

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

IN THE MATTER OF:)

M J. S)

OAH No. 11-0460-CSS

CSSD No. 001175626

DECISION AND ORDER

I. Introduction

M J. S has appealed an Amended Administrative Child and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on November 10, 2011. The obligee children are J, 15; and A, 12. The other party and custodian of record is C P.

The formal hearing was held on January 4 and January 18, 2011. Mr. S appeared in person; Ms. P participated by telephone. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based upon the record and after careful consideration, Mr. S's child support is set at \$966.21 per month for two children, based on the parties exercising 70/30 shared custody of J and A, with Mr. S having the 30% component.

II. Facts

A. Procedural History

Ms. P applied for child support services for J and A in May 2011.¹ CSSD initiated a child support action on their behalf, which culminated in the division issuing an Amended Administrative Child and Medical Support Order on November 10, 2011.² That order set Mr. S's ongoing child support at \$1,323 per month, with arrears totaling \$9,261 from May 2011 through November 2011.³ Mr. S appealed, asserting that CSSD used incorrect income figures, as he is no longer able to perform his usual occupation because of failing eyesight, and the parties share custody of the children.⁴

¹ Exh. 1.

² Exh. 6.

³ *Id.*

⁴ Exh. 7.

B. Material Facts

Mr. S and Ms. P have two children, J and A. The children live most of the time with Ms. P but the parties stipulated to this being a shared custody case in which Mr. S has them overnight approximately 30% of the time.

Mr. S is currently unemployed. His previous occupation involved working with fiber optic cable for a telecommunications company. He last worked in February 2007. Mr. S claims that he is unable to work in his usual field because he is no longer able to discern red, orange and yellow colors, and as a result, is not able to work with fiber optic cable any longer. In addition, he stated he has problems with his back and said his chiropractor has indicated it is probably fused. Finally, Mr. S stated he has gout in his left big toe and cannot climb a light pole or even walk very well at this time.

Mr. S submitted documents from Dr. A E, his eye doctor, that confirm he has difficulty with red, orange and yellow colors, and that he also has cataracts that enhance his difficulty with those colors. However, the doctor stated that Mr. S “passed” all of the color plates in spite of this difficulty. The doctor’s recommendation is for Mr. S to get glasses for both distance and close-up use for increased visual acuity and that he have annual eye exams to review the status of his cataracts.⁵ Mr. S was given the opportunity to call Dr. E as a witness during the hearing, but according to the obligor, the doctor did not believe presenting testimony at the hearing would clarify her testimony any better than her correspondence, so he chose not to call her to testify.

Mr. S provided a copy of an MRI report prepared by his chiropractor in 2005. The report noted he has some “degenerative changes of the SI joints”, but that condition was not explained and the report does not address Mr. S’s ability to work. It does not appear from the report that the doctor who prepared it considered Mr. S to be disabled from employment.⁶ Mr. S did not submit any evidence regarding his claim that he has gout in his left big toe.

Mr. S was last employed in 2007. Since then he has supported himself on unemployment benefits, savings and his retirement account. He collected unemployment benefits after he stopped working in 2007 and when those expired he began withdrawing lump-sum amounts from his retirement fund. For three years beginning in 2009, Mr. S withdrew \$50,000 each year from this account. He acknowledged at the hearing that he intends to do the same thing in 2012. He

⁵ Exh. A at pg. 3.

⁶ See Exh. A at pg. 1.

has approximately \$73,000 remaining in this account, so at the end of 2012, assuming he withdraws \$50,000, Mr. S will have about \$23,000 left.

In spite of his difficulties with his vision and back, Mr. S is able to work. He twice asserted during the hearing that he is more than capable of going to work for an employer such as Wal-Mart or Home Depot and earning \$15 per hour. He chooses not to work, and to rely instead on his retirement account to support himself. Because Mr. S has chosen not to work, he is voluntarily unemployed.

The parties stipulated that they exercise shared physical custody of the children, with Ms. P having them 70% of the time and Mr. S having them 30% of the time. As a result, a shared custody calculation should be utilized in this appeal case.

Ms. P is employed at a medical facility. Her year-end paystub indicates her total income from earnings for 2011 was \$7,723.34.⁷ Adding the Permanent Fund dividend of \$1,174 results in her having total annual income for 2011 of \$9,117.14.⁸ If she were obligated to pay child support to Mr. S based on him having primary custody of the children, her support obligation would be \$194 per month for two children.⁹

The retirement deduction that Mr. S takes from his retirement account on an annual basis is the measure of his annual income for child support purposes. This figure is \$50,000. When the Permanent Fund dividend of \$1,174 is added, this results in total annual income of \$51,174. Were Mr. S obligated to pay support to Ms. P on a primary custody basis, his support obligation would be \$1,003 per month for two children.¹⁰

Inserting the parties' primary custody obligations into a shared custody calculation results in Mr. S being obligated to pay support of \$966.21 per month to Ms. P for the support of the children.¹¹

III. Discussion

Mr. S's appeal challenges CSSD's determination that Ms. P had primary custody of J and A when this support obligation was established. The custody issue is no longer contested, as the parties have stipulated that they share custody of the children on a 70/30 basis, with Mr. S having

⁷ Exh. 11.

