

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

In the Matter of:)
)
A J. B) OAH No. 12-0041-CSS
) CSSD No. 001167265
_____)

DECISION AND ORDER

I. Introduction

This matter is a Uniform Interstate Family Support Act case based on a petition from the State of South Dakota. The custodian of record is C L, and the obligee child is Y, who is approximately 3 years old.

Telephonic hearings were held on March 12, 2012 and April 30, 2012. The Child Support Services Division (CSSD) was represented by Child Support Specialist Erinn Brian.

Based on the evidence in the record, Mr. B' child support obligation should be set at \$209 per month from June 1, 2009 through December 31, 2009; \$554 per month from January 2010 through December 31, 2010; \$446 per month from January 1, 2011 through December 31, 2011; and \$329 per month beginning on January 1, 2012 and ongoing.

II. Facts

A petition pursuant to the Uniform Interstate Family Support Act was received by CSSD on April 12, 2010.¹ An Administrative Child Support and Medical Support Order was issued on December 17, 2011, setting Mr. B' child support obligation at \$518 per month for one child effective January 1, 2011, and identifying arrears in the amount of \$4,662 from April 1, 2010 through December 31, 2011.² Subsequently, CSSD became aware that Ms. L applied for services in May 2009.³ This information changed the amount of arrears, as the order would need to be modified to be effective June 1, 2009.

In addition to the change in effective date for 2009, Mr. B informed CSSD that he had two children from a prior relationship and sought to receive a deduction for those children. In support of his claim, he provided statements from several individuals who all wrote that Mr. B was involved with these two older children, took care of them, and exercised a 50% shared

¹ Exhibit 1.
² Exhibit 4.
³ Exhibit 5.

custody schedule.⁴ All three statements were notarized in the fall of 2011. None indicated when the custody schedule started. Several years prior, CSSD entered a child support order for the two older children in the amount of \$327 per month, with the custodian having primary visitation. The custodian eventually withdrew from services and CSSD was no longer involved in the collection of child support. Mr. B is involved in a court custody dispute involving these two children. Effective January 1, 2011, the court ordered 50/50 shared physical custody.

On September 23, 2011, Mr. B requested an administrative review.⁵ Based on the new information provided, CSSD issued an Amended Administrative Child and Medical Support Order on January 26, 2012 ordering Mr. B to pay \$404 per month for one child, effective February 1, 2012, with arrears of \$11,563 from June 1, 2009 through January 31, 2012.⁶ These calculations included deductions for children from a prior relationship.⁷ The deductions far exceeded the \$327 previously ordered by CSSD. The 2009 calculation performed for the January 25, 2012 order included a deduction for prior children in the home of \$386 per month. The 2010 calculation included a deduction for prior children in the amount of \$748 per month.

Mr. B appealed the amended order and requested a formal hearing.⁸ He believed CSSD overstated his income. CSSD prepared an extract of wages from the department of labor and Mr. B provided additional information regarding his income. This information resulted in the following determination:

Year	Total Wages ⁹	Resulting Child Support ¹⁰
2012	\$25,350.00	\$329
2011	\$35,712.00	\$404 ¹¹

⁴ Exhibit 8.

⁵ Exhibit 6.

⁶ Exhibit 12.

⁷ Exhibit 12 at 1.

⁸ Exhibit 14.

⁹ Exhibit 14 at 9 (2011 Federal Income Tax Return); Exhibit 15; and Testimony of Parties. The amounts do not include the Permanent Fund Dividend (PFD).

¹⁰ These amounts were calculated by CSSD based on the evidence received at the hearing using CSSD's online child support calculator. These amounts reflect all allowable income, including PFD, and deductions for prior children in the home. The deductions for prior children in the home for 2009 and 2010 are the deductions previously calculated by CSSD and contained in their January 25, 2012 Amended Administrative Child Support and Medical Support Order.

¹¹ The actual amount was \$446 per month. This was less than a 15% increase; therefore, the new support amount was not a presumptive material change in circumstance sufficient to warrant a change in the amount of support ordered. 15 AAC 125.321(b).

2010	\$39,425.45	\$404
2009	\$18,503.99	\$209

With the receipt of additional evidence through the hearing process (court ordered 50/50 shared custody of prior children) the parties narrowed the unresolved issues to the child support calculations for 2010 and 2011. Specifically, Mr. B contends that CSSD should base his support owing for 2010 and 2011 on his 2012 income, because that is the income that will be earned when the support is paid, and that CSSD should have provided a deduction for prior children commencing in 2010.

