

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

IN THE MATTER OF:)

J. W. P., JR.)

) OAH No. 09-0562-CSS

) CSSD No. 001158287

DECISION AND ORDER

I. Introduction

The obligor, J. W. P., Jr., 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 children are A. and T., who are 15 and 13 years old.

The formal hearing was held on November 10, 2009. Mr. P. participated in person; the custodian of record, G. M. P., appeared by telephone. Andrew Rawls, Child Support Specialist, represented CSSD. The record closed on November 25, 2009.

Based upon the record and after careful consideration, Mr. P. is liable for child support based on primary custody in the amount of \$1,194 per month for April 2009 through August 2009; \$822 per month for September 2009 through December 2009, based on shared custody; and \$693 per month, effective January 1, 2010, and ongoing. His request for direct credit is granted in part and denied in part, as discussed below.

II. Facts

A. Procedural History

Ms. P. applied for child support services on April 6, 2009.¹ On July 27, 2009, CSSD served an Administrative Child and Medical Support Order on Mr. P.² He requested an administrative review and provided income information.³ On September 4, 2009, CSSD issued an Amended Administrative Child Support and Medical Support Order that set Mr. P.’s ongoing child support at \$1,289 per month, effective October 1, 2009. CSSD gave Mr. P. a direct credit of \$1,289 per month for rental payments he made on Ms. P.’s behalf, which reduced his arrears

¹ Exh. 1.

² Exh. 2.

³ Exhs. 3 & 5.

to zero for the period from April 2009 through September 2009.⁴ Mr. P. filed an appeal on October 6, 2009, asserting he does not earn the income CSSD attributed to him, he is entitled to a higher direct credit amount and he and Ms. P. exercise shared custody of A. and T.⁵

B. Material Facts

Mr. P. is a truck driver by trade. He was previously employed at C. E. and A. L. Corp.,⁶ where he was laid off for lack of work at the end of March 2009. He immediately started working for S. E., where he earns \$19 per hour in addition to a mileage stipend for travel within the state.

Mr. P. received \$23,974.35 during the first quarter of 2009 from A. L., and \$14,870.62 and \$14,779.42 during the second and third quarters, respectively, from S. E.⁷ In order to estimate Mr. P.'s total 2009 income, the amount he is expected to receive from S. E. during the fourth quarter of 2009 must be determined. This is accomplished by taking the average of the second and third quarters, which is \$14,825.02,⁸ and adding it to the other three quarters' total of \$53,624.39,⁹ to reach the total estimated income figure of \$68,449.41 for 2009. During primary custody time periods, the correct child support amount, based on this estimated income figure, is \$1,194 per month in 2009.¹⁰

Mr. P.'s income for 2010 is estimated by multiplying the half-year earnings he received during the second and third quarters of 2009, \$29,650.04,¹¹ times two, to equal \$59,300.08. Were he liable for primary custody child support in 2010, the correct amount, based on this estimated income figure, would be \$1,055 per month.¹²

Ms. P. has been employed full-time by A.C.E. for two years. She receives \$15.25 per hour and does not get any overtime. She has been paying 3% of her income into a 401(k) retirement plan since November 2008. In the first three quarters of 2009, she received a total of \$19,861.87, the average of which is \$6,620.62 per quarter. When this figure is multiplied times

⁴ Exh. 7.

⁵ Exh. 8.

⁶ Exh. 12 at pg. 1.

⁷ *Id.*

⁸ $\$14,870.62 + \$14,779.42 = \$29,650.04 \div 2 = \$14,825.02.$

⁹ $\$23,974.35 + \$14,870.62 + \$14,779.42 = \$53,624.39.$

¹⁰ *See Attachment A.*

¹¹ *See n.8, above.*

¹² Exh. 17 at pg. 3.

four quarters, it results in total estimated income of \$26,482.49 for 2009.¹³ Were Ms. P. liable for primary custody child support, the amount would be \$506 per month for two children in 2009.¹⁴ Ms. P.'s estimated income for 2010 is the same as for 2009 because her income is relatively stable. Her primary custody support amount for 2010 would be \$506 per month for two children, the same as for 2009.¹⁵

Mr. P. lived with his parents after the parties separated; apparently Ms. P. stayed in the marital household with A. and T. Ms. P. needed help paying the rent so Mr. P. made the rent payment of \$1,690 per month from April 2009 through August 2009, when the lease agreement expired. Ms. P. filed a statement with CSSD that she had received child support in the amount of \$1,690 per month from April 2009 through August 2009.¹⁶ These five payments total \$8,450.

