

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

IN THE MATTER OF:)
)
A C. L)
)
) OAH No. 11-0231-CSS
) CSSD Case No. 001166038
_____)

DECISION AND ORDER

I. Introduction

This case concerns the obligation of A C. L for the support of N A. O. Mr. L is subject to an order for the support of N’s older sister, F E. O. The custodian of record is H O.

On October 27, 2010, the Child Support Services Division (Division) issued an administrative support order establishing Mr. L’s support obligation for F as \$588 per month, effective January 1, 2010. The Division issued a corrected modified order on May 26, 2011, adding N to the prior order and setting arrears and modified ongoing support for her.¹

Mr. L filed an appeal and the matter was referred to the Office of Administrative Hearings. The assigned administrative law judge conducted a telephonic hearing on June 29, 2011. Mr. L participated. Ms. O was not available at her telephone number of record. Andrew Rawls represented the Division.

On appeal, Mr. L did not dispute the amount of income attributed to him. The evidence and the testimony established that Mr. L is entitled to a deduction for older children in the home that was not provided in either the October 27 order or the May 26 order, and that modified ongoing support should reflect Ms. O’s return to the work force in May, 2011. Arrears on the modified child support obligation are set at zero, and modified ongoing support is set at the presumptive amount.

¹ Ex. 8, p. 9.

II. Facts

A. Procedural History

On May 26, 2010, the Division sent Mr. L an order requiring him to provide income information in order to establish a child support order.² Mr. L received the order on June 14, 2010.³ On October 27, 2010, the Division issued an administrative support order establishing Mr. L's support obligation for F as \$588 per month, effective January 1, 2010. The support obligation was suspended in November, 2010, when F began living with her father.⁴ On November 15, 2010, the Division established Mr. L's paternity of N.⁵

On December 30, 2010, the Division issued a notice of intent to modify the October 27 support order.⁶ The Division issued a modified order on February 22, 2011, and provided notice of a clerical error in that order (it was based on primary custody rather than divided custody) on April 22, 2011.⁷ The Division issued a corrected modified order on May 26, 2011, adding N to the prior order and setting arrears for her support in the amount of \$214 per month from April through October, 2010, and zero dollars per month from November, 2011, through January, 2011, and modified ongoing support in the amount of \$561 effective February 1, 2011, based on divided custody (F with Mr. L and N with Ms. O).⁸

B. Custody, Income and Household Expenses

A L and H O have two children, F (the older of the two) and N. F lived with her father from the time she was born until early in 2010, when she went to live with her mother. F remained with her mother until October, 2010, and has lived with her father since November 1, 2010. N was born while F was living with her mother, and N remained in her mother's custody after F returned to her father's household. In addition to F, Mr. L's household includes three additional minor children, two older than F and one younger than N.⁹

² Ex. 2.

³ Ex. 2, p. 4.

⁴ Ex. 1, p. 8.

⁵ See Ex. 4.

⁶ Ex. 5.

⁷ Ex. 6; Ex. 7.

⁸ Ex. 8, p. 9.

⁹ Testimony of A. L.

Mr. L, Ms. O, and the children all in no name, a village in Southeast Alaska. Ms. O was unemployed until May, 2011, when she obtained a job paying \$10 per hour.¹⁰ For the last several years, Mr. L has worked for the No Name Indian Community. His average annual income from wages in 2008-2010 was \$41,526.¹¹ His monthly net, after-tax take home pay, exclusive of child support and deductions for taxes, an automobile loan for his primary vehicle, rent, water, sewer, garbage and electricity, is about \$3,000.

Mr. L's monthly household living expenses total about \$2,512-\$2,762, including rent (\$350), fuel oil (\$200-300), food (\$400), water, sewer and garbage (\$80), electricity (\$110), personal care items (\$100-\$150), child care (\$230), clothing (\$50-\$100), telephone and Internet (\$105), and his primary vehicle, gasoline, insurance and maintenance (\$887-937).¹²

III. Discussion

A. Case History

The substantive facts of this case, as set forth above, are not complicated. Prior to January, 2010, F lived with Mr. L, along with Mr. L's two older minor children (A, Jr. and S). In January, 2010, Ms. O was pregnant. Around the time N was born, F moved out of her father's house and into her mother's home. In October, 2010, after N was born, F returned to live with her father and her older siblings, as well as an infant sibling (A) born after F had moved out.

