

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

IN THE MATTER OF:)

B N. M)

) OAH No. 11-0398-CSS

) CSSD No. 001164408

DECISION AND ORDER

I. Introduction

This appeal will establish Mr. M's child support obligation commencing December 2009 and ongoing. It is treated as Mr. M's challenge to a denial of his request for an administrative review of the December 21, 2010 Administrative Child Support and Medical Support Order. In June 2011, this matter was remanded to CSSD directing it to conduct an administrative review. CSSD's failure to complete the administrative review and instead issue a Modified Administrative Child Support and Medical Support Order has been just one of the challenges presented in this matter. The custodian of record is L B and the obligee children are W and T.

The December 21, 2010 order calculated Mr. M's monthly support with Ms. B having primary custody of the two children. The primary custody calculation resulted in Mr. M's child support obligation for two children being set at \$281 per month, effective September 1, 2010 and ongoing, with arrears owing in the amount of \$2,298 for the period from December 1, 2009 through August 31, 2010. This order is incorrect. It fails to consider that Mr. M's income is means-based and that Ms. B does not have primary custody of T.

The record supports a finding that Mr. M's situation presents special circumstances of the type contemplated by Alaska Rule Civil Procedure 90.3(c) and as a result, the Administrative Child Support and Medical Support Order should be amended to reflect that Mr. M's monthly support obligation be set at \$15 per month, effective December 1, 2009 and ongoing.

II. Facts

Procedural History

On December 21, 2010, CSSD issued an Administrative Child Support and Medical Support Order establishing Mr. M's support obligation for two children.¹ On January 12, 2011,

¹ Exh. 1.

Mr. M filed a Request for Modification.² Because this was an establishment proceeding, the correct procedural step would have been for him to request an administrative review. CSSD represents that it issued a Response to Request for Modification Review on January 13, 2011, informing Mr. M of the proper procedure.³

On February 1, 2011, Mr. M filed a second Request for Modification.⁴ In response, CSSD issued a Notice of Petition for Modification of Administrative Support Order requesting financial information from the parties.⁵ Mr. M did not provide the information requested and for this reason the request for modification review was denied.⁶ Mr. M appealed, contending that CSSD overstated his income and a review was appropriate.⁷ A hearing was held and it was agreed that the undersigned should remand the appeal to CSSD with instructions that it conduct an administrative review. The order was issued on June 30, 2011.⁸

For reasons not clear from the record, on July 11, 2011, CSSD, rather than comply with the remand order, instead issued another Notice of Petition for Modification of Administrative Support Order.⁹ A modification review was conducted and CSSD issued a Modified Administrative Child Support and Medical Support Order on September 14, 2011. This order provided that due to divided custody, Ms. B owed support, but that Mr. M had not requested services from CSSD.¹⁰ Ms. B appealed, challenging the propriety of the support order and questioning why she should have to pay child support.¹¹ CSSD considered the long history in this case and concluded that the September 14, 2011 Modified Administrative Child Support and Medical Support Order was not valid. It requested additional information from the parties in order to determine the income of each parent and their custody arrangements. Neither party provided the requested information. Subsequent orders provided them with an opportunity to submit evidence in support of their respective positions. Often only one party would participate

² Exh. 2.

³ The document provided by CSSD is insufficient to establish that a response was sent or even what information was contained in the document if it was provided to Mr. M. Exh. 3.

⁴ Exh. 4.

⁵ Exh. 5.

⁶ Exh. 6.

⁷ Exh. 7.

⁸ Exh. 8.

⁹ Exh. 9.

¹⁰ Exh. 10.

¹¹ Exh. 11.

in a hearing. At the last hearing, Ms. B did not answer her telephone and the matter moved forward without her active participation. The record closed February 1, 2012.

1. Material Facts

The unchallenged testimony established that Mr. M is disabled and receives “means-based” Social Security Income. Mr. M’s testimony also established the following living arrangements for the two children:

December 2009 – May 2010	Both children with Ms. B.
June 2010 – August 2010	One child with each parent.
September 2010 – March 2011	Both children with Ms. B.
April 2011 – November 2011	One child with each parent.
December 2011 and ongoing	Both children with Ms. B.

At the November 29, 2011 hearing, Ms. B testified that she had been told that T was living with an older sister. Ms. B also informed the tribunal that she had quit her job and would begin to receive unemployment in January of 2012.

Neither parent has applied for Children’s Insurance Benefits (CIB) from the Social Security Administration. The custodial parent should apply, as a CIB payment would provide additional funds for the children.

According to Department of Labor records, Ms. B earned \$14,664.80 in the first three quarters of 2011 and she reported to public assistance that she earned \$2,438.43 in November. Mr. M thought she may also have had income from repairing nets but he had no evidence to support his allegation.

Finally, both parents have applied for public assistance for one or both children since December 2009.

III. Discussion

This decision is based on the best information available, given the parties’ reluctance to participate. For example, at the November 29, 2011 supplemental hearing, evidence was presented that tended to establish that at the time, both parents may have exercised divided custody, but that Ms. B may now have primary custody of both children. When asked to provide school records or statements from individuals with personal knowledge of where the children lived during what periods, Ms. B accepted the offer to leave the record open for receipt of these

documents. An order was issued explaining the type of evidence that a party could submit that would be helpful in resolving the custody issue. No additional documents were provided.

A final hearing was held to provide the parties with one more opportunity to present evidence. Mr. M provided evidence regarding his income from Social Security. Means-based income, such as social security disability, is not considered income for purposes of child support.¹² Mr. M participated by telephone. He provided testimony regarding T's living arrangements and his social security disability income. Ms. B did not participate.¹³

The hearing concluded with instructions to CSSD to prepare new calculations based on Mr. M's income and T's living arrangements. CSSD submitted a post hearing brief. Much of the information contained in the post hearing brief and relied upon by CSSD was not offered as evidence in this proceeding and concerns a separate matter regarding Ms. B.

