2004 through May 2004 because Ms. W., who applied for child support services as the Custodian of the child, was not living with C. at the time, and C. W. and her husband were supporting the child. Thus, Ms. W., as CSSD's client, is not entitled to support for those months. Her parents supported C., but they are not CSSD's clients. The agency may not collect support on their behalf absent their application for services. Of course, if this were a public assistance case, the analysis would be entirely different, but this version of the facts requires this result.

IV. Health Insurance Credit

Mr. W. maintains he is entitled to a credit of \$31 per month for the medical insurance premiums he pays for C. CSSD did not include the credit in its calculations. There is a dispute concerning whether the insurance was available to C. while in grandmother C. W.'s care: she claims, in CSSD's Post-Hearing brief, that Mr. W. refused to give her his insurance

¹⁶ Mr. W.'s complaint that CSSD refers to Ms. W. as the "Custodian of record" represents bias on the agency's part is misplaced. The term actually is one I coined many years ago in recognition of the fact that the actual physical Custodian of the child may be a different person than the individual who initiated the child support action - the "Custodian of record".

¹⁷ Under 15 AAC 05.030(h), the person who filed the appeal has the burden of proving by a preponderance of the evidence that the agency's calculations are incorrect

information.¹⁸ For his part, the Obligor asserted C. W. refused to bring C. to Alaska Regional Hospital, his preferred provider. It is not known how immediate C.'s health needs were, so there is no way of measuring whether either party was being unreasonable. That said, however, it appears at least that C. W. and Mr. W. were being equally stubborn in refusing to work it out.

The parties were informed at the hearing that the medical credit issue was being referred to CSSD to resolve independently under its authority to issue and enforce medical support orders. Mr. W. will need to contact his caseworker in order to follow up on that issue.

V. Conclusion

The parties exercised 50/50 shared custody of the Obligee C. for all time periods at issue, except for December 2003 through May 2004, when C. lived in Wasilla with her maternal grandparents. From December 2003 through mid-February, Ms. W. lived in the Wasilla home with C. and her parents, so Mr. W. must pay support based on primary custody for December 2003 through February 2004 only. He is not liable for support for March 2004 through May 2004, and as of June 2004, he is entitled to the shared custody calculation for ongoing child support purposes. Accordingly, I issue the following child support order.

VI. Child Support Order

1. The Obligor is liable for child support in the amount of \$459 per month for December 2003 through February 2004.
2. The Obligor is not liable for support in this action for March 2004 through May 2004.
3. The Obligor is liable for ongoing child support of \$170.25 per month, effective June 2004.
4. The issue of medical insurance credits has been referred to CSSD for the agency to resolve pursuant to its own authority.

DATED this 14th day of January, 2005.

By: Signed _____
Kay L. Howard
Administrative Law Judge

¹⁸ Mr. W. maintains C. W.'s statements were inadmissible hearsay, but this claim is disingenuous, given the fact that he is the one who first requested that CSSD contact C.'s maternal grandparents after the hearing. It should have been obvious this request would result in hearsay evidence.

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. I, Terry L. Thurbon, Chief Administrative Law Judge, on behalf of the Commissioner of Revenue, order that this decision and order concerning the child support obligation of H. B. W. be adopted as of this date and entered in his file as the final administrative determination in this appeal.

Under AS 25.27.062 and AS 25.27.250 the Obligor's income and property are subject to an order to withhold. Without further notice, a withholding order may be served on any person, political subdivision, department of the State or other entity.

Reconsideration of this decision may be obtained by filing a written motion for reconsideration within 10 days after the adoption of this decision, pursuant to 15 AAC 05.035(a). The motion must state specific grounds for relief, and, if mailed, be addressed: Commissioner's Office Appeals (Reconsideration), Alaska Department of Revenue, P.O. Box 110400, Juneau, Alaska 99811-0400.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 25.27.210 within 30 days of the date of this decision.

DATED this 14th day of January, 2005.

By: Signed _____
Terry L. Thurbon
Chief Administrative Law Judge

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