

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

In the Matter of)	
)	
E N)	OAH No. 18-1296-CSS
_____)	Agency No. 001224617

CORRECTED DECISION AND ORDER¹

I. Introduction

The Child Support Services Division (CSSD) issued an Administrative Child Support and Medical Support Order that established E N’s support obligation for her daughters, N and N. The order was based on primary custody with the children’s father, S H. After an administrative review hearing, CSSD upheld the order. Ms. N appealed.

Ms. N requested time to submit documents showing that her medical condition limits her ability to work. She also requested time to arrange for witnesses who would support her claim of equal shared custody. However, she did not submit any documents and she failed to appear at the rescheduled hearing. Her written appeal statements are insufficient to meet her burden of proof. Therefore, CSSD’s administrative review hearing decision is affirmed, and the Administrative Child Support and Medical Support Order dated June 8, 2018 remains in full force and effect.

II. Facts and Proceedings

E N and S H are the parents of N, age 10, and N, age 5. The children spend time with both parents but primarily live with Mr. H, who is the custodian of record.

In January 2018, CSSD received notice that public assistance was paid on the children’s behalf. It confirmed that Ms. N is each child’s legal mother by referencing Bureau of Vital Statistics records and observing that her name appears on each birth certificate.² Ms. N did not contest this finding.

CSSD ordered Ms. N to provide her income information so it could establish a child support order.³ She did not respond. On June 8, 2018, it issued an Administrative Child Support and Medical Support Order that set her ongoing child support obligation at \$370 per month for two children, effective July 1, 2018, based on primary custody exercised by Mr. H. To calculate

¹ This Corrected Decision and Order is issued pursuant to 2 AAC 64.350(a) because of a manifest error in the proposed decision. The Order section incorrectly cited the date of the Administrative Child Support and Medical Support Order at issue as “June 8, 2018, 2016” rather than June 8, 2018. The date has been corrected; no other changes were made.

² CSSD pre-hearing brief, p. 1.

³ Exhibit 1.

the ongoing support obligation, CSSD assumed Ms. N earns or could earn the average hourly wage for hairdressers in Alaska, \$16.76, and work a half-time schedule, 20 hours per week.⁴ This results in gross annual wage income of \$17,460.40.⁵ CSSD set the arrears amount at \$50 per month for January 2018 through June 2018, based solely on Ms. N's PFD income.⁶

Ms. N requested an administrative review hearing.⁷ With the request, she submitted a hand-written letter dated July 2, 2018, stating that she and Mr. H "share equal legal and physical custody" of their daughters. It was signed by both parents.⁸

Ms. N did not appear for the administrative review hearing on October 22, 2018. Mr. H participated and testified that he exercised overnight custody more than 70% of the time from January 2018 through April 2018. From May through September, he stated that the parents tried to share custody. Ms. N's percentage of custody during those months was approximately 30%, while his was 70%.⁹

On November 15, 2018, CSSD issued an administrative review hearing decision affirming its June 8th child support order.¹⁰ It concluded that Ms. N did not exercise overnight custody of the girls at least 30% of the time on an annual basis.

Ms. N requested a formal hearing.¹¹ Her written request again asserts that she and Mr. H exercise equal shared custody. It also asserts that she is unable to work because of back problems and chronic pain, and it explains that she missed the administrative review hearing because she was having back surgery. She wrote: "I do not and can not work due to my back. I haven't worked since 2014."¹²

Ms. N appeared telephonically for the hearing that began on January 14, 2019. Before evidence was taken, she requested a continuance. She indicated that she wanted to arrange for witnesses to testify in support of her custody claim. She also planned to obtain a letter from her doctor explaining her medical situation and associated limitations on her ability to work. All

⁴ Exhibit 2, p. 5. CSSD obtained the hourly rate from a Bureau of Labor Statistics database showing occupational employment and wage estimates for Alaska. See https://www.bls.gov/oes/current/oes_ak.htm#39-0000. The May 2017 publication provides the most recent data.

⁵ Exhibit 4, p. 2. $\$16.76/\text{hour} \times 20 \text{ hours/week} \times 52 \text{ weeks} = \$17,430.40/\text{year}$.

⁶ Exhibit 2.

⁷ Exhibit 3.

⁸ Exhibit 3, p. 2.

⁹ Exhibit 4, pp. 1-2.

¹⁰ Exhibit 4.

¹¹ Exhibit 5.

¹² *Id.*

parties agreed to reschedule the hearing for February 5, 2019. A scheduling order formally set the new hearing date and explained how documents could be submitted.

Ms. N did not submit any documents. On February 5, 2019, Mr. H answered a call to his telephone number of record. He declined to participate in the hearing because an urgent family situation required his immediate attention. Ms. N did not appear or answer a call to her number of record. The undersigned left her a voice message advising that she must contact the Office of Administrative Hearings or submit a written explanation showing good cause for her failure to appear within ten days if she wanted to reschedule the hearing.