In August 2009, Mr. P. secured housing and the parties began exercising 62/38 shared custody of A. and T., with Ms. P. having them 62% of the time and Mr. P. having them 38% of the time. The parties memorialized their shared custody agreement in court documents when they filed their dissolution action.¹⁷

III. Discussion

A parent is obligated both by statute and at common law to support his or her children.¹⁸ 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).¹⁹ In this case, Ms. P. requested child support services in April 2009, so that is the first month Mr. P. is obligated to pay support in this administrative child support action.

The person requesting the hearing, in this case, Mr. P., has the burden of proving that CSSD's Amended Administrative Child Support and Medical Support Order is incorrect.²⁰

¹³ Exh. 14 at pg. 2.

¹⁴ *Id.*

¹⁵ Exh. 16 at pg. 2.

¹⁶ Exh. 6.

¹⁷ *See* Exh. 10 at pg. 9.

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

¹⁹ 15 AAC 125.105(a)(1)-(2).

²⁰ 15 AAC 05.030(h).

A. *The Parties' Incomes*

Civil Rule 90.3(a)(1) provides that an Obligor's child support obligation is to be calculated based on his or her "total income from all sources." The parent's annual gross income is determined and mandatory deductions such as taxes, social security and union dues are subtracted. The result is a figure most commonly referred to as "net" income, but which Civil Rule 90.3 identifies as the parent's "adjusted annual income."²¹ This figure is multiplied times a certain percentage, depending on the number of children, to calculate the annual child support obligation, which is then divided by 12 to obtain the monthly figure.²² In this case there are two children, so the parent's "adjusted annual income" is multiplied times 27% to calculate the annual child support obligation.

When Ms. P. requested child support services in April 2009, she had primary physical custody of A. and T. Since then, the parties have begun sharing physical custody on a more equal basis, as discussed below. As a result, both parties' incomes must be utilized in the child support calculations. Also, since this decision is being issued at the end of the 2009 calendar year, the ongoing 2010 child support amount will also be addressed.

1. Mr. P.

CSSD's Amended Administrative Child Support and Medical Support Order estimated Mr. P.'s 2009 income at \$73,866.94.²³ In its post-hearing brief, CSSD estimated Mr. P.'s 2009 income at a somewhat lower figure, \$72,115.85.²⁴ As can be seen at the bottom of the calculation worksheet, CSSD stated this later figure was "[b]ased on 1st/2nd/3rd qtr 2009 DOL wages extrapolated & pfd". CSSD did not demonstrate the mathematical calculations it used to extrapolate this estimated income figure and the results cannot be duplicated. To illustrate, Mr. P.'s earnings through the end of the third quarter totaled \$53,624.39.²⁵ CSSD may have estimated Mr. P.'s 2009 income by taking the average of all three quarters and multiplying that amount times four, but that result²⁶ does not square with CSSD's post-hearing estimate of Mr. P.'s annual income for 2009. Or, CSSD may have used some combination of Mr. P.'s quarterly

21 Civil Rule 90.3(a).

22 Civil Rule 90.3(a)(1)-(2).

23 Exh. 7 at pg. 6.

24 Exh. 15 at pg. 3.

25 Exh. 12 at pg. 1.

26 $\$23,974.35 + \$14,870.62 + \$14,779.42 = \$53,624.39 \div 3 = \$17,874.80 \times 4 = \$71,499.19.$

income report and his latest paystubs,²⁷ but the agency did not explain its methodology such that its results could be duplicated. For this reason, the agency's estimate of Mr. P.'s 2009 income should not be used.

To estimate Mr. P.'s actual annual income for 2009, his projected fourth quarter earnings were added to the three quarters that have already been reported, as discussed above in the Material Facts section. His actual income for the first three quarters was \$53,624.39. The average of the second and third quarters is \$14,825.02. Adding these two figures results in total estimated earnings of \$68,449.41 for Mr. P. in 2009.

Mr. P. is obligated to pay support based on primary custody from April through August of 2009. Inserting his estimated income figure into CSSD's online child support calculator²⁸ results in a primary custody calculation of \$1,194 per month for two children.²⁹

Mr. P.'s estimated income for 2010 is \$59,300.08. Based on this income figure, his primary custody child support obligation, again using CSSD's online child support calculator, would be \$1,055 per month.³⁰

2. Ms. P.

Ms. P. receives \$15.25 per hour for full-time work. The average of her earnings from the first three quarters of 2009 is \$6,620.62 per quarter, which equals a total of \$26,482.49 for 2009. If Mr. P. had primary custody of A. and T., Ms. P. would be liable for paying child support in the amount of \$506 per month for two children in both 2009 and 2010.

B. 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

²⁷ Exh. 9.

²⁸ <https://webapp.state.ak.us/cssd/guidelinecalc.jsp>

²⁹ See Attachment A.

