

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

IN THE MATTER OF: )

D. B. B. )

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OAH No. 09-0523-CSS

CSSD No. 001157997

**DECISION AND ORDER**

**I. Introduction**

The obligor, D. B. B., appeals an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (“CSSD”) issued in his case on September 4, 2009. The obligee child is J., who is 4 years of age.

The formal hearing was held on October 22, 2009. Mr. B. participated in person; the custodian of record, K. R.-T., appeared by telephone. Erinn Brian, Child Support Specialist, represented CSSD. The record closed on November 2, 2009.

Based upon the record and after careful consideration, Mr. B.’s child support obligation is set at \$664 per month, effective March 1, 2009. His requests for a shared custody calculation and for a variance based on financial hardship are both denied.

**II. Facts**

**A. Procedural History**

Ms. R.-T. applied for child support services on March 16, 2009.<sup>1</sup> CSSD established Mr. B.’s paternity of J. on May 4, 2009, after he acknowledged his paternity of the child.<sup>2</sup> On July 16, 2009, CSSD served an Administrative Child and Medical Support Order on Mr. B.<sup>3</sup> He requested an administrative review and provided income information.<sup>4</sup> On September 4, 2009, CSSD issued an Amended Administrative Child Support and Medical Support Order that set Mr. B.’s ongoing child support at \$746 per month, effective October 1, 2009, with arrears of \$5,222

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

<sup>2</sup> Exh. 4.

<sup>3</sup> Exh. 5.

<sup>4</sup> Exh. 6.

for the period from March 2009 through September 2009.<sup>5</sup> Mr. B. filed an appeal on September 14, 2009, asserting he and Ms. R.-T. were litigating custody of J.<sup>6</sup>

**B. Material Facts**

Mr. B. is employed as a pipe threader at Unique Machine, Alaska's largest machine shop.<sup>7</sup> He has worked there for 1½ years and was laid off because of lack of work for six weeks in mid-July and August 2009. He makes \$18.61 per hour and \$27.92 per hour for overtime work.<sup>8</sup> He contributes 2% of his income to a retirement program. Mr. B. is currently working the night shift and on alternating weekends, but he anticipates returning to the day shift in the near future when the company's new facility is finished and all the employees go back to working just the day shift.

Mr. B.'s estimated income for 2009 is \$50,333.55.<sup>9</sup> When this figure is inserted into CSSD's online child support calculator, it results in a child support amount for 2009 of \$664 per month.<sup>10</sup>

Mr. B. has regular monthly expenses of about \$2,575, which includes \$500 for rent; \$500 for food; \$75 for a cell phone; \$250 for the payment on a 2001 Dodge truck, which he purchased in 2008; \$125 for the payment on a Suzuki motorcycle, which he purchased in 2009; \$175 for gasoline; \$364 for vehicle and motorcycle insurance; \$20 for health insurance; \$100 for personal care items; \$240 for alcohol and/or tobacco products; \$150 for the payments on three medical bills totaling \$9,113; and \$75 for the payments on two personal loans totaling \$770.<sup>11</sup>

Mr. B.'s mother has been providing daycare for J. since 2005. Recently, the parties instituted a schedule wherein each of J.'s grandmothers provides daycare for two days per week.

Mr. B. desires to exercise shared physical custody of J. with Ms. R.-T., but it is not currently possible with his work schedule. Also, the parties have substantially different expectations about custody. Mr. B. is able to see J. during the day and on the weekends when he is off work. The parties did not keep track of how many overnights J. spent with Mr. B. in

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<sup>5</sup> Exh. 8.  
<sup>6</sup> Exh. 9.  
<sup>7</sup> <http://www.umalaska.com/>  
<sup>8</sup> Exh. 10 at pg. 11.  
<sup>9</sup> Post-hearing brief at pg. 1.  
<sup>10</sup> Exh. 13.  
<sup>11</sup> Exh. 12.

March 2009, but J. spent 11 overnights with Mr. B. in April, 12 overnights in May, 6 overnights in June, 11 overnights in July, 8 overnights in August, and 3 overnights in September.<sup>12</sup> At the time of the hearing, J. had spent 4 overnights with Mr. B. This equals 44 overnights in 7 months; assuming Mr. B. would have one more weekend with J. at the end of October, the total could be as high as 46 overnights during that period of time.

Ms. R.-T. was formerly employed at H.'s A. as a full-time receptionist, but she was laid off in connection with a recent downsizing at the company. She is currently employed part-time and works 24 hours per week for \$13 per hour.

### **III. Discussion**

A parent is obligated both by statute and at common law to support his or her children.<sup>13</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." By regulation, CSSD collects support from the date the custodial parent requested child support services, or the date public assistance or foster care was initiated on behalf of the child(ren).<sup>14</sup> In this case, Ms. R.-T. requested child support services in March 2009, so that is the first month Mr. B. is obligated to pay support in this administrative child support action.

