

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

IN THE MATTER OF:	)	
	)	OAH No. 12-0858-CSS
K L. W	)	CSSD No. 001178945
_____	)	

**REVISED DECISION AND ORDER**

**I. Introduction**

The obligor, K L. W, appealed an Amended Administrative Child and Medical Support Order that CSSD issued in his case on October 11, 2012. The child, named T, is six years of age. The custodian of record is J S. N.

The formal hearing was held on November 28, 2012, and December 14, 2012. Both parties appeared in person. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after careful consideration, Mr. W's request for a good cause variance under Civil Rule 90.3(c) based on financial hardship is granted. His child support is set at \$261 per month from August 2010 through September 2012; and \$0 per month from October 2012 forward, based on the court's order that the parties exercise 70/30 shared custody.

**II. Facts**

*A. Procedural History*

T became eligible for and began receiving state medical assistance in August 2010.<sup>1</sup> CSSD initiated the process of establishing Mr. W's child support obligation and issued an administrative child support order on July 2, 2012.<sup>2</sup> Mr. W requested an administrative review and both parties submitted documentary evidence.<sup>3</sup> On October 11, 2012, CSSD issued an Amended Administrative Child Support and Medical Support Order that set Mr. W's ongoing child support at \$261 per month, with arrears of \$9,371.92 from August 2010 through October 2012.<sup>4</sup> Mr. W appealed on October 29, 2012 and submitted additional evidence for the hearing.<sup>5</sup>

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<sup>1</sup> Exh. 10 at pg. 16.  
<sup>2</sup> Exhs. 1-5.  
<sup>3</sup> Exhs. 6-8.  
<sup>4</sup> Exh. 10.  
<sup>5</sup> Exhs. 11 & 12.

*B. Material Facts*

Based on the record as a whole, the following facts are established by a preponderance of the evidence based on the testimony of Mr. W, Ms. N and the documents submitted into evidence, as cited below.

Mr. W and Ms. N are the parents of T, 6. They have previously been in litigation regarding T's custody and care. In that litigation, the court resolved the issue whether the parties exercise shared custody: on December 14, 2012, the Superior Court entered an order that indicated "[c]hild support shall be calculable on a 50-50 basis through September 10, 2012, and on a 70-30 basis thereafter."<sup>6</sup> Mr. W is the parent with 70% physical custody, although the court's order contemplates that under certain conditions, Ms. N may be able to modify custody and return to a 50-50 split in the future.<sup>7</sup>

T was born in 2006. Mr. W and Ms. N remained in a relationship into early 2007, at which time they began sharing custody of their daughter. This administrative child support action arose in August 2010, upon Ms. N's application for Medicaid and/or public assistance benefits.<sup>8</sup> A significant amount of the record in this appeal concerns custodial issues the parties raised, but the court resolved these with its direction that CSSD calculate child support on a 50/50 basis up to September 2012, and on a 70/30 basis after that.

Mr. W is married. He works in the loan department of a local bank and L, his wife, is employed full time by the state of Alaska. They have a son in the home born in 2010. On a monthly basis, they pay \$1,105 for a mortgage payment and condo dues; \$1,000 for food; and have usual expenses for other household costs, insurance, entertainment, personal care items and medical expenses. They have two vehicles that were purchased in 2007 and 2008 and are paid for.<sup>9</sup> In addition, they have regular babysitting and child care expenses, student loan payments for the obligor's \$6,300 loan, and increased medical expenses for L for extensive dental work and regular care for chronic back problems.<sup>10</sup> Finally, Mr. W pays \$250 per quarter for T to

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<sup>6</sup> Findings of Fact and Conclusions of Law received December 17, 2012, pg. 11. At the hearing, the parties and CSSD stipulated that Mr. W's ongoing child support obligation would be effective as of October 1, 2012.

<sup>7</sup> *Id.* at pgs. 9-10.

<sup>8</sup> *See* Exh. 10 at pg. 16.

<sup>9</sup> Exh. 12 at pg. 1.

<sup>10</sup> Exh. 12 at pg. 2.

attend preschool and afterschool programs that enable him and his wife to work full-time. That quarterly cost averages out to \$83 per month.<sup>11</sup>

At the time this case arose in August 2010, Ms. N was unemployed. She had spent the several years prior to that time attending the California Culinary Academy in 2005 and UAA from 2006 through 2009. Her educational pursuits ultimately were not successful. Eventually, she received an “academic dismissal” in January 2012 from Charter College related to her attempt to obtain a paralegal certificate. Ms. N has financed her educational pursuits through various means, including permanent fund dividends and assistance from her parents. She has worked at several retail establishments in the past, including Coldstone Creamery, Habitat and Pier 1. Ms. N stated she does have a paralegal certificate but is not able to obtain it from Charter College because it has been red flagged and is on hold at this time.

