

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

|                  |   |                      |
|------------------|---|----------------------|
| In the Matter of | ) |                      |
|                  | ) |                      |
| K S. Z           | ) | OAH No. 16-0462-CSS  |
| _____            | ) | Agency No. 001211466 |

**DECISION AND ORDER**

**I. Introduction**

This case is C Z’s appeal of an order issued by the Alaska Child Support Services Division (Division). That order established the child support obligations of K Z, the father of Ms. Z’s two children G and W. On May 12, 2016, a formal hearing was held on Ms. Z’s appeal.<sup>1</sup> Both Ms. Z and Mr. Z participated in the hearing. Joseph West, Child Support Specialist, represented the Division. The hearing was audio-recorded. The record closed on May 20, 2016.

Having reviewed the record in this case, and after due deliberation, the Administrative Law Judge concludes that the Division’s Amended Administrative Child and Medical Support Order should be adjusted to set child support, both for arrears and ongoing, in accordance with the Division’s latest shared custody calculations, set forth in its May 17, 2016 Submission to Record. This means that Mr. Z’s monthly child support obligation is \$662 for November and December 2015; \$603 for January through March of 2016; and \$515 starting on April 1, 2016 and ongoing.

**II. Facts**

The Zs’ children, W and G, are five years old and 10 months old, respectively. The Division established a child support order for Mr. and Ms. Z’s children in response to an application for child support services that Ms. Z submitted to the Division on November 2, 2015.

The Division issued an Administrative Child and Medical Support Order on December 22, 2015, setting Mr. Z’s monthly child support obligation at \$768.63.<sup>2</sup> Mr. Z appealed that child support order.<sup>3</sup> The Division conducted an administrative review on March 23, 2016 and issued an Administrative Review Hearing Decision and Amended Administrative Child and Medical Support Order (Amended Order) on April 7, 2016, setting Mr. Z’s monthly obligation at \$550,

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<sup>1</sup> The hearing was held under the authority of Alaska Statute 25.27.170.  
<sup>2</sup> Exhibit 5.  
<sup>3</sup> Exhibit 6.

beginning on November 1, 2015.<sup>4</sup> Ms. Z appealed that decision, leading to this hearing.<sup>5</sup>

Mr. Z is an employee of the No Name union and earns a salary of approximately \$91,800 per year.<sup>6</sup> In connection with his employment, Mr. Z voluntarily makes payments into a retirement account that are withheld from his paycheck; in addition, the No Name separately funds a pension account for him.<sup>7</sup>

Ms. Z is an employee of the State of Alaska, and earns approximately \$38,300 per year.<sup>8</sup> During 2015, however, Ms. Z had to take unpaid leave in connection with the birth of her daughter G, and as a result she only earned approximately \$30,400 during that year.<sup>9</sup>

Mr. and Ms. Z share custody of their two daughters. During November and December 2015, their shared custody, on average, resulted in the girls spending 55% of their overnights with Ms. Z and 45% with Mr. Z.<sup>10</sup> From January through March, 2016, the shared custody percentages changed to 53% with Ms. Z and 47% with Mr. Z.<sup>11</sup> From April 1, 2016 and going forward, they are sharing custody on a 50/50 basis.<sup>12</sup>

After the May 12, 2016 hearing, the Division filed new calculations, as requested and discussed at the hearing. These calculations use Ms. Z's actual income for 2015, based on her W2 form for that year, which takes into account her unpaid maternity leave; the calculations also reflect the shared custody percentages described above.<sup>13</sup>

Based on the evidence in the record, it is more likely than not that the Division's latest calculations are correct, as they are based on the best estimates of both parties' actual annual income and earning capacity.<sup>14</sup> These calculations show Mr. Z's monthly child support obligation should be set at \$662 for November and December 2015, \$603 for January through March of 2016, and \$515 starting on April 1, 2016 and ongoing.<sup>15</sup>

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<sup>4</sup> Exhibit 9.

<sup>5</sup> Exhibit 10.

<sup>6</sup> Exhibit 9, p. 10.

<sup>7</sup> Testimony of Ms. Z.

<sup>8</sup> Exhibit 9, p. 9.

<sup>9</sup> Exhibit 14.

<sup>10</sup> Testimony of Ms. Z.

<sup>11</sup> *Id.*; testimony of Mr. Z.

