

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

IN THE MATTER OF:)
)
A. J. B.) OAH No. 09-0038-CSS
) CSSD Case No. 001153169
_____)

DECISION AND ORDER

I. Introduction

This case concerns the obligation of A. J. B. for the support of F. T. B.-M. (DOB 00/00/98) and S. M. B.-M. (DOB 00/00/2001). The obligee is E. M.

On January 9, 2009, the Child Support Services Division issued an amended administrative child support order establishing an ongoing support obligation in the amount of \$0, with arrears in the amount of \$3,472 for the period from November 1, 2007, through January 31, 2009.¹

Ms. B. filed an appeal and requested an administrative hearing. The Office of Administrative Hearings conducted a telephonic hearing on February 9 and March 17, 2009. Andrew Rawls represented the division. Ms. B. participated in both hearings. Mr. M. was not available at his telephone number of record on February 9, but he participated in the March 17 hearing.

All parties agreed at the hearing that ongoing support should remain at \$0. The only issue to be resolved is arrears, which are set at \$0.

II. Discussion

A. B. and E. M. are the parents of two children, F. and S. The couple has never been married; neither has any other children.

After the parties separated, on June 18, 2007, the superior court entered a custody order pursuant to the mediated agreement of the parties.² At that time, Mr. M. was living in No Name City and Ms. B. was living in Girdwood.³ The order provided that the children were to stay with Mr. M. except for summer vacation,⁴ winter break,⁵ spring

¹ Exhibit 7, pages 1-2.

² Exhibit 1.

³ Exhibit 1, page 2.

⁴ Exhibit 1, page 14 (¶8.3).

⁵ Exhibit 1, page 15 (¶8.5).

break,⁶ and otherwise as agreed.⁷ The parties abided with this agreement through the end of summer vacation, 2008, at which time Ms. B. retained physical custody of the children pending resolution of a motion to change custody that she had filed with the superior court on August 6, 2008.⁸ By then, Mr. M. had moved from No Name City to Talkeetna, but he was no longer in Talkeetna and his residence was unknown to Ms. B.⁹ The children remained with her until January 9, 2009, after the superior court (on November 25, 2008) had heard and denied her motion to modify custody, and ordered that at the end of the winter break the children would return to Mr. M., who by then was living with his parents in Fairbanks.

In 2007, Mr. M. worked as a self-employed carpenter and earned about \$21,000 net after expenses. With his Alaska Permanent Fund dividend, his total income in 2007 was about \$22,654. In 2008, Mr. M. was injured for a part of the year and had reduced earnings from his self employment as a carpenter and employment as a wilderness guide. He earned about \$14,000 that year, including his net income from self employment and his wages of \$3,179.¹⁰ With his Alaska Permanent Fund dividend and energy dividend, his total income in 2008 was about \$17,269. In 2007, Ms. B. earned wages of \$19,545, primarily working for the Alyeska resort,¹¹ and, with her Alaska Permanent Fund dividend, had total income of \$21,199.¹² In 2008 she earned wages of \$8,961 and received unemployment compensation of \$5,856.¹³ With her Alaska Permanent Fund dividend and energy payment, her total income in 2008 was \$18,107.

III. Discussion

The division establishes a child support obligation based upon “the expected actual annual income that the parent will earn or receive when the child support award is

⁶ Exhibit 1, page 16 (¶8.6).

⁷ Exhibit 1, page 16-17 (¶8.7, ¶8.8), page 19 (¶13).

⁸ Exhibit 3

⁹ Exhibit 3, pages 2, 5.

¹⁰ Mr. M. testified regarding his income in 2007 and 2008. His wages were reported to the Department of Labor and recorded by the division.

¹¹ Exhibit 3, pages 23, 26 (2007 Tax Return).

¹² Exhibit 3, page 23 (2007 Tax Return).

¹³ 2008 Tax Return (unsigned).

to be paid.”¹⁴ When adequate information is available, arrears may be based on the actual income received during the period for which arrears are due.¹⁵

A. Income

In this case, Mr. M.’s income for 2007 and 2008 was established through his own testimony. His testimony is consistent with the evidence in the record. He testified that his Alaska Permanent Fund dividend was attached to pay for a student loan, but it constitutes income to him even if it was paid to his creditor rather than to him. Ms. B.’s income for 2007 and 2008 was established by her tax returns, buttressed by her W-2 forms and an unemployment insurance claim form.