By contrast, because of the changes in custody and the paternity contest, the procedural history of this case is complicated and somewhat opaque. In addition to an order establishing Mr. L's paternity of N, the record includes three separate administrative orders imposing affirmative obligations on Mr. L: (1) a May 19, 2010, administrative order in CSSD No. 001168076 to produce income information; (2) an October 27, 2010, administrative order in CSSD No. 001166038 establishing Mr. L's support obligation for F; and (3) a May 26, 2011, administrative order in CSSD No. 001166038 modifying the October 27 order.

¹⁰ Ex. 11; Ex. 12; Testimony of A. L.

¹¹ Ex. 10.

¹² Mr. L testified that he owns a 2005 Tahoe, purchased in 2005, on which he owes \$16,000 and the biweekly payments are \$271 (equivalent to \$587 per month), and a 2005 Equinox, on which he owes \$12,000 and the biweekly payments are \$166. He also testified that the monthly cost of gasoline for the vehicles is \$150-\$200, and maintenance is \$50, and that insurance costs more than \$100 per month. He testified that he is in the process of selling the Equinox, and thus the cost of that vehicle is disregarded.

1. *Financial Information Order*

The division issued an administrative order to Mr. L to provide financial information, dated May 19, 2010, in CSSD No. 001168076.¹³ That is not this case, which is CSSD No. 001166038.

The May 19 order in CSSD No. 001168076 does not state the names of the child (or children) that are the subject of the case, or identify the mother. The order was served on Mr. L on June 14, 2010. At the time the order was issued, the division was not yet enforcing the child support order that is the subject of this case, which was issued in CSSD No. 001166038: that order, which established Mr. L's support obligation for F, was not issued until October 27, 2010.

Whether the division issued the May 19 order to obtain income information pertaining to Mr. L's support obligation for F and N (who were both in Ms. O's custody at the time) is not clear. It is clear, however, that the May 19 order did not initiate a modification proceeding under 15 AAC 125.340: the order references AS 25.27.020 and 15 AAC 125.100 (and not 15 AAC 125.340), and when it was issued, the division did not yet have grounds to initiate a modification proceeding under 15 AAC 125.340.¹⁴

2. *Establishment Order*

On October 7, 2010, Mr. L and Ms. O reached an agreement that F would return to Mr. L's custody.¹⁵ A week later, they participated in genetic testing for N.¹⁶ On October 27, the Division issued an administrative child support order in CSSD No. 001166038, establishing arrears for F in the amount of \$588 per month for the period from January-October, 2010;¹⁷ the order set arrears and ongoing support for F effective

¹³ Ex. 4.

¹⁴ See 15 AAC 125.340(a) (providing that the division will establish paternity and support under the procedures stated in 15 AAC 125.340 “[i]f, while enforcing an administrative support order for the child of a relationship, the agency obtains evidence [of an additional child] [emphasis added].” 15 AAC 125.405 provides that the division “will initiate an administrative enforcement action...if there is a valid child support order in effect with respect to the child.” Thus, for an Alaska child, the agency must first establish a support obligation and issue a child support order before it commences administrative enforcement proceedings, and only then will it proceed to add an additional child to the order.

¹⁵ See Ex. 9, p. 2 (October 7, 2010 note from Ms. Olofson).

¹⁶ Ex. 3, p. 1.

¹⁷ Ex. 1, p. 8.

November, 2010, in the same amount and was suspended (consistent with the parties' agreement that F would return to Mr. L's custody).¹⁸

The October 27 order was mailed to Mr. L on October 28 and he picked it up on November 5.¹⁹ By that time, Mr. L's paternity of N had been confirmed through genetic testing, although the division had not been notified of that fact. The Division issued an order establishing Mr. L's paternity on November 15.²⁰ The time to request administrative review of the initial order establishing F's support obligation expired on December 5, 2010, 30 days after service of the order on Mr. L.²¹ Mr. L did not request administrative review.