The hearing took place on February 5, 2019 without either parent's participation. Child Support Specialist Brandi Estes appeared by telephone and represented CSSD. The hearing was audio-recorded. All exhibits were admitted to the record which closed ten days later, on February 15, 2019. Ms. N did not contact the Office of Administrative Hearings or show good cause for her failure to appear. This decision is issued based on the evidence in the record.¹³

III. Discussion

As the person who filed the appeal, Ms. N has the burden of proving by a preponderance of the evidence that CSSD's child support order is incorrect.¹⁴ She raised two issues on appeal: custody and the income determination.

A. Custody

In determining whether there is primary or shared custody, CSSD is to follow the terms of the court's custody order, if one is in effect. If there is no custody order, the agency is to make the determination based on the parents' actual custody practices.¹⁵

A parent exercises primary custody if the children reside with that parent more than 70% of the year and with the other parent less than 30% of the year.¹⁶ Custody is shared if the children reside with the other parent at least 30% but not more than 70% of the year, regardless of the status of legal custody.¹⁷ This determination is made based on the parents' practices over the course of the year; it is not revised on a month-by-month basis. Thirty percent of the overnights in a year is 110 overnights.¹⁸

¹³ AS 25.27.170(f); 15 AAC 05.030(j).

¹⁴ 15 AAC 05.030(h).

¹⁵ 15 AAC 125.070(d).

¹⁶ Civil Rule 90.3(f)(2).

¹⁷ Civil Rule 90.3(f)(1).

¹⁸ Civil Rule 90.3, Commentary V.A.

For a visitation day to count toward the required 30% of the year, the child normally must stay overnight. A day or an evening of visitation, by itself, does not count toward the total time necessary to establish shared custody. Thus, visitation from Saturday morning through Sunday evening counts as one overnight.¹⁹

There is no custody order in effect in this case. Ms. N points to the July 2, 2018 letter to support her claim of equal shared custody. However, Mr. H's testimony in October 2018 disavowed the letter. His testimony clarified that there is no agreement about an ongoing arrangement for equal shared custody. Thus, CSSD appropriately gave the parties' actual custody practices determinative weight.

The evidence is that Ms. N exercised overnight custody 30% of the time for some months, but less than 30% in other months of the year. After her back surgery in October 2018, it is likely that Mr. H again exercised primary custody for a period of time.²⁰ Viewing the year as a whole, the weight of the evidence supports CSSD's conclusion that Mr. H exercised physical custody more than 70% of the time. Ms. N did not show otherwise, nor did she show that the parents' practices are likely to change in 2019.

B. Income Determination

Setting child support is largely a predictive function.²¹ Child support awards are set under Civil Rule 90.3 based on a formula that starts with a determination of the noncustodial parent's total income from all sources. In this, CSSD is to use the best information available. When a parent's actual income history is not available, the determination can be based on other information, including the parent's job skills, training, work history, and the average wages earned by others in the parent's same occupation.²² When a parent is voluntarily and unreasonably unemployed or underemployed, the income determination is based on potential or imputed income, which is set with reference to the parent's work history, qualifications and job opportunities.²³ The obligor-parent bears the burden of proving his or her income or earning capacity.²⁴

¹⁹ *Id.*

²⁰ *See* CSSD pre-hearing brief, p. 1.

²¹ *Holmes v. Holmes*, 414 P.3d 662, 668 (Alaska 2018) (citing *Potter v. Potter*, 55 P.3d 726, 730 (Alaska 2002)).

²² *See* 15 AAC 125.050(c).

²³ 15 AAC 125.060; Civil Rule 90.3(a)(4).

²⁴ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

In this case, CSSD found no record of Ms. N's actual wages in recent years. It had information that she has training or experience as a hairdresser, so it set the ongoing child support amount based on the average hourly wage for Alaskans working in that field and a part-time job, plus the PFD. Ms. N did not present sufficient evidence to show that CSSD erred in this determination. She asserts that she cannot work due to back problems and chronic pain. This may be true; however, without more information, her unsworn statement does not meet her burden of proof. Ms. N understood that she needed to document her circumstances, and she planned to do so. Without explanation or any communication, she did not follow through. Accordingly, CSSD's determination of her ability to work and her potential income is affirmed. Ms. N may request a modification review if she can provide additional information showing her circumstances.

IV. Conclusion

Ms. N did not show that CSSD made a mistake when it issued its administrative review hearing decision on November 15, 2018. Therefore, that decision is affirmed. This leaves the Administrative Child Support and Medical Support Order dated June 8, 2018 in full force and effect.

V. Child Support Order

- The Administrative Review Hearing Decision dated November 15, 2018, is affirmed;
- The Administrative Child Support and Medical Support Order dated June 8, 2018, remains in full force and effect.

DATED: March 6, 2019.

By: Signed
Signature
Kathryn A. Swiderski
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

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 7th day of March, 2019.

By: Signed
Signature
Kathryn A. Swiderski
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]