

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

IN THE MATTER OF)	OAH No. 10-0090-CSS
W. D. W.)	CSSD No. 001158921
)	
_____)	

DECISION AND ORDER

I. Introduction

On March 17, 2010, and April 16, 2010, a formal hearing was held to consider the child support obligation of W. D. W. (Obligor) for the support of his child, J.¹ Mr. W. participated at the hearings by phone. J.'s mother, L. C.-W., did not participate in the March 17, 2010, but participated in the April 16, 2010 hearing. Erinn Brian, Child Support Services Specialist, represented the Child Support Service Division (CSSD). The hearing was audio-recorded. The record closed on May 14, 2010.

This case is Mr. W.'s appeal of CSSD's order establishing child support for J. Having reviewed the record in this case and after due deliberation, I conclude that Mr. W.'s arrears and ongoing child support obligation should be set at \$517 per month, which includes Ms. C.-W.'s credit for paying child support for an older minor child. These amounts are based on shared custody with each parent having J. live with them 50% of the overnights.

II. Facts

A. History

CSSD established this order because Ms. C.-W. applied for public assistance in March of 2009.² Ms. C.-W. received cash grants of public assistance only for six months in 2009.³

Paternity is not in dispute.⁴ CSSD served Mr. W. with an Administrative Child and Medical Support Order on September 17, 2009.⁵ This order set Mr. W.'s monthly child support

¹ The hearing was held under Alaska Statute 25.27.170.

² Division's Pre Hearing Brief.

³ Exhibit 2.

⁴ Exhibit 7, page 9.

⁵ Exhibit 2.

obligation at \$1,044 per month based on the assumption that Ms. C.-W. had primary custody of J.⁶ Mr. W. requested an administrative review.⁷

CSSD issued an Amended Administrative Child and Medical Support Order on January 12, 2010.⁸ Mr. W. requested a formal hearing.⁹

Ms. C.-W. did not participate in the hearing held on March 17, 2010. Ms.C.-W. did not appear or provide a contact telephone number for the hearing as directed on the notice sent to her. Ms. C.-W. did not provide her income and detailed custody documentation prior to the March 17, 2010 hearing as directed by the Division.

At the March 17, 2010 hearing, Mr. W. explained that Ms. C.-W. and he have shared custody of J. since March of 2009. Mr. W. explained that he has had custody 50% of the overnights.

After the March 17, 2010 portion of evidentiary hearing in this appeal, a post hearing order was issued rescheduling the hearing. This order set a date for Ms. C.-W. to file her 2009 federal income tax return including all schedules and copies of her W-2s, her last paystubs with her current employer, and any documentation she wished have considered on the issue of where J. had been spending his overnights since February of 2009. In the order, Ms. C.-W. was warned that if she did not comply with the order and did not participate in the rescheduled hearing, a \$0 shared custody child support order might be entered based on the evidence in the record at that date.

The order also set a date for Mr. W. to file his 2009 federal income tax return including all schedules and copies of his W-2s; his last paystubs with his current employer; and any additional documentation additional he wished have considered on the issue of where J. has been spending his overnights since February of 2009.

Mr. W. and Ms. C.-W. both filed additional documentation for the rescheduled hearing.

At the April 16, 2010 portion of evidentiary hearing in this appeal, the participating parties provided additional information about the custody situation and their financial circumstances.

⁶ Exhibit 2.

⁷ Exhibit 3.

⁸ Exhibit 7.

⁹ Exhibit 8.

After the April 16, 2010 portion of evidentiary hearing in this appeal, a second post hearing order was issued setting a date for the Child Support Services Division to submit a shared custody calculation based on the child, J., spending 50% of his nights in Mr. W.'s custody, beginning in March of 2009. This order required a 50/50 shared custody calculation based on the assumption that Ms. C.-W. earns or could earn \$490 per week. The order gave both parents an opportunity to respond to CSSD's calculations and proposed monthly child support amounts before the record was scheduled to close. Neither party filed a response to CSSD's calculations or CSSD's position in its post hearing submission to record.

B. Findings

Based on the evidence in the record, I find that it is more likely than not that:

1. From March 2009 through the present, Mr. W. and Ms. C.-W. have shared custody of J. with each parent having the child, J., live with them 50% of the overnights.¹⁰
2. In 2009, Ms. C.-W. has earned or could have earned \$490 per week.¹¹
3. Ms. C.-W. currently earns or could earn \$490 per week.¹²
4. CSSD's latest calculations of Mr. W.'s arrears and ongoing child support for 2010 are correct and are based on the best estimate of Mr. W.'s income and Ms. C.-W. earning capacity.¹³

III. Discussion

Mr. W. was a very credible witness. At the hearing, Mr. W. explained when he was living with the J. and how custody was shared. Mr. W. kept accurate records of when J. stayed with him and had a clear recollection of the custody situation.

Ms. C.-W. was a very unconvincing witness. Ms. C.-W.'s testimony was evasive and vague. Ms. C.-W. contradicted herself when pressed to about inconsistencies in her testimony. Ms. C.-W. had to be cautioned more than once about failing to tell the truth under oath, but she continued to avoid answering questions responsively, and sometimes intentionally provided deceptive answers when she did provide a response.

