

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

|                   |   |                     |
|-------------------|---|---------------------|
| IN THE MATTER OF: | ) |                     |
|                   | ) | OAH No. 11-0262-CSS |
| J D. G            | ) | CSSD No. 001166309  |
| _____             | ) |                     |

**DECISION AND ORDER**

**I. Introduction**

The obligor, J D. G, challenges the Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on May 19, 2011. This order establishes Mr. G's child support payment for one child to be \$995 per month effective June 1, 2011, and arrears o \$12,840 from March 1, 2010 through May 31, 2011.<sup>1</sup> The obligee child is X, who is five years old. The custodian is B M. J.

The formal hearing was held on July 25, 2011. All parties participated in person. A court order awarding Ms. J sole legal custody and primary custody was entered into evidence.<sup>2</sup> Additionally, it became apparent that Mr. G was entitled to a deduction for retirement. The parties agreed that CSSD should perform revised calculations based on this new information. CSSD provided its submission and the record closed August 8, 2011.<sup>3</sup>

Having considered the evidence and compliance with the court's July 21, 2011 order awarding Ms. J sole legal custody and primary physical custody effective July, 2011, Mr. G's child support obligation for one child should be \$878 per month for the period from March 2010 through July 2010; \$929 per month effective August 2010 through July 2011; and \$989 per month effective August 2011 and ongoing.

**II. Facts**

There is only one area of material disagreement between the parties - whether Ms. J had primary custody of X from August 2010 through November 2010. They agree that from March

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<sup>1</sup> Exhibit 8.

<sup>2</sup> Exhibit 10.

<sup>3</sup> The record originally closed August 5, 2011. CSSD filed its submission to the record August 8, 2011 and requested the submission be accepted for consideration even though it is late filed. The record was reopened to accept CSSD's late filed submission.

2010 through July 2010 they shared custody of X on a 67/33 schedule. Ms. J contends that she assumed primary custody of X when he started preschool in August 2010. Mr. G contends Ms. J assumed primary custody of X effective December 2010. This dispute is best resolved by reviewing the facts beginning March 2010, when Ms. J applied for support services.

Ms. J applied for child support services on March 3, 2010.<sup>4</sup> In response to a request from CSSD each parent provided information regarding income and a letter setting out each parent's position on custody. Mr. G asserted they shared custody and Ms. J asserted she had primary custody.<sup>5</sup> CSSD considered the information provided by the parties and on February 24, 2011 it issued an Administrative Child Support and Medical Support Order establishing Mr. G's child support obligation.<sup>6</sup>

This order provided that Mr. G's support was to be \$880 per month from March 2010 through July 2010 and \$955 per month effective August 2010 and ongoing. The difference in amount was attributable to CSSD's calculating support during the first period based on a 67/33 custody arrangement and changing to a primary custody arrangement effective August 2010. Mr. G requested an administrative review asserting that he and Ms. J continued to share custody and that CSSD's calculation was incorrect. With his appeal Mr. G included receipts showing several payments to X's preschool starting in August 2010.

Ms. J disputed Mr. G's statement in support of his request for an appeal. She wrote that Mr. G did not want to take X for Mr. G's entire week off because he believed the daily drive from Palmer to Eagle River everyday for X's school was too far.

In an attempt to resolve the custody issue for purposes of child support, CSSD asked Mr. G to provide three notarized statements from friends and family stating when X was with Mr. G. Mr. G did not provide the requested affidavits and on May 19, 2011 CSSD issued an Amended Administrative Child Support and Medical Support Order affirming its first child support calculations and adJg the amount of arrears owing.<sup>7</sup>

Mr. G appealed. In support of his claim that he had shared custody of X from March 2010 through November 2010 he identified three people who knew he kept X for his one week

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<sup>4</sup> Exh. 1.

<sup>5</sup> Exh. 3 at 8.

<sup>6</sup> Exh. 4.