III. Discussion

A. Applicable Law

In a child support hearing, the person who files the appeal has the burden of proving that it is more likely than not that the division's order is incorrect.¹² There is no dispute that the January 26, 2012 order was incorrect. For example, Mr. B' actual earnings for 2011 exceeded the amount originally used by CSSD and his income for 2012 will be less than that used by CSSD. Also, the January 26, 2012 order did not take into account the court-ordered shared custody of two older children. Therefore, this order will address the amount of child support owing (arrears) for 2010 and 2011.

B. Income for Purposes of Calculating Child Support Owing in 2010 & 2011

Mr. B agrees that the amount of income identified at the hearing for the years in question is his actual income for those years. He contends that his arrears should be based upon 2012 income because he will be paying arrears with 2012 income (\$23,350), which is significantly less than that earned in 2010 (\$39,425.45) and 2011 (\$35,712). He also argues that his income in 2010 should be reduced because it was an extraordinary year.

CSSD and Ms. L contend that Mr. B' child support obligation for 2010 and 2011 should be based on the actual income earned in those years and it is only by doing so that the policy behind and objectives of child support can be fulfilled.

Child support is calculated as a percentage of the obligor parent's income from all sources.¹³ The obligation should be based on an estimate of what the parent will actually earn

¹² 15 AAC 05.030(h).

¹³ Alaska Rule Civil Procedure 90.3(a)(2).

when the support obligation is due.¹⁴ When looking at ongoing support, the amount is always somewhat speculative because the relevant income figure is expected future income.¹⁵ It is sometimes necessary to look at past earnings when making a determination of a parent's expected future income. This is why the rules recognize that when an obligor has had erratic income, "the court may choose to average the obligor's past income over several years."¹⁶ Conversely, when calculating arrears, the regulations provide that "total income from all sources is the actual annual income that the parent earned or received each calendar year for which arrears are sought to be established. . . ."¹⁷ Therefore, Mr. B' child support obligation for 2010 and 2011 will be based on his actual income earned in those years.

C. Deduction for Children of Prior Relationship

An obligor may receive a deduction for supporting a child from a prior relationship by either 1) actually paying support as required by a court order or administrative proceeding, or 2) the prior child actually lives with the parent."¹⁸

1. *Mr. B Lacks Evidence of Support Provided for his Prior Children*

There is an administrative order in place for Mr. B' prior children requiring that he pay support to the custodian in the amount of \$327 per month. The custodian in that case withdrew from services. Her withdrawal did not relieve Mr. B of his obligation to pay support in that amount. To determine whether Mr. B is entitled to a deduction in this case for support paid for prior children, it is instructive to look at the Department's regulations regarding how Mr. B could prove entitlement to a direct credit in the prior children's support case.

The Department's regulations provide that evidence of direct payments includes:

- (1) copies of ... cancelled checks and money orders;
- (2) bank statements indicating deposits or funds transfer;
- (3) receipts signed by the custodial parent; and
- (4) signed, notarized statements by the custodial parent, the obligor, or a third party with personal knowledge of the direct payment.¹⁹

¹⁴ Alaska Rule Civil Procedure, Commentary III.E.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 15 AAC

¹⁸ Civil Rule 90.3(a)(1)(C), (D).

¹⁹ 15 AAC 125.465(a).

An obligor may receive credit for in-kind contributions in one of two ways: 1) if the obligor is ordered to provide in-kind in lieu of monetary support, or 2) if the obligation is established by a support order, the parties have a written agreement to allow credit for the in-kind contribution and both parties agree to the dollar value of the contribution.²⁰

Both regulations require proof by clear and convincing evidence. However, because this is not the case in which Mr. B would be seeking a credit, but rather, he is seeking a deduction, it would be inappropriate to hold him to the higher clear and convincing burden of proof. It will be sufficient if Mr. B can establish that it is more likely than not that he *could* receive a credit in the prior children's case.

Mr. B testified that he does not have receipts or other evidence of child support because he and the custodian in the other case had an unwritten agreement. The notarized witness statements he submitted establish only a general knowledge, not direct personal knowledge of a direct payment to the custodian in that other proceeding. He has failed to present evidence of the type anticipated by Department regulations that would support a finding of a credit against an obligor's child support obligation.

2. Mr. B has not Established that His Prior Children Lived with Him in 2010

Mr. B' testimony that he exercises 50/50 shared custody of his prior children is partially undisputed. As to 2011, his testimony is corroborated by court documents and notarized statements and is unchallenged by Ms. L. Therefore, what is at issue is whether he is entitled to a deduction for prior children in the home in 2010.

