

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

In the Matter of: )  
 )  
 K X ) OAH No. 13-0246-CSS  
 ) CSSD Case No. 001136702  
\_\_\_\_\_ )

**DECISION AND ORDER**

**I. Introduction**

The obligor, K X, appeals a Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD) on January 15, 2013,<sup>1</sup> and a Denial of Petition for Genetic Testing CSSD issued on February 8, 2013.<sup>2</sup> Mr. X asserts primarily that he and Ms. P now exercise shared custody of the children, so his support obligation should be decreased. He also requested DNA testing regarding his paternity of one of the children for whom he is currently paying support.

Based on the evidence presented, CSSD's Modified Administrative Child Support and Medical Support Order is affirmed. Mr. X's child support is modified to \$148.00 per month, effective January 1, 2013. CSSD's denial of Mr. X's request for paternity testing is also affirmed.

**II. Facts**

*A. Undisputed Material Facts*

Mr. X and Ms. P have three children: E, 12; F, 10; and M, 9.<sup>3</sup> Both Mr. X and Ms. P previously lived in No Name, where Ms. P's mother, J P, also resides.<sup>4</sup> However, at the time of the hearing, Ms. P was living in No Name.<sup>5</sup>

Mr. X works on an on-call basis for the City of No Name, maintaining and repairing its no name systems.<sup>6</sup> Mr. X's income remained fairly steady from about 2000 - 2010. The last year he regularly worked for the City of No Name (about 2010), his income was about \$20,000.00. However, since about 2010 he has not been working as much and his income has decreased. In 2012 he made about \$12,000.00. This income consisted mostly of unemployment insurance

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<sup>1</sup> Ex. 5.

<sup>2</sup> Ex. 10.

<sup>3</sup> Ex. 1 p. 5. Mr. X also has a child in No Name, from a separate relationship, for whom he also pays child support (H X hearing testimony).

<sup>4</sup> Ex. 1, p. 1; undisputed hearing testimony.

<sup>5</sup> F P hearing testimony.

<sup>6</sup> All information in this paragraph is from Mr. X's hearing testimony unless otherwise noted.

benefits (UIB), a \$3,000.00 dividend from his village or regional corporation, and the Alaska Permanent Fund Dividend. Mr. X currently receives about \$400.00 in UIB every two weeks. However, CSSD garnishes about half of this as support for his child in No Name, so he only gets about \$202.00 every two weeks to live on.

Mr. X owns his home.<sup>7</sup> He owes about \$1,200.00 to the City of No Name on the home, and he is paying that debt at the rate of \$100.00 per month. He received a grant of \$3,000.00 to pay for heating fuel and electricity. He pays about \$40.00 per month for phone service.

*B. Disputed Testimony About Shared Custody*

Mr. X agrees that he should be paying child support for E, since E lives primarily with his grandmother.<sup>8</sup> However, he does not feel that he should be paying child support for F and M, because he asserts they live with him most of the time.

Mr. X testified that when Ms. P moved to No Name about two years ago, all three children began residing with him. F, a special needs child, has been living with him for most of the last two years (80-90% of the time). F generally goes to his grandparents' house for the weekends and sometimes during the summer. However, he went to No Name just a few days prior to the hearing to spend time with Ms. P.

Mr. X also testified that for the last two years M has lived with him during the school year (about nine months per year), but with her grandmother during the summer. However, M was in No Name with Ms. P at the time of the hearing. Mr. X was uncertain as to exactly when she went to No Name; at one point he testified that it was in January 2013, and at another point he testified that it was during the first week of March 2013.

Finally, Mr. X stated that E has been living with his grandmother, J P, for the last 1-2 years.

D P testified that all three children have generally been living with their grandmother (J P) since at least January 2013, but that F and M flew to No Name to stay with her about 2-4 weeks before the hearing, and remained in No Name at the time of the hearing.

J P is retired.<sup>9</sup> She lives with her boyfriend, who receives retirement income from his service in the National Guard. She testified that she had all three children the majority (at least 50%) of the time during 2012. However, she also stated that since about December 26, 2012, F and

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<sup>7</sup> All information in this paragraph is from Mr. X's hearing testimony unless otherwise noted.

<sup>8</sup> Mr. X asserts that he is not E's biological father, and that for this reason he is ultimately not responsible for E's support. However, Mr. X acknowledged at hearing that he is required to pay support for E unless and until he proves that he is not E's biological father.

<sup>9</sup> All information in this paragraph is from J P's hearing testimony unless otherwise noted.

M have been living mainly with Mr. X. She received Food Stamps for the three children from 2009 until about November 2012. Since then she has paid about \$2,000.00 per month out-of-pocket for their food and clothes.