⁸ Exh. 12 at pg. 3.

⁹ *Id.*

¹⁰ Exh. 12 at pg. 2.

¹¹ Exh. 12 at pg. 1.

them 30% of the time. The remaining issue to be decided involves a determination of Mr. S's total income for the shared custody child support calculation.

Mr. S claims that CSSD used incorrect income figures for the calculation in the Amended Administrative Child and Medical Support Order. He argues that he is not capable of earning his previous income working in telecommunications because his eyesight is failing and he can no longer work with fiber optic cable.

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." Mr. S is not currently working. CSSD set his annual income at \$74,880, which was obtained by multiplying his previous hourly wage of \$36 per hour by 2,080, the usual number of hours a full-time, 40-hour per week employee works in one year. This income figure resulted in the child support amount of \$1,323 per month for two children that CSSD adopted in the Amended Administrative Child and Medical Support Order. This method should not be used because Mr. S has not earned income in that amount for several years.

An obligor parent has the burden of proving his or her earning capacity.¹² An obligor who claims he or she cannot work or pay child support because of a disability or similar impairment must provide sufficient proof of the medical condition such as testimony or other evidence from a physician.¹³ Mr. S did not meet his burden of proving that he is disabled from work. It is not disputed that he is having difficulty discerning red, orange and yellow colors, and that this has affected his ability to work with fiber optics. Telecommunications work is not all that is available to him, however. Mr. S stated more than once during the hearing that he could easily go out and find a job paying \$15 per hour, yet he chooses to support himself by slowly withdrawing all of the funds from his retirement account.

This decision includes a finding of fact that Mr. S is voluntarily unemployed.¹⁴ Were he not choosing to withdraw and live on \$50,000 annually from his retirement account, his child support obligation would have been determined based on the finding of voluntary unemployment. Such a determination is not necessary because of the unique facts of this case.

¹² *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

¹³ *Id.* at 1371.

¹⁴ *See* page 3.

The figure that should be used for Mr. S's income for the child support calculation is the annual \$50,000 deduction he takes from his retirement account. Granted, that fund will probably be depleted soon after one year has passed and his child support obligation will have to be modified sometime thereafter.¹⁵ But at this point in time, \$50,000 per year is the amount of money Mr. S actually withdraws and uses to support himself. The commentary to Civil Rule 90.3 states that "total income from all sources" is a phrase that "should be interpreted broadly to include benefits which would have been available for support if the family had remained intact."¹⁶ Were this family intact with Mr. S withdrawing his retirement funds, as he is doing now, those monies would be available for and most likely would be used to support J and A. Thus, this is the figure that should be used in Mr. S's support calculation.

Mr. S and Ms. P have stipulated that they exercise 70/30 shared physical custody of the children. 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. Each parent's primary custody support obligation to the other is determined based on the income figures for that parent for the year in question. Then the resulting figure is inserted into the shared custody formula.

Mr. S's total income from all sources is \$51,174, including the PFD. Were Mr. S obligated to pay support to Ms. P on a primary custody basis, his support obligation would be \$1,003 per month for two children.¹⁷

Ms. P's total income from all sources for 2011 was \$9,117.14, including the PFD.¹⁸ If she were obligated to pay child support to Mr. S based on him having primary custody of the children, her support obligation would be \$194 per month for two children.¹⁹

When the parties' primary custody support amounts and shared custody percentages are inserted into the shared custody calculation, it results in Mr. S having a child support obligation of \$966.21, which is rounded to \$966 per month, effective as of May 2011, and ongoing.²⁰

¹⁵ Mr. S's withdrawals should not be used to set his ongoing amount into the future after his retirement account is empty.

¹⁶ Civil Rule 90.3, Commentary III.A.

¹⁷ Exh. 12 at pg. 2.

¹⁸ Exh. 12 at pg. 3.

¹⁹ *Id.*

²⁰ Exh. 12 at pg. 1.

One final matter should be addressed. Mr. S made a direct payment of \$500 to Ms. P for May 2011 that was not credited to him in CSSD's child support order. The parties requested that the payment be credited to him in this decision.

IV. Conclusion

Mr. S met his burden of proving by a preponderance of the evidence that CSSD's Amended Administrative Child and Medical Support Order was incorrect. His income has been corrected and the child support calculated based on shared custody. The resulting shared custody child support calculation of \$966 per month is correct and should be adopted.

V. Child Support Order

1. Mr. S is liable for child support for J and A in the amount of \$966 per month, effective May 2011, and ongoing;
2. Mr. S is entitled to a credit of \$500 for May 2011, which reflects the direct payment he made to Ms. P;
3. All other provisions of the Amended Administrative Child Support and Medical Support Order dated November 10, 2011, remain in full force and effect.

DATED this 10th day of February, 2012.

By: Signed _____
Kay L. Howard
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 March, 2012.

By: Signed
Signature
Angela M. Rodell
Name
Deputy Commissioner
Title

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