

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

IN THE MATTER OF:)

T. H. R.)

OAH No. 08-0112-CSS

CSSD No. 001148091

DECISION AND ORDER

I. Introduction

The Obligor, T. H. R., has appealed an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (“CSSD”) issued in his case on February 14, 2008. The Obligee child is S., DOB 0/00/06.

The formal hearing was held on March 26, 2008 and April 17, 2008. Mr. R. appeared in person at the first hearing; the custodian of record, J. W., f/k/a J. R., appeared in person at the second hearing. Andrew Rawls and David Peltier, Child Support Specialists, represented CSSD. The record closed on April 17, 2008.

Kay L. Howard, Administrative Law Judge, conducted the hearing. Based upon the entire record in this case and after careful consideration, Mr. R.’ child support obligation should be set at \$568 per month for one child.

II. Facts

A. Procedural History

The child, S., began receiving public assistance in February 2007.¹ On August 23, 2007, CSSD served an Administrative Child and Medical Support Order on Mr. R.² He requested an administrative review and provided income information.³ On February 14, 2008, CSSD issued an Amended Administrative Child Support and Medical Support Order that set Mr. R.’ child support at \$580 per month, effective March 1, 2008, with arrears of \$7540 for the period from February 2007 through February 2008.⁴ Mr. R. filed an appeal on February 29, 2008, claiming he had shared custody of S. at least 30% of the time.⁵

¹ Pre-Hearing Brief at pg. 1.

² Exh. 3.

³ Exhs. 4 & 7.

⁴ Exh. 8.

⁵ Exh. 10.

B. Material Facts

The person requesting the hearing, in this case, Mr. R., has the burden of proving that CSSD's Amended Administrative Child Support and Medical Support Order is incorrect.⁶ The following facts have been established by a preponderance of the evidence, meaning they are more likely than not true:⁷

Mr. R. and Ms. W. have known each other since 2005. They lived with her parents for six months in 2006, during which time S. was born on July 30, 2006. In October 2006, the parties got their own apartment together. Ms. W. and S. left the home in February 2007, at which time Ms. W. applied for and began receiving public assistance benefits on the child's behalf. Ms. W. subsequently met her husband, E. W., and they were married on August 00, 2007.

After Mr. R. and Ms. W. separated in February 2007, they reached a verbal agreement for him to have visitation with S. on Tuesday and Thursday evenings from 4 p.m. to 8 or 9 p.m., and overnight on Saturdays. Occasionally Mr. R. would keep S. overnight on Tuesday or Thursday, but not on a regular basis. The agreement was in place until October 2007, when they agreed Mr. R.'s visitation would increase temporarily to three overnights per week. This is because Ms. W. and her husband and S. were going to be out of town on vacation for the month of November 2007 and the parties perceived it would be fair for Mr. R. to have more overnights with S. in October to make up for her absence during November.

In December 2007, after Ms. W.'s vacation was over, the parties returned to their original agreement in which Mr. R. would have S. on Tuesday and Thursday evenings and overnight on Saturdays. However, in early 2008 Mr. R. indicated a desire to keep S. overnight more often and Ms. W. consented to the child staying with him up to two overnights per week. The parties' agreement has stayed relatively consistent since then.

Mr. R. is employed and earns \$16 per hour working for a company that moves household goods. In 2007 his income was \$39,902.85.⁸ He has regular monthly expenses of approximately \$2353, including \$900 for rent; \$20 for electricity; \$66 for cable; \$60 for a cell phone; \$350 for the payment on a 2004 Silverado; \$317 for vehicle insurance; \$400 to \$500 for food; and \$240

⁶ 15 AAC 05.030(h).

⁷ See 2 AAC 64.290(e).

⁸ Exh. 11 at pg. 1.

for gasoline. He does not have any credit card debt, but he does have one unpaid medical bill of \$3000.⁹

III. Discussion

A. Shared custody

A parent is obligated both by statute and at common law to support his or her children.¹⁰ 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. In general, and depending on the percentage of time each parent has overnight visitation, the parent with the higher income will pay a somewhat lower amount of support than in a primary custody scenario. 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.^[11]

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.¹² One year is equal to 365 days, so 30% of the overnights in one year equals 110 overnights.

Although Civil Rule 90.3(f)(1) indicates shared custody should be based on a written agreement, the parties to child support actions rarely have one. Thus, the administrative law judge must make findings of fact regarding whether shared custody exists and, if so, in what percentages. The party asserting shared custody, in this case, Mr. R., has the burden of proof by a preponderance of the evidence.¹³

The parties' testimony was diametrically opposed on the shared custody issue. Mr. R. testified at the first hearing that he has overnight custody of S. four nights per week, on Tuesday, Thursday, Saturday and Sunday. In contrast, Ms. W. testified that in general, Mr. R. has had

⁹ Testimony of T. H. R.

