

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

IN THE MATTER OF	)	OAH No. 14-0027-CSS
T X	)	CSSD No. 001143538
_____	)	

**DECISION AND ORDER**

**I. Introduction**

This case is T X's appeal of an order modifying his ongoing child support obligation for his child, J. H H is the custodial parent. The Child Support Services Division (Division) issued this order, increasing Mr. X's ongoing monthly obligation for the support of their child, J, from \$233 to \$235, effective September 1, 2013.

On January 22, 2014, a formal hearing was held to consider Mr. X's appeal.<sup>1</sup> Mr. X did not participate in the hearing. Ms. H participated. Russell L. Crisp, Child Support Services Specialist, represented the Division. The hearing was audio-recorded. The record closed on January 22, 2014.

Mr. X appealed the Division's order that increased ongoing child support to \$235 per month. That order was based on the Division's estimate of Mr. X's estimated 2013 annual income, but the Division did not base this estimate on Mr. X's reported 2013 earnings. Instead, the Division imputed full-time year-round earnings of \$9.00 per hour in this estimate. Prior to the hearing, the Division ran new calculations based on Mr. X's estimated 2013 annual income without any earnings, based on Mr. X's incarceration.

The evidence at the hearing showed this new annual income estimate was probably the best estimate of his current income and earning capacity. The Division's latest calculation uses this estimate of Mr. X's annual income in a shared custody calculation because Ms. H testified that she and Mr. X have been sharing custody of J equally. This calculation should be used to set Mr. X's ongoing child support obligation. This calculation results in a monthly ongoing child support amount of \$0 because Ms. H's estimated annual income is higher than Mr. X's. Modified ongoing child support should be set at this amount.

The administrative law judge concludes that Mr. X's modified ongoing child support order should be set at \$0 effective September 1, 2013.

## **II. Facts**

This case is an appeal of the Division's order increasing Mr. X's ongoing child support obligation through the modification process.<sup>2</sup> Mr. X's child support for his child, J was set in 2008 at \$233 per month for the one child.<sup>3</sup>

Mr. X filed a request for modification on August 27, 2013.<sup>4</sup> The Division issued notice of the petition for modification on August 30, 2013.<sup>5</sup>

The Division issued a Modified Administrative Child and Medical Support Order on December 24, 2013.<sup>6</sup> The Division set Mr. X's modified ongoing child support from calculations using his estimated annual income. This projected estimate was imputed full-time year-round earnings of \$9.00 per hour and a PFD.<sup>7</sup> The calculations result in a monthly support amount of \$235 per month.<sup>8</sup> This is only a two dollar increase, which is less than a 15% change, but the Division issued the modification order despite this apparent lack of a material change in circumstance.<sup>9</sup>

Mr. X requested a formal hearing. Mr. X was concerned that the Division had overestimated Mr. X's income because he was on an ankle monitor as the result of a felony conviction, and would not be released until 2015.<sup>10</sup>

Prior to the hearing, the Division provided new calculations and Mr. X's reported earnings information from the last few years. The Division also agreed with Mr. X that his ongoing child support should be reduced based on his historical earnings and the physical restrictions imposed by his criminal sentence. The Division's new calculations indicated that Mr. X's ongoing child support should be set at \$50 per month, which is the minimum, if he was not sharing custody of J.<sup>11</sup>

---

<sup>1</sup> The hearing was held under Alaska Statute 25.27.190.

<sup>2</sup> Alaska Civil Rule 90.3(h) governs child support modification actions.

<sup>3</sup> Exhibit 1.

<sup>4</sup> Exhibit 2.

<sup>5</sup> Exhibit 3.

<sup>6</sup> Exhibit 5.

<sup>7</sup> Recording of Hearing & Exhibit 5, page 8.

<sup>8</sup> Exhibit 5, page 1.

<sup>9</sup> Recording of Hearing & Exhibits 1 & 5.

<sup>10</sup> Mr. X's request for a formal hearing is found at Exhibit 6.

<sup>11</sup> Exhibits 8 & 9.

Mr. X did not provide a phone number for the hearing as instructed by the notice sent to him. Mr. X did not answer at his phone numbers of record for the hearing. Mr. X did have voice mail and a message was left, but he did not call in during the hearing or call in after asking to have the hearing rescheduled.

Ms. H explained at the hearing that J was currently living with her, but that the parents had worked out an equal shared custody arrangement. The parents alternate summers and school years with J. Ms. H also explained that the parents had also agreed that neither parent would pay child support to the other because of this arrangement. Ms. H had understood that her child support case had been closed based on a phone conversation with her Division caseworker, but this may have been because in the Division's records at the time of the hearing, Ms. H was not identified as the adult that J was living with.<sup>12</sup>

Mr. X's had no reported earnings for the first three quarters of 2013.<sup>13</sup> This is probably due to incarceration.<sup>14</sup> Mr. X's reported earnings for all four quarters of 2012 totaled \$281.<sup>15</sup> Mr. X's had no reported earnings for the all of 2011. The earnings records provided by the Division and discussed at the hearing indicate that Mr. X's current annual income of his current income and earning capacity would result in a minimum child support order, which is \$50. When the Division used this monthly amount in a shared custody calculation based on the custody and income information provided by Ms. H, the monthly amount for Mr. X that resulted was \$0 because Ms. H's income is higher than Mr. X's.<sup>16</sup>

Based on the evidence in the record, I find that it is more likely than not that the Division's latest shared custody calculation uses the best estimate of Mr. X's and Ms. H's current income and the parents' shared custody arrangement. These calculations result in a monthly child support amount of \$0.<sup>17</sup>

### **III. Discussion**

In a child support hearing, the person who filed the appeal, in this case, Mr. X, has the

---

<sup>12</sup> Recording of Hearing.

