

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

IN THE MATTER OF:)

J W. O)

OAH No. 11-0386-CSS

CSSD No. 001136730

DECISION AND ORDER

I. Introduction

The obligor, J W. O, appeals a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on August 12, 2011. The obligee children are X, 11, and Y, 5. The other party is N S. L.

The formal hearing was held on October 19 and December 29, 2011. Mr. O appeared by telephone for both hearings; Ms. L participated in the second hearing. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded.

Based upon the record and after careful consideration, Mr. O's child support is set at \$1,349 per month for two children, effective July 1, 2011, and ongoing.

II. Facts

A. Procedural History

Mr. O's child support obligation for X and Y was established at \$753 per month in January 2009.¹ On May 31, 2011, Mr. O initiated a modification review of the order.² On June 8, 2011, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.³ Mr. O did not provide income information.⁴ On August 12, 2011, CSSD issued a Modified Administrative Child Support and Medical Support Order that set Mr. O's modified ongoing support at \$1,261 per month for two children, effective July 1, 2011.⁵ Mr. O filed an appeal on September 30, 2011.⁶

1 Exh. 1.

2 Exh. 2.

3 Exh. 3.

4 Pre-hearing brief at pg. 1.

5 Exh. 4.

6 Exh. 5.

B. Material Facts

Mr. O and Ms. L are the parents of X, 11, and Y, 5. Mr. O and his wife, B, have an infant child in the home. Mr. O also has a child a few months older than Y, named D. She entitles him to a prior child deduction as to Y only.

The children live the majority of the time with Ms. L. She also has an older child named S in the home, who would qualify Ms. L for a prior child deduction.

Mr. O is employed on the North Slope working a 2 weeks-on/ 2 weeks-off schedule. He submitted paystubs that show he had earned \$68,038 through October 2, 2011.⁷ From that year-to-date figure, Mr. O's total annual earnings for 2011 are estimated at \$90,717.32.⁸ In addition, he was estimated to receive Native corporation dividends of \$1,136.50 plus the PFD, for total annual income of \$93,027.82.⁹

Ms. L is not currently working. According to records maintained by the Alaska Department of Labor and Workforce Development, she has earned wages during six of the last ten years. Her overall total income has been \$27,500.75, which averages \$4,583.46 for each of those six years. In addition to this average wage, Ms. L receives Native corporation dividends of \$1,150 on a yearly basis and the 2011 PFD of \$1,174.¹⁰ On top of the earnings figures, Ms. L received unemployment benefits totaling \$8,999.20 during four separate years.¹¹ The average of her unemployment figures is \$2,249.80 per year.¹² This should be added to her income from employment and dividends. All of these figures total \$9,157.26¹³ – this is Ms. L's estimated annual income.

Although the children live a majority of the time with Ms. L, they do spend overnights with Mr. O when he is home from his work rotation. He testified he has them an average of ten overnights per month, which is 120 overnights per year, or 33% shared custody.¹⁴ In addition to his testimony, Mr. O submitted affidavits supporting his testimony that he exercises shared custody of the children from J P, his wife's sister-in-law; DA K, his wife's sister; and K G, his

⁷ Exh. A at pg. 2.

⁸ $\$68,038 \div 9 \text{ months} = \$7,559.78 \times 12 \text{ months} = \$90,717.32.$

⁹ Exh. 10.

¹⁰ See CSSD's Post-Hearing Brief at pg. 1.

¹¹ Exh. 7 at pgs. 2-3.

¹² $\$8,999.20 \div 4 = \$2,249.80.$

¹³ $\$4,583.46 + \$1,150 + \$1,174 + \$2,249.80 = \$9,157.26.$

¹⁴ $10 \times 12 = 120/365 = 0.32876 = 33/100 = 33\%.$

cousin.¹⁵ Ms. L disputes Mr. O's testimony about shared custody, but she did not submit any affidavits or letters from witnesses in support of her claim.

