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

IN THE MATTER OF:	)	
	)	OAH No. 09-0623-CSS
S. M.	)	CSSD No. 001155544
	)	

DECISION AND ORDER

I. Introduction

The obligor, S. M., appealed an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on August 5, 2009. The Obligee child is S., who is fifteen years old.

The hearing was held on December 9 & 23, 2009. Both Mr. M. and the custodian of record, A. D. M., appeared by telephone. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded. The record closed on February 12, 2010.

Based on the record as a whole and after careful consideration, Mr. M. is liable for child support for S. from April 2007 through March 2008. Mr. M. is liable for support even though S. was not always in Ms. M.'s direct care. However, Mr. M.'s arrears should be reduced to $400 per month to reflect the fact that he has had custody of S. since April 1, 2008 and it would be manifestly unjust to charge him with the full monthly amount during the arrears period.

II. Facts

A. Procedural history

On April 12, 2004, the Alaska Superior Court issued a dissolution order ending the parties' marriage.[1] Neither parent was awarded custody, nor was child support addressed. CSSD received a child support petition from Ms. M.'s state of residence in September 2008.[2] On April 27, 2009, CSSD served an Administrative Child Support and Medical Support Order on Mr. M.[3] He requested an administrative review and submitted evidence regarding his income and S.'s residence.[4] Following the administrative review, CSSD issued an Amended Administrative Child Support and Medical Support Order on August 5, 2009, that set Mr. M.'s

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1 Exh. 1.
2 Exh. 2.
3 Exh. 3.

ongoing child support at $641 per month, suspended, with arrears of $15,826 for the period from June 2005 through March 2008.[5] On November 4, 2009, Mr. M. filed an appeal and requested a formal hearing. He asserted that he had information regarding S.'s actual whereabouts during the time periods in question.[6]

B. Material facts

This child support case involves four distinct time periods, from June 2005 through the present. The relevant dates are as follows:[7]

June 2005 – April 2006	Obligor does not contest these dates
May 2006 – March 2007	CSSD has suspended collection for these dates
April 2007 – March 2008	**These dates are in dispute**
April 2008 – present	Obligor has assumed custody of child and ongoing support has been suspended

The dates for which CSSD has charged Mr. M. with support are from June 2005 through April 2006 and April 2007 through March 2008. He does not contest the obligation to pay support for the first time period, so the only period remaining to be resolved is the latter, as seen in bold above.

Mr. M. argues that he should not be charged for support during the 12-month time period from April 2007 through March 2008 because S. was not living with Ms. M. – she was living with her maternal aunt, S. J. R., in No Name, Oklahoma. In support of his appeal, Mr. M. submitted a letter from Ms. R. that claims S. lived with her from September 2005 through March 2008.[8] Mr. M. also provided Ms. R.'s tax returns for 2006 and 2007 that list S. as a dependent, and S.'s school records for the 2006-2007 school year that show Ms. R.'s address in Claremore, Oklahoma, was listed as S.'s home address.[9]

Mr. M.'s prehearing exhibits also include copies of two notes written by Ms. M.: the first authorized Ms. R. and their mother, D. G. to obtain medical care for S. while the child stayed

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4 Exhs. 4-6.

5 Exh. 7.

6 Exh. 8.

7 *See* Exh. 7 at pgs. 9-10.

8 Exh. 10 at pgs. 2-3. These documents were received from Mr. M. on December 11, 2009, and marked by the OAH as Exhibit 10, pages 1-11, including his cover letter.

9 Exh. 10 at pgs. 4-11.

with Ms. R. from May 7, 2006 through December 2006.[10] In the second note, dated January 1, 2007, Ms. M. stated that S. "currently" resides with Ms. R. for educational purposes.[11]

Finally, Mr. M. provided copies of S.'s school records from the Anchorage School District and letters verifying she now resides in Alaska,[12] but this issue is moot because there is no dispute that S. moved to Alaska in March 2008 to live with Mr. M.

Ms. M. responds to the obligor's claim by asserting that she always had responsibility for S., regardless of where the child stayed prior to going to live with Mr. M. Ms. M. explained that she has medical problems – lupus and psychological issues – and that she has difficulties with her memory as a result. Ms. M. testified that she and S. lived in No Name City from February through October 2006. However, when Ms. M. moved to No Name, Oklahoma, in October, S. did not want to change schools in the middle of the year, so she stayed with Ms. R. during the week and was at home with Ms. M. on weekends and holidays. The custodian further testified that she allowed her sister to claim S. on her tax return because of the help Ms. R. provided regarding S.

