

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

IN THE MATTER OF:)
)
D T-W) OAH No. 11-0275-CSS
) CSSD No. 001172404
_____)

DECISION AND ORDER

I. Introduction

This establishment case was initiated when the custodian, E S, requested public assistance on behalf of the obligee child, Z, who has just turned one year old. On April 4, 2011, CSSD issued an Administrative Child Support and Medical Support Order that set the obligor, D T-W' monthly child support obligation for one child at \$420 per month effective May 1, 2011 with arrears from November 2010 through April 2011. Mr. T-W sought an administrative review of the April 2011 order claiming the parties shared custody of Z and support should be calculated to reflect this. The division affirmed the April 2011 order in its June 22, 2011 Administrative Review decision. This appeal followed.

Mr. T-W raised three issues on appeal. The first issue identified is that CSSD overstated his income for purposes of child support because CSSD included performance incentives which vary from month to month and are not a guaranteed source of income. The second issue was whether Mr. T-W should receive a credit for a \$420 payment he made to Ms. S on April 28, 2011. The third and final issue raised was whether child support should be calculate with Ms. S having primary custody of Z or whether the parents have shared custody of Z.

At hearing the parties settled the second and third issues leaving only the first issue unresolved. They agreed that Mr. T-W should receive a credit in the amount of \$420 for a direct payment in April 2011 and that beginning January 2011 the parents exercised shared custody with Mr. T-W having Z 30% of the time and Ms. S 70% of the time. In 2010, Ms. S had primary custody of Z with Mr. T-W exercising one overnight visit per month.

At the August 1, 2011 hearing Mr. T-W appeared in person. Ms. S appeared by telephone, and Child Support Services Division (CSSD) was represented in person by Child Support Specialist Erinn Brian.

Based on the agreement of the parties and the evidence in the record, Mr. T-W' child support obligation should be \$420 per month for one child from November 2010 through December 2010 and \$375 per month¹ for one child from January 2011 and ongoing.

II. Facts

In this case, the parties do not disagree about the relevant facts, only about their legal implications.

Mr. T-W is employed by No Name Business as a loan officer. In this position he earns \$12.48 per hour. He can increase his earnings through a variety of incentive programs including a sales incentive, referring new employees, and a score card bonus. He is also eligible for overtime. Mr. T-W contends the incentive programs and overtime should not be included in his income for purposes of child support because they vary from month to month.

It is undisputed that in 2010 Mr. T-W' gross income, including PFD, totaled \$32,144.68² and this resulted in a monthly child support obligation for one child in the amount of \$420. For the pay period ending July 2, 2011 Mr. T-W had year to date earnings totaling \$17,064.59. When this amount is annualized it totals \$34,129.18. When the PFD is added monthly child support obligation is \$473.³ The increase in child support from 2010 to 2011 is less than a 15% change.⁴

Ms. S is 19 years old. She has not worked for four years. She was employed as a cashier. Ms. S testified that she is working on her GED but that she has no special skills or training. She pays the rent and lives with her mother who is also unemployed. When questioned regarding her efforts at obtaining employment Ms. S could not provide the names of any businesses at which she had recently applied.

III. Discussion

Where parents exercise shared custody of their children, Civil Rule 90.3 provides that child support is to be calculated differently than in a situation in which one parent has primary custody. Each parent's primary custody child support obligation to the other is determined, based on the income figures for that parent during the year in question. Then the resulting figure

¹ See Attachment A.

² Exh. 2 at 7. Mr. T-W agreed that this was an accurate reflection of his 2010 gross income.

³ Attachment B.

