

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

IN THE MATTER OF: )

T. F. K. )

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) OAH No. 06-0782-CSS

) CSSD No. 001139314

**DECISION AND ORDER**

**I. Introduction**

The Obligor, T. F. K., has appealed an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on November 7, 2006. The Obligee child is A., DOB 00/00/97.

The formal hearing was held on December 14, 2006, January 16, 2007, and February 9, 2007. Both Mr. K. and the Custodian of record, T. L. K., appeared by telephone during all three proceedings. Andrew Rawls, Child Support Specialist, represented CSSD. The record closed on February 24, 2007.

Kay L. Howard, Administrative Law Judge, Alaska Office of Administrative Hearings (OAH), conducted the hearing. Having reviewed the record in this case and after due deliberation, it is concluded Mr. K.'s appeal is granted in part and denied in part, as discussed below.

**II. Facts**

**A. Procedural History**

Ms. K. applied for child support services in May 2006.<sup>1</sup> On September 11, 2006, CSSD served an Administrative Child and Medical Support Order on Mr. K.<sup>2</sup> He requested an administrative review and provided income information.<sup>3</sup> Following the review, CSSD issued an Amended Administrative Child Support and Medical Support Order on November 7, 2006, that set Mr. K.'s ongoing child support at \$489 per month, effective November 1, 2006, based on the parties' shared custody agreement.<sup>4</sup> CSSD calculated Mr. K.'s arrears at \$933 per month (totaling \$4287), based on Ms. K. having primary custody, for the period from May 2006

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<sup>1</sup> Exh. 8 at pg. 1.

<sup>2</sup> Exh. 3.

<sup>3</sup> Exhs. 4, 6 & 6b.

<sup>4</sup> Exh. 7 at pg. 1; Exh. 6b.

through October 2006.<sup>5</sup> Mr. K. filed an appeal on November 21, 2006, claiming primarily that the parties exercised shared custody from May through October of 2006, and that CSSD incorrectly treated his military retirement income as nontaxable.<sup>6</sup>

**B. Findings of Fact**

1. Mr. K. had overnight visitation with A., DOB 00/00/97, a total of 10 days in May 2006; 12 days in June 2006; 12 days in July 2006; 10 days in August 2006; and 9 days in September 2006, which totals 53 overnights.<sup>7</sup> For those five months, this number of overnights constitutes 35% shared physical custody (53 overnights/153 days total).

2. Ms. K. had primary custody of A. in October 2006.<sup>8</sup>

3. On September 16, 2006, the Hon. Niesje J. Steinkruger issued an order for the parties to have shared legal custody of A.<sup>9</sup> As to physical custody, Judge Steinkruger's order provided that Mr. K. would have "alternate weekend visitation" from Fridays at 3:30 p.m. through Mondays at 9:00 a.m.<sup>10</sup> In a one-year period, this visitation equals 78 overnights, in addition to the occasional extra visitations ordered by the court, such as Thanksgiving and Christmas vacations.<sup>11</sup> This period of time does not constitute shared physical custody.

4. On October 30, 2006, Mr. K. and Ms. K. entered into a written "Parenting Agreement" regarding their child, A., DOB 00/00/97. The parties' agreement specified that Mr. K. would have visitation with A. from Saturday at noon until Tuesday each week, which is three overnights per week, and which constitutes 43% shared physical custody.<sup>12</sup> The parties have not specifically followed this agreement since they signed it, although they have been trying to work toward it gradually over time.

5. There is no evidence in the record that the court has adopted or signed off on the parties' Parenting Agreement, or entered a subsequent custody order.<sup>13</sup>

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<sup>5</sup> Exh. 7 at pg. 2; Exh. 8 at pg. 1.

<sup>6</sup> Exh. 9.

<sup>7</sup> Exh. 9 at pg. 2, affidavit of Lori Davis.

<sup>8</sup> Hearing testimony of Mr. K.

<sup>9</sup> Exh. 17.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Exh. 6B at pgs. 6-7. By comparison, therefore, Ms. K.'s shared custody time under this agreement is 57%.

<sup>13</sup> *See* Exh. 6B at pg. 25.