*C. Written Statements From Others Regarding Child Custody*

A statement from the principal and teachers of the No Name school, dated January 30, 2013, states that F and M returned to No Name from No Name in early November 2012.<sup>10</sup> Statements from the Village Public Safety Officer and from two public assistance fee agents from No Name dated January 29 and January 30, 2013 state that F and M have lived with Mr. X since November 2012.<sup>11</sup>

*D. Relevant Procedural History*

Prior to March 24, 2008 Mr. X's child support obligation had been set at zero, based on the parents' exercise of divided custody.<sup>12</sup> However, at some point between March 24, 2008 and February 11, 2009, CSSD determined that Ms. P had primary custody of the children.<sup>13</sup> At that point, Mr. X's monthly child support obligation increased.<sup>14</sup> On October 27, 2008 CSSD issued a Modified Administrative Child Support and Medical Support Order which set Mr. X's monthly child support obligation, for three children, at \$644.00.<sup>15</sup> CSSD's order was subsequently appealed, and was affirmed at the formal hearing level on March 2, 2009.<sup>16</sup>

On July 3, 2012 CSSD issued an Administrative Review Decision suspending Mr. X's child support obligation, based on information that the children were no longer living with D P.<sup>17</sup> On November 7, 2012 Ms. P applied for child support services, requesting resumption of child support payments.<sup>18</sup> CSSD evidently treated this as a Petition for Modification of the prior administrative support order and initiated a modification review.<sup>19</sup> On December 1, 2012 CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order, which requested their income

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<sup>10</sup> Ex. 12.

<sup>11</sup> Ex. 11, pp. 2 - 4.

<sup>12</sup> Ex. 1, p.1. Pursuant to Civil Rule 90.3(f)(3), "[p]arents have divided custody . . . if one parent has primary physical custody of one or more children of the relationship and the other parent has primary custody of one or more other children of the relationship, and the parents do not share physical custody of any of their children."

<sup>13</sup> Ex. 1, p.1. Pursuant to Civil Rule 90.3(f)(2), a parent has primary physical custody if the children reside with him or her at least 70% of the time..

<sup>14</sup> Ex. 1.

<sup>15</sup> Ex. 1.

<sup>16</sup> Ex. 1, p. 4.

<sup>17</sup> Ex. 2, pp. 1 - 2.

<sup>18</sup> Ex. 3.

<sup>19</sup> Ex. 4.

information for the last two years.<sup>20</sup> On January 15, 2013 CSSD issued a Modified Administrative Child Support and Medical Support Order that reduced Mr. X's ongoing child support from \$644.00 per month to \$148.00 per month, effective January 1, 2013.<sup>21</sup> This child support amount was based on annual gross income of \$5,453.73 and adjusted annual income of \$5,392.41, and included employer-reported wages, unemployment insurance benefits, and the Alaska Permanent Fund Dividend.<sup>22</sup> The new child support amount was also based on primary custody remaining in Ms. P; CSSD made no finding of shared custody.<sup>23</sup>

Mr. X appealed CSSD's decision on February 22, 2013, asserting that two of the children (M and F) had not resided with D P since mid-October 2012, and that they began residing with him on or about November 2-3, 2012.<sup>24</sup> He also requested that CSSD order DNA testing to confirm the paternity of the oldest child, E.<sup>25</sup> On February 8, 2013 CSSD denied Mr. X's request for genetic testing because he previously signed an Affidavit of Voluntary Paternity as to E.<sup>26</sup>

The formal hearing was held on March 19, 2013. Mr. X, Ms. P, J P and Russell Crisp, Child Support Specialist with CSSD, participated by telephone. A post-hearing filing was submitted by CSSD on March 20, 2013, following which the record closed.

### **III. Discussion**

#### *A. The Burden of Proof is on Mr. X*

As the person who filed the appeal in this case, Mr. X has the burden of proving, by a preponderance of the evidence, that the child support amount established in CSSD's Amended Administrative Child Support and Medical Support Order dated January 15, 2013 is incorrect.<sup>27</sup> That order reduced his child support from \$644.00 per month to \$148.00 per month, effective January 1, 2013.

#### *B. Shared Custody*

The child support modification order which Mr. X appeals from is based on CSSD's finding that Ms. P has primary custody of the children. Mr. X asserts that he and Ms. P now exercise

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<sup>20</sup> Ex. 4.

<sup>21</sup> Ex. 5.

<sup>22</sup> Ex. 5, p. 6.

<sup>23</sup> Ex. 5, p. 5. Pursuant to Civil Rule 90.3(f)(1), "[a] parent has shared physical custody (or shared custody) of children . . . if the children reside with that parent for a period specified in writing in the custody order of at least 30, but no more than 70, percent of the year, regardless of the status of legal custody."

<sup>24</sup> Ex. 6.

<sup>25</sup> Ex. 6.

<sup>26</sup> Ex. 10.

<sup>27</sup> 15 AAC 05.030(h).

shared custody of the children, so his support obligation should be decreased. Thus, the primary issue in this case is whether Mr. X is entitled to have his child support calculated based on the shared custody formula.

