

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

In the Matter of)	
)	
D (D) N)	OAH No. 18-0964-CSS
<hr style="width: 80%; margin-left: 0;"/>)	Agency No. 001212987

DECISION AND ORDER

I. Introduction

D N appeals the decision of the Child Support Services Division to set his monthly child support obligation for his three children based on a primary custody calculation instead of a shared custody calculation. The Division’s August 23, 2018 Amended Administrative Child Support and Medical Support Order set Mr. N’s obligation under a primary custody calculation. On appeal, he argues that his significant overnight visitation with the parties’ two older children – sometimes for up to two weeks in a month – justifies calculating his support obligation for those children under a shared custody calculation.

The evidence presented on appeal establishes that Mr. N will have, at most, 100 nights of overnight visitation with the older children in 2018. Under Alaska law, this is below the threshold necessary for a shared custody calculation. While either party can seek a modification of the existing order if their custody arrangement changes, Mr. N did not meet his burden of establishing that he is currently entitled to a shared custody calculation. The Division’s August 23, 2018 Order is therefore affirmed.

II. Facts

D and T N are the parents of K (age 12), B (age 9), and E (24 months old). The children live with Ms. N.

In December 2016, Ms. N also sought a Domestic Violence Protective Order, as well as a Temporary Support and Visitation Order, in Juneau Superior Court. On December 23, 2016, the Juneau Superior Court entered a Long-Term Domestic Violence Protective Order and a temporary child support order governing the parties’ child support and custody arrangement through December 23, 2017. That order awarded full custody of the three children to Ms. N, and set child support for the three children at \$150 per month.¹

¹ Ex. 4, pp. 5-8.

Around the same time, Ms. N applied for Temporary Assistance for Needy Families (TANF). That application triggered the Division’s process for establishing a child support order. On January 10, 2017, the Division issued an administrative order directing both parties to submit income information. Mr. N did not provide any information, and the Division ultimately determined his monthly support obligation based on an imputed minimum wage income. The Division issued an Administrative Child Support and Medical Support Order for the parties’ case on April 19, 2017. The Order set Mr. N’s child support for 2016 based on his employer-reported income for that year, but set his ongoing support based on the minimum wage. Using these income figures, the monthly support obligation for three children was set at \$283.00 per month,

Mr. N appealed, arguing that his support should be calculated based on a shared custody calculation. CSSD held an “administrative review hearing,” at which Mr. N described the parties’ visitation arrangements. (Ms. N did not participate in this proceeding).² Based on Mr. N’s statements, as well as his newly submitted documentation about income, custody, and visitation, CSSD issued an Administrative Review Hearing Decision on August 23, 2018.

The Decision concluded that Mr. N’s visitation with the children did not appear to rise to the level of shared custody for purposes of a shared custody calculation under Alaska Civil Rule 90.3.³ However, the Decision concluded that the April 19 Order should be amended.⁴ Because the Juneau Superior Court had issued a Temporary Child Support Order governing 2017, the Decision provided that that order would apply for that year.⁵ For 2018, the Decision concluded that Mr. N’s monthly support obligation should be recalculated based on the actual income information he had provided. With a July 20, 2018 paystub indicating a year-to-date income of \$72,360.00, the Division concluded that Mr. N’s annual income for 2018 would be \$134,382.82.⁶

After accounting for allowable deductions for federal income tax and FICA, the Division determined Mr. N’s adjusted annual income for child support purposes to be

² Ex. 3, p. 12.

³ Ex. 3, p. 12.

⁴ Ex. 3, p. 12.

⁵ Ex. 6, p. 8.

⁶ Ex. 6, p. 8; Ex. 3, p. 12.

\$101,807.42. Based on the formula in Rule 90.3(a), his annual income available for child support for three children was identified as \$33,596.45, which results in a monthly support obligation of \$2,800 for three children.⁷

Accordingly, along with the Administrative Review Decision, CSSD issued an Amended Administrative Child and Medical Support Order, dated August 23, 2018, which increased Mr. N's support obligation for the three children to \$2,800 per month. Mr. N appealed, again arguing that his support obligation should be calculated based on a shared custody calculation.