6. Ms. K.'s 2006 income totaled \$50,892.62, including wages and the PFD.<sup>14</sup> She has a prior child living with her, a son who was born on October 6, 1987, and who was still under the age of 19 years of age in May 2006, when he graduated from high school.<sup>15</sup> She is entitled to a prior child deduction from her income for that month only; as of June 2006, he was a high school graduate and Ms. K. would not be entitled to a prior child deduction after May 2006.

7. Mr. K.'s 2006 income totaled \$73,542.93, which includes his income from wages, his taxable retirement income, and the PFD.<sup>16</sup> In June 2006, he started paying \$319.92 per month into a retirement plan.<sup>17</sup>

### III. Discussion

The issue in this appeal is whether Mr. K. exercised shared physical custody of the parties' daughter, A., DOB 00/00/97.

#### A. Controlling law

A parent is obligated both by statute and at common law to support his or her children.<sup>18</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>[19]</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>20</sup> One year is equal to 365 days, so 30% of the overnights in one year equals 110 overnights.

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<sup>14</sup> Exh. 18; testimony of T. K.

<sup>15</sup> Testimony of T. K.

<sup>16</sup> Exh. 22; testimony of T. K.

<sup>17</sup> Exh. 23.

<sup>18</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

<sup>19</sup> Civil Rule 90.3(f)(1).

<sup>20</sup> Civil Rule 90.3, Commentary V.A.

In Alaska, child support orders must be calculated according to the custody and visitation provisions of a court's custody order.<sup>21</sup> In *Turinsky*, the Alaska Supreme Court set aside a child support obligation that had been calculated based on the actual physical custody exercised by the parties rather than the custody and visitation provisions of the Superior Court's order in their divorce litigation. The parents in that case had an acrimonious relationship, and for various reasons, they did not follow the court's custody and visitation orders.

In holding that their respective child support obligations must be based on the terms of the court order rather than actual visitation, the Alaska Supreme Court noted that to do otherwise would be to reward one of the parties for interfering with the other's visitation.<sup>22</sup> The rule that child support calculations must conform to custody and visitation orders has been consistently followed by the court since *Turinsky*.<sup>23</sup>

## **B. Analysis**

Before Mr. K. filed this appeal, the status of his child support case, in general, was that CSSD had adopted the parties' October 2006 Parenting Agreement and calculated ongoing child support as of November 2006 in conformity with the agreement that Mr. K. had 43% shared physical custody as of that date. For the time period from May 2006, when his obligation begins in CSSD's case, through October 2006, CSSD calculated Mr. K.'s child support based on Ms. K. having primary custody of A.<sup>24</sup>

Now that the evidence has been submitted and the parties have attended and participated in more than one hearing, it is obvious that Mr. K.'s child support obligation will change radically from CSSD's Amended Administrative Child Support and Medical Support Order. The primary reason for this change is Judge Steinkruger's September 16, 2006, order awarding Ms. K. full time custody of A., and granting Mr. K. only alternate weekend visitation.<sup>25</sup> Although the parties signed a shared custody agreement on October 30, 2006, that gave Mr. K. 43% shared custody of

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<sup>21</sup> *Turinsky v. Long*, 910 P.2d 590 (Alaska 1996).

<sup>22</sup> *Id.* at 596.

<sup>23</sup> See, for example, *Morino v. Swayman*, 970 P.2d 426 (Alaska 1999) (holding that de facto modifications of custodial arrangements should be formalized because child support awards should be based on the custody order); *Rowen v. Rowen*, 963 P.2d 249 (Alaska 1998) (holding that "the percentage of time each parent has custody must be determined by reference to the child custody order, not the parties' actual conduct"); and *Boone v. Boone*, 960 P.2d 579 (Alaska 1998) (holding that a child support obligation can be changed based on actual custody when a party has moved to modify the child support order).

<sup>24</sup> See CSSD's November 7, 2006, Amended Administrative Child Support and Medical Support Order, Exh. 7.

<sup>25</sup> Exh. 17.

A., their agreement, as far as can be determined at this time, was not adopted, agreed to or signed off on by Judge Steinkruger.

