

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

IN THE MATTER OF: )

M. J. )

---

OAH No. 09-0639-CSS

CSSD No. 001135870

**DECISION AND ORDER**

**I. Introduction**

The obligor, M. J. appeals an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (“CSSD”) issued in his case on October 9, 2009. The Obligee child is W., who is four years of age.

The formal hearing was held on December 22, 2009. Mr. J. appeared in person; the custodian, S.L. F., appeared by telephone. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded. The record closed on December 29, 2009.

Based on the record and after careful consideration, Mr. J.’s child support is set at \$200 per month effective February 2008, based on clear and convincing evidence of unusual circumstances.

**II. Facts**

**A. History**

Ms. F. applied for child support services in February 2008.<sup>1</sup> On July 7, 2009, CSSD served an Administrative Child Support and Medical Support Order on Mr. J.<sup>2</sup> He requested an administrative review and provided income information.<sup>3</sup> On October 9, 2009, CSSD issued an Amended Administrative Child Support and Medical Support Order that set Mr. J.’s ongoing child support at \$370 per month, with arrears of \$8,606 for the period from February 2008 through October 2009.<sup>4</sup> Mr. J. appealed on November 23, 2009, asserting essentially that he cannot afford the child support amount calculated.<sup>5</sup>

---

<sup>1</sup> Exh. 7 at pg. 10.

<sup>2</sup> Exh. 3.

<sup>3</sup> Exhs. 2, 4 & 6.

<sup>4</sup> Exh. 7.

<sup>5</sup> Exh. 8.

## **B. Material Facts**

Mr. J. and Ms. F. share custody of the obligee, W. From the time the parties first separated in February 2008, until the present, Mr. J. has had W. on the average of three overnights per week and Ms. F. had her four overnights per week.

Ms. F. has another child from a different relationship named D., but Mr. J. is her predominant father figure. When Mr. J. has custody of W. he also has D.; she goes back and forth between the parties on the same schedule as W.

Mr. J. is currently unemployed. He was laid off from T. R. at the end of November 2009. CSSD estimated his 2009 income at \$32,972.48. Mr. J. expects to begin working again in the spring of 2010 when the store is reopened. He has been active in pursuing other employment, but he has not been able to find anything. Mr. J.'s 2008 income was \$32,927, plus the PFD.

Ms. F. is disabled with spina bifida. She has tried to find work but potential employers resist hiring her because of her health problems. Ms. F. is in the process of applying for Social Security disability.

Mr. J. has regular monthly expenses of \$1,209 for a mortgage payment; \$400 for food; \$463 for utilities; \$84 for cable and cell phone; and \$160 for gasoline. He has an unpaid medical bill of \$962.75.

## **III. Discussion**

A parent is obligated both by statute and at common law to support his or her children.<sup>6</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," minus mandatory deductions such as taxes and Social Security. By regulation, CSSD collects support in a foster care case from the date foster care services were initiated on behalf of the child(ren).<sup>7</sup> Ms. F. applied for child support services in February 2008, so that is the first month in which Mr. J. is obligated to pay support for his children through CSSD.<sup>8</sup>

---

<sup>6</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

<sup>7</sup> 15 AAC 125.105(a)(1)-(2).

<sup>8</sup> Exh. 5 at pg. 8.

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 specified in writing of at least 30 percent of the year, regardless of the status of legal custody.<sup>9</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>10</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>11</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 parents agreed at the hearing that they exercise shared custody in a 57/43 split. This would make Mr. J.'s ongoing child support obligation \$370 per month, with arrears of \$8,606 for the period from February 2008 through October 2009. This is the amount that should be used to consider Mr. J.'s request for a variance because of financial hardship.

B. *Financial hardship*

Mr. J. testified that he cannot afford to pay child support and requested a variance pursuant to Civil Rule 90.3(c). 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

---

<sup>9</sup> Civil Rule 90.3(f)(1).

<sup>10</sup> Civil Rule 90.3, Commentary V.A.

<sup>11</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.

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>12</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>[13]</sup>

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.<sup>[14]</sup>

In applying the above language to Mr. J.’s arrears, several factors must be taken into consideration. First, Mr. J. has shared custody of W., and he also takes Ms. F.’s daughter D. when he has W. Thus, much of the child support collected from Mr. J. deprives W. of the support she is entitled to. This essentially makes W. bear the burden of his arrears. Second, Mr. J. is in danger of losing his housing, which would make it impossible for him to exercise his custody of W. and also take care of D. The times he has with the children provide a significant benefit to Ms. F., who has a painful health condition.

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:

---

<sup>12</sup> Civil Rule 90.3(c).  
<sup>13</sup> Civil Rule 90.3(c)(1).  
<sup>14</sup> Civil Rule 90.3, Commentary VI.E.1.

The meaning of the term “good cause,” however, is to “be determined by the context in which it is used.”<sup>15</sup> 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).<sup>16]</sup>

Based on all the evidence, this case presents unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. J. 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. J. household by adding more child support debt to his current obligation to support W. Setting Mr. J.’s child support at \$200 per month constitutes a reasonable measure of his ability to pay support under Civil Rule 90.3(c).

#### **IV. Conclusion**

Mr. J. met his burden of proving by clear and convincing evidence that manifest injustice would result if his child support amount calculated under Civil Rule 90.3 were not varied. His child support should be set at \$200 per month.

#### **V. Child Support Order**

- Mr. J. is liable for child support for W. in the amount of \$200 per month for the period from February 2008 through January 2010 and ongoing;
- All other provisions of the October 9, 2009, Amended Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 15th day of January, 2010.

By: Signed  
Kay L. Howard  
Administrative Law Judge

---

<sup>15</sup> Citing *Coats v. Finn*, 779 P.2d 775, 777 (Alaska 1989).

<sup>16</sup> *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 2<sup>nd</sup> day of February, 2010.

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

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