In Alaska, the rules pertaining to child support are contained in Civil Rule 90.3. Civil Rule 90.3(f)(1) provides that where (as here) there is no court order regarding custody, a finding of shared custody should be based on a written child custody agreement. However, as a practical matter, the parties to child support actions rarely have a written custody agreement, and that is the situation here. In this case, the parties do not agree whether shared custody was in effect at any time as to any child. Thus, it is up to the administrative law judge to determine whether Mr. X has proven the existence of shared custody and, if so, what percentage of shared custody is exercised by each party.

The parent asserting that he or she has shared physical custody (in this case Mr. X) has the burden of proving shared physical custody by a preponderance of the evidence.<sup>28</sup> Under Civil Rule 90.3(f)(1), a parent has shared physical custody of children for purposes of calculating child support if the children reside with that parent for at least 30 percent of the year. Further, in order for a visitation day to count toward the required 30% of the year, the children must stay overnight with the respective parent.<sup>29</sup>

In this case Mr. X testified that, since January 2012, he had two of the three children (F and M) for "most" of the school year. However, he acknowledged that these two children routinely stayed with their grandmother on weekends, and that M stayed with her grandmother all summer. He also admitted that both of these children left his home at different times during 2013 and went to No Name, and that both were still in No Name at the time of the hearing.

Mr. X's testimony was fairly consistent with J P's testimony. Based on their testimony, it is probable that Mr. X has had shared custody of F and M, *in a non-legal sense*, since sometime in November 2012.

However, in order to establish that he has shared custody of F and M *in the technical, legal sense as defined in Civil Rule 90.3(f)(1)*, Mr. X must demonstrate that F and M have stayed overnight in his home at least 30% of the time. The evidence provided by Mr. X falls short of

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<sup>28</sup> See 2 AAC 64.290(e).

<sup>29</sup> Civil Rule 90.3, Commentary V.A.

establishing that his children are staying overnight with him for the minimum 30% of the year required to establish shared custody under Civil Rule 90.3(f)(1).<sup>30</sup>

In summary, CSSD has recently reduced Mr. X's child support obligation from \$644.00 per month to \$148.00 per month based on decreased income. In order to further reduce his support obligation, Mr. X was required to demonstrate that it is more likely than not that he has the three children at issue in his home, overnight, at least 30% of the time. While Mr. X provided credible testimony that the children spend a significant amount of time in his home, he was not able to show that he currently has the children a specific percentage of overnights in excess of 30 percent. Accordingly, Mr. X did not satisfy his burden of proving a change in custody and a specific shared custody arrangement. Ms. P therefore remains the custodial parent, and CSSD was correct to determine Mr. X's child support obligation based on Ms. P having primary custody of the children.<sup>31</sup>

### C. *Paternity Testing*

Mr. X also appeals CSSD's decision denying his request for genetic testing because he previously signed an Affidavit of Voluntary Paternity as to E.<sup>32</sup> CSSD's regulations do provide procedures whereby a putative parent may attempt to disestablish paternity through genetic testing.<sup>33</sup> However, disestablishment of paternity is not available *through CSSD* in cases where (as here) the parent seeking disestablishment of paternity previously signed an Acknowledgement of Paternity form.<sup>34</sup> Mr. X still has the right to attempt to disestablish his paternity of the child at issue. However, by statute, that right can only be exercised by way of a proceeding filed in superior court.<sup>35</sup>

## IV. **Conclusion**

Mr. X failed to prove, by a preponderance of the evidence, that CSSD's Modified Administrative Child Support and Medical Support Order of January 15, 2013 was incorrect. Mr. X's child support obligation should remain at \$148.00 per month effective January 1, 2013. CSSD's

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<sup>30</sup> Many parents in these proceedings keep a calendar of the specific nights in which each child stays with that parent in order to prove shared or divided custody under Civil Rule 90.3.

<sup>31</sup> Mr. X is free to seek modification of his child support obligation in the future should he have shared custody supported by sufficient documentation.

<sup>32</sup> Exs. 6, 10. Mr. X did not dispute CSSD's assertion that he in fact signed a form acknowledging paternity of the child at issue.

<sup>33</sup> See 15 AAC 125.217(c) and 15 AAC 125.236 ("Procedures to Initiate Disestablishment of Paternity").

<sup>34</sup> See AS 18.50.165, AS 25.20.050(a), and 15 AAC 125.232(a)(1).

<sup>35</sup> See AS 25.20.050(l) and Civil Rule 90.4.

February 8, 2013 denial of Mr. X's request for genetic testing was also correct; Mr. X must pursue any action to disestablish paternity in superior court.

**V. Child Support Order**

- Mr. X's child support remains at \$148.00 per month effective January 1, 2013 and ongoing;
- All other provisions of the Modified Administrative Child Support and Medical Support Order dated January 15, 2013 remain in full force and effect.

DATED this 5th day of April, 2013.

*Signed* \_\_\_\_\_  
Jay Durych  
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 22<sup>nd</sup> day of April, 2013.

By: *Signed* \_\_\_\_\_  
Signature  
Jay D. Durych \_\_\_\_\_  
Name  
Administrative Law Judge \_\_\_\_\_  
Title

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