The undersigned administrative law judge issued an interim order reopening the record on March 16, 2007, and asking the parties to produce any evidence that the court has issued an order subsequent to the one on September 16, 2006. Mr. K.'s attorney in the divorce case filed a letter stating that the parties were waiting for the decision in this case to be issued so the child support calculation may be used in their litigation. He also provided a copy of a Child Custody, Visitation, and Support Agreement they executed on March 6, 2007, in order to settle those issues in their divorce. Unfortunately, however, because no court order has superseded the order of September 16, 2006, pursuant to the Alaska Supreme Court's ruling in the *Turinsky* case, it must be concluded that the court order dated September 16, 2006, remains in full force and effect.

The administrative law judge and CSSD must follow the *Turinsky* rule in this appeal, although it is clear the parties probably had a different custody arrangement in mind. It is understood that following *Turinsky* will have severe financial implications for Mr. K. because the court's order provides for him to have A. only 78 overnights per year, along with a few extra overnights that would be added as a result of him having her during school breaks. Because the court order does not set out a different schedule during the summer, it also must be concluded that the court intended for the alternate weekend visitation schedule to remain in place all year. As a result, Mr. K.'s child support obligation as of October 1, 2006, must be calculated based on Ms. K. having primary custody of A..

The period of time from May 2006 through September 2006 has a different result. The parties were significantly at odds in their perceptions of and testimony about that period, but overall, Mr. K.'s evidence that he had A. during the days stated in Finding #1, above, is more credible, and therefore his claim that they had shared custody for that period is adopted.<sup>26</sup>

CSSD determined the parties' incomes for the 2006 calendar year, as shown in the agency's Submission to Record. Mr. K.'s child support obligation for May 2006 should be calculated using the shared custody calculation that considers both parties' incomes. First, Mr. K.'s income without a retirement deduction should be used for that month, based on his testimony he started having a retirement deduction taken out in June 2006. CSSD's Exhibit 22 is

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<sup>26</sup> Mr. K.'s issues regarding health insurance can be resolved by his caseworker. His last issue asserting that his retirement income is taxable was acknowledged by CSSD and will be followed.

the appropriate one to use for that month. Similarly, Ms. K.'s income figures as shown in Exhibit 19 should be used, because her older son was still in high school and had not yet attained the age of 19 years. Inserting these respective figures into the shared custody calculation results in a child support figure for Mr. K. of \$462 for the month of May 2006 only.<sup>27</sup>

For the months of June 2006 through September 2006, CSSD's Exhibit 20 should be used for Ms. K.'s income figures, because she was no longer entitled to a deduction for supporting a prior child in the home after her son graduated in May 2006. Likewise, Exhibit 23 should be used for Mr. K.'s figures because he began paying into a retirement plan as of June 2006. Inserting the parties' respective figures into the shared custody calculation results in a child support figure for Mr. K. to pay in the amount of \$321 per month for those months.<sup>28</sup>

As stated above, effective October 1, 2006, Mr. K. must pay child support based on Ms. K. having primary custody of A. pursuant to the court's order. The parties may have intended much different results, but in the absence of any court order subsequent to the one discussed at length in this decision, the *Turinsky* doctrine must be followed.<sup>29</sup>

#### **IV. Conclusion**

Mr. K.'s child support obligation in the administrative case before CSSD is now correctly calculated and should be adopted. In the event the Superior Court enters another order adopting the parties' intent, CSSD must follow that most recent order. In the meantime, however, Mr. K.'s child support should be set according to this decision.

#### **V. Child Support Order**

- Mr. K. is liable for child support in the amount of \$462 for May 2006; \$321 per month for June 2006 through September 2006; and \$876 per month, effective October 1, 2006, and ongoing.

DATED this 26<sup>th</sup> day of April, 2007.

By: Signed  
Kay L. Howard  
Administrative Law Judge

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<sup>27</sup> See Attachment A.

<sup>28</sup> See Attachment B.

<sup>29</sup> The calculations for 2007 will not be adopted because the parties' income figures are too speculative at this time.

**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 17<sup>th</sup> day of May, 2007.

By: Signed  
Signature  
Jerry Burnett  
Name  
Director, Admin Services  
Title

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