

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

IN THE MATTER OF)
)
C. G.-S.)
)
) Case No. OAH-05-0678-CSS
) CSSD Case No. 001136447
_____)

DECISION & ORDER

I. Introduction

The obligor, C. G.-S., appeals an Amended Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD) on July 28, 2005. Administrative Law Judge Dale Whitney of the Office of Administrative Hearings heard the appeal on September 22, 2005. Ms. G.-S. appeared by telephone with her attorney, Shannon J. Boussom. The custodian of record, D. A., did not appear. Andrew Rawls represented CSSD. The child is S. A. (DOB xx/xx/89). The administrative law judge affirms the amended order.

II. Facts

The child in this case, S., is now sixteen years old. For most of his life he has lived with his mother in Sitka. On March 30, 2005 he went to stay with his father, Mr. A. S. stayed with Mr. A. until June xx, 2005, and then returned to stay with Ms. G.-S. On July 11, 2005, he went to stay with his maternal grandmother, and on August xx, 2005 he returned to his father's in Juneau. Over Labor Day weekend in 2005 S. went back to Sitka for three days to visit, but he is attending school in Juneau.

Ms. G.-S. is married and has two children, ages four and one, by her husband. She is not employed, but stays in the family home caring for the younger children. Until last March, she had also been caring for S. along with the two younger children. Ms. G.-S.'s husband is a fisherman who trolls and longlines for halibut. Ms. G.-S. testified that for eleven months out of the year her husband is usually gone fishing for about a week at a time. He then returns for a few days to rest, visit the family, and take care of the boat, and then he returns to sea. Ms. G.-S. testified that her husband earns about \$30,000 per year, and that the entire family lives on that amount. There is no evidence regarding Mr. A.'s financial situation.

III. Discussion

Ms. G.-S. raises two issues. First, she asserts that she should not be required to pay support for the period from June 14 to August 16, 2005, when S. was either staying with Ms. G.-

S. or her mother. Ms. G.-S.'s second issue is that CSSD has imputed income to her because she is unemployed. Ms. G.-S. asserts that she is not voluntarily and unreasonably unemployed, and that her support should be set at a lower or even minimal amount.

The parents in this case do not have a custody order in effect and they have no formal agreement on custody. S. initially went to his dad's house to visit. When he decided he would like to try living with his dad, Ms. G.-S. did not object. Although there is no formal custody order in effect, it is necessary to determine what kind of custody the actual arrangement most closely approximates. According to Civil Rule 90.3(f), a parent has shared custody when he or she has custody more than 30 percent but less than 70 percent of the year. A parent has primary custody if the child lives with the other parent less than 30 percent of the year.

It appears that S. will stay with Mr. A. for most of the remaining balance of 2005. In very approximate terms, at the end of the year S. will have spent seven months of 2005 with his father, four months with his mother, and one month with his maternal grandmother. There are three ways custody can reasonably be considered to exist. There could be shared custody through all of 2005, primary custody alternating back and forth, or primary custody with summer visitation that changed from mom to dad in March.

The most reasonable interpretation of the facts is that S. had been in his mother's primary custody until March 2005, when primary custody shifted to Mr. A. and summer and holiday visitation shifted to Ms. G.-S. It is clear that something changed after S. went to visit Mr. A. in March, and the most obvious evidence is where S. is enrolled in school. He now attends school in Juneau, and only goes back to Sitka when school is out. It appears likely that this schedule will continue. Mr. A. has been the primary custodian since before this order became effective on April 1, 2005.

Civil Rule 90.3(a) generally requires the obligor to make monthly support payments over the entire year, regardless of the visitation schedule. The rule allows, but does not require, a reduction in support of up to seventy five percent for any period during which the obligor has extended visitation of over 27 days.¹ Since the time custody changed to Mr. A., the longest period that S. was with Ms. G.-S. was from June 14, 2005, to July 11, 2005, a period of exactly 27 days. One could argue that the month S. spent with Ms. G.-S.'s mother might be attributable to Ms. G.-S. But the evidence in the record does not show any unusual direct expenditure for S.'s support on Ms. G.-S.'s part that would justify a variance from the normal rule of support.

