

IN THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 1417

Amending Civil Rule 90.3(b) and (f) and
the Commentary to 90.3 to address child
support in divided custody situations.

IT IS ORDERED:

1. Paragraph (b) of Civil Rule 90.3 is amended to read as follows:

(b) **Shared Physical Custody.** A child support award in a case in which the parents are awarded shared physical custody as defined by paragraph (f) will be calculated by:

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(6) *Divided Custody.* A child support award in a case in which the parents have divided custody is calculated, first, by determining what each parent would owe the other for children in that parent's primary physical custody under 90.3 (a) and offsetting those amounts. Second, the court will consider whether this support amount should be varied under 90.3(c)(1)(A).

2. Paragraph (f) of Civil Rule 90.3 is amended to read as follows:

(f) **Definitions.**

(1) *Shared Physical Custody.* A parent has shared physical custody (or shared custody) of children for purposes

of this rule if the children reside with that parent for a period specified in writing in the custody order of at least 30, but no more than 70, percent of the year, regardless of the status of legal custody.

(2) *Primary Physical Custody.* A parent has primary physical custody (or primary custody) of children for purposes of this rule if the children reside with the other parent for a period specified in the custody order of less than 30 percent of the year.

(3) *Divided Custody.* Parents have divided custody under this rule if one parent has primary physical custody of one or more children of the relationship and the other parent has primary custody of one or more other children of the relationship, and the parents do not share physical custody of any of their children.

(4) *Health Care Expenses.* Health care expenses include medical, dental, vision and mental health counseling expenses.

3. The Commentary to Civil Rule 90.3 is amended to read as follows:

Commentary

* * * *

V. SHARED CUSTODY

A. **Generally.** “Shared custody” as this term is used in Rule 90.3 means that each parent has physical custody of the children at least thirty percent of the year according to a specified visitation schedule in the decree. “Shared custody” as used in 90.3 has no relation to whether a court has awarded sole or joint legal custody. “Shared custody” is solely dependent on the time that the decree or agreement of the parties which has been ratified by the court specifies the children will spend with each parent.

In order for a day of visitation to count towards the required thirty percent, the children normally must remain overnight with that parent. (Thirty percent of the overnights in a year total 110 overnights.) Thus, a day or an evening of visitation by itself will not count towards the total of time necessary for shared custody. Visitation from Saturday morning until Sunday evening would count as one overnight. However, the court may use another method of calculating the percentages of custody when counting overnights does not accurately reflect the ratio of expenditures by the parents.

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D. **Divided Custody.** Rule 90.3(f)(3) defines divided custody as when both parents have primary physical

custody of at least one of the parent's children and the parents do not share custody of any of their children. The calculation of support for divided custody is a two-part process.

The first step is to offset the amounts of support each parent would pay the other for the children in that parent's primary custody calculated under 90.3(a). For example, if the father has primary custody of one child and the mother primary custody of three children (four children total), the father would owe support to the mother of 33% (three children) of his adjusted annual income. This amount would be offset by 20% (one child) of the mother's adjusted annual income. This method was implicitly approved in *Bunn v. House*, 934 P.2d 753, 755-58 (Alaska 1997). Note that this method of calculation supercedes the method used in *Rowen v. Rowen*, 963 P.2d 249, 254 (Alaska 1998).

The second step in determining divided custody support is for the court to carefully consider whether the support amount should be varied under paragraph (c)(1)(A). A divided custody case should be treated as an unusual circumstance under which support will be varied if such a variation is "just and proper..."

E. Hybrid Custody. The rule does not address the situation in which the parents have primary custody of some of their children and shared custody of other of their children. See *Turinsky v. Long*, 910 P.2d 590, 596-97 (Alaska 1996). The

supreme court currently is considering this situation.

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VI. EXCEPTIONS

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B. **Unusual Circumstances.** 90.3(c)(1) provides that a court shall vary support if it finds, first, that unusual circumstances exist and, second, that these unusual circumstances make application of the usual formula unjust. Examples might include especially large family size, significant income of a child, health or other extraordinary expenses, or unusually low expenses. This determination should be made considering the custodial parent's income because the percentage of income approach used in Alaska tends to slightly understate support relative to the national average for cases in which the custodial spouse does not earn a significant income. This understatement relative to the national average becomes substantial if the custodial parent has child care expenses. The application of the unusual circumstances exception to particular types of factual situations is considered below.

* * * *

2. *Subsequent Children.* A parent with a support obligation may have other children living with him or her who were born or adopted after the support obligation arose. The existence of such "subsequent" children, even if the obligor has a legal obligation to support these children, will not generally constitute good cause to vary the guidelines.