<sup>13</sup> Exhibit 9, page 1.

<sup>14</sup> Recording of Hearing & Exhibits 5, 9 & 10.

<sup>15</sup> Exhibit 9, page 1 & Exhibit 10, page 1.

<sup>16</sup> Recording of Hearing & Exhibit 9.

burden of proving by a preponderance of the evidence that the Division's order is incorrect.<sup>18</sup> Although he did not participate in the hearing, the Division admitted before the hearing that the modified order was incorrect. The evidence in the record shows that the Division over-estimated Mr. X's current earnings based on Mr. X's reported earnings history and the restrictions imposed on him as a result of his felony conviction. The Division was also unaware of the shared custody arrangement between the parents when it modified Mr. X's order. Both the Division and Ms. H agreed at the hearing that ongoing modified child support should be set at \$0. The hearing record was not held open for ten days to give Mr. X time to file a request to reschedule the hearing because this order gives Mr. X the relief that he requested.

At the hearing Ms. H explained that she and Mr. X share custody of J equally. When calculating child support, a parent is entitled to a reduction on the monthly obligation if the parent is exercising shared custody. Shared custody exists when a child resides with a parent at least 30, but no more than 70, percent of the overnights.<sup>19</sup> Under the shared custody formula, the annual amount each parent would pay to the other parent if that parent had sole custody is calculated. That support amount is then multiplied for each parent by the percentage of time the other parent will have physical custody of the child. The parent with the larger amount under this calculation is the obligor parent. The annual award from the obligor parent to the other parent is equal to the difference between the two figures multiplied by 1.5.<sup>20</sup>

The Division used only the \$416 in annual income it had used to calculate that Mr. X was entitled to a \$50 primary custody order prior to the hearing in the shared custody calculation that the Division submitted after the hearing. It would not be appropriate to impute additional income to Mr. X's in setting his support without additional evidence of Mr. X's earning capacity. Child support may be based on the potential income of a person who is voluntarily and unreasonably unemployed or underemployed.<sup>21</sup> A noncustodial parent who voluntarily reduces his or her income does not automatically receive a corresponding reduction in his or her child support

---

<sup>17</sup> Recording of Hearing & Exhibits 9 & 10.

<sup>18</sup> Alaska Regulation 15 AAC 05.030(h).

<sup>19</sup> Alaska Civil Rule 90.3(f).

<sup>20</sup> Alaska Civil Rule 90.3(f).

<sup>21</sup> Civil Rule 90.3 Commentary, Part III-C.

obligation.<sup>22</sup> If Mr. X could earn more income, but was unreasonably unemployed, it would be appropriate to set Mr. X's child support based on income he could earn.

The evidence in the record does not show unreasonable underemployment. Ms. H explained she had agreed to no child support between the parents because of the shared custody arrangement. Ms. H did not object to his child support being modified to \$0 per month. Ms. H does not know whether Mr. X's restrictions allow him to work.<sup>23</sup>

Civil Rule 90.3 allows a child support amount to be modified if the party requesting the change shows that a material change of circumstances has occurred.<sup>24</sup> The rule states that a material change of circumstances "will be presumed" if the modified support amount would alter the outstanding support order by 15 percent.<sup>25</sup>

The evidence in the record shows that a material change of circumstances has occurred since Mr. X's ongoing child support was set at \$233 per month, and there has also been a change in the parents' custody arrangement requiring that ongoing child support be based on a shared custody calculation. A material change of circumstances justifying a downward modification of ongoing child support has occurred.

Generally, a new monthly child support amount in a modification action should be effective the month after the parties are served with the petition. Following this general rule, the modification should be effective September 1, 2013, because the petition was issued in August of 2013.

#### **IV. Conclusion**

Mr. X's ongoing child support should be modified based on the Division's latest shared custody calculations. Modified ongoing child support should be set at \$0 per month, effective September 1, 2013. The child support amount in this order was calculated using the shared custody formula in Civil Rule 90.3(b).

---

<sup>22</sup> *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

<sup>23</sup> Recording of Hearing.

<sup>24</sup> Alaska Civil Rule 90.3(h)(1).

<sup>25</sup> Alaska Civil Rule 90.3, Commentary X.

**V. Child Support Order**

Mr. X's Modified ongoing child support for J is set in the monthly amount of \$0, effective September 1, 2013.

All other provisions of the Division's Modified Child Support and Medical Support Order issued on December 24, 2013 remain in effect.

DATED this 27<sup>th</sup> day of January 2014.

By: Signed  
Mark T. Handley  
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 19<sup>th</sup> day of February, 2014.

By: Signed  
Signature  
Mark T. Handley  
Name  
Administrative Law Judge  
Title

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