<sup>7</sup> Exh. 8.

off during this time period. Mr. G's note was signed by three individuals whose signatures were notarized.

At the hearing, Ms. J testified consistent with her written statements. She sought to impeach the signers through cross examination. Attempts were made during the hearing to contact each signor so they could testify. However, no one was available at the telephone numbers Mr. G provided. Ms. J testified that she thought the signers signed the statement out of spite. For example, one signatory is Ms. J's cousin. Ms. J testified that her cousin was upset with her for leaving Mr. G. Ms. J called one witness, her sister, in an attempt to corroborate her claim that she had primary custody of X beginning August, 2010. This witness was unable to recall with specificity who picked up X and when.

The parties provided a copy of the July 21, 2011 court order entitled Custody Findings of Fact and Conclusions of Law in *J v. G*, Case No. 3AN-11-00000 CI (00/00/2011). The court, in its findings, abated the court proceeding to establish child support, leaving child support to be established through CSSD.<sup>8</sup> The court did address custody. It awarded Ms. J sole legal custody and primary physical custody effective July 21, 2011.

### **III. Discussion**

The primary issue in this appeal is whether Mr. G had shared physical custody of the parties' son, X, from August 2010 through November 2010. The issue given less attention by the parties is whether Mr. G is entitled to a credit or a deduction for his payment to X's preschool.

#### *A. Controlling Law*

A parent is obligated both by statute and at common law to support his or her children.<sup>9</sup> 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", minus mandatory deductions. The actual amount paid may vary depending upon the type of custody exercised by the parents, for example, whether there is shared or primary custody.<sup>10</sup> Regardless of the custody actually exercised, child support orders must be calculated according to the custody and visitation provisions of a court's custody

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<sup>8</sup> AS 25.27.135; Exh. 10 at 2.

<sup>9</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

<sup>10</sup> For example, the shared custody formula calculates the annual amount each parent would pay to the other parent assuming the other had primary custody and then multiplying this amount by the percentage of time the other

order.<sup>11</sup> Here, the court's order awarded Ms. J primary physical custody effective July 21, 2011. The court did not establish child support. Rather, the court stated that an administrative order should be entered. Accordingly, child support effective March 2010 and ongoing will be established in this proceeding. Establishment requires a factual determination regarding the type of custody exercised by the parties between March 2010 and July 2011, when the court's order went into effect. Once the type of custody exercised is determined and child support calculated, Mr. G asks that he receive some consideration for his contribution to X's preschool.<sup>12</sup>

Because this is Mr. G's appeal, it is his burden to establish by a preponderance of the evidence that CSSD's Amended Administrative Child Support and Medical Support Order is incorrect.<sup>13</sup> He does this by either pointing to evidence that is already in the record or by adding evidence through the formal appeal process that establishes that the facts challenged are more likely than not true.<sup>14</sup>

Finally, it is noted that Mr. G's income increased in 2011 and that X turned five. Five years of age is a common age for children to start school, therefore this decision presumes that X started school in August 2011.<sup>15</sup> Whether these events are a material change in circumstance will be explored below. "A material change of circumstances will be presumed if support as calculated under this rule is more than 15 percent greater or less than the outstanding support order."<sup>16</sup>

## B. *Analysis*

### 1. Ms. J Assumed Primary Custody of X in August 2010

The parties offered contradictory testimony as to the custody arrangement during the four months in question. The witness called by Ms. J offered little insight into the custody of X during the period in question. The written statement offered by Mr. G is not an affirmative statement by the individuals regarding custody. Rather, Mr. G wrote:

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parent will have physical custody. A few other adjustments are made but the amount paid is less than a straight primary calculation. See Alaska Rule Civil Procedure 90.3(b).

<sup>11</sup> *Turinsky v. Long*, 910 P.2d 590 (Alaska 1996).

<sup>12</sup> There has been no objection raised to the income figures used by CSSD.

