

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

IN THE MATTER OF:)

D. W. L.)

) OAH No. 10-0622-CSS
) CSSD No. 001061976
)

DECISION AND ORDER

I. Introduction

The obligor, D. W. L., appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on November 17, 2010. The obligee child is E., 14. The custodian of record is E. K. K.

The hearing was held on January 5, 2011. Mr. L. appeared in person and is represented by Melinda Miles. Ms. K. participated by telephone. Erinn Brian, Child Support Specialist, appeared for CSSD. The hearing was recorded.

Based on the record and after careful consideration, Mr. L.'s child support is modified to at \$1,560 per month for October 2010 through December 2010, and \$1,108 per month, effective January 2011, and ongoing, based on primary custody.

II. Facts

A. Procedural History

Mr. L.'s child support obligation for E. was established at \$599 per month in September 1997.¹ On September 7, 2010, Ms. K. initiated a modification review of the order.² On September 28, 2010, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.³ Mr. L. did not provide income information.⁴ On November 17, 2010, CSSD issued a Modified Administrative Child Support and Medical Support Order that set Mr. L.'s modified ongoing child support at \$1,491 per month for one child, effective October 1, 2010.⁵ Mr. L. filed an appeal on December 14, 2010.⁶

¹ Exh. 1.

² Exh. 2.

³ Exh. 3.

⁴ Pre-hearing brief at pg. 1.

⁵ Exh. 6.

⁶ Exh. 7.

B. Material Facts

Mr. L. is employed at M. Industries, where he is a building superintendent. In 2010, he earned \$119,850 through November 27, 2010.⁷ His total earnings for 2010 are estimated at \$128,350.⁸ A primary custody support amount from that figure is \$1,560 per month for one child.⁹

For 2011, Mr. L. testified that his weekly salary is now \$1,700. CSSD used that information to estimate his 2011 earnings at \$88,400.¹⁰ A primary custody calculation from that income amount equals \$1,108 per month for one child.¹¹

Mr. L. and Ms. K. are the parents of E., who was born in 1996. They separated when she was about two years old. Thereafter, custody of E. fluctuated back and forth between the parties in a somewhat fluid manner. Ms. K. had primary custody after the parties separated, but by 2006, the parents were exercising 50-50 shared custody of E.¹²

After E. returned from a week-long trip to Fairbanks in May 2010, she spent the bulk of the summer with her mother, but returned to the 50-50 arrangement for the 2010-2011 school year.¹³ About this time, E. initiated a conversation with her father to discuss spending only weekends with him. She wanted to have all of her belongings in one location and she feels more comfortable with her mother. Mr. L. resisted, so the custody arrangement essentially remained 50-50 at that time.

During the week of the formal hearing held in this matter on January 5th, E. was staying with her father. Upon returning home from school on Thursday, January 6th, she overheard and became upset about a telephone conversation Mr. L.'s wife, K., was having with someone. E.

⁷ Exh. 7 at pg. 15. Mr. L.'s pre-hearing brief was to have contained up-to-date paystubs in its Exhibit Q, but that document was missing from the packet of exhibits. CSSD estimated Mr. L.'s total 2010 income from data provided by the Alaska Department of Labor and Workforce Development through the third quarter of 2010, his year-to-date paystub and his hearing testimony.

⁸ See Exh. 9 at pg. 1.

⁹ *Id.*

¹⁰ Exh. 9 at pg. 2. $\$1,700 \times 52 = \$88,400$.

¹¹ *Id.*

¹² The findings regarding custody of E. prior to the effective date of this modification are only meant to be a general background of the parties' custodial agreements leading up to the present. The relevant findings regarding custody begin with the summer of 2010.

¹³ On January 24, 2011, Ms. K. submitted a handwritten statement prepared by E. L. Although the administrative law judge generally disallows affidavits or witness statements by obligee children in child support cases for a myriad of reasons, E.'s statement is accepted into evidence because she appears to be of sufficient maturity to submit one, but also because her statement sheds light on the issue of shared custody in this matter.

called Ms. K., who, at her daughter's request, picked her up early from school the next day, and as of January 24th, E. reported she was still at her mother's house. Mr. L. also reported in an affidavit filed on January 14th, that E. had not returned to his residence since Ms. K. picked her up from school on January 6th.

