

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

IN THE MATTER OF: )

M. D. S. )

OAH No. 06-0671-CSS

CSSD No. 001142041

**DECISION AND ORDER**

**I. Introduction**

This matter involves the Obligor M. D. S.'s appeal of an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on August 6, 2006. The Obligee child is A., DOB 00/00/06.

The formal hearing was held on October 19, 2006, and December 7, 2006. Mr. S. appeared in person at the first proceeding; both he and the Custodian of record, M. L. F., participated by telephone during the second session of the hearing. A. Rawls, Child Support Specialist, represented CSSD. The record closed on January 2, 2007.

Kay L. Howard, Administrative Law Judge, Alaska Office of Administrative Hearings, conducted the hearing. Based on the record as a whole and after due deliberation, Mr. S.'s child support obligation should be set based on shared custody, as discussed herein, but he is not entitled to a variance based on financial hardship under Civil Rule 90.3(c).

**II. Facts**

**A. History**

Ms. F. began receiving public assistance benefits in March 2006, the month of A.'s birth. On June 19, 2006, CSSD served an Administrative Child and Medical Support Order on Mr. S.<sup>1</sup> He requested an administrative review.<sup>2</sup> Following the review, CSSD issued an Amended Administrative Child Support and Medical Support Order on August 6, 2006, that set Mr. S.'s ongoing child support at \$398 per month, based on primary custody, with arrears of \$2124 for the period from March 2006 through August 2006.<sup>3</sup> Mr. S. filed an appeal and requested a formal hearing on September 21, 2006.<sup>4</sup>

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<sup>1</sup> Exh. 1.

<sup>2</sup> Exh. 2.

<sup>3</sup> Exh. 6.

<sup>4</sup> Exh. 8.

## **B. Material Facts**

Mr. S. and Ms. F. are the parents of A., DOB 00/00/06. The parties both live in the greater Kenai/Soldotna area and currently exercise shared custody of A. roughly on a 50/50 basis.<sup>5</sup> They are litigating custody and have a final hearing scheduled for July 13, 2007.

Mr. S. and Ms. F. have not always exercised 50/50 shared custody of A. According to Mr. S.'s journal and calendar filed on December 13, 2006, Mr. S. had custody of A. 15.79% in March 2006; 10% in April; 0% each month during May, June and July; 32.26% in August; 20% in September; 35.48% in October; 53.33% in November; and 50% in December.<sup>6</sup> After the supplemental hearing, however, the parties jointly filed a statement that indicates Mr. S. had custody of A. 31% in May 2006; and 50% each month in June and July 2006. These figures were substituted for the figures CSSD derived from Mr. S.'s journal and calendar.

Mr. S. and Ms. F. attended an interim custody hearing before the court on November 14, 2006. Mr. S. asked the court to adopt the parties' August 2006 custody agreement in which they agreed to share custody of A. on a 50/50 basis.<sup>7</sup> According to Mr. S.'s hearing testimony, the court would not adopt the agreement because of A.'s tender age and Ms. F.'s resistance to the agreement. Soon after that interim custody hearing, Mr. S. had overnight custody of A. on the average of three nights per week, which equates to 43% shared custody for November and December 2006. Then, according to Ms. F.'s testimony, the parties were to begin a 50/50 shared custody agreement in mid-December 2006, which would then be effective January 2007.

When all of the shared custody percentages are added together for the period from March 2006 through December 2006 and then divided by 10 to equal the number of months, the result is an average of 33% shared custody for Mr. S. for the period from March 2006 through December 2006. As of January 2007, the 50/50 shared custody arrangement is effective.

Mr. S. earned \$30,740.35 in the four consecutive quarters from the end of 2005 through the third quarter of 2006.<sup>8</sup> His basic child support obligation, based on primary custody, equals

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<sup>5</sup> Except where indicated, the facts are taken from the parties' testimony at the supplemental formal hearing held on December 7, 2006.

<sup>6</sup> See CSSD's compilation in the Post Hearing Brief.

<sup>7</sup> See Exh. 7.

<sup>8</sup> CSSD provided this information in its final child support calculation at Exhibit 11, pg. 2. The most current figures from the Alaska Department of Labor and Workforce Development only include the time period through the second quarter of 2006. See Exh. 17 (renumbered from Exh. 12 after CSSD filed its Post-Hearing Brief that contained exhibits with the same numbers as were assigned during the hearing).