<sup>12</sup> *Id.*

<sup>13</sup> CSSD Submission to Record, 5/17/16, and Exhibits 14-15.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

### **III. Discussion**

#### **A. Burden of Proof**

Ms. Z argued that Mr. Z's child support obligations should be greater than the amount set by the Division. In a child support hearing, the person who filed the appeal, in this case, Ms. Z, has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.<sup>16</sup> Ms. Z met her burden of showing that a portion of Mr. Z's child support order should be adjusted based on updated income and custody information.

#### **B. Issues Raised On Appeal**

Ms. Z raised the following issues in her appeal of CSSD's Amended Order:

1. The Amended Order should have used her actual income for 2015, rather than an income estimate based on several of her paystubs from late 2015;
2. The Amended Order should have reflected the actual shared custody percentages, rather than being based on an assumed 50/50 split;
3. Mr. Z's income should be adjusted upward for purposes of determining his child support obligation, because his employer funds a separate pension account for him that is not reflected on his W2 forms;
4. The Amended Order should be adjusted to take into account the hardship imposed on her by the low amount of Mr. Z's child support order.

##### **1. Ms. Z's Actual Income For 2015**

Ms. Z testified credibly at the hearing that she made substantially less money in 2015 than the \$38,351 estimate used by CSSD in the Amended Order. This was due to the fact that she had to take unpaid leave from work in connection with the birth of her daughter G.<sup>17</sup> Mr. Z did not dispute Ms. Z's testimony on this point, which was corroborated by her W2 form for 2015, submitted after the hearing, which showed her total earnings for 2015 to be \$30,438. It is appropriate to base past child support obligations on the best evidence of actual, rather than estimated, income, and Ms. Z met her burden of proving that the Amended Order incorrectly based its calculations on an overestimate of her 2015 income. Accordingly, CSSD's May 17, 2016 Submission to Record correctly utilized Ms. Z's 2015 W2 in the shared custody calculation that determined Mr. Z's child support obligation for November and December, 2015.

##### **2. Actual Shared Custody Percentages**

When calculating child support, a parent is entitled to a reduction of their monthly obligation if the parent is exercising shared custody. Shared custody exists when a child resides

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<sup>16</sup> Alaska Regulation 15 AAC 05.030(h).

<sup>17</sup> Testimony of Ms. Z.

with a parent at least 30, but no more than 70, percent of the overnights.<sup>18</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>19</sup>

In connection with this issue, Ms. Z testified that she told Mr. West during the Administrative Review conference that she and Mr. Z expected to share custody of their daughters on a 50/50 basis going forward from April 2016. Mr. West, however, apparently applied that 50/50 shared custody split going all the way back to the date of establishment of the order – November 1, 2015.<sup>20</sup> At the hearing, after a detailed discussion of the parties' shared custody history during the relevant period, it was determined that the Zs' daughters spent 55% of their overnights in November and December 2015 with Ms. Z and 45% with Mr. Z.<sup>21</sup> From January through March, 2016, the percentages changed to 53% with Ms. Z and 47% with Mr. Z,<sup>22</sup> and going forward from April 1, 2016, the appropriate percentages are 50% for each parent.<sup>23</sup>

Ms. Z met her burden of establishing that the Amended Order did not correctly set forth the shared custody percentages reflected by the facts. Accordingly, CSSD's May 17, 2016 Submission to Record correctly utilized the percentages discussed above in calculating Mr. Z's child support obligations.

### **3. Mr. Z's Employer-Funded Pension**

CSSD's Amended Order gave Mr. Z a deduction equal to 7.5% of his income for his voluntary contributions to his retirement. This type of deduction is mandated by the court rule governing child support determinations, Civil Rule 90.3.<sup>24</sup> CSSD appropriately limited the deduction to the maximum allowable percentage, 7.5% of Mr. Z's income.<sup>25</sup> Ms. Z argued on appeal, however, that Mr. Z only began making his voluntary payments into this retirement account after he and Ms. Z separated and started the process of getting divorced; she believes

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<sup>18</sup> Alaska Civil Rule 90.3(f).

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

<sup>20</sup> Ms. Z testimony.

<sup>21</sup> Testimony of Ms. Z.

<sup>22</sup> *Id.*; testimony of Mr. Z.

<sup>23</sup> *Id.*

<sup>24</sup> Alaska Civil Rule 90.3 Commentary III.D(1).