III. Discussion

A. Modification

Child support orders may be modified upon a showing of "good cause and material change in circumstances."¹⁴ If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes "material change in circumstances" has been established and the order may be modified. 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." In a modification situation, if the child support amount calculated from an obligor's current income is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes that "good cause and material change in circumstances" has occurred such that the order may be modified.

This modification is effective October 1, 2010.¹⁵ At the formal hearing, Mr. L. submitted documentation and gave testimony regarding the parties' relationship going back to 1996, the year E. was born. He claims he and Ms. K. and E. were living together during a period of time in which he paid child support through CSSD. He is requesting, essentially, that the child support he paid prior to the effective date of this modification be vacated because the parties were cohabitating at the time. He was informed that the undersigned administrative law judge is prohibited from adjusting his support obligation prior to the effective date of the modification because it would constitute an impermissible retroactive modification under Civil Rule 90.3(h)(2). Mr. L. may be able to obtain relief regarding his child support arrears by filing a request with CSSD for the director to review his case under the authority found in 15 AAC 125.125.

¹⁴ AS 25.27.190(e).

¹⁵ A modification is effective beginning the month after the parties are served with notice that a modification has been requested. 15 AAC 125.321(d). CSSD sent the parties a notice of the modification on September 28, 2010. See Exh. 3.

B. Shared custody calculation

When parents exercise shared custody of their children, Civil Rule 90.3 provides that child support is to be calculated differently than in the situation in which one parent has primary custody. 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.^[16]

Thirty percent (30%) of the year is 110 days. 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.¹⁷

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 parent asserting that they share physical custody, in this case, Mr. L., has the burden of proof by a preponderance of the evidence.¹⁸

Mr. L. did not meet his burden on the shared custody issue for purposes of this modification, even though it is clear the parties have exercised shared custody of E. in the past. More likely than not Mr. L. and Ms. K. were exercising week on, week off shared custody at the beginning of the 2010-2011 school year, but unfortunately, their arrangement disintegrated in early January 2011, essentially at E.'s instigation. She had already asked her father to consent to changing his custody time to weekends only, preferably every other weekend, but he had so far refused. E. became upset at a conversation she overheard between her stepmother and another individual, so she called and asked Ms. K. to pick her up early, and apparently has not returned.

Mr. L. confirmed that these events had occurred, and there is scant evidence in the record to suggest that a 50-50 arrangement for E. can be resurrected. She did not want to return to her father's home on a 50-50 basis, and it does not appear as though Ms. K. would insist E. return to her father's for shared custody.

¹⁶ Civil Rule 90.3(f)(1).

¹⁷ Civil Rule 90.3, Commentary V.A.

¹⁸ See 2 AAC 64.290(e).

Thus, based on the record as a whole, Mr. L.'s request to calculate his child support using the shared custody formula must be denied. The parties had 50-50 custody of E. in October 2010, when the modification became effective, but shared custody lasted only three months and as a result is not sufficient to calculate his annual child support obligation using the shared custody formula. Mr. L.'s child support must be calculated using the primary custody formula and the resulting calculations from section II, above. His modified child support is thus set at \$1,560 per month for October 2010 through December 2010, and \$1,108 per month, effective January 2011, and ongoing.

IV. Conclusion

Mr. L. met his burden of proving by a preponderance of the evidence that CSSD's Modified Administrative Child Support and Medical Support Order is incorrect, as required by 15 AAC 05.030(h), but only as to his income. Mr. L. did not prove he and Ms. K. are currently exercising shared custody, so the primary custody formula should be used. CSSD correctly calculated his modified support obligation at \$1,560 per month for October 2010 through December 2010, and \$1,108 per month, effective January 2011, and ongoing. These amounts should be adopted.

V. Child Support Order

- Mr. L.'s child support is modified to \$1,560 per month for October 2010 through December 2010, and \$1,108 per month, effective January 2011, and ongoing;
- All other provisions of CSSD's November 17, 2010, Modified Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 15th day of February, 2011.

By: Signed
Kay L. Howard
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 March, 2011.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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