Mr. B testified that he had the prior children week on and week off in 2010, but he could not recall when that arrangement actually began. In addition to his testimony, he offers the notarized statements asserting that he takes care of his children on a week on and week off basis. Ms. L testified that when she and Mr. B were together, he had the prior children on the weekends. Her statement went unchallenged.

Ms. L's testimony references a period of time that is not at issue in this matter and is self serving, as is Mr. B' testimony. However, Ms. L's testimony is instructive in that it establishes that shared custody was not in effect in 2008. The notarized statements do not identify when the 50/50 arrangement commenced. Also, because they were written well after the January 2011 court ordered shared custody, is more likely that the statements were submitted to the court to

²⁰ 15 AAC 125.470(a).

establish that Mr. B was complying with the custody schedule.²¹ The evidence presented does not establish by a preponderance of the evidence that Mr. B had and exercised shared custody of the prior children.

D. Arrears

When establishing child support and calculating arrears, the Department of Revenue's regulations provide specific instruction. The first step is to calculate the support obligation under Civil Rule 90.3(a) for the first year for which support is being established. Civil Rule 90.3(a)(1) provides that an obligor's child support amount is to be calculated from his or her "total income from all sources," minus allowable deductions. Here, the first year is 2009. The parties agreed that the appropriate amount of support for 2009 was \$209 per month.²²

Next, it must be determined whether a material change in circumstances occurred justifying a modification of support for each subsequent year. A material change is presumed if there is a 15% or more increase or decrease in the amount of support owing. If there is a material change, then the support amount will be modified.²³ Because the parties agreed that \$209 was an appropriate monthly support amount for 2009, it is from that amount that a material change in circumstance will be measured.

In 2010, Mr. B had an annual gross income totaling \$40,706.²⁴ As presented at Appendix A, after allowable deductions²⁵, Mr. B' child support for one child is \$554 per month. This is more than a 15% increase from the previous support amount of \$209 per month, so an upward modification is appropriate.

In 2011, Mr. B had an annual gross income totaling \$36,886.²⁶ The parties agree that Mr. B is entitled to a deduction for prior children in the home in the amount of \$348.50 per month. As presented at Appendix B, after allowable deductions²⁷, Mr. B' child support for one child is

²¹ Had Mr. B made them available to testify, the declarants could have explained their statements.

²² This figure includes a deduction for prior children. As discussed above, Mr. B' failed to establish that he is entitled to a deduction for prior children in 2009 and 2010. However, as the parties agreed to this number, it will not be disturbed.

²³ 15 AAC 125.105(e); 15 AAC 125.321.

²⁴ \$39,425 Wages + \$1,281 PFD = \$40,706.

²⁵ \$622.61 Monthly Allowable Deduction = \$357.06 Federal Income Tax + \$251.34 FICA + \$14.21 SUI.

²⁶ 35,712 Wages + \$1,174 PFD = \$36,886.

²⁷ \$842.14 Monthly Allowable Deduction = \$308.78 Federal Income Tax + \$168.14 FICA + \$16.72 SUI + \$348.5 Prior Child.

\$446 per month. This is more than a 15% decrease in child support and, for 2011, Mr. B' child support obligation should be reduced to \$446 per month.

IV. Conclusion

Mr. B has shown that the child support obligation originally calculated by CSSD was incorrect. When calculated based on Civil Rule 90.3(a), Mr. B' monthly child support obligation for one child from June 2009 through December 2009 should be \$209 per month; from January 2010 through December 2010, his monthly child support obligation for one child should be \$554 per month; from January 2011 through December 2011, his monthly child support obligation for one child should be \$446 per month; and effective January 2012 and ongoing, his monthly child support amount for one child should be \$329 per month.

V. Child Support Order

- Mr. B' child support obligation is set at \$209 per month for one child, effective June 1, 2009 through December 31, 2009;
- Mr. B' child support obligation is set at \$554 per month for one child, effective January 1, 2010 through December 31, 2010;
- Mr. B' child support obligation is set at \$446 per month for one child, effective January 1, 2011 through December 31, 2011;
- Mr. B' child support obligation is set at \$329 per month for one child, effective January 1, 2012 and ongoing;
- All other provisions of the January 26, 2012 Amended Administrative Child and Medical Support Order remain in effect.

DATED this 12th day of June, 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 29th day of June, 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.]