Ms. M.'s exhibits include a letter from a social worker named L. G.-B., who indicated that she had therapy sessions with S. starting in June 2007:

> I had therapeutic sessions with [S.] at her mother's home in No Name City and in No Name Oklahoma. I started seeing this client in June of 2007. During the time in No Name City, I saw this client for individual and family therapy. She was seen in her bedroom, in the livingroom (sic), the kitchen and at school. I also had some visits with the said client, her mother and aunt in the Mother's home with the client several times for family therapy. While in No Name, she was seen at her mother's home in the livingroom (sic) and the client's bedroom. I stopped seeing this client in March of 2008 when she moved to Alaska with her father. … Also this client was seen by another therapist from February to June 2007 though (sic) this office.[13]

Based on the evidence as a whole, it is more likely than not that S. lived primarily with her mother, Ms. M., through April 2006, then with Ms. R. from May 2006 through March 2007.

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10 Exh. 6 at pg. 2.

11 Exh. 6 at pg. 3.

12 Exh. 6 at pgs. 4-12.

13 Exh. 11 at pg. 2. This letter and other documents were received from Ms. M. on January 28, 2010, and marked by the OAH as Exhibit 11, pages 1-21. (CSSD re-submitted most, but not all, of these exhibits with its Post-Hearing Brief. *See* Exh. 9.)

In the two notes she wrote giving her sister permission to obtain medical care for S., Ms. M. specifically stated that S. was staying with her aunt for educational purposes, and it was reasonable for CSSD to view this time period as one in which S. was in third party custody.

As to the time period from April 2007 through March 2008, it is more likely than not that S. lived primarily with Ms. M. The letter from the social worker has particular relevance here because she is the only person who submitted evidence in this appeal who did not have any financial interest in the outcome. These findings are addressed further in the discussion section, below.

III. Discussion

A. Period of time Mr. M. is liable for support

A parent is obligated both by statute and at common law to support his or her children.[14] This obligation begins when the child is born.[15] 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), up to six years prior to service on the obligor of notice of his or her support obligation.[16] The record indicates that Ms. M. applied for services in June 2005,[17] so that is the first month for which CSSD may charge Mr. M. with child support.

As the person who filed the appeal in this case, Mr. M. has the burden of proving by a preponderance of the evidence that the child support amount established in CSSD's Amended Administrative Child Support and Medical Support Order is incorrect.[18] He is challenging the assessment of support for S. for the period from April 2007 through March 2008. Based on the evidence as a whole, all of which is very inconsistent, Mr. M. did not meet his burden of proof and he shall remain liable for S.'s support for this time period.

At first, Mr. M. appears to have submitted the most convincing evidence: Ms. R.'s letter that asserts S. stayed with her the entire time from September 2005 through March 2008, and S.'s school records that show her aunt's address was listed as her address of record for the 2006-2007 school year. But this evidence, in particular Ms. R.'s letter, does not mesh with one glaring fact – that Mr. M. does not contest paying support for the time period from June 2005 through

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

15 *CSSD v. Kovac*, 984 P.2d 1109 (Alaska 1999).

16 15 AAC 125.105(a)(1)-(2).

17 Exh. 7 at pg. 9.

April 2006.[19] If S. did, indeed, live with her aunt beginning as early as September 2005, surely Mr. M. would have contested having to pay support for those months just as he did for the later time period. That he did not suggests Ms. R.'s letter may not be entirely accurate.

On the other side of the coin, however, it is clear from the record that S. did live with her aunt for a portion of the time at issue in this appeal. The notes Ms. M. wrote, possibly to school officials or merely just for backup in case S. had a medical emergency of some sort, clearly indicate that S. was staying with her aunt.[20] The first note gave the time period from May 7, 2006 through December 2006; the second did not specify a block of time but rather was dated January 1, 2007, and said that S. currently "resides" at Ms. R.'s home for "educational purposes."

CSSD suspended Mr. M.'s child support obligation from May 2006 through March 2007, apparently on the strength of these notes and S.'s school records showing Ms. R.'s address as her own. The agency's treatment of this time period appears to be consistent with the evidence, although it should be noted that this portion of the dates at issue was not discussed during the appeal, and therefore this decision takes no position on these months.

As to the final time period in this case – from April 2007 through March 2008, Mr. M. did not meet his burden of proving S. lived primarily with Ms. R. This is because Ms. M. filed a letter from S.'s counselor that details her therapeutic relationship with S. from June 2007 through March 2008. Ms. G.-B. said she provided S. with therapy during this time in her mother's home in both No Name City and No Name, and that when Ms. R. participated, it was in Ms. M.'s home.[21] There was no mention of therapy occurring in the aunt's home, a location which would have been a reasonable choice for therapy if S. actually lived there.