1. Case No. 001174888 Ms. B's Support Obligation

CSSD, in its post hearing brief, has attempted to "piggy back" child support agency Case No. 001174888 which it contends was opened by the state due to Mr. M applying for public assistance for T. There is no evidence in this record establishing the existence of the other case or that in the other case CSSD issued the proper notice that would permit it to issue and enforce a child support order. Nor can it be concluded that there was proper notice to Ms. B in this matter that her support obligation would be adjudicated here. Therefore, CSSD's proposal that a hybrid calculation be accepted and as a result that "Ms. [B] would owe on Case No. 001174888 \$30 per month from January 1, 2010 through November 30, 2011 . . . [s]hould both children go live with Mr. [M], Ms. [B] would owe \$427 per month on Case No. 001174888"¹⁴ is rejected. This is especially so when, as here, Ms. B has provided testimony that could support a finding that she is voluntarily and unreasonably unemployed or under employed and it is unclear whether CSSD has made any such finding.

¹² Alaska Rule Civil Procedure 90.3 Commentary III.A.

¹³ She was called at the telephone number contained in the Office of Administrative Hearings file. Ms. B had been reached at that number for prior hearings.

¹⁴ CSSD Post-hearing Brief at 2 (emphasis in original) (CSSD's brief refers to a Ms. L and Mr. M. It is reasonable to conclude that this is a clerical error and CSSD was referring to Ms. B and Mr. M).

2. Case No. 001164408, Mr. M's Support Obligation

A parent is obligated both by statute and at common law to support his or her children.¹⁵ Civil Rule 90.3(a) provides that an Obligor's child support amount is to be calculated based on his or her "total income from all sources." Mr. M's income, other than the permanent fund dividend, is from means-based public assistance which is not included as income for purposes of child support.¹⁶ Therefore, for purposes of child support calculations, Mr. M has no income apart from his permanent fund dividend. However, this does not relieve him of his obligation to support his children.

How support is calculated depends upon the type of support exercised by the parents or custodians of the children.¹⁷ Divided custody exists when parents each have primary custody of different children.¹⁸

Here, Ms. B has primary custody of W, and as a result, Mr. M has an obligation to provide support for W. The amount of time T spends with each parent is inconsistent and neither parent maintains a record of her visits. There are also times when, with her father's permission, she lives with her older sister. There is no verbal or written agreement between the parents. During any month there may be primary, divided, or hybrid custody. This makes it extremely difficult to determine any calculation of future child support. Because of how the parents resolve issues surrounding T's physical custody, it is difficult to make findings that accurately reflect what her future custody situation might be. Mr. M appears to exercise control over where T lives and the amount of time spent with each parent supports a finding that it is more likely than not that the custody arrangement is closest to divided physical custody.

The commentary to Alaska Rule Civil Procedure 90.3 explains that setting child support for divided custody situations is a two-step process. First, support must be calculated using the formula found in Alaska Rule Civil Procedure 90.3(b)(3), as the Division did in its Post-Hearing

¹⁵ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁶ Alaska Rule Civil Procedure 90.3 Commentary III.A.

¹⁷ Alaska Rule Civil Procedure 90.3(a), (b) (recognizing four types of custody [primary, shared, divided, and hybrid] and identifying a calculation for each type). *See also* Alaska Rule Civil Procedure 90.3(f) defining types of custody.

¹⁸ Alaska Rule Civil Procedure 90.3(f).

Brief. This formula offsets the amount each parent would pay the other for the children in the other parent's custody.¹⁹

The second step in determining divided custody support is for the tribunal to carefully consider whether the support amount should be varied under paragraph (c)(1)(A). Divided custody should be treated as an unusual circumstance under which support should be varied if such a variation is "just and proper."²⁰

This decision addresses only Mr. M's support obligation. As demonstrated by the division's divided custody calculations at exhibits 15 and 16, in those months when Mr. M has T or both children, his monthly support obligation will be fully offset by Ms. B's support obligation. However, there are periods of time when Ms. B has custody of both children and Mr. M's child support obligation is not offset.

Based on the totality of the circumstances, this appeal presents clear and convincing evidence that it would be just and proper to vary the amount of support owed by Mr. M. Mr. M receives social security disability. His ability to change his living situation is restricted by his disabilities. To avoid manifest injustice, Mr. M's child support amount should be varied to \$15 per month. While even this small amount will tax Mr. M's limited resources, he will still be contributing to the support of his children.

IV. Conclusion

The totality of the circumstances supports a finding based on clear and convincing evidence that it would be manifestly unjust for Mr. M to pay \$50 per month in child support for two children. Therefore, it is just and proper to vary the amount of child support to \$15 per month for both children, effective December 2009 and ongoing.

A copy of this order should be placed in Case No. 001174888, regarding Ms. B's support obligation.

V. Child Support Order

- Mr. M's child support for two children is \$15 per month effective December 1, 2009, and ongoing;
- In the event any of the obligee children reach the age of emancipation before any

¹⁹ Alaska Civil Rule 90.3, Commentary V.D.

²⁰ *Id.*

other action is undertaken in this case, Mr. M's child support should remain at \$15 per month unless further reviewed;

- Other than as amended by this Decision and Order, all other provisions of CSSD's Administrative Child Support and Medical Support Order issued December 21, 2010, remain in full force and effect.

DATED this 6th day of February, 2012.

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 27th 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.]