The second issue in this case is whether Ms. G.-S.'s unemployment is "voluntary and unreasonable" under Civil Rule 90.3. Ms. G.-S. testified that the cost of childcare for her two younger children would approximately equal the amount she could earn working full-time. She argued that under these circumstances a return to the workforce would be unreasonable.

Within the context of Ms. G.-S.'s immediate household, her argument makes sense. When one parent's earning potential is less than or equal to the cost of childcare, and the other parent has a higher earning potential, the wisest choice from an economic perspective is for the lower-paid parent to quit work and care for the children, while the higher-paid parent works full-time. This is an eminently reasonable decision.

The above argument fails when an older child of a previous relationship lives with that child's other parent. In this child support case, the right of support belongs to S., and "reasonableness" must be considered from his perspective. Under Civil Rule 90.3, the amount of support due to an older child of a previous relationship is calculated before the obligation to a younger child of a subsequent relationship. Thus, according to the law, S.'s entitlement to support takes priority over that of his half-siblings.

Ms. G.-S. and her husband have an equal responsibility to support their own two children. The way they choose to allocate the resources of their family is their own concern, and they have done so in the manner that is most beneficial to their two children. But such a decision may not be made at the expense of S.'s right to be supported by both of his parents. The decision of Ms. G.-S. and her husband to shift all of the family's income-producing responsibility to the husband and all of the childcare responsibility to Ms. G.-S. is reasonable from everyone's perspective except S.'s. S. now derives no benefit from Ms. G.-S.'s decision to stay home and not work, while he would derive a benefit if Ms. G. worked and paid for childcare for the younger children. One could debate the policy behind the law in unusual situations, but the law as it exists is clear; S. is entitled to a percentage of his non-custodial parent's earning capacity before any accommodation is made for younger children of a subsequent relationship.

To the question, "if you were to look for daycare, would it be fair to expect [your husband] would be at least paying half of it?" Ms. G.-S. answered as follows:

Well it wouldn't be on his choice for me to be going to work. And so I would feel as if I would pay all of it. Because the choice we make between each other is for me to stay home with the children and if I was to go to work it would be because I have the obligation to pay child support to Dan [the custodian]. Which I do not feel should come

¹ Civil Rule 90.3(a)(3).
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out of my husband's pocket; that's not his child. So I would feel obligated to take care of that amount because it would be my choice on going to work because I have to pay for child support, and not because of any other reason.

Ms. G.-S. is correct that her husband has no obligation to support S.. But he did marry and have children with someone whom he knew to have an existing duty to support an older child. The unavoidable result of this decision is that his children will have fewer resources available to them than if he had married someone who had no children. Because Ms. G.-S. may have to work to support her older child, the family of the younger children may have to adjust its resources accordingly.

CSSD calculated Ms. G.-S.'s support obligation based on a minimum-wage income with a PFD and Native corporation dividends. Although some evidence at the hearing shows that she has earned more than that in the past, Ms. G.-S. has been out of the work force for some time now. CSSD was correct to impute income at this level.

IV. Conclusion

S. has been in the primary custody of Mr. A. from the effective date of the amended order. Ms. G.-S. is voluntarily and unreasonably unemployed. CSSD has correctly calculated Ms. G.-S.'s potential income and correctly calculated support accordingly. The amended order should be affirmed.

V. Order

IT IS HEREBY ORDERED that the Amended Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD) on July 28, 2005 be AFFIRMED.

DATED this 6th day of October, 2005.

By: Signed
DALE WHITNEY
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 within 30 days after the date of this decision.

DATED this 24th day of October, 2005.

By: _____

Signature

Name

Title

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