III. Discussion

A. Controlling Law

Child support orders may be modified upon a showing of "good cause and material change in circumstances."¹⁶ 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. Mr. O's child support has been \$753 per month, as set in 2009. Thus, a child support calculation of \$865.95 or more would be sufficient to warrant modification in this case.¹⁷

A modification is effective beginning the first of the next month after CSSD issues a notice to the parties that a modification has been requested.¹⁸ In this case, the notice was issued on June 8, 2011, so a modification would be effective as of July 1, 2011.¹⁹

In a child support matter, the person who files the appeal has the burden of proving that the division's order was issued in error.²⁰ Mr. O filed the appeal, so he must prove by a preponderance of the evidence that the Modified Administrative Child Support and Medical Support Order was erroneous.²¹

B. Calculating the Parties' Income Figures

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." Thus, Mr. O's child support obligation is calculated from the total of his income from earnings, his Native corporation dividends, and the yearly Permanent Fund dividend. CSSD estimated Mr. O's total 2011 income from all sources by adding to his year-to-date income an estimate of the earnings he would receive from the time of his last paystub to the end of the year. His 2011 year-to-date earnings through October 2nd were \$68,038, an average of \$7,559.78 per month for the nine months from January through the

¹⁵ Exh. A. at pgs. 4-6.

¹⁶ AS 25.27.190(e).

¹⁷ \$753 x 1.15 = \$865.95.

¹⁸ 15 AAC 125.321(d).

¹⁹ Exh. 3.

²⁰ 15 AAC 05.030(h).

²¹ 2 AAC 64.290(e).

end of September. CSSD multiplied that monthly average times 12 months to arrive at the estimated yearly figure of \$90,717.32, to which the agency added his Native corporation dividends and the 2011 PFD. His total income from all sources is correctly estimated at \$93,027.82.

CSSD treated Ms. L's income somewhat differently. In a telephone conversation that occurred between the first and second hearings, Ms. L apparently told CSSD that she last attended college four years ago and does not have a degree, but were she to become employed again she would attempt to earn \$13 per hour as a secretary.²² Based on their conversation, CSSD claimed "there is no reason for [Ms. L] not to work,"²³ and requested that the administrative law judge make a finding that Ms. L is voluntarily and unreasonably unemployed. CSSD proposed that her annual income be based on her earning \$13 per hour, which is \$27,040 annually.²⁴

If a parent is found to be voluntarily and unreasonably unemployed, his or her child support may be calculated from that parent's "potential income," which should be based on his or her "work history, qualifications and job opportunities."²⁵ This treatment may also be applied to the custodian's portion of a shared custody support amount.

In cases in which CSSD is claiming voluntary unemployment, the court or administrative law judge must determine whether the parent has engaged in voluntary conduct "for the purpose of becoming or remaining unemployed."²⁶ In addition to the question whether the parent's lack of work is voluntary, it is also necessary to determine whether the parent's unemployment is unreasonable. An integral part of the analysis is whether the parent's lack of employment is a result of "economic factors," as in being laid off, or of "purely personal choices."²⁷ It is not necessary to prove the individual was purposefully avoiding a support obligation, or acting in bad faith, in order to impute income to a parent.²⁸ The commentary to Civil Rule 90.3 directs

²² See CSSD's Post-hearing Brief at pg. 1.

²³ *Id.*

²⁴ \$13 x 2080 hours per year = \$27,040. See Exh. 9.

²⁵ Civil Rule 90.3(a)(4).

²⁶ *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

²⁷ *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

²⁸ *Kowalski*, 806 P.2d at 1371.

that tribunals adjudicating child support “shall consider the totality of the circumstances in deciding whether to impute income to a party based on voluntary unemployment.”²⁹

After careful consideration, CSSD’s request to have Ms. L found voluntarily and unreasonably unemployed is denied. An adequate determination of the “totality of the circumstances” regarding Ms. L cannot be made. CSSD’s evidence is not sufficient to make such a critical finding of fact about the custodian based on statements she may have made to the agency representative during a private telephone conversation. The information in CSSD’s Post-Hearing Brief did not come into the record by oath or affirmation – either through Ms. L’s testimony or a CSSD affidavit – nor was it submitted via business records such as tax returns, paystubs or the Alaska Department of Labor database. Most importantly, Ms. L did not have the opportunity to respond to CSSD’s claim that she is voluntarily and unreasonably unemployed. As a result, CSSD’s request must fail. At this point, the best evidence of Ms. L’s income earning potential is the report submitted from Alaska Department of Labor and Workforce Development records accessed by CSSD, and reported to the tribunal in affidavit form. As discussed above, Ms. L’s estimated annual income for the purpose of calculating a shared custody support amount is \$9,157.26.