¹⁰ Recording of Hearing.

¹¹ Recording of Hearing.

¹² Recording of Hearing.

¹³ Recording of Hearing & Ex. 9.

Ms. C.-W.'s assertions regarding the custody situation, her income and her earning capacity were not credible. Ms. C.-W. did not provide records, except for March of 2010, when J. stayed with her. She did not express any clear recollection on specific dates when J. was with her. Ms. C.-W. eventually admitted that the parties had agreed to share custody evenly. The evidence showed that this is the way custody had actually been exercised and would be likely to continue.¹⁴

Shared custody exists when a child resides with a parent at least 30, but no more than 70, percent of the overnights.¹⁵ Under the shared custody formula, the annual amount each parent would pay to the other parent if that parent had sole custody is calculated. That support amount is then multiplied for each parent by the percentage of time the other parent will have physical custody of the child. The parent with the larger amount under this calculation is the obligor parent. The annual award from the obligor parent to the other parent is equal to the difference between the two figures multiplied by 1.5.¹⁶

The Division proposed that Mr. W.'s arrears should be set at \$677 per month for the months of March 2009 through December 2009 in accordance with CSSD's shared custody calculation using Ms. C.-W.'s reported income. The Division proposed that Mr. W.'s arrears for the months of January 2010 and his ongoing child support obligation should be set at \$517 per month based on Ms. C.-W. earning \$490 per week. Both calculations give Ms. C.-W. a credit for supporting her older child B.

The evidence in the record at this time indicates Mr. W. and Ms. C.-W. have been exercising shared custody of J. during the period covered by this order with Mr. W. having J. at least 50 percent of the overnights. The evidence in the record also indicates that Ms. C.-W.'s earning capacity during the period covered is at least \$490 per week, not even taking into account the income producing property she owns.

Ms. C.-W.'s testimony regarding her income was not credible. She may well be paying off some of her legal bills through some arrangement with her attorney that is not reflected in the documentation that she produced. She may be receiving income from other sources that she did not report. However, Ms. C.-W.'s admissions at the hearing show that she has been earning or

¹⁴ Recording of Hearing.

¹⁵ Alaska Civil Rule 90.3(f).

¹⁶ Alaska Civil Rule 90.3(f).

could earn at least \$490 per week. It is not appropriate to set child support based on her reported earnings for 2009 as proposed by CSSD.

In this case it is appropriate to impute income. When a parent with a child support obligation makes an accurate determination of his or her income impossible, income must be imputed to calculate the child support obligation. The criteria used to estimate the proper amount of income to impute are the same as those used in a case where the noncustodial parent is voluntarily and unreasonably unemployed or underemployed. Rather than determining the parent's actual income, the parent's earning capacity is used to estimate the parent's potential income.¹⁷

Income can also be imputed to an obligor in cases of unreasonable voluntary underemployment.¹⁸ The Alaska Supreme Court has recognized that an obligor parent should not be locked into a particular job or field, nor prevented from seeking personal or professional advancement.¹⁹ On the other hand, a noncustodial parent who voluntarily reduces his or her income should not automatically receive a corresponding reduction in his or her child support obligation.²⁰

Obligor parents should not always have to pay support based on their maximum earning capacity when they choose to earn less than they could.²¹ The custodial parent and the children should not, however, be forced to finance the noncustodial parent's lifestyle choice if that choice is unreasonable given the duty to provide child support.²² The Alaska Supreme Court has indicated that the circumstances surrounding an obligor's failure to maximize earnings should be carefully considered, and then a determination made about whether, under all the circumstances in the case, income should be imputed.²³

Ms. C.-W. probably did not reporting all her income in 2009. If Ms. C.-W.'s income in 2009 was not equal to that of someone earning \$490 per week, then she was unreasonably voluntarily underemployed. The evidence shows that she could have earned at least this much.

¹⁷ *Laybourn v. Powell*, 55 P.3d 745, 747 (Alaska 2002).

¹⁸ Alaska Civil Rule 90.3(a)(4).

¹⁹ See *Pattee v. Pattee*, 744 P.2d 659 (Alaska 1987).

²⁰ *Pattee v. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

²¹ See *Pattee v. Pattee*, 744 P.2d 659 (Alaska 1987).

²² *Olmstead v. Ziegler*, 42 P3d 1102 (Alaska 1987).

IV. Child Support Order

1. Mr. W.'s ongoing child support for J. is set in the monthly amount of \$517, effective July 1, 2010.
2. Mr. W.'s child support arrears for J. are set in the monthly amounts of \$517, per month for the months of March 2009 through December 2009 and \$517 per month for the months of January 2010 through June 2010.
3. The Division shall give the parties the appropriate credit or debit for any out-of-pocket expenses for providing health insurance coverage for J..
4. All other provisions of the Amended Administrative Child and Medical Support Order issued on January 12, 2010 remain in effect.

DATED this 14th day of June, 2010.

By: Signed
Mark T. Handley
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 9th day of July, 2010

By: Signed
Signature

Name

Title

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

²³ See *Pattee v. Pattee*, 744 P.2d 659, 662 (Alaska 1987).