Ms. N currently lives with her parents and has minimal living expenses. She does not pay for rent or food and her vehicle is paid for. She spends \$120 per month on gasoline and \$15 per month for medical prescriptions. Ms. N has approximately \$35,000 in various student loans and is currently paying on two of them.<sup>12</sup>

Mr. W does not object to the income figures CSSD used for him in the child support calculations. Accordingly, his 2010 income consisted of wages of \$38,793.50, plus the permanent fund dividend of \$1,281, for total annual income of \$40,074.50.<sup>13</sup> For 2011, his income consisted of wages of \$52,315.71, plus the permanent fund dividend of \$1,174, for total gross income of \$53,489.71.<sup>14</sup> Mr. W’s total annual income for 2012 was not known at the time of the hearing, so CSSD used the same figures as from 2011.<sup>15</sup>

In 2010, Ms. N’s income consisted of wages of \$3,075.38, plus the permanent fund dividend of \$1,281, for total income of \$4,356.38.<sup>16</sup> Ms. N did not have any earned income during 2011, so her total gross income consists of the permanent fund dividend of \$1,174.<sup>17</sup> CSSD used the same income figure for Ms. N for the beginning of 2012.<sup>18</sup> However, as of September 2012, CSSD imputed income to Ms. N in the amount of \$10 per hour times 2080

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<sup>11</sup> *Id.*  
<sup>12</sup> Custodian’s Exh. A.  
<sup>13</sup> Exh. 10 at pg. 7.  
<sup>14</sup> Exh. 10 at pg. 10.  
<sup>15</sup> See Exh. 10 at pg. 13.  
<sup>16</sup> Exh. 10 at pg. 8.  
<sup>17</sup> Exh. 10 at pg. 11.  
<sup>18</sup> Exh. 10 at pg. 16.

hours, the usual numbers of hours worked in one year. The result is income of \$20,800, plus the permanent fund dividend of \$878, for total gross income of \$21,678.<sup>19</sup>

When CSSD inserted the parties' respective income figures into the child support calculations for the time periods at issue, it resulted in a child support obligation for Mr. W in the amount of \$322 per month for 2010; \$463 per month for 2011 and for January 2012 through September 2012; and \$261 per month as of October 2012, and ongoing.<sup>20</sup>

With the exception of the ongoing child support calculation that begins on October 1, 2012, the above calculations are correct. As to the ongoing amount, CSSD based the calculation on 50/50 shared custody, but the court awarded the parties 70/30 shared custody beginning September 11, 2012, with Mr. W having the 70% portion.<sup>21</sup> Correcting the ongoing calculation based on 70/30 shared custody results in Mr. W owing \$0 per month as of October 2012.<sup>22</sup>

### **III. Discussion**

Mr. W requested the formal hearing in this matter. His primary challenge to the child support calculations is based on his assertion that Ms. N is voluntarily and unreasonably unemployed or underemployed and should have income imputed to her. He also requested a good cause variance under Civil Rule 90.3(c). As the appealing party, Mr. W has the burden of proving by a preponderance of the evidence that CSSD's Amended Administrative Child and Medical Support Order is incorrect.<sup>23</sup>

#### *A. Time Period of Obligation*

A parent is obligated both by statute and at common law to support his or her children.<sup>24</sup> In cases established by CSSD, the agency collects support from the date the custodial parent requested child support services, or the date public assistance or foster care was initiated on

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<sup>19</sup> Exh. 10 at pg. 14. This was done following the court's comments to Ms. N about the need for her to secure employment. See Findings of Fact and Conclusions of Law received December 17, 2012.

<sup>20</sup> Exh. 10 at pgs. 9, 12, and 15.

<sup>21</sup> Findings of Fact and Conclusions of Law dated December 14, 2012, at pg. 11.

<sup>22</sup> This calculation uses CSSD's income figures for the parties, taken from Exh. 10, pg.15; the only change is the shared custody percentage. It results in a child support amount of \$33 per month for Ms. N. Even though this calculation suggests Ms. N should be paying support, her obligation cannot be determined in Mr. W's case, but must be addressed in her own administrative case.

<sup>23</sup> 15 AAC 05.030(h).

<sup>24</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

behalf of the child.<sup>25</sup> Ms. N applied for Medicaid services in August 2010, so that is the first month in which Mr. W is obligated to pay support through CSSD.

*B. Child support calculation*

Civil Rule 90.3(a)(1) provides that an obligor's child support is to be calculated based on his or her "total income from all sources," minus mandatory deductions such as taxes and Social Security.

