

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

In the Matter of)	
)	
O M. E)	OAH No. 17-0512-CSS
_____)	Agency No. 001190619

DECISION AND ORDER

I. Introduction

The Child Support Services Division (CSSD) denied Anthony E’s request to increase O E’s child support obligation for her son, X. On the same day, CSSD also denied Mr. E’s related request to modify Ms. E’s support obligation for her second child, for whom she has a separate child support order, but for whom Mr. E is also the custodian of record. Due to CSSD’s denials, Ms. E’s child support amount remained \$50 per month in each child’s case. Mr. E appealed both denials, and the matters were consolidated for purposes of the formal administrative hearing. This decision addresses Ms. E’s child support obligation for X.

Based on the evidence brought forward during the hearing process, the decision to deny a modification is reversed. Ms. E’s support amount should be increased, since she is no longer incarcerated and she is earning regular income. However, this decision calculates her child support amount pursuant to Civil Rule 90.3(c), because unusual circumstances justify a variance from the usual child support formula. Ms. E’s two oldest children live together in one household, so her child support obligations should be calculated as if this case involved a two-child order. Her support amount for X should be set at one-half of that total amount, \$153 per month, effective February 1, 2017 and ongoing. Rounding to the nearest whole dollar, the other half (\$152) should be allocated to her second child’s support order.

II. Facts

Ms. E has three children: X, 12; Y, 9; and Z, the youngest. The children are the subject of separate child support orders because each has a different father.¹ Mr. E is Y’s biological father, but not X’s. However, Mr. E was granted primary custody of both X and Y in his divorce from Ms. E, so he is the custodian of record in two of Ms. E’s three child support cases, including this one.²

¹ See *In re O E*, OAH No. 14-1476-CSS (Commissioner of Revenue, 12/1/2014).

² *Id.*

Ms. E's child support obligation for X was last reviewed in 2014. On July 15, 2014, CSSD issued a Modified Administrative Child Support and Medical Support Order that reduced Ms. E's ongoing obligation to the state-minimum amount of \$50 per month.³ It did so because Ms. E had been incarcerated for most of the prior year, and she remained in the long-term custody of the Department of Corrections at the time of the modification; therefore, she was unable to work and earn income. Following an administrative appeal, an administrative law judge affirmed the \$50 monthly obligation, and the Commissioner of Revenue adopted that decision as the final agency action on December 1, 2014.⁴ The administrative law judge's decision provides some background on Ms. E's income history. As of 2014, Ms. E had received wage income in only nine quarters over the previous eleven years, earning \$1,240 at her most recent job in 2008.⁵

Ms. E was released from jail sometime in 2016. She currently lives with four roommates in transitional housing, and she is working part-time at an Anchorage bakery and café. Overall, she lives frugally. Her largest expenses are rent, \$550/month, and car expenses of roughly \$450 per month.⁶ Other monthly expenses include: food, \$150; cell phone, \$45; personal care, \$30; and entertainment, \$40. Ms. E also pays for substance abuse treatment, for which she owes \$920, as well as court-ordered restitution.

Ms. E started her current job on March 24, 2017, working as a pastry chef, but she soon transferred to a barista position. She earns minimum wage, plus tips, which vary. At the hearing, she indicated that she had recently earned \$80 in weekly cash tips. Ms. E's work schedule varies significantly, depending on the employer's needs, and she is not sure how many hours she will work each week.⁷ Some weeks, she works less than 25 hours. During the busy summer season, she hopes to work 35 or more hours each week.

Prior to her employment with the bakery, Ms. E worked for several different employers, all on a part-time schedule and generally for minimum wage.⁸ In late 2016 and early 2017, she worked for several months cleaning houses, earning \$13 per hour and working roughly 10 to 20 hours per

³ Exhibit 1.

⁴ *In re O E*, OAH No. 14-1476-CSS (Comm'r of Revenue, 12/1/14) (in the record at Exhibit 1).

⁵ Exhibit 1, p. 2.

⁶ Ms. E drives a 2002 Dodge Intrepid, for which she makes monthly payments of \$250, and she pays gas expenses, \$50/month, and car insurance of just over \$150/month. O E testimony.

⁷ O E testimony.