3. *Modification Order*

After the Division issued the October 27 order establishing Mr. L's support obligation for F and the November 15 order establishing Mr. L's paternity of N, on December 30, 2010, the Division issued notice of a petition to modify the October 27, 2010 order.²²

The Division issued an order modifying the October 27 order on February 22, 2011.²³ Because the modification order mistakenly was based on primary custody, rather than divided custody, the Division issued a corrected modification order, dated May 26, 2011. The corrected order was issued in two parts. The first part added N to the October 27 order and set modified ongoing support at \$561 per month, effective February 1, 2011, based on divided custody;²⁴ it was mailed to Mr. L on May 27.²⁵ The second part established Mr. L's obligation for arrears for N in the amount of \$214 per month from April through October, 2010;²⁶ it was sent to Mr. L by certified mail on May 31.²⁷

¹⁸ Ex. 1, p. 8. The October 27 order states that Mr. L had not provided income information. It may be that this statement was based upon Mr. L's non-response to the May 19 order issued in CSSD No. 001168076.

¹⁹ Ex. 1, p. 9.

²⁰ Ex. 4.

²¹ See 15 AAC 125.118(a). The order states that administrative review must be requested within 30 days of after the date of receipt. Ex. 1, p. 1.

²² Ex. 5.

²³ The record does not include a copy of the modified support order. The Division has provided a copy of a computer printout indicating the actions taken by the Division, and the standard forms used in such cases. Ex. 6.

²⁴ Ex. 8, pp. 1-5.

²⁵ Ex. 8, p. 5.

²⁶ Ex. 8, pp. 11-12.

²⁷ Ex. 8, p. 10.

With the two-part modification order, the Division provided two separate appeal documents. The first part of the order included a form for filing an appeal of the modification order. The second part of the order included a form for requesting an administrative review of the amount of the modified order. Mr. L completed the first form; his appeal of the modification order, dated June 2, points out that he had been supporting F in his own home “with her other siblings” except for a period of time in 2010, and asks that the division establish a support obligation for her on the part of Ms. O.²⁸

B. Presumptive Modified Support Obligation

Mr. L’s support obligation for F was established in the October 27 order, which he did not appeal and which is not at issue in this case. At issue in this case is Mr. L’s support obligation for N, which was set in the corrected modified support order issued on May 26, 2011. The modified support order covers three distinct periods of time, during which the circumstances are materially different: (1) April-October, 2010 (primary custody); (2) November, 2010-May, 2011 (divided custody); and (3) June 1, 2011-ongoing (Ms. O working).

The presumptive support obligation when one parent has primary custody is based on the applicable percentage of the non-custodial parent’s adjusted annual income: 20% for one child, and 27% for two children.²⁹ The presumptive support obligation in a divided custody case is based on the applicable percentage of the adjusted annual income of both parents, and the amount of time the children spend with each.³⁰

1. *April-October, 2010*

For the period from April-October, 2010, the Division calculated Mr. L’s modified support obligation based on primary custody, using his 2010 income. This yielded a modified support obligation of \$802 for two children. The modified obligation exceeded the support obligation established in the October 27 order for one child by the amount of \$214 per month ($\$802 - \$588 = \214). Accordingly, the Division’s modified order provided for additional arrears in the amount of \$214 per month (\$1,498 in total) for the period of time from April-October, 2010.

²⁸ Ex. 9, p. 1.

²⁹ 15 AAC 125.070(a); Civil Rule 90.3(a).

³⁰ 15 AAC 125.070(c); Civil Rule 90.3(b)(2).

The division's calculation, however, omitted any deduction from Mr. L's income for the cost of supporting his two older children in the home. Providing a deduction for those two children, Mr. L's presumptive modified support obligation for two children in the primary custody of Ms. O is \$580 per month.³¹ Because this is less than the existing support order for one child under the October 27 order, no additional arrears for N are owed for that period.

2. *November, 2010-May, 2011*

For the period from November, 2010, through May, 2011, the Division calculated Mr. L's modified support obligation based on divided custody of two children, using both parties' 2010 income. This yielded a modified support obligation of \$561 per month. For the months of November, 2010, through January, 2011, the Division did not charge pre-modification arrears.³² Effective February, 2011, the Division set arrears and ongoing support at the rate of \$561 per month.