The person requesting the hearing, in this case, Mr. B., has the burden of proving that CSSD's Amended Administrative Child Support and Medical Support Order is incorrect.<sup>15</sup>

#### **A. Shared Custody**

Where parents exercise shared custody of their children, Civil Rule 90.3 provides that child support is to be calculated differently than in a situation in which one parent has primary custody. In general, and depending on the percentage of time each parent has overnight visitation, the parent obligated to pay child support will have a somewhat lower monthly support amount 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

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<sup>12</sup> Testimony of Mr. B. and Ms. R.-T.

<sup>13</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

<sup>14</sup> 15 AAC 125.105(a)(1)-(2).

<sup>15</sup> 15 AAC 05.030(h).

specified in writing of at least 30 percent of the year, regardless of the status of legal custody.<sup>[16]</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>17</sup> One year is equal to 365 days, so 30% of the overnights in one year equal 110 overnights. This is the minimum number of overnights needed on an annual basis to reach the threshold definition of shared custody.<sup>18</sup>

If there is no court order regarding custody, a finding of shared custody under Civil Rule 90.3(f)(1) should be based on a written agreement, but 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, what percentage of shared custody each party exercises. The parent asserting that they share physical custody, in this case, Mr. B., has the burden of proof by a preponderance of the evidence.<sup>19</sup>

Mr. B. did not meet his burden on the shared custody issue. His recollection of the number of nights J. had spent with him so far in 2009 was hazy, at best, with the exception of April, when he recalled she spent 11 overnights with him. Ms. R.-T., on the other hand, had kept a calendar and recited with specificity the number of overnights J. had with Mr. B. from May through late October. Thus, at most, the total was 46 overnights for the seven months from April through October. On an annualized basis, this equals no more than 79 overnights,<sup>20</sup> much less than the 110 required to reach the threshold definition of shared custody.

Accordingly, Mr. B.'s child support should be based on primary custody in Ms. R.-T. for 2009 and ongoing. In the event the court issues an order resulting in shared custody or the parties enter into a written agreement for shared custody, Mr. B.'s child support order will need to be modified to reflect the change.

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<sup>16</sup> Civil Rule 90.3(f)(1).

<sup>17</sup> Civil Rule 90.3, Commentary V.A.

<sup>18</sup> In general, a party having visitation with a child for 8 or 9 overnights per month (96 – 108 overnights total), on average, will attain the 110 overnight minimum with the addition of a few extra nights during the year, such as during the holidays or other vacation periods.

<sup>19</sup> See 2 AAC 64.290(e).

<sup>20</sup>  $46 \text{ overnights} \div 7 = 6.6 \text{ overnights per month} \times 12 \text{ months} = 79.2 \text{ total overnights.}$

## **B. Financial Hardship**

Mr. B.'s child support obligation is correctly calculated at \$664 per month. Mr. B. stated that he cannot afford this support amount and requested a variance due to financial hardship.

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."<sup>21</sup> The presence of "unusual circumstances" in a particular case 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>[22]</sup>

It is appropriate to consider all relevant evidence, including the circumstances of the custodian and obligee child to determine if the support amount should be set at a different level than provided for under the schedule in Civil Rule 90.3(a).<sup>23</sup>

Based on the evidence presented, this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. B. did not prove by clear and convincing evidence that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 were not varied. There are no "unusual circumstances" present to warrant varying his child support calculated under Civil Rule 90.3 for J.

Mr. B. believes he is incapable of meeting the child support obligation because his income is not sufficient to pay all of his bills. The obligor has some medical and consumer debt to contend with, but even if his living expenses exceed his net income, his child support should not be lowered. Mr. B. has a duty to support J., and this duty takes priority over other debts and obligations. J. is entitled to receive child support in an amount commensurate with Mr. B.'s ability to pay, as calculated pursuant to Civil Rule 90.3. Mr. B.'s financial situation does not

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<sup>21</sup> Civil Rule 90.3(c).

<sup>22</sup> Civil Rule 90.3(c)(1).

<sup>23</sup> See Civil Rule 90.3, Commentary VI.E.1.

constitute “unusual circumstances” pursuant to Civil Rule 90.3(c) such that his child support calculated under the rule should be lowered.

**IV. Conclusion**

Mr. B. did not meet his burden of proving he exercises shared custody of J. at this time, so his child support should be calculated using the primary custody formula. He also did not meet his burden of proving that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 were not varied. CSSD’s calculation of Mr. B.’s support amount for 2009 is based on his actual and projected income for the year and it is correctly calculated at \$664 per month. This figure should be adopted.

**V. Child Support Order**

1. Mr. B. is liable for child support for J. in the amount of \$664 per month for the period from March 2009 through November 2009, and ongoing;
2. All other provisions of CSSD’s September 4, 2009, Amended Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 20th day of November, 2009.

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

DATED this 7th day of December, 2009.

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

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