The hearing convened on October 10, 2018. Both parents participated by phone. The parents had conflicting version of the children's visitation schedule, and their descriptions of the visitation situation changed as the hearing progressed. Ms. N initially testified that the children had not spent any seven-day period at Mr. N's house during 2018. Mr. N testified that they had. He acknowledged it had "been awhile" because of his work schedule, but insisted that, for the first four five-week periods of the year, the children had spent two weeks of every five-week period at his house. Ms. N then acknowledged that the children had spent 10-night periods of Sunday to the following Wednesday at Mr. N's house throughout the first part of the (calendar) year. Neither party had documents on hand or readily available to either confirm or clarify their recollections of the children's schedules.

The Division's position was that there was insufficient evidence to find shared custody. The Division noted that Ms. N's receipt of public assistance benefits for the children triggers a presumption of primary custody. The Division further noted that, under the applicable Court Rule and regulations, the question of shared custody is determined based on the entire calendar year. The Division suggested that, with visitation having occurred as described by Mr. N, there was insufficient time left in the year for him to reach a level of visitation required to trigger a shared custody calculation.

Because neither parent had documents available to support their versions of events vis-à-vis custody, it was agreed that a second hearing session would be held after the parties were able to gather and file any such documents. The second hearing session was held on November 8, 2018. Prior the hearing, Mr. N submitted the following:

⁷ Ex. 6, p. 10.

- An October 15, 2018 memo stating that “it is very difficult to see my children when I am ignored or denied visitation with them when I ask,” and that “I would like to be able to see them as much as possible and when she denies me visitation there wasn’t much I could do.”⁸
- An October 15, 2018 list of “the number of days [he] had the children for 2018,” as follows:

January 1-6 & 28-31	10 days
February 1-10	10 days
March 4-17	14 days
April 8-21	14 days
May 11-26	14 days
June 24-30	7 days
July 1-4 & 22-31	14 days
August 1-4	4 days

This document added “I anticipate I will have them: November 14 days [and] December 9 days for a total of 110 days.”⁹

- October 15, 2018 letters from his parents and his sister, both stating that K and B “have spent as much time D N on his weeks off as [Ms. N will] allow, usually 2 weeks out of every 5 weeks,” and avering that Ms. N has denied Mr. N, as well as his parents, sufficient visitation with the children.¹⁰
- An October 18, 2018 follow-up memo and letter indicating that, depending on his December work schedule, Mr. N anticipated having the children for either nine or fourteen days that month.¹¹
- A 2018 calendar, with certain weeks highlighted.¹²

At the second hearing session, Mr. N testified that the dates highlighted on the calendar he had provided showed the days he had off from work, not necessarily the days he had the children, and that he had constructed the list of visitation dates from memory and (unidentified) records. He also explained that, for each of the time periods listed, the last day was the date the children went home, so it was not a date on which overnight visitation occurred. It was agreed during the hearing that some of the dates on Mr. N’s list were off by a day or two – for example, he listed visitation starting on June 24, but later agreed with Ms. N’s testimony that the children had spent that day and night with her, and that visitation with Mr. N had not started until the following day.

⁸ October 15, 2018 fax, p. 1 of 4.

⁹ October 15, 2018 fax, p. 2 of 4.

¹⁰ October 15, 2018 fax, pp 3-4.

¹¹ October 19, 2018 fax, pp. 1-2.

¹² October 19, 2018 fax, p. 3 (illegible); October 22, 2018 fax, p. 2.

Mr. N testified that the children spend the following nights with him:

- January: 1, 2, 3, 4, 5 [total: 5]
- January: 28, 29, 30, 31; Feb. 1, 2, 3, 4, 5, 6, 7, 8, 9 [total: 13]
- March: 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 [total: 10]
- April: 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 [total: 13]
- May: 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 [total: 13]
- June: 25, 26, 27, 28, 29, 30; July 1, 2, 3 [total: 9]
- July 22, 23, 24, 25, 26, 27, 28, 29, 30, 31; Aug. 1, 2, 3 [total: 13]

Ms. N generally agreed with Mr. N's summary, except that she does not think there was a period of visitation at the end of July.