¹⁰ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹¹ Civil Rule 90.3(f)(1).

¹² Civil Rule 90.3, Commentary V.A.

¹³ See 2 AAC 64.290(e).

evening visitation on Tuesday and Thursday, with overnight custody on Saturdays. She acknowledged he occasionally keeps S. overnight during the week, but Ms. W. maintains it is not more than two overnights per week. Her husband and mother corroborated her testimony at the second hearing.

In addition to his testimony, Mr. R. presented several witness statements asserting he has had shared custody of S.,¹⁴ but many were not useful because they did not state why the witness would have had personal knowledge of Mr. R.' situation, or they appeared to have been written in order to help him obtain or maintain *custody* of S., as though this were a contested custody dispute. Significantly, the witness statement prepared by Mr. R.' sister, L. K., states that "T. has been picking up S. every other day during the work week, after work and on Saturday afternoon, overnight until Sunday evening and drops her back off to J."¹⁵ Ms. K.'s statement suggests S. stays overnight with Mr. R. only on Saturday, so her statement actually supports Ms. W.'s testimony more than it does Mr. R.'. Moreover, if Mr. R. had overnight custody of S. four overnights per week, his expenses for her would have been much higher than \$270.76 during the seven-month period from February 2007 through September 2007,¹⁶ and he would have had to purchase diapers more often. That he purchased then twice during that period further supports Ms. W.'s testimony that for the most part, she provided the bulk of S.'s supplies for Mr. R.' visitations with the child.

Accordingly, the administrative law judge finds, based on the record as a whole, including all of the testimony and exhibits, that Ms. W.'s evidence is the most credible and adopts her recitation of the custody situation. Mr. R. did not meet his burden of proving he has had shared custody of S. since he and Ms. W. separated. Thus, his child support obligation should be based on Ms. W. having primary physical custody of S. for all of the relevant time periods.

Mr. R.' 2007 income was \$39,902.85.¹⁷ Pursuant to Civil Rule 90.3, a child support calculation for one child in a primary custody situation results in a support amount of \$568 per

¹⁴ See Exh. 7 at pgs. 6-12 and Exh. A.

¹⁵ Exh. 7 at pg. 6.

¹⁶ See Exh. 7 at pg. 5.

¹⁷ Exh. 11 at pg. 1.

month.¹⁸ This amount is correct and should be adopted, subject to Mr. R.’ request for a reduction in support based on financial hardship, as discussed below.

B. Financial hardship

The second issue in this appeal is whether Mr. R. 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). Also, 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^[19]

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).²⁰ Based on the evidence presented, this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. R. did not prove by clear and convincing evidence that manifest injustice will result if the child support amount calculated under Civil Rule 90.3 is not varied. Mr. R.’ situation does not constitute “unusual circumstances” pursuant to Civil Rule 90.3, and he has not proven there is good cause to reduce his support obligation.

Mr. R.’ financial situation may be somewhat strained as a result of having to pay his living expenses in addition to child support on a regular basis. However, Mr. R. is employed in a full-time job and should be able to budget his expenses so that he can handle all of his financial obligations. He may have to make some difficult financial adjustments, but simply having monthly living expenses or debts that exceed one’s net income does not automatically entitle a

¹⁸ Exh. 12 at pg. 2. This calculation was included in the documents submitted by CSSD after the first hearing.

¹⁹ Civil Rule 90.3(c)(1).

²⁰ See Civil Rule 90.3, Commentary VI.E.1.

parent to a reduction in the child support calculation.²¹ Mr. R. has a duty to support S., based on his total annual income, and this duty to his child takes priority over other debts and obligations.²²

IV. Conclusion

Mr. R. did not meet his burden of proving he exercises shared custody of S., or that there is good cause to reduce his child support obligation from the amount calculated under Civil Rule 90.3. Mr. R.' child support is now correctly calculated at \$568 per month, and that amount should be adopted.

V. Child Support Order

1. Mr. R. is liable for child support in the amount of \$568 per month for the period from February 2007 through July 2008, and ongoing;
2. All other provisions in CSSD's February 14, 2008, Amended Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 25th day of July, 2008.

By: Signed
Kay L. Howard
Administrative Law Judge

²¹ Civil Rule 90.3, Commentary VI.B.4.

²² See *Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

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 and Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 11th day of August, 2008.

By Signed
Kay L. Howard
Administrative Law Judge

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