<sup>13</sup> AS 44.62.460(e)(1); 15 AAC 05.030(h).

<sup>14</sup> 2 AAC 64.290(e).

<sup>15</sup> See Footnote 20 *infra*.

<sup>16</sup> Alaska Rule Civil Procedure 90.3(h).

These are the following people that knows[sic] I kept my son X A. J during March 2010 – November 2010, during my 1 week off from work.<sup>17</sup>

Unfortunately, the evidence provided by the parties was not particularly helpful. The written statement provided by Mr. G was his statement, not that of the individuals who signed the document. As written it is subject to several interpretations. For example it does not confirm the exact amount of time X spent with his father.

The burden is on Mr. G to establish that the portion of CSSD's order regarding custody is more likely than not incorrect. He has not met his burden. This finding does not assess the credibility of the parties. Rather, it is a finding that when viewed as a whole, the evidence presented by Mr. G in support of his appeal on this point is insufficient to tip the scales in his favor.

## 2. Deductions from Gross Income for Purposes of Child Support

Mr. G did establish by a preponderance of the evidence that CSSD's initial calculation understated his deductions. This point is undisputed. There is a dispute, however, regarding how Mr. G's preschool payments should be characterized. Both parents agree that the payments were not intended to be a direct payment of child support. Therefore, Mr. G may not receive a direct credit for those payments.<sup>18</sup>

Mr. G may, however, be entitled to a deduction for work-related child care expenses for X.<sup>19</sup> When asked its position on the payments CSSD argued by analogy that the payments were no different than tuition for school, so they should not be deductible as a child care expense. This is incorrect.

X started preschool at age 4. He was not old enough for public school (typically age 5 or older). There is no evidence that the program was an actual school program that was offered by a charter school as an early kindergarten or that the program followed an approved curriculum. CSSD's position ignores that it is not uncommon for parents to place a young child in preschool

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<sup>17</sup> Exh. 9 at 2.

<sup>18</sup> Before a parent may receive a direct credit, he or she has several things to establish by clear and convincing evidence. One item is that both parents intend that the payment be direct payment for child support. 15 AAC 125.465. Here, both parents testified that it was not intended to be a direct payment for child support.

<sup>19</sup> Alaska Rule Civil Procedure 90.3(a)(1)(E).

as a type of child care. It is more likely than not that X's preschool was childcare. Therefore, Mr. G is entitled to a deduction for work-related child care expenses for X.

For purposes of child support it is appropriate to annualize this expense. Mr. G paid \$355 in August 2010, \$400 in December 2010, and \$355 in March 2011. When annualized and averaged, Mr. G's child care expenses would be \$123.33 per month.<sup>20</sup>

If Mr. G receives a deduction for work-related child care expenses, then it is reasonable to conclude that when X turns five and actually starts school that Mr. G will no longer have this expense. If there is no expense then Mr. G would no longer be entitled to a deduction. Therefore, Mr. G has established by a preponderance of the evidence that he is entitled to a monthly deduction of \$123.33 for work-related child care expenses for X from August 2010 through July 2011.<sup>21</sup>

### 3. Calculation of Mr. G's Monthly Child Support

#### (a) March 2010 – July 2010

CSSD's revised calculation for shared custody is appropriate. Based on the information provided by Mr. G, his 2010 gross earnings totaled \$76,757.14. CSSD's calculation includes, in addition to the standard deductions (income tax, social security, and unemployment insurance) a deduction for Mr. G's contribution to his retirement account. The starting point for a shared custody calculation is each parent's support obligation calculated as if the other parent had primary custody. If Ms. J had primary custody of X during this period Mr. G's monthly support obligation should be \$953 per month. Applying a 67/33 shared custody formula for the period commencing March 2010 and concluding July 2010, Mr. G's monthly child support obligation for one child should be \$878.22.<sup>22</sup>

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<sup>20</sup>  $\$1,110/3 = \$370$ ;  $\$370 \times 4 = \$1,480$ ;  $\$1,480/12 = \$123.33$  per month.