⁸ *Id.*

week.⁹ She lost that job when business slowed in January 2017.¹⁰ According to the Alaska Department of Labor, Ms. E earned \$1,234.35 in wages during the first quarter of 2017.¹¹

On January 27, 2017, after Ms. E had been out of jail a number of months, Mr. E requested to modify her child support obligation for X. He submitted a similar request to increase her support obligation for Y.¹² CSSD served the parties with notice of the petition to modify Y's order on January 31, 2017.¹³ Ms. E provided CSSD with a copy of her 2016 W-2 form, which shows 2016 gross wage income of \$3,396.14.¹⁴ She earned this income during the fourth quarter of the year.¹⁵ She also submitted two paystubs from her cleaning job.¹⁶

CSSD denied the modification request on March 29, 2017, because Ms. E was back in jail at that time.¹⁷ Mr. E appealed, asserting that Ms. E was only in jail for three days on a probation violation. She was released on March 30, 2017, and he argued that she remains capable of working and earning at least minimum wage income.¹⁸

The formal hearing was consolidated with the hearing in OAH No. 17-0506-CSS, the parallel administrative appeal regarding Ms. E's child support obligation for Y. It took place by telephone on June 1, 2017. C J represented Mr. E. Ms. E represented herself. Both Mr. E and Ms. E testified. Child Support Services Specialist Kimberly Sledgister represented CSSD. The hearing was audio-recorded. All submitted documents were admitted to the record.

III. Discussion

As the appealing party, Mr. E bears the burden to show that CSSD made a mistake when it denied his request to modify X's child support order.¹⁹ He met that burden by showing that Ms. E is no longer incarcerated, and she is earning income that justifies a higher child support obligation.

Child support orders may be modified upon a showing of "good cause and material change in circumstances."²⁰ A material change of circumstances is presumed if the modified support

⁹ See Exhibits 3, 4.

¹⁰ O E testimony.

¹¹ Exhibit 7.

¹² See *In re O E*, OAH No. 17-0506-CSS.

¹³ Exhibit 2.

¹⁴ Exhibit 3.

¹⁵ Exhibit 7.

¹⁶ Exhibit 3.

¹⁷ Exhibit 5.

¹⁸ Exhibit 6.

¹⁹ 15 AAC 05.030(h); 2 AAC 64.290(e).

²⁰ AS 25.27.190(e). See also Alaska Civil Rule 90.3(h)(1).

amount would alter the outstanding support order by 15 percent.²¹ Thus, a change of Ms. E's obligation by \$7.50 or more would justify a modification.²²

A modification is effective beginning the first of the next month after CSSD issues notice to the parties that a modification has been requested.²³ In this case, CSSD issued the notice on January 31, 2017, so the modification is effective as of February 1, 2017.

Child support determinations are governed by Alaska Civil Rule 90.3. Under Civil Rule 90.3(a)(1), which addresses primary custody situations like this one, the first step is to determine the non-custodial parent's total expected income from all sources during the period in which the support will be paid. By its nature, this determination is necessarily somewhat speculative, because the relevant income figure is expected future income.²⁴

It is not easy to determine Ms. E's likely 2017 gross wage income, because her work history is both limited and erratic. Since her release from jail, she has worked several short-term, part-time jobs. Her work schedule at her current job fluctuates widely. During the summer tourist season, she is likely to work 35 or more hours per week. However, she likely will work significantly less than that during other seasons of the year. In addition, it appears she did not earn any income for a period of time, after she lost her cleaning job and before she started at the bakery in March 2017.

To account for the temporary gap in her 2017 employment, and in light of the many uncertainties relating to her work schedule, Ms. E's modified child support obligation should be based on income she earns over an average 25-hour work week through the course of the year. To recognize and adjust for her tip income, however, it is reasonable to calculate Ms. E's expected income based on a 30-hour average work week at minimum wage. This schedule results in expected 2017 gross wage income of \$15,288.²⁵ Ms. E will not receive a 2017 PFD.

X is Ms. E's oldest child. Under Civil Rule 90.3(a) and after deductions for matters such as federal taxes and Social Security, her expected income results in an ongoing child support obligation of \$226 per month for one child.²⁶ Her support amount in the related case regarding Y would be \$225 per month, assuming that Ms. E's deduction from income for child support paid on behalf of

²¹ Alaska Civil Rule 90.3, Commentary X.

²² $15\% \times \$50 = \7.50 .

²³ 15 AAC 125.321(d).

²⁴ Civil Rule 90.3, Commentary III.E.

²⁵ $\$9.80/\text{hour} \times 30 \text{ hours per week} \times 52 \text{ weeks per year} = \$15,288$.

²⁶ Attachment A (from CSSD online support calculator at: <https://webapp.state.ak.us/cssd/guidelinecalc/form>).

her prior child (X) is limited to her average actual payment.²⁷ Her combined child support obligations for her two oldest children would then total \$451 per month, roughly 40% of her adjusted annual income.²⁸ This amount is beyond Ms. E's current ability to pay, and it would result in manifest injustice.

Civil Rule 90.3(c)(1) provides authority to vary a child support determination if unusual circumstances exist that make application of the usual formula unjust.²⁹ In making this determination, it is appropriate to consider all relevant evidence, including the custodial parent's income.

