

compensation averaged \$591.82.² Mr. C. has been unemployed since terminating his employment at the seafood plant. Mr. C. has been incarcerated on multiple occasions, most recently for ten days in 2009. He is presently on probation.

Mr. C. has four children. D. is his oldest child. Since the date the request for modification was filed, Mr. C. has not exercised his right to visitation to the full extent allowed under the court order. D. has stayed with him substantially less than 30% of the time. Mr. C. is subject to an administrative child support order in the amount of \$381 per month for his two next youngest children, who are in the custody of their mother.³ His fourth child, aged five months, lives with Mr. C. and the child's mother, H. J. She has one other child, age eight, who lives in the household. Ms. J. is presently employed and earns \$15.60 per hour for full time work. She has a child support order for her older child, but the obligor is in arrears and pays no support.

The couple's monthly household living expenses total \$2,070, including rent and utilities (\$1,050), telephone, cable and internet (\$120), vehicles (\$350), food (\$300-\$400), and personal care (\$250).⁴

Ms. K. is married and has three children, one, her youngest, with her present husband. All of the children live with her. D. is the eldest. Her youngest child was born in August, 2010.

From 2006 through 2008, C. K. worked regularly, earning an average annual income from wages of \$16,624.46, and receiving average annual income from unemployment compensation of \$2,234.67.⁵ In 2009, her wages dropped to \$6,062.51 (all in the third quarter) and she received unemployment compensation of \$4,472.50, for total annual income (exclusive of her Alaska Permanent Fund dividend and energy payment) of \$10,814.51.⁶ In the first half of 2010, Ms. K. had no wage income and was paid \$3,654 in unemployment compensation.⁷ Her eligibility for unemployment compensation has expired. Ms. K.'s husband is an apprentice carpenter; he has not been able to find work since February. The couple receives \$682 per month in public assistance payments, as well as \$400 per month in food stamps.

² See Exhibit 6, p. 2.

³ CSSD No. 001146192.

⁴ G. C. testimony.

⁵ Exhibit 10.

⁶ *Id.*

⁷ *Id.*

Ms. K.'s monthly household living expenses, exclusive of food, are about \$3,170, including rent (\$850), utilities (\$310), telephone and satellite television (\$160), vehicles (\$1,450),⁸ and personal care items (\$400).⁹

II. Discussion

A. Ms. K. Is The Primary Custodian

The court custody order in this case states that Ms. K. was awarded primary physical custody, but provides for a legal right to visitation in excess of 40% of the time.¹⁰ The division initially calculated Mr. C.'s support obligation without providing a shared custody calculation. The proposed decision calculated his support obligation on the basis of shared custody. However, the evidence and testimony at the hearing on remand established that Mr. C. actually exercises his legal right to custody substantially less than 30%. He is therefore not entitled to a calculation of his support obligation based upon shared custody, which requires a minimum of 30% visitation.¹¹

B. Mr. C.'s Presumptive Support Obligation is \$235

Under 15 AAC 125.070(a), the presumptive support obligation is generally based on annual income during the time the order will be in effect.¹² However, under 15 AAC 125.060(a), the child support obligation may be based on potential income, if the parent will be voluntarily unemployed during that time.

In this case, Mr. C. was employed and earning an income of about \$24,000 per year when the request for modification was filed and would be effective. However, by the time of the supplemental hearing he had terminated his employment and had no immediate plan to return to work. Instead, he planned on remaining as the child care provider for his infant child.

⁸ Ms. K. testified that the couple owns a 2004 Jetta and a 2006 Chevrolet Silverado, with combined payments of \$860 per month for the purchase price, \$200 for gas, \$20 for maintenance, and \$370 for insurance.

⁹ Ms. K. testified this includes \$200 per month for diapers.

¹⁰ K. v. C., No. 1JU 03-0326 CI (August 1, 2003). The agreement provides that D. will spend the following nights with his father: one-half of his winter vacation (7 nights); March 1-25 (25 nights), April 1 to May 1 (30 nights); one-half of summer vacation (42 nights); and two nights each weekend during the school year except (excepting the periods otherwise accounted for) (53 nights). See Ex. 9.