B. Presumptive Support Obligation

For two children, a parent’s presumptive support obligation is 27% of that parent’s adjusted annual income,¹⁶ that is, total income after allowable deductions.¹⁷ In a shared custody situation, child support is determined by first calculating the basic child support obligation of both parents (treating both as if the other parent were the sole custodian), adjusting the basic obligation to reflect the percentage of time that the child spends with each parent, and then multiplying the amount due by 1.5 in order to compensate for the increased cost of providing support that generally occurs when custody is shared.¹⁸

In order not to reward a parent for interfering with another parent’s custody or visitation rights, a parent’s child support obligation is generally determined based upon the existing custody order, rather than actual custody.¹⁹ In this case, the court custody order provided for Ms. B. to have custody during summer vacation (less two weeks) plus winter and spring breaks, with extra days as agreed. Thus, the order gave Ms. B. scheduled visitation rights for only about 94 nights per year,²⁰ somewhat less than the 30 % (110 nights per year) threshold for shared custody status.²¹ However, the order

¹⁴ 15 AAC 125.030(a).

¹⁵ Duffus v. Duffus, 72 P.3rd 313, 321 (Alaska 2003); Spott v. Spott, 17 P.3rd 52, 56 (Alaska 2001).

¹⁶ 15 AAC 125.070(a); Civil Rule 90.3(a)(2)(A).

¹⁷ 15 AAC 125.070(a); -.065; Civil Rule 90.3(a)(1).

¹⁸ 15 AAC 125.070(b); Civil Rule 90.3(b). *See* Civil Rule 90.3, Commentary at V(B).

¹⁹ *See generally*, Turinsky v. Long, 910 P.2d 590, 594-595 (Alaska 1996).

²⁰ 17 (winter break) + 10 (spring break) + 67 (summer vacation).

²¹ Civil Rule 90.3(f).

characterized the custody arrangement as for shared custody,²² and it provided for additional custody as agreed. On balance, the custody order should be construed as providing for shared custody for child support purposes.

The evidence indicates that when the 2008 summer vacation period of visitation ended, Ms. B. was unaware of Mr. M.'s location.²³ With the new school year imminent, Ms. B. immediately requested an expedited hearing on custody. She informed the court that she had not returned the children and described the circumstances. From that point forward, the court had direct control over custody and visitation. The court did not order the immediate return of the children and it did not entertain Ms. B.'s request to modify the custody order until November 25, 2008, at which time it allowed the children to remain with her until the end of the upcoming winter break. Under these circumstances, Ms. B.'s exercise of extended visitation has not been shown to be the result of willful disobedience of the court's child custody order and her child support obligation may be based upon actual custody.

During the time the arrears accumulated, from November, 2007, through November, 2008, the children were actually living with Ms. B. about 50% of the time.²⁴ Thus, a 50% shared custody calculation for that period is appropriate. Applying the standard deductions as provided on the division's calculator, Ms. B.'s presumptive support obligation during that time was zero, as shown in Appendices A and B.²⁵

IV. Conclusion

From November, 2007, through November, 2008, the children were living with Ms. B. approximately 50% of the time. The parents had substantially equal income in both 2007 and 2008. Ms. B. has no liability for arrears.

²² Exhibit 1, page 3.

²³ Exhibit 3, pages 2, 5.

²⁴ The period from November 1, 2007-November 30, 2008, is 396 days. The children were with Ms. B. for the winter (17 nights) and spring (10 nights) breaks and after the first week of summer vacation through the end of November (176 nights), for a total of about 203 nights.

²⁵ The division's calculator does not include deductions federal taxes on self-employment income. Thus, Appendix A may slightly overstate Mr. M.'s income. The standard calculations are applied, however, because Mr. M. did not provide any evidence of his actual income or taxes.

CHILD SUPPORT ORDER

The Amended Administrative Child Support and Medical Support Order dated January 9, 2009, is **AMENDED** as follows; in all other respects, the Amended Administrative Child Support and Medical Support Order dated January 9, 2009, is **AFFIRMED**:

Ms. B.'s arrears are set at \$0 for the period from November 1, 2007, through January 31, 2009.

DATED: April 29, 2009.

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

DATED this 19th day of May, 2009.

By: *Signed* _____
Signature
Andrew M. Hemenway
Name
Administrative Law Judge
Title

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