<sup>25</sup> *Id.*

that he did this in an effort to lower his income and thus lower his child support obligation to her and their daughters.<sup>26</sup> She further argued that Mr. Z separately is the beneficiary of an employer-funded pension through the No Name, which does not appear on his W2 or tax returns.<sup>27</sup> She argued that it is inappropriate to give him a deduction for his voluntary retirement contributions and thus lower the child support payments she will receive, when Mr. Z only started making those contributions after their marriage ended and when he also has a separate pension through his employer.<sup>28</sup> She also pointed to a provision of Rule 90.3 that states that pensions are to be included within the definition of “income” for child support purposes, and to a separate provision that provides that “perquisites” are to be included in income, suggesting that Mr. Z’s pension should be considered a “perquisite.”<sup>29</sup>

The law and evidence, however, do not support Ms. Z’s arguments concerning Mr. Z’s retirement contributions and employer-funded pension. The provision of Rule 90.3 that includes pensions within the definition of “income” is intended to cover situations where an obligor is drawing down their pension, i.e., receiving payments from it, rather than money being paid into a pension fund on the obligor’s behalf.<sup>30</sup> And the provision regarding “perquisites” requires their inclusion within the definition of income “to the extent that they ... reduce living expenses, including but not limited to employer provided housing ... and transportation benefits.”<sup>31</sup> There was no showing at the hearing of this matter that Mr. Z’s employer-funded pension has the effect of reducing his living expenses in a manner comparable to these types of employer-provided benefits. The pension, therefore, does not constitute a “perquisite” that should be included in Mr. Z’s income.

Ms. Z did not meet her burden of proof to establish that Mr. Z’s employer-funded pension provides a basis for an upward adjustment of Mr. Z’s income for purposes of determining his child support obligations.

#### **4. Ms. Z’s Hardship Argument**

Ms. Z initially filled out and submitted with her appeal a form entitled “Formal Hearings

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<sup>26</sup> Ms. Z testimony.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; see Civil Rule 90.3 Commentary III.A(13), Commentary III.A(19).

<sup>30</sup> Ms. Z acknowledged and understood this interpretation of Rule 90.3 during the hearing.

<sup>31</sup> See Civil Rule 90.3 Commentary III.A(19).

Expense Checklist for Hardship.”<sup>32</sup> During the hearing, Ms. Z never explicitly referred to this document or argued that she qualifies for a hardship exception as provided in Civil Rule 90.3(c)(1). She did argue, however, that Mr. Z’s child support amounts set by CSSD were unfair to her, because his income is substantially higher than hers and his child support payments will barely cover her daycare expenses, let alone covering her other costs of caring for their daughters.

The so-called hardship exception to Civil Rule 90.3 provides that a child support award may be varied from the amount calculated under the rule “for good cause upon proof by clear and convincing evidence that manifest injustice would result if the award were not varied.”<sup>33</sup> The commentary to Rule 90.3 states that an award may be varied if “unusual circumstances exist” and those unusual circumstances “make application of the usual formula unjust.”<sup>34</sup> This exception is rarely applied, and when applied it is usually because application of the normal formula under the rule would result in significant hardship to other children in the obligor’s household.

Ms. Z presented no facts that could support the application of the hardship exception to Mr. Z’s child support obligations. The fact that Mr. Z’s annual income is significantly higher than Ms. Z’s, and that he started making contributions to his retirement account after only the couple had started the divorce process, does not provide grounds for varying the child support calculations from the normal formula. Ms. Z did not meet her burden of showing by clear and convincing evidence that the award should be varied.

#### **IV. Conclusion**

I conclude that Ms. Z met her burden of establishing that Mr. Z’s child support obligations should be based on Ms. Z’s actual income for 2015, and that she met her burden of establishing that the couple’s shared custody percentages should be adjusted as discussed above. Ms. Z did not meet her burden of establishing that Mr. Z’s income should be adjusted upward due to his employer-funded pension, or that his child support obligations should be varied from the normal formula due to hardship.

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<sup>32</sup> See Exhibit 13, submitted by Ms. Z 5/10/16.

<sup>33</sup> Civil Rule 90.3(c)(1); note that the “clear and convincing evidence” standard is a higher standard than the “preponderance of the evidence” standard applicable to the other issues raised by Ms. Z.

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

**V. Child Support Order**

1. Mr. Z’s ongoing child support for W and G is set at \$515 per month based on the current shared custody arrangement and the parents’ income, effective April 1, 2016.
2. Mr. Z’s monthly child support arrears for W and G are set at \$662 for November and December 2015, and \$603 for January through March, 2016.
3. All other provisions of the Administrative Review Decision and the Administrative Child and Medical Support Order dated September 23, 2015 remain in effect.

DATED this 29<sup>th</sup> day of June, 2016.

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 18<sup>th</sup> day of July, 2016.

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

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