B. Good cause variance

The second issue in this case concerns whether Mr. M.'s child support obligation should be adjusted now that he has custody of S.

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

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18 15 AAC 05.030(h).

19 *See* Exh. 7 at pg. 9.

20 *See* Exh. 6 at pgs. 2-3.

21 Exh. 11 at pg. 2.

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). A finding that "unusual circumstances" exist 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 . . . .[22]

Civil Rule 90.3 also states that when establishing support arrears, the court or tribunal should consider all the relevant factors in the case. The Commentary provides:

> It will sometimes be necessary for the court to establish support for a time when no complaint or petition for support had yet been served, and there was no other court or administrative order in effect. The court has determined that Civil Rule 90.3 applies to such calculations. Vachon v. Pugliese, 931 P.2d 371, 381-382 (Alaska 1996). However, in some circumstances unfairness may result from rigid application of the rule. The court should consider all relevant factors in such a situation, including whether the obligor was aware of the support obligation, especially if the obligor had children subsequent to that child. See also Commentary VI.B.2.[23]

In applying the above language to Mr. M.’s arrears, several factors must be taken into consideration. S. is now living with Mr. M., so any child support the obligor has to pay on this case would deprive S. of the support she should have as a member of Mr. M.’s household. This essentially makes S. bear the current burden of those arrears, along with Mr. M.’s subsequent family. The bulk of the underlying debt is owed to Ms. M. as reimbursement for the support not paid for S. before she came to Alaska to live with Mr. M. Also, S. did not live with her mother full-time, which would have reduced Ms. M.’s expenses for such things as food, but still the custodian was required to maintain housing and related services for S., so her fixed costs would have remained fairly stable.

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22 Civil Rule 90.3(c)(1).

23 Civil Rule 90.3, Commentary VI.E.1.

The Alaska Supreme Court holds that factors such as these, which relate to the well being of an obligee, are especially important in determining whether there is good cause to vary the child support amount. The court has stated:

> The meaning of the term "good cause," however, is to "be determined by the context in which it is used."[24] That context, for Civil Rule 90.3 purposes, must focus first and foremost on the needs of the children. See Civil Rule 90.3, commentary at sec. I(B).[25]

Based on all the evidence, this case presents unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. M. proved by clear and convincing evidence that manifest injustice would result if he were required to pay the full arrears in this case. It makes little sense and it would be unjust to burden Mr. M.'s household by adding more child support debt to his current obligation to support S. in the home. Setting Mr. M.'s child support at $400 per month constitutes a reasonable measure of his ability to pay support under Civil Rule 90.3(c).

There is no ongoing support due because Mr. M. has custody of S. However, an ongoing child support amount will remain in this order, but it will not be collected. It will remain in place so in the event Mr. M. becomes liable for paying support in the future, CSSD can begin income withholding much sooner than if the division has to initiate a modification procedure.

IV. Conclusion

Mr. M. met his burden of proving that the Amended Administrative Child Support and Medical Support Order was incorrect. Mr. M. has not contested the arrears for June 2005 through April 2006, so those amounts remain at $193 per month for June through December 2005 and $405 per month from January through April 2006.

Mr. M. is not liable for support for the second time period, from May 2006 through March 2007, because it is more likely than not that S. lived primarily with her aunt during this time and there is no application for services on record from Ms. R.

As to the time period at issue, from April 2007 through March 2008, Mr. M. remains liable for support for this period of time, although the obligor did prove by clear and convincing evidence that there is good cause to adjust his child support arrears for that time period to $400 per month.

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24 Citing *Coats v. Finn*, 779 P.2d 775, 777 (Alaska 1989).

Ongoing support has been suspended as of April 2008, when Mr. M. took custody of S., and it shall remain suspended so long as Mr. M. has custody.

V. Child Support Order

- Mr. M. is liable for support arrears in the amount of $193 per month for June through December 2005 and $405 per month from January through April 2006;
- Mr. M. is not liable for support from May 2006 through March 2007;
- Mr. M. is liable for child support of $400 per month from April 2007 through March 2008;
- Ongoing support is suspended as of April 2008 and it will remain suspended so long as Mr. M. has custody of the child;
- All other provisions of CSSD's August 5, 2009, Amended Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 4th day of March, 2010.

By: *Signed*
Kay L. Howard
Administrative Law Judge

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[25] *Doyle v. Doyle*, 815 P.2d 366 (Alaska 1991).

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 22nd day of March, 2010.

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

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