C. Shared Custody

Where parents exercise shared custody of their children, Civil Rule 90.3 provides that child support is to be calculated differently than where one parent has primary custody. In general, and depending on the percentage of time each parent has overnight visitation, the parent obligated to pay child support in a shared custody situation would have a somewhat lower monthly support amount than where one parent exercises 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.^[30]

²⁹ Civil Rule 90.3, Commentary III.C.

³⁰ Civil Rule 90.3(f)(1).

In order for a visitation day to count toward the required 30% of the year, the children must stay overnight with the respective parent.³¹ One year is equal to 365 days, so 30% of the year equals 110 overnights.³² This is the minimum number of overnights needed on an annual basis to reach the threshold definition of shared custody.

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. In the absence of a written agreement, the parties' actual periods of overnight custody determine whether shared custody exists and, if so, what percentage of shared custody each party exercises.

The parent asserting that shared physical custody exists has the burden of proof by a preponderance of the evidence.³³ Mr. O and Ms. L did not execute a written agreement for shared custody, so Mr. O must prove that he had the children at least 30% of the time in order to meet the minimum requirements for a shared custody calculation.

Based on all of the evidence presented regarding the issue of shared custody, Mr. O met his burden of proving he exercises shared custody of X and Y while he is home from his job rotations. Mr. O testified, and three other individuals submitted affidavits, that he has the children during his time off work from the North Slope. He stated the children average about 10 days per month staying with him. One witness statement indicated this arrangement has been ongoing for about two years.³⁴

Ms. L insisted Mr. O does not exercise shared custody. During the second hearing she agreed to provide copies of letters from two individuals – S N and C W – whom she claims had already provided letters that Mr. O does not exercise shared custody of the children. However, nothing was received from Ms. L after the supplemental hearing, nor has she contacted the OAH about providing the letters. The bulk of the evidence on shared custody thus supports Mr. O's position. As a result, his child support obligation should be calculated based on him having X and Y 33% of the time.

31 Civil Rule 90.3, Commentary V.A.

32 $365 \times .30 = 109.5$ (rounded to 110).

33 See 2 AAC 64.290(e).

34 Exh. A at pg. 6.

Shared custody child support is calculated by determining each parent's primary custody child support obligation to the other parent, as if each parent had primary custody of the child(ren). The figures are then inserted into a mathematical formula that calculates the paying parent's shared custody child support amount.

Mr. O's primary custody support amount for two children in 2011 has been correctly calculated by CSSD at \$1,421 per month in its Post-Hearing Brief. Ms. L's primary custody support obligation for two children, based on her earnings history, various dividends and unemployment benefits, is \$160 per month.³⁵ Inserting the parties' respective primary custody support amounts into the shared custody formula results in Mr. O being obligated to pay \$1,349 per month.³⁶

IV. Conclusion

Mr. O met his burden of proving he exercises shared custody of X and Y, so his child support should be calculated using the shared custody formula. Combining Mr. O's primary custody support amount of \$1,421 per month for two children, and Ms. L's primary custody support amount of \$160 per month for two children, yields a shared custody calculation of \$1,349 per month for two children. This figure is correct and should be adopted.

V. Child Support Order

- Mr. O is liable for child support for X and Y in the amount of \$1,349 per month for two children, effective July 1, 2011, and ongoing;
- All other provisions of CSSD's Modified Administrative Child Support and Medical Support Order dated August 12, 2011, remain in full force and effect.

DATED this 30th day of January, 2012.

By: Signed _____
Kay L. Howard
Administrative Law Judge

³⁵ Attachment A. Ms. L is also entitled to a deduction for having a prior child in the home.

³⁶ Attachment B.

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 17th day of February, 2012.

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

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