\$437 per month.<sup>9</sup> Ms. F. had gross income of \$6,414.01 in 2006. Her basic child support obligation, based on primary custody, equals \$83 per month.<sup>10</sup>

### III. Discussion

A parent is obligated both by statute and at common law to support his or her children.<sup>11</sup> 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", minus mandatory deductions.

Where parents exercise shared custody of their children, Civil Rule 90.3 provides that child support is to be calculated differently than in the situation in which 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.<sup>[12]</sup>

In order for a visitation day to count toward the required 30% of the year, the child(ren) must stay overnight with the respective parent.<sup>13</sup>

Shared custody child support is calculated by determining each parent's primary custody child support obligation to the other parent, as if each parent had primary custody of the child(ren). The figures are then inserted into a shared custody mathematical formula that calculates the paying parent's child support from a combination of both parents' primary custody support obligations and their individual shared custody percentages.

Mr. S.'s primary custody child support obligation, with his annual income estimated at \$30,740.35, would be \$437 per month for 2006. Ms. F.'s primary custody child support obligation, with annual income estimated at \$6,414.01, would be \$83 per month. When Mr. S.'s and Ms. F.'s information is inserted into the shared custody calculation, it results in Mr. S. having a child support calculation of \$287 per month for 2006.<sup>14</sup> The 2007 calculation is based

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<sup>9</sup> Exh. 11.

<sup>10</sup> Exh. 13. This calculation includes a deduction for her prior child. See Exh. 14 at pg. 2.

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

<sup>12</sup> Civil Rule 90.3(f)(1).

<sup>13</sup> Civil Rule 90.3, Commentary V.A.

<sup>14</sup> See Attachment A.

on 50/50 shared custody, so that calculation results in Mr. S. having a child support amount of \$266 per month, effective January 1, 2007, and ongoing.<sup>15</sup>

CSSD prepared separate child support calculations for the individual months at the end of 2006 because the shared custody percentages were not the same for each month.<sup>16</sup> These individual calculations are not necessary and should not be adopted. Since child support is calculated as much as possible on an annual basis, the best estimate of an average shared custody figure should be determined for longer periods of time. This makes the support amount more consistent from one month to the other, and complies with the mandate of Civil Rule 90.3 to set child support on an annual basis where possible.

### **B. Financial Hardship**

The second issue in this appeal is whether Mr. S. is entitled to a reduction in his child support obligation based on a financial hardship, pursuant to Civil Rule 90.3(c). He stated he cannot afford to pay the child support amount CSSD calculated.

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." Civil Rule 90.3(c). If there are "unusual circumstances" in a particular case, this may be sufficient to establish "good cause" for a variation in the support award:

Good cause may include a finding . . . that unusual circumstances exist which require variation of the award in order to award an amount of support which is just and proper for the parties to contribute toward the nurture and education of their children . . . .<sup>[17]</sup>

It is appropriate to consider all relevant evidence to determine if the support amount should be set at a different level than provided under the schedule in Civil Rule 90.3(a).<sup>18</sup> Based on the evidence presented, I find that this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. S. did not prove by clear and convincing evidence that

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<sup>15</sup> Exh. 15 at pg. 5.

<sup>16</sup> See, e.g. Exh. 15 at pgs. 1-4.

<sup>17</sup> Civil Rule 90.3(c)(1).

<sup>18</sup> See Civil Rule 90.3, Commentary VI.E.1.

manifest injustice will result if the child support amount calculated under Civil Rule 90.3 is not varied.

Mr. S.'s financial situation may have been somewhat strained as a result of having to begin to pay child support on a regular basis. But he is employed in a full-time job and as a result of having 50/50 shared custody of A. his child support obligation is significantly lower than originally calculated by CSSD. Thus, Mr. S.'s financial situation does not constitute "unusual circumstances" pursuant to Civil Rule 90.3(c).

**IV. Conclusion**

Mr. S. met his burden of proving by a preponderance of the evidence that the Amended Administrative Child Support and Medical Support Order was incorrect because it was based on Ms. F. having primary custody. His child support obligation is now correctly calculated at \$287 per month for 2006, based on his having an average of 33% shared custody, and \$266 per month for 2007, based on 50/50 shared custody going forward. These figures are a reasonable measure of his ability to pay support, and they should be adopted.

**V. Child Support Order**

1. Mr. S. is liable for child support in the amount of \$267 per month for the period from March 2006 through December 2006; and \$266 per month, effective January 1, 2007, and ongoing.

DATED this 30<sup>th</sup> day of March, 2007.

By: 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 within 30 days after the date of this decision.

DATED this 30<sup>th</sup> day of March, 2007.

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

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