This case presents unusual circumstances that make application of the usual formula unjust. When separate child support orders are involved, the Civil Rule 90.3(a) formula assumes that the children live in different households, with resulting duplication of some expenses. This case is unusual, because those circumstances are not present. Mr. E is the custodial parent for both of Ms. E's two oldest children, and the children live together in a single household. Mr. E is the recipient of any support payments Ms. E makes on behalf of either child, and any arrearages on either child's case are also owed to him. Therefore, this situation is comparable to cases in which one set of parents has two children and a single child support order. In that situation, Ms. E's support obligation for both of her oldest children would be set at 27% of her adjusted annual income.³⁰ After all applicable deductions for matters such as federal taxes and Social Security, Ms. E's \$15,288 gross annual income would result in a \$305 monthly support obligation for two children.³¹

Based on the evidence presented, this combined support amount reflects Ms. E's ability to pay and it should be adopted. The \$305 monthly amount could be allocated between X's and Y's cases in two different ways. One would be to calculate X's support amount under Civil Rule 90.3(a) at \$226 per month, and apply the remaining \$79 per month to Y's support order under Civil Rule 90.3(c). However, the better course is to acknowledge that Mr. E is akin to a third-party custodian in X's case and to allocate Ms. E's combined support amount evenly between the two children.³²

²⁷ According to the CCS hearing representative, Ms. E's average actual payment in X's case over the past twelve months is \$4.51/month. The calculation for Ashlynn's support amount is taken from the CSSD online calculator, assuming \$15,288 gross income, no PFD, and a \$4.51 monthly prior child credit.

²⁸ $\$226 + \$225 = \$451$. $\$451/\text{month} \times 12 \text{ months} = \$5,412/\text{year}$. $\$5,412 / \$13,548.24 \text{ adjusted ann. income from Attachment A} = 39.95\%$.

²⁹ Civil Rule 90.3(c); Civil Rule 90.3, Commentary VI.B.

³⁰ Civil Rule 90.3(a)(2)(B).

³¹ Attachment A.

³² The record does not fully explain Mr. E's legal relationship to X. The above support calculation generally applies the approach taken in Civil Rule 90.3(i) for allocating child support in cases involving third party custody. Ms. E's third

Rounding to the nearest whole dollar, this results in a \$153 monthly obligation for X, and a \$152 monthly obligation in Y's case. This amount is more than a 15% change from Ms. E's prior obligation, so the child support order should be adjusted.

The parties' relative financial circumstances weigh in favor of a variance. Mr. E earns a steady income and he can provide for his household's needs, even without more significant financial assistance from Ms. E.³³ Conversely, Ms. E is in the process of financially re-establishing herself after a period of long-term incarceration, including developing a stable employment situation and income stream.

Mr. E argued that CSSD should impute income to Ms. E based on a full-time, minimum wage job. However, there is no evidence in the record showing that Ms. E has ever worked a full-time job for any significant period of time, or that it is realistic to expect she could successfully do so at the present time. Moreover, there is insufficient evidence in the record to justify a finding that Ms. E is voluntarily and unreasonably underemployed at this time.

Mr. E also argued that Ms. E could afford to pay additional child support if she eliminated her vehicle expenses and instead relied on public transportation. While public transportation would cost less than a personal vehicle, it also can be a significantly limiting factor in retaining employment or accessing new employment opportunities. Ms. E faces some difficult budget choices in deciding how to provide for her own needs while also meeting her child support obligations. However, this decision does not conclude that her overall living expenses are unreasonably high.

Ms. E expressed the desire to support her children, and she agreed she can pay more than \$50 per month. However, she also indicated that she is financially struggling, and she still has debts for substance abuse treatment and for court-ordered restitution, in addition to her basic living expenses. Ms. E is understandably concerned about making ends meet, and her budget is tight. She likely will need to look for additional sources of income to assist in meeting her financial obligations, such as from a second job.

IV. Conclusion

Based on the evidence brought forward during the hearing process, Mr. E showed that Ms. E's child support obligation for X should be modified. Ms. E is no longer incarcerated, and she is

child is not included in this analysis, however.

³³ Mr. E testimony.

working and earning income. As discussed above, Ms. E's support amount for X should be modified to \$153 per month, effective February 1, 2017 and ongoing. This amount was calculated under Civil Rule 90.3(c) due to unusual circumstances, since Ms. E's two oldest children have separate child support orders, yet they share the same household and custodian of record, Mr. E.

V. Child Support Order

- CSSD's Decision on Request for Modification Review, issued March 29, 2017, is overturned;
- The petition to modify Ms. E's administrative child support order, as addressed in the Notice of Petition for Modification issued on January 31, 2017, is granted;
- Ms. E's child support obligation for X is modified to \$153 per month, effective February 1, 2017 and ongoing;
- All other provisions of the Modified Administrative Child Support and Medical Support Order dated July 15, 2014, remain in full force and effect.

DATED: June 15, 2017.

By: Signed
Kathryn Swiderski
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, 2017.

By: Signed
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

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