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

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| In the matter of: | ) | |
| | ) | OAH No. 05-0627-CSS |
| R. L. W. | ) | CSSD No. 001122531 |
| | ) | |

## DECISION AND ORDER

Both R. L. W. and L. F. W. appealed an Amended Administrative Child and Medical Support Order and Administrative Review Decision that the Child Support Services Division (CSSD) issued on July 14, 2005, requiring Mr. W. to pay child support of $788 per month based on sole custody with Ms. W. and finding him in arrears by $21,276 for support owed since 2003. The obligee children are A., born 00/00/99, and R., Jr. ("R."), born 00/00/97.

The formal hearing was held on September 6, 2005, with record closure occurring on September 30, 2005. Both parents appeared in person. A.J. Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

The child support order in this matter will be adjusted to reflect (1) the parties' agreement that the support obligation was satisfied through May, 2005 by direct payments; (2) the parties' agreement that credit should be given for certain prior children; and (3) the evidence showing shared physical custody of R.. The resulting support payment is $686 per month, effective June 1, 2005.

## I. Facts

### A. Introduction

R. and A. spend the majority of the time at the home of Rev. T. M. and M. M., their maternal grandparents. The house is also their mother's home. There they are nurtured by a loving, extended Samoan family. Mr. W. admires and appreciates the contribution of the grandparents and of Ms. W. to his children's welfare.

Mr. W. works on the North Slope, but makes his children a priority when he is in Anchorage. Ms. W. admires and appreciates him as a father. In the past, the two parents cooperated quite well in raising and supporting the children, despite their personal differences. Support was handled through an informal agreement whereby Mr. W. paid $500 per month toward the M.s' mortgage.

In April 2003, Ms. W. applied for child support enforcement services regarding both A. and R..[1] She did not tell Mr. W. about the application. Two years later, CSSD issued a child support order for R. alone, requiring Mr. W. to pay $796 per month going forward and $19,040 in arrears.[2] The appearance of this order, especially the assessment of a large arrearage for the period Mr. W. had been paying the M. mortgage, seems to have disturbed the cooperative relationship between the parties. Ms. W. had not realized that her 2003 application would result in a large lump-sum debt charged to Mr. W., and she regrets that result.

Mr. W. asked for an administrative review, which led to the July Administrative Review Decision at issue in this appeal. The Administrative Review Decision modified the obligation only slightly, to $788 per month, again with a large arrearage.[3] Due to an oversight, it continued to treat the matter as a one-child support case, even though the application for services pertained to two children. All parties agree that the order produced by this appeal should address both children, R. and A.

**B. Past Support**

Mr. W. and Ms. W. agreed at the hearing that he faithfully paid $500 each month toward the M. mortgage through May of 2005. They agree that this was a payment in support of the children, and that it should satisfy his support obligation for all the months it was paid. CSSD joins the stipulation in its Post-Hearing Brief: "CSSD does not oppose the stipulation as there is no state debt. The child support obligation in this case should begin on June 1, 2005."

**C. Prior Children**

The parties and CSSD agree that Mr. W. is entitled to an allowable deduction of $1239.91 per month the amount of support he pays for his two older children, S. H. and C. S. The parties and CSSD agree that in a shared custody calculation, Ms. W. is entitled to an allowable deduction for one older child, E. W., who lives in her household.

**D. Custody**

There has been some confusion and disagreement about custody in this case. A significant part of that confusion results from the parties' different conceptions of who has physical custody when the children are at the M. home. Mr. W.' view was that the M.s were

1 Exhibit 1, p. 1.
2 Exhibit 2, pp. 1-2.
3 Exhibit 6, p. 6.

providing child care for him while he was on the slope, and therefore the children were in his custody, as they would be if he left them with a babysitter. Ms. W.'s view was that when the children were in her parents' care, they were in her custody. Prior to 2005, it did not really matter who was right.

To set a child support amount by law, however, it is necessary to determine physical custody. Because Ms. W. generally lives at her parents' house, I find that the children are in her custody when they are at that house.

An element of the support calculation will be the percentage of time the children are in the physical custody of each parent. In general, physical custody is determined by where the children spend the night.[4] However, another method of calculating percentages of custody may be used when counting overnights does not accurately reflect the ratio of expenditures by the parents.[5]

The parties agree that A. rarely spends a night away from the M. home, regardless of whether her father is in Anchorage. Mr. W. works a two-week-on, two-week-off schedule, and so he is in Anchorage 50 percent of the time. During the 50 percent of the time he is in Anchorage, A. spends considerable time with her father during the days, but the testimony was clear that Mr. W.' custody would not reach the overall level of 30 percent, no matter how calculated. If a parent has physical custody less than 30 percent of the time, the other parent has primary physical custody and it is unnecessary to inquire further into the relative percentages of custody.[6] I find that Ms. W. has primary physical custody of A.

Determination of physical custody in R.'s case is a different question. Mr. W. submitted a logbook after the hearing indicating that in 2004, R. spent 129 nights at his father's house. This would represent 35 percent custody. However, Ms. W. disputes the accuracy of the log, claiming that it is exaggerated. There is evidence in the record that Mr. W. has sometimes exaggerated on this subject. For example, his Request for Administrative Review in this matter[7] claimed that he kept both children in his own home two weeks per month and left them with the M.s two weeks per month, whereas his testimony at the hearing, and even the log, does not match this claim.

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4 Civil Rule 90.3, Commentary, V.A.