The primary issue from Mr. W's standpoint is Ms. N's income earning capacity. He asserts that Ms. N is voluntarily and unreasonably unemployed. If a parent is found to be voluntarily and unreasonably unemployed, his or her child support amount may be calculated from that parent's "potential income," which should be based on his or her "work history, qualifications and job opportunities."<sup>26</sup>

In cases in which voluntary unemployment becomes an issue, the court or administrative law judge must determine whether the parent has engaged in voluntary conduct "for the purpose of becoming or remaining unemployed."<sup>27</sup> It is also necessary to determine whether the parent's unemployment or underemployment 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."<sup>28</sup> 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 noncustodial parent.<sup>29</sup> The commentary to Civil Rule 90.3 directs 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."<sup>30</sup>

Based on the evidence as a whole and after careful consideration, Mr. W's request to have Ms. N found voluntarily and unreasonably unemployed is denied. As CSSD remarked at the hearing, Ms. N's primary pursuit has been to acquire an education so she can have a career and have some success for herself. There is insufficient evidence in the record on which to find that her purpose in taking so long to get through school was to become or remain unemployed. Ms. N may not have been the best student, and she may not have been able to consistently

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<sup>25</sup> 15 AAC 125.105(a)(1)-(2).

<sup>26</sup> Civil Rule 90.3(a)(4).

<sup>27</sup> *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

<sup>28</sup> *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

<sup>29</sup> *Kowalski*, 806 P.2d at 1371.

<sup>30</sup> Civil Rule 90.3, Commentary III.C.

remain on one goal, but that does not equate to a personal choice on her part to be unemployed.

CSSD correctly calculated Mr. W's child support based on the parties' actual income figures for the time periods from August 2010 through August 2012. These amounts are \$322 per month for August 2010 through December 2010; \$463 per month for 2011; and \$463 per month for January 2012 through August 2012.

As of September 2012, CSSD imputed income of \$10 per hour to Ms. N and calculated ongoing child support at \$261 per month.<sup>31</sup> However, this ongoing support amount is incorrect, not because the income figures are wrong, but because CSSD based ongoing child support on 50/50 shared custody. The court order gave the parties 70/30 shared custody as of September 11, 2012, with Mr. W having the higher percentage. Using CSSD's income figures from the shared custody calculation for 2012, Exhibit 10, pg. 15, the 70/30 custody split results in an ongoing child support amount of \$0 per month for Mr. W.

These child support figures are now correct. It is from these calculations that Mr. W's request for a variance will be considered.

### *C. Good Cause Variance Based on Financial Hardship*

Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. The parent may obtain a reduction in the amount calculated, but only if he or she shows that "good cause" exists for the reduction. In order to establish good cause, the parent must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."<sup>32</sup> The existence of "unusual circumstances" may also provide a sufficient basis for a finding of good cause to vary the calculated child support amount.<sup>33</sup> It is appropriate to consider all relevant evidence in order to determine if the support amount should be lowered from the amount calculated pursuant to Civil Rule 90.3(a).<sup>34</sup>

Based on the evidence in its entirety, Mr. W proved by clear and convincing evidence that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 were not reduced for the period prior to September 2012. During the period of time the court

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<sup>31</sup> Because the court adjusted the shared custody percentages as of mid-September 2012, the parties stipulated that ongoing child support should be effective October 1, 2012.

<sup>32</sup> Civil Rule 90.3(c).

<sup>33</sup> Civil Rule 90.3(c)(1).

<sup>34</sup> Civil Rule 90.3, Commentary VI.B.

directed CSSD to calculate Mr. W's child support based on 50-50 shared custody, the obligor was providing more than half of T's financial support. The way to balance the parties' respective situations is to grant Mr. W's request for a variance under Civil Rule 90.3(c). His child support for August 2010 through September 2012 should be set at \$261 per month.

#### **IV. Conclusion**

Mr. W met his burden of proving that CSSD's Amended Administrative Child and Medical Support Order was incorrect. CSSD mistakenly calculated his ongoing child support at \$261 per month as of October 2012, based on a 50/50 shared custody percentage. However, the court ordered 70/30 shared custody as of mid-September 2012, so the correct ongoing child support figure is \$0 per month as of October 2012.

In addition, CSSD set Mr. W's arrears at \$322 per month for August 2010 through December 2010; \$463 per month for 2011; and \$463 per month for January through September 2012. Mr. W met his burden of proving by clear and convincing evidence that all these arrears should be varied to \$261 per month. These amounts should be adopted.<sup>35</sup>

#### **V. Child Support Order**

- Mr. W is liable for child support for T in the amount of \$261 per month from August 2010 through September 2012; and \$0 per month, effective October 2012 and ongoing;
- All other provisions of the Amended Administrative Child and Medical Support Order dated October 11, 2012 remain in full force and effect.

DATED this 1<sup>st</sup> day of July, 2013.

Signed  
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Kay L. Howard  
Administrative Law Judge

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<sup>35</sup> The medical insurance premium has been referred to CSSD, as explained to the parties at the hearing.

**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 2<sup>nd</sup> day of July, 2013.

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

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