However, the circumstances of a particular case involving subsequent children might constitute unusual circumstances justifying variation of support. The court should reduce child support if the failure to do so would cause substantial hardship to the "subsequent" children.

In addition, the interests of the subsequent family may be taken into account as a defense to a modification action where an obligor proves he or she has taken a second job or otherwise increased his or her income specifically to better provide for a subsequent family. This defense to an upward modification action should not be allowed to the extent that the prior support was set at a lower amount prior to the adoption of this rule, or to the extent that the obligor's increase in income is limited to ordinary salary increases.

In considering whether substantial hardship to "subsequent" children exists, or whether the existence of a subsequent family should defeat a motion to increase child support, the court should consider the income, including the potential income, of both parents of the "subsequent" children.

~~3. *Divided Custody.* The formula for shared custody described above was developed primarily for the situations in which the parents share custody of their only child, or the parents share custody of several children, but the children stay together. Custody of several children also can be~~

~~divided so that at any one time one parent may have physical custody of one child and the other may have physical custody of the other children. Such an arrangement, depending on the circumstances, may require greater expenditures to support the children because it is somewhat less expensive to support children living together than in two households at the same time.~~

~~The first step in determining support in such a divided custody arrangement is to apply the usual shared custody formula in 90.3(b) by averaging the time all children will spend with each parent. For example, if one child will live with the father all of the time and two with the mother, support is calculated as if all the children spent one third of the time with the father. The appropriate percentage figure for all the children (in the example, 3 or 33%) then is applied.~~

~~The second step in determining divided custody support is for the court to carefully consider whether the support amount should be varied under paragraph (c)(1)(A). A divided custody case should be treated as an unusual circumstance under which support will be varied if such a variation is "just and proper...."~~

(4).3. *Relocation of Custodial Parent.* The relocation of the custodial parent to a state with a lower cost of living normally will not justify a reduction in support. The level of Alaska's guidelines is comparable to the national average. The fact that the obligor parent's income has in effect marginally increased relative to the children's living expenses simply

enables the children to be supported at a slightly higher level.

~~(5)~~4. *Prior and Subsequent Debts.* Prior or subsequent debts of the obligor, even if substantial, normally will not justify a reduction in support. The obligation to provide child support is more important than the obligation to fulfill most other obligations. However an obligor parent may attempt to present evidence which shows the existence of exceptional circumstances in an individual case.

~~(6)~~5. *Income of a New Spouse (or other person in the household).* The income of a new spouse of either the custodial or obligor parent normally will not justify a variation in support. Either party may attempt to show that exceptional circumstances exist in a particular case. A parent who does not work because of the income of a new spouse (or other person in the household) may be assigned a potential income.

~~(7)~~6. *Age of Children.* While the costs of raising children who are very young or who are over about ten years old are generally greater than raising other children, this in itself does not justify an increase in support. However, it should be considered in concert with other circumstances, and a parent always may seek to establish exceptional expenses in a particular case.

~~(8)~~7. *Denial of Visitation.* A denial of visitation may not be countered with a reduction in support. See AS 25.27.080(c). Neither may non-payment of support be countered by a denial of visitation. Courts should use their powers to strictly enforce the visitation and custody rights of obligor parents.

(9)8. *Property Settlement.* A parent may justify variation of the guidelines by proving that a property settlement in a divorce or dissolution between the parents provided one of the parents with substantially more assets than the parent otherwise would have been entitled to, that this inequity was intended to justify increasing or decreasing child support, and that this intent specifically was stated on the record. Any such change in monthly child support may not exceed the actual excess of the property settlement apportioned over the minority of the child.

However, courts should not approve in the first instance unequal property settlements which are meant to increase or decrease child support payments. "Property divisions are final judgments which can be modified only under limited circumstances, whereas child support awards can be changed periodically under much more liberal standards. One should not be a trade-off for the other." *Arndt v. Arndt*, 777 P.2d 668 (Alaska 1989)

(10)-9. *Overtime Income*. In most cases income from overtime or a second job will be counted as adjusted annual income under Rule 90.3(a). However, the court has discretion not to include this income when, for example, the extra work is undertaken to pay off back child support.

DATED: September 27, 2000

EFFECTIVE DATE: April 15, 2001

/s/ _____
Chief Justice Fabe

/s/ _____
Justice Matthews

/s/ _____
Justice Eastaugh

/s/ _____
Justice Bryner

/s/ _____
Justice Carpeneti