<sup>21</sup> There is no record of nor is a claim made for child care expenses prior to August 2010. School began August 2011. The starting date of the school year for the Anchorage School District is available on its web site, [http://asdk12.org/Calendar/11\\_12.asp](http://asdk12.org/Calendar/11_12.asp). A party objecting to the taking of official notice of this fact may file an objection and submit evidence or authority to refute the officially noticed fact. Any such filing should be made prior to the date set in this case for submission of proposals for action under AS 44.64.060(e), and should be submitted separately from any proposal for action filed under that provision.

<sup>22</sup> Exh. 14 at 3.

(b) August 2010 – December 2010

Two events occurred in August 2010. First, Ms. J assumed primary custody of X and second, X started pre-school. When Mr. G's calculation includes retirement and a deduction for work-related preschool expenses, his support obligation under a primary calculation should be \$929 per month. While this figure is not at least 15% more than \$878.22, the 15% threshold for a presumptive material change in circumstances, it is important to remember that a material change in circumstances may be other than financial and that a failure to meet the 15% threshold does not preclude modification. In this instance these two events do rise to the level of a material change in circumstances. Therefore, effective August 2010 and ongoing, Mr. G's monthly child support obligation for X should be \$929 per month.<sup>23</sup>

(c) January 2011 – July 2011

Mr. G's income for 2011 is expected to be \$81,193.20. This is an increase over his 2010 income. Using this figure less standard deductions, a deduction for retirement and child care expenses, when calculated using CSSD's online support calculator, Mr. G's monthly support obligation should be \$964 per month.<sup>24</sup> This figure does not meet the presumptive 15% threshold for a material change in circumstance supporting a change from the previous child support amount of \$929 per month. Nor are there other events which, when viewed in conjunction with the increase in income, would support such a finding. Therefore, Mr. G's monthly support obligation for X should remain at \$929 per month.

(d) August 2011 and Ongoing

As in August 2010, in August 2011 two events occurred: the court issued an order adopting the parties existing custody arrangement and X started school. Because X is in school, Mr. G no longer has a work-related child care expense associated with preschool. These two events, in this instance, constitute a material change in circumstances sufficient to warrant a recalculation of child support. Using Mr. G's anticipated 2011 income less ordinary deductions, including contributions to his retirement account, Mr. G's monthly child support obligation for one child should be \$989 per month.<sup>25</sup>

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<sup>23</sup> Attachment A.

<sup>24</sup> Attachment B.

<sup>25</sup> Attachment C.

#### **IV. Conclusion**

Mr. G and Ms. J had shared custody of X from March 2010 through August 2010 and his support obligation after deducting retirement contributions should be \$878 per month. Mr. G did not prove that the shared custody arrangements continued beyond X starting preschool in August 2010. Starting preschool and the change in custody are a material change in circumstances under these facts and Mr. G's child support should be modified to reflect primary custody and work-related child care expenses to \$929 per month. The next material change in circumstances occurred in August 2011 when the court entered its order affirming the parties' custody arrangement and X entered school. Accordingly, Mr. G's ongoing child support obligation should be \$989 per month as of that date.

#### **V. Child Support Order**

- J D. G is liable for child support in the amount of \$878 per month for the period from March 2010 through July 2010; \$929 per month effective August 2010 through July 2011; and \$989 per month effective August 2011 and ongoing.
- All other provisions of the Amended Administrative Child Support and Medical Support Order dated May 19, 2011, remain in effect.

DATED this 12<sup>th</sup> day of September, 2011.

By: Signed \_\_\_\_\_  
Rebecca L. Pauli  
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 30<sup>th</sup> day of September, 2011.

By: Signed  
Signature  
Rebecca L. Pauli  
Name  
Administrative Law Judge  
Title

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