⁴ A 15% increase would require a monthly child support payment of \$483 or more.

is inserted into the shared custody formula. In general, and depending on the percentage of time each parent has overnight visitation, the parent obligated to pay child support will have a somewhat lower monthly support amount than in a primary custody scenario. 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.^[5]

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.⁶

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 determine whether shared custody existed, and if so, what percentage of shared custody each party exercised. The parent asserting that he or she has shared physical custody, in this case, Mr. T-W, has the burden of proof by a preponderance of the evidence.⁷

While there is no written agreement, the parties do agree on the periods of time each had custody of their son. They agree that beginning January 2011 they have exercised a 70%/30% custody arrangement with Ms. S having custody 70% of the time. Mr. T-W also provided a calendar showing when he had Z overnight and when he had Z for the day. When questioned regarding the schedule memorialized on the calendar, Ms. S agreed that it was an accurate representation of when the parties exercised custody. The parties' agreement corroborated by the calendar is evidence that establishes on a more likely than not basis that Mr. T-W and Ms. S exercise shared custody on a 70%/30% basis.

Accordingly, Mr. T-W' child support obligation should be based on a 30%/70% shared custody split. Shared custody child support is calculated by determining what each parent would have to pay if this were a primary custody case with the other parent having primary custody, then inserting these figures into the formula that makes the adjustment for the specific shared

⁵ Civil Rule 90.3(f)(1).

⁶ Civil Rule 90.3, Commentary V.A.

⁷ See 2 AAC 64.290(e).

custody percentages. To make this calculation, it is necessary to determine each parent's income for purposes of child support.

A. *Mr. T-W' Income*

Mr. T-W does not dispute his 2010 income. He does challenge whether his sales incentives and other incentives should be included in his gross income for purposes of child support. If these items are included and the income annualized based on his total income for the first six months of 2011 his gross earnings for 2011 should be \$34,129.18. When the PFD is included his total gross income for 2011 is anticipated to be \$35,410.18.

The Commentary to Civil Rule 90.3 instructs that when determining a "parent's total income from all sources" it is to include benefits which would have been available for support if the family had remained intact and is to be broadly interpreted.⁸ It includes commission's bonuses, royalties, overtime, etc.⁹ Because child support is to be calculated based on income earned when the support is to be paid, the "determination will necessarily be somewhat speculative because the relevant income figure is expected future income. The court must examine all available evidence to make the best possible calculation."¹⁰ Applying these principals, the best predictor of Mr. T-W's income when child support is to be paid is taking his first six months earnings and doubling it. Using this amount, \$35,410.18, Mr. T-W's child support obligation for one child should be \$473 per month.¹¹ This is less than a 15% change from \$420 per month necessary to warrant presumptive modification.¹² Therefore, Mr. T-W child support remains unchanged at \$420 per month.

B. *Ms. S's Income*

When as here, a parent has no income; the support award may be based on imputed or potential income of a parent who voluntarily and unreasonably is unemployed or underemployed.¹³ The essence of an inquiry into whether a parent is voluntarily unemployed or underemployed is to determine if he or she has engaged in voluntary conduct "for the purpose of

⁸ Civil Rule 90.3 Commentary III(A).

⁹ *Id.*

¹⁰ Civil Rule 90.3 Commentary III(E).

¹¹ Attachment A.

¹² *See* 15 AAC 125.105(e).

¹³ Civil Rule 90.3 Commentary III(C).

becoming or remaining unemployed.”¹⁴ It is not necessary to prove the parent was purposefully avoiding a support obligation, or acting in bad faith, in order to find voluntary unemployment or underemployment.¹⁵ The inquiry should focus on whether the person’s lack of employment is for reasons beyond his or her control, such as in being laid off, or if it is the result of "purely personal choices."¹⁶ Therefore, it is appropriate to conduct an inquiry into the nature and reasons for the individual’s unemployment prior to determining a child support award.¹⁷

If a parent is found to be voluntarily unemployed or underemployed, potential income will be based on that parent’s “past income, skills, work history, and education and the job opportunities in the area where the parent physically resides.”¹⁸

The use of “potential income” in a child support obligation is not to punish the obligor parent; rather, it is to insure that the child(ren) and the other parent are not “forced to finance” the obligor parent's lifestyle.¹⁹ The commentary states the court should consider “the totality of the circumstances” when deciding whether to impute income to the obligor parent.²⁰ A primary goal of imputing income, according to the Alaska Supreme Court, is to compel the parent to find full-time employment:

An important reason -- if not the chief reason -- for imputing income to a voluntarily underemployed parent is to goad the parent into full employment by attaching an unpleasant consequence (a mounting child support debt or, in certain cases of shared custody, a reduced child support payment) to continued inaction. Indeed, in primary and shared custody situations alike, an order imputing income often yields no tangible benefits to the children unless and until it impels the underemployed parent to find a job.^[21]

Here, Ms. S voluntarily removed herself from the workforce long before Z was born. She has not presented persuasive evidence that she has made an honest and good faith effort to find employment. It is not unusual for a 15 year old to decide not to take a job so her removing herself from the workforce is given minimal weight. However, her failure to obtain employment

14 *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

15 *Kowalski*, 806 P.2d at 1371 (Alaska 1991).

16 *Vokacek v. Bokacek*, 933 P.2d 544, 549 (Alaska 1997).

17 *Kowalski*, 806 P.2d at 1371 at n. 5.

18 15 AAC 125.020(b).

19 *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

20 Civil Rule 90.3, Commentary III.C.

21 *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).

as she entered the age of maturity and her inability to identify her efforts to obtain employment weigh heavily in favor of finding that Ms. S is voluntarily unemployed.

If Ms. S was only responsible for supporting herself, she would be within her rights to make these decisions. She has, however, one child who she is also responsible for. Given her limited efforts to look for a job, it is determined that she is voluntarily and unreasonably unemployed. Accordingly, her potential income will be used to calculate her child support obligation.²²

Ms. S has the ability to earn at least the minimum wage of \$7.75 per hour. While she may not be able to find full time work, she should at least be capable of obtaining part time work if she makes reasonable efforts to look for a job. Some weeks she may work more than 20 hours per week; other weeks she may work less. Working part time would also afford Ms. S the time to continue to pursue her GED.²³ She should, however, be able to average 20 hours per week. This would result in an annual income of \$8,060.²⁴ Using CSSD's online child support calculator, this results in a support obligation of \$147 per month for one child.²⁵

C. *Shared Custody Calculation*

When the parties' income and shared custody percentages information is inserted into the shared custody calculation, it results in Mr. T-W having a child support obligation of \$375 per month for beginning January 2011²⁶

IV. **Conclusion**

Mr. T-W has established by a preponderance of the evidence that his appeal should be granted. It is undisputed that the parties share custody of Z. Using the shared custody calculation prescribed by Civil Rule 90.3(b)(1) Mr. T-W monthly child support obligation for one child should be \$420 effective November 2010 through December 2010 and \$375 per month for one child effective January 2011 and ongoing.

²² Civil Rule 90.3(a)(4).

²³ It is likely that with a GED Ms. S would have more employment opportunities available to her thereby benefitting D.

²⁴ 20 hours per week times 52 weeks per year times \$7.75.

²⁵ Attachment B.

²⁶ Attachment C.

V. Child Support Order

- Effective November 2010, the Ms. S had primary custody of Z.
- Effective January 2011, the parties exercise a shared custody arrangement with Ms. S having Z 70% of the time and Mr. T-W having Z the remaining 30% of the time.
- Using a primary custody calculation, Mr. T-W' child support obligation for one child is set at \$420 per month for November 2010 through December 2010.
- Using a shared custody calculation effective January 2011 and ongoing, Mr. T-W' child support obligation for one child is \$375.
- Mr. T-W is entitled to a \$420 credit for a direct payment made to Ms. S on April 28, 2011.
- CSSD's June 22, 2011 Administrative Review Decision affirming the April 4, 2011 Administrative Child Support and Medical Support Order is reversed.
- Other than as amended by this Decision and Order, all other provisions of CSSD's April 4, 2011 Administrative Child Support and Medical Support Order issued April 4, 2011, remain in full force and effect.

DATED this 18th day of August, 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 6th 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.]