³⁰ Exh. 17 at pg. 3.

specified in writing of at least 30 percent of the year, regardless of the status of legal custody.^[31]

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.³² 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.

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 he or she has shared physical custody, in this case, Mr. P., has the burden of proof by a preponderance of the evidence.³³

Mr. P. met his burden on the shared custody issue. The parties agree they exercise shared custody as set forth in the draft dissolution document Mr. P. filed. The resulting custody breakdown of A. and T. is a 62/38 split, with Ms. P. having them 62% of the time and Mr. P. having them 38% of the time. Shared custody began in August 2009. When the parties' income and shared custody percentages information is inserted into the shared custody calculation, it results in Mr. P. having a child support obligation of \$822 per month for two children, beginning in September 2009.³⁴

For 2010, Mr. P.'s primary custody child support obligation, with his annual income estimated at \$59,300.08, would be \$1,055 per month for two children. As with 2009, Ms. P.'s primary custody child support, with annual income estimated at \$26,482.49, would be \$506 per month. Inserting the parties' income and custody percentages into the shared custody calculation results in Mr. P. having a child support obligation of \$693 per month for two children, effective January 1, 2010.³⁵

31 Civil Rule 90.3(f)(1).

32 Civil Rule 90.3, Commentary V.A.

33 See 2 AAC 64.290(e).

34 Attachment B.

35 Attachment C.

C. *Credit For Direct Payments*

Mr. P. has requested credit for direct payments he made from April 2009 through August 2009 by way of paying Ms. P.'s rent in the amount of \$1,690 per month. CSSD has given Mr. P. partial credit for the payments; the agency asserts that it cannot grant him the total credit for each month because it exceeds the amount of his child support obligation. Ms. P. testified she and the obligor agreed that his rental payments would be for child support.

CSSD may give the obligor credit for direct payments made "before the time the obligor is ordered to make payments through the agency," so long as the direct payment was not made before the first date support is due in the administrative child support action.³⁶ An obligor who requests such credit must prove by clear and convincing evidence that he or she actually made the payments.³⁷

CSSD cites the following regulation in support of its position that Mr. P. is not entitled to a credit for the total amount of each rental payment he made for Ms. P.:

When giving credit for direct payments . . . the agency will give credit only up to the amount of the support that is charged for the period for which support is established under (a) of this section. If the direct payments or in-kind contributions exceed the amount of the support established under (a) of this section, the excess payments or contributions will be treated as voluntary payments for which the agency will not give credit unless a parent provides clear and convincing evidence that both parents intended the payment or contribution to be applied toward future child support. The agency will not give credit for the excess payments or contributions as future child support for any period of time during which the child received public assistance or was in state-sponsored foster care or state placement.^[38]

Mr. P. has not met his burden of proof on the direct credits issue. Based on a review of the evidence, Mr. P. has not proven by clear and convincing evidence that Ms. P. also intended that the excess funds Mr. P. paid in rent were to be treated as future child support. Although she testified she intended the rent payments to be for support, the record is not at all clear that she understood the consequences in terms of future support. The potential impact of the obligor parent having a credit against his or her future support obligation is that the custodial parent will

³⁶ AS 25.27.020(b).

³⁷ *Id.*

not receive another child support payment until the credit is depleted. In this case, Mr. P. is requesting a credit of \$8,450 for the five months he paid Ms. P.'s rent. If the total credit were granted, Mr. P. would not have to pay support again until November 2009. Because the record does not contain clear and convincing evidence that Ms. P. intended that the excess rent payments would go to future child support, Mr. P. is entitled to credit against his child support obligation only to the extent that it equals his monthly child support amount for April 2009 through August 2009.

IV. Conclusion

Mr. P. met his burden of proving that the Amended Administrative Child Support and Medical Support Order was incorrect, as required by 15 AAC 05.030(h). Mr. P. is entitled to a shared custody calculation as of September 2009, and he is also entitled to credit for direct payments for April 2009 through August 2009, but only in the amount of his child support obligation for each month. The correct child support amounts should be adopted.

V. Child Support Order

1. Mr. P. is liable for child support for A. and T. in the amount of \$1,194 per month for the period from April 2009 through August 2009; \$822 per month for September 2009 through December 2009; and \$693 per month, effective January 1, 2010, and ongoing;
2. Mr. P. is entitled to a credit for direct payments of \$1,194 per month for the 5-month period from April 2009 through August 2009, a total of \$5,970.
3. 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 15th day of December, 2009.

By: Signed
Kay L. Howard
Administrative Law Judge

³⁸ 15 AAC 125.105(d).

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 4th day of January, 2009.

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

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