¹¹ 15 AAC 125.070(b); Civil Rule 90.3(f).

¹² See 15 AAC 125.030(a) ("total income...is the expected annual income that the parent will earn or receive when the child support award is to be paid."); 15 AAC 125.050(c) ("the agency will base the support obligation on the total annual income that the parent is likely to earn or receive when the child support is to be paid."). The agency will modify the order if anticipated annual income is 15% greater or less than the existing order. See 15 AAC 125.070(b)(1).

Under these circumstances, Mr. C. may reasonably be deemed voluntarily unemployed.¹³ Thus, his income may be based upon his potential income. Potential income is based upon a person's work history, qualifications, and job opportunities.¹⁴ Mr. C. has shown an ability to earn income of as much as \$24,000 per year. However, he has been incarcerated on multiple occasions, and in light of his limited education and lack of job skills, his ability to obtain and retain work at that level of income is uncertain. In light of the his work history, qualifications, and job history, Mr. C.'s potential earned income is deemed to be the equivalent to full time employment at the minimum wage. Even if Mr. C. is unable to match his prior earnings on a consistent, full time basis, he is likely to be able to earn income equivalent to full time employment at the minimum wage, either from periodic employment at a higher wage, or from full time employment at the minimum wage. Because Mr. C. was incarcerated in 2009, he will not be eligible for an Alaska Permanent Fund dividend in 2010, and accordingly that payment should be excluded from his anticipated income.

Based on earnings equivalent to full time employment at the minimum wage, Mr. C.'s anticipated annual earned income is \$16,120,¹⁵ and his presumptive support obligation is \$235 per month, as shown on Appendix A.

C. The Presumptive Obligation Is Not Manifestly Unjust

Mr. C. asserted that an increase in his support obligation from \$50 per month to \$374 per month (as originally calculated by the division) would be manifestly unjust, and in view of the fact that Mr. C. is not presently working, it is apparent that he does not presently have sufficient income to meet the presumptive support obligation.

However, Mr. C. has voluntarily chosen to remain at home rather than to work. Mr. C.'s partner is presently employed full time, earning about \$2,683 per month. Given that Mr. C.'s joint household expenses are just over \$2,000 per month, and that his decision to provide child care for his infant child enables his partner to work full time, his presumptive support obligation

¹³ 15 AAC 125.060(b) provides that an obligor may not be considered voluntarily unemployed if the obligor is providing child care to a child under the age of two "to whom the parents owe a joint legal responsibility." A parent by definition is a person with a legal responsibility for the child. See 15 AAC 125.900(a)(12). Pursuant to 15 AAC 125.900(a), the term must be read in context. It is apparent that the reference to "the parents" in the context of 15 AAC 060(b) is to the obligor and obligee parents, that is, to the parties to the case, not to the natural parents of the child being cared for. If the term were read in 15 AAC 125.060(b) to include all parents it would apply whenever an obligor parent has custody of a child under the age of two, no matter who owed a legal responsibility to that child.

¹⁴ 15 AAC 125.060(a).

¹⁵ The current Alaska minimum wage is \$7.75 per hour ($\$7.75/\text{hr.} \times 2080 \text{ hours} = \$16,120$).

is not manifestly unjust. The value of Mr. C.'s services to his partner as a full time child care provider for their child exceeds his monthly child support obligation. To the extent that Mr. C.'s existing obligation of \$381 for his two younger children makes the combined support obligation onerous, his remedy is to seek modification of the other order.

IV. Conclusion

In this case, Mr. C.'s support obligation has changed by more than 15%. Accordingly, modification is appropriate.

CHILD SUPPORT ORDER

The Modified Administrative Child Support and Medical Support Order dated March 23, 2010, is **AMENDED** as follows; in all other respects, the Amended Administrative Child Support and Medical Support Order dated March 23, 2010, is **AFFIRMED**:

Modified ongoing child support is set at \$235 per month, effective November 1, 2009.

DATED: October 22, 2010.

Signed _____
Andrew M. Hemenway
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 Revised 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 26th day of October, 2010.

By: *Signed* _____
Signature
Jerry Burnett _____
Name
Deputy Commissioner _____
Title

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