Once again, these calculations omitted the deduction for Mr. L's two older children. Providing a deduction for those two children, and using both parties' Mr. L's 2010 income, his presumptive support obligation for divided custody of two children is \$379 per month.³³

3. *June, 2011-Ongoing*

The modified support order set ongoing modified support based on Ms. O's employment status in 2010, during which she was unemployed and had no earned income. However, at the hearing Mr. L testified that Ms. O had entered the work force. The Division's post hearing brief notes that income information available to it shows that Ms. O obtained employment in May, 2011, at the rate of \$10 per hour. Based on Ms. O's actual income at the time of the hearing, the division proposed setting modified ongoing support at the rate of \$242 per month, effective June 1, 2011.

³¹ See App. A, A-1 (attached).

³² The Division's calculation indicates that no arrears were imposed for this period because Mr. L's support obligation under a divided custody calculation was less than his support obligation under the primary custody calculation for F. However, because the order for F had been suspended, it is not clear why its existence would affect Mr. L's liability for arrears on the modified order during the period from November, 2010 through January, 2010.

³³ See App. B (attached).

The Division’s proposal omits the deduction for Mr. L’s two older children in the home. Providing that deduction yields a presumptive support obligation, effective June 1, 2011, based on divided custody and Ms. O’s income at that time, of \$121 per month.³⁴

C. Unusual Circumstances

The presumptive support obligation may be reduced if the amount would result in a manifest injustice due to unusual circumstances.³⁵ The obligor must provide clear and convincing evidence of manifest injustice.³⁶ In determining whether manifest injustice exists, all of the relevant circumstances should be considered.³⁷ Manifest injustice is shown when “a reasonable person would be convinced that the award is either unjustly large or unjustly small after carefully evaluating the award amount with reference to the considerations set out in the Commentary to Alaska Rule of Civil Procedure 90.3 and 15 AAC 125.075(a)(2) and (b).”³⁸

In this case, there are a number of circumstances that suggest a departure from the presumptive support obligation may be appropriate. First, divided custody is a circumstance that in itself warrants careful consideration to determine whether a variance from the presumptive support obligation is appropriate, and the majority of the period of time covered by the modified order involves divided custody.³⁹ Second, this case involves establishment of pre-order arrears, and in that situation “unfairness may result from rigid application of the rule.”⁴⁰ Third, Mr. L has a subsequent child in the home, and the cost of supporting that child is not considered in the presumptive support calculation. Fourth, the original October 27 order is manifestly incorrect, because it omits any deduction for the two older children in the home, and yet it may not be corrected because that would constitute a prohibited retroactive modification. Fifth, imposition of an obligation for arrears that accrued during a period when Ms. O was receiving public assistance would have the effect of reducing the amount of current

³⁴ See App. C, C-1 (attached).

³⁵ 15 AAC 125.075(a)(2).

³⁶ 15 AAC 125.075(a); see Civil Rule 90.3(c)(1).

³⁷ See 15 AAC 125.080.

³⁸ 15 AAC 125.080.

³⁹ 15 AAC 125.070(c); 15 AAC 125.075(a)(2)(C). See Civil Rule 90.3a(2) (“[B]ecause divided custody is an ‘unusual circumstance,’ the court must consider whether this support amount [as set by the formula] should be varied...”); Commentary at VI(D) (“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...’”).

⁴⁰ Civil Rule 90.3, Commentary at VI(E).

income available to Mr. L to support F, who is now in his custody, as well as N, without providing any financial benefit to either F or N. Sixth, calculating support from April through October, 2010, based on primary custody disregards the fact that Mr. L had custody of F prior to April and after October, and that his appeal in this case asked for the establishment of a support obligation for the period of time prior to April, 2010.