5 *Id.*

6 Civil Rule 90.3(f)(1).

7 Exhibit 3, p. 1.

In her own post-hearing submission, Ms. W. gave her own listing of overnights, focusing on 2005 and indicating R. spent only ten overnights at the W. residence between January 2005 and September 2005. However, there are indications that Ms. W. and the M.s have prevented Mr. W. from taking the children since the child support dispute began, and this conduct may artificially lower custody percentages in 2005.

Testimony was undisputed at the hearing that Mr. W. has had extensive daytime contact with R., taking him to events or to go shopping. Indeed, before she learned that overnights, not days, are usually the determining factor, Ms. W. testified that, "being fair," Mr. W. probably had custody of R. 110 days per year. She also acknowledged his generous spending for R.'s needs. Finally, she noted that she does not have much food cost because of the communal eating at the large M. household.

In this case, because of Mr. W.' spending on day visits and because dinners and breakfasts at the overnight location are not as large an expense as they might be in many households, overnight stays probably do "not accurately reflect the ratio of expenditures by the parents." Under the Civil Rule 90.3 Commentary, this situation permits use of another method of calculation. The use of a different method of calculation is also supported by the difficulty of ascertaining overnight stays in this case. I find that days spent with the father is a better way to calculate custody percentages in R.'s case, and that Mr. W. has physical custody of R. approximately 30 percent of the time.

**E. Income**

In a case that includes an element of shared physical custody, it is necessary to ascertain the income of both parents.

Mr. W. has been, and remains, employed full-time by VECO Alaska, Inc. The best measure of his income was his 2004 W-2 form, showing $63,026.18 in wages. He also received a permanent fund dividend.

Ms. W. operated a coffee shop in 2004. She did not file a tax return. She testified that her 2004 net income, after all expenses, was approximately $24,000, together with a permanent fund dividend. At the end of 2004, she sold the coffee shop. She "took a break" for a few months. At the time of the hearing, she was just starting a Mary Kay business, and there was no reliable indication of what she would be able to earn in that business over the long term.

Potential income may be used in the case of parents who are voluntarily unemployed or underemployed.[8] Because Ms. W. was voluntarily unemployed for part of 2005, her 2004 income is the best indication of her earning capacity.

## II. Discussion

In a case such as this one where the parents have shared physical custody of one child, but the other child is in the primary physical custody of one parent, the parents are said to have "hybrid custody" for purposes of calculating child support.[9] The calculation of support in a hybrid custody situation is a complex one governed by Civil Rule 90.3(b)(3).

Several preliminary calculations are necessary to set the stage for the final calculation. First, it is necessary to run an ordinary child support calculation for Mr. W. to determine his adjusted annual income. Mr. Rawls provided this calculation in his Post-Hearing Brief, and it can be followed at Exhibit 14, page 4, attached to that brief. The calculation correctly includes allowable deductions for federal income tax, FICA, unemployment insurance, and the $1239.91 per month that Mr. W. pays in support for S. H. and C. S. Mr. W.' resulting adjusted annual income is $33,369.54.

Second, it is necessary to determine the size of the allowable deduction for Ms. W. for the cost of supporting her prior child, E., in her own home. According to the Civil Rule 90.3 Commentary, "In this situation support provided directly to the [child] is calculated by Rule 90.3 as if the [child] from the prior relationship were the only [child]."[10] This calculation can be followed on Exhibit A, attached to this Decision and Order. It shows that if Ms. W. were paying child support for a single child based on her gross income of $24,845.76, the support amount would be $345. This is used as the allowable deduction in the next calculation.

The third preliminary calculation is to determine Ms. W.'s adjusted gross income for use in the final hybrid custody calculation. Another child support calculation has been run based on Ms. W.'s gross income, this time using as an additional allowable deduction the $345 derived above as the cost of supporting E. Exhibit B, attached to this decision and order, shows how this was done. The result is an adjusted annual income of $16,580.40.

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8 Civil Rule 90.3, Commentary III.C.

9 Civil Rule 90.3(f)(4).

10 Civil Rule 90.3, Commentary III.D.

The final hybrid custody support calculation uses these preliminary figures together with the support percentages for R. that were determined in Part I-D above. The calculation is too complicated to explain in prose, but can be followed step-by-step in Exhibit C, attached to this decision and order. It results in a determination that Mr. W. should make a monthly support payment, covering both A. and R., of $686.

Civil Rule 90.3 requires, in every hybrid custody case, that the judge "consider whether this support amount should be varied" because of manifest injustice.[11] I find that there is no evidence of manifest injustice if Mr. W. is required to pay $686 to support the two children, beginning on June 1, 2005, when he discontinued the direct mortgage payments he was making in lieu of support. I note that the amount is not a great deal higher than the mortgage payments he managed for several years, and that his income is adequate to sustain the increase.

All arrears from the period before June 1, 2005 will be eliminated pursuant to the stipulation noted in Part I-B.

## III. Child Support Order

1. R. L. W. satisfied all child support prior to June 1, 2005 through direct payments to Ms. W.;
2. R. L. W. is liable for child support in the amount of $686 per month, effective June 2005, and ongoing.

DATED this 22nd day of March, 2006.

By: *Signed*
Kay L. Howard
Administrative Law Judge

[11] Civil Rule 90.3(b)(3).

## 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 within 30 days after the date of this decision.

DATED this 7th day of April, 2006.

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

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