Mr. N also testified that he expects to have the children for 24 for nights this calendar year, as follows:

- November: 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 [total 13]
- December: 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 [total 11]

Ms. N did not disagree with Mr. N's testimony about his expectations for further visitation this year. The record closed at the end of the second hearing session.

III. Discussion

Parents are required by law to support their children. Child support under Alaska law is calculated based on an obligor parent's total income from all sources. Certain specific deductions are taken from that total income amount to determine an adjusted income amount to which the Rule 90.3(a) child support formula is applied. In situations where the parties do not share custody, the noncustodial parent is expected to pay 20% of their adjusted income in support of one child, 25% for two children, and 27% for three children.

The Division calculated Mr. N's monthly support obligation using his actual income based on employer-reported wages. The Division determined Mr. N's 2018 annual wages to be \$134,382.82.¹³ After accounting for allowable deductions for federal income tax and FICA, the Division determined Mr. N's adjusted annual income for child support purposes to be \$101,807.42. Based on the formula in Rule 90.3(a), his annual income available for child support for three children was identified as \$33,596.45, which results in a monthly support obligation of \$2,800 for three children.¹⁴

¹³ Ex. 6, p. 8.

¹⁴ Ex. 6, p. 10.

In this case, Mr. N does not challenge the information CSSD used to determine his total income from all sources, nor its calculation of his adjusted income from which his monthly support obligation is to be determined. His only dispute is with CSSD's application of the 90.3(a) primary custody formula, rather than using a shared custody calculation.

When parties share custody, the support calculation is modified to account for the amount of time the child or children are with each parent. Critical to this case, however, shared custody under Rule 90.3 is determined based on the percentage of time each parent has the children over the entire calendar year, and requires that the noncustodial parent have the children for at least 30 percent of the year to trigger a finding of shared custody. While in no way diminishing the value of the time Mr. N spends with the children, the evidence does not support a finding that he exercises shared custody under this standard.

Alaska 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 no more than 70, percent of the year, regardless of the status of legal custody.¹⁵

The Commentary to the Rule further explains that "Shared custody" as this term is used in Rule 90.3 means that each parent has physical custody of the children at least thirty percent of the year[.]¹⁶ The Commentary continues: "In order for a day of visitation to count towards the required thirty percent, the children normally must remain overnight with that parent. (Thirty percent of the overnights in a year total 110 overnights.)."¹⁷

Even accepting Mr. N's summary as accurate, including the disputed July dates, and accepting the testimony that he will have 24 more nights of overnight visits with the children this calendar year, the total number of days on which overnight visitation has or will occur for 2018 is 100. This is ten nights short of the 110 overnights for Mr. N to be considered to have had "physical custody of the children at least thirty percent of the year."

This result may seem unfair in that there were months where Mr. N had physical custody for far more than thirty percent of the month. But, in the absence of some written agreement or a court order on visitation, the rule counts custody by the year, not by the

¹⁵ Alaska Civil Rule 90.3(f)(1)

¹⁶ Alaska Civil Rule 90.3, Commentary, V(A).

¹⁷ Alaska Civil Rule 90.3, Commentary, V(A).

month. The fact that Ms. N is receiving public assistance benefits for the family, including the children, further supports a finding of primary physical custody.

Mr. N's hearing request separately raised the question of whether he is entitled to a medical credit based on payment for the children's medical insurance. During the hearing, it was explained that the availability of a medical credit is not a factor in the calculation of the monthly child support obligation, and is therefore not within the scope of the administrative appeal of that calculation. CSSD's representative explained the process by which an obligor can obtain a credit by providing the required medical insurance cost breakdown information to the case worker at any time while the support case is active.

IV. Conclusion

Mr. N did not meet his burden of showing that the Division erred in using a primary custody calculation. The order based on that calculation is therefore affirmed.

V. Child Support Order

1. D (D) N is liable for child support in the amount of \$2,800 per month for three children, effective September 1, 2018 and ongoing.
2. All other terms of the Amended Administrative Child Support and Medical Support Order dated August 23, 2018 remain in full force and effect.

Dated: November 21, 2018

By: Signed
Name: Cheryl Mandala
Title: Administrative Law Judge

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

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 14 day of December, 2018.

By: *Signed* _____

Name: Cheryl Mandala

Title: Administrative Law Judge

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