The total amount of support for both children that was owed between January, 2010, and May, 2011, under the orders issued by the Division on October 27 and May 26 is \$9,622.⁴¹ The total amount of support that would have been owed during that period under the orders if the correct deduction for older children had been provided would be \$8,003.⁴² In order to avoid manifest injustice, the total amount of support that is imposed under the modified order through the end of May, 2011, should be set, at most, in the amount that results in an amount payable under both orders that is equal to the amount that would have been imposed under both orders through May, 2011, if the applicable deduction for two older children in the home had been applied to both orders in the first place: \$8,003.

The total amount of support that accrued under the October 27 order through May, 2011, was \$5,880 (\$588 per month for F's support for January-October, 2010). Thus, providing for a total support obligation (additional arrears for April-October, 2010, plus modified ongoing support for November-May, 2011) under the modification order of \$2,133 for the period through May, 2011, would provide for payment by Mr. L of an amount of support equal to the amount of support that would have been owed if both orders had provided the appropriate deduction for older children in the home ($\$5,880 + \$2,133 = \$8,003$).

⁴¹ Through May, 2011, the October 27 order provides for payment of support for F at the rate of \$588 per month from January through October, 2010 ($10 \times \$588 = \$5,880$), and the May 26 order provides for payment of support for N in the amount of \$1,498 ($7 \times \214) in arrears, plus ongoing support in the amount of \$561 per month from February through May, 2011 ($4 \times \$561 = \$2,244$). Altogether, under the two orders the amount of support owed through May, 2011 is \$9,622 ($\$5,880 + \$1,498 + \$2,244$).

⁴² Correctly calculated through May, 2011, the October 27 order would have provided for payment of support for F at the rate of \$430 per month from January through October, 2010 ($10 \times \$430 = \$4,300$), and the May 26 order would have provided for support for N in the amount of \$2,187 in arrears ($7 \times \150 for April-October, plus $3 \times \$379$ for November, 2010-January, 2011), plus ongoing support in the amount of \$379 per month from February-May, 2011 ($4 \times \$379 = \$1,516$). Altogether, had the two orders been correctly calculated, the total amount of support due through May, 2011, would have been \$8,003 ($\$4,300 + \$2,187 + \$1,516$).

The presumptive amount of modified support from the effective date of the modified order (February 1, 2011) through May, 2011, is \$1,516.⁴³ Accordingly, additional arrears for N in the amount of \$617 would be the most that should be imposed for the period prior to the effective date of the modified order. However, in view of the fact that Mr. L had custody of F prior to April, the award of arrears is offset by his prior provision of support for F, even if Ms. O's obligation is the minimum of \$50 per month. Accordingly, arrears will be set at zero. Modified ongoing support in the presumptive amounts owed beginning with the effective date of the modified order, \$379 per month through May, and \$121 per month thereafter, is not manifestly unjust.

IV. Conclusion

The modified order should be adjusted to provide for arrears and modified ongoing support through May, 2011, equal to the amount that would have been owed had both orders provided the appropriate credit for older children in the home. An offset for arrears should be provided based on Ms. O's support obligation for periods of time prior to April, 2010. Modified ongoing support effective June 1, 2011, should be set in accordance with the parties' current income as of that date.

CHILD SUPPORT ORDER

1. The Administrative Child Support and Medical Support Order dated May 26, 2011 is **AMENDED** as follows; in all other respects, the Administrative Child Support Order date May 26, 2011 is **AFFIRMED**:

Arrears under are set at \$0 (zero dollars) for the period from April, 2010, through January, 2011.

2. The Modified Administrative Child Support and Medical Support Order dated May 26, 2011, is **AMENDED** as follows; in all other respects, the Amended Administrative Child Support and Medical Support Order dated May 26, 2011, is **AFFIRMED**:

⁴³ Arrears in the amount of \$150 per month for April-October, 2010 (\$1,050) and \$379 per month for November, 2010-January, 2011 (\$1,137), plus modified ongoing support in the amount of \$379 per month for four months (\$1,516).

Modified ongoing child support is set at \$379 per month, effective February 1, 2011, through May 31, 2011, and at \$121 per month, effective June 1, 2011.

DATED: August 15, 2011.

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 Corrected 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 8th day of September, 2011.

By: *Signed* _____
Signature
Andrew M. Hemenway
Name
Administrative Law Judge
Title

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