

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

In the Matter of)	
)	
H C. L)	OAH No. 19-0230-CSS
_____)	Agency No. 001228428

DECISION AND ORDER

I. Introduction

H L appeals an administrative review hearing decision and Amended Administrative Child and Medical Support Order issued by the Child Support Services Division (CSSD) on January 29, 2019. The amended order established Mr. L’s 2019 and ongoing child support obligation for his youngest son, D, based on shared custody with D’s mother, T L. CSSD concluded that the parents’ custody practices reflect a 64% (mother), 36% (father) arrangement. The order also set pre-order arrears for D and another son, F, for the months of August 2018 through December 2018. F received his high school diploma and turned 19 in December 2018.

Mr. L argues that CSSD erred in three ways: by including F in the order; by calculating the 2019 support amount for D based on 64% - 36% shared custody; and by failing to impute more income to Ms. L.

This decision concludes that CSSD appropriately included pre-order arrears for F. Until December 2018, he was actively pursuing his high school diploma while living as a dependent in his mother’s home. Regarding the 2019 custody plan for D, Mr. L showed that the parents’ practices have changed. Their actual year-to-date arrangement reflects a 56% (mother), 44% (father) schedule. This is the best evidence of their future practice and should be adopted for the 2019 and ongoing calculation. CSSD did not err in determining Ms. L’s 2018 income, but her expected 2019 income should increase.

II. Facts¹

A. Material Facts

H L and T L live in Anchorage. They were married for many years but separated during the summer of 2018. They are the parents of three boys: E, F, and D. The oldest, E, is now an adult and no longer lives with either parent. However, he has special needs that required

¹ The facts are based on the evidence in the hearing record and rely heavily on the testimony of H L and T L.

intensive parental time and attention when he was a child. F was born December 29, 1999 and is now 19 years old. He was eighteen when his parents separated. He has lived with Ms. L since the separation. D is currently 14 years old. He plays competitive hockey and frequently travels for hockey tournaments or other events. One parent typically accompanies him on out-of-town hockey trips, but occasionally both parents travel with him.

Mr. L works full-time with Employer A. His 2018 and expected 2019 gross wages from that job are \$180,003.20.²

Ms. L is 51 years old. She graduated from college in 1990 with a bachelor's degree in finance. During the early to mid-1990's, she spent four years working for Employer B; she also worked for Employer C for a year. Her last full-time job was in 1995 or 1996. After E was born, Ms. L stopped working and became a stay-home parent. With a brief exception in 2015, when she did some part-time work as a realtor and earned \$8,000 to \$12,000, Ms. L has been a stay-home parent for more than 20 years. For the last several years, she has served as a volunteer parent-manager for D's hockey team.

In November 2018, Ms. L started a job working in the office at a school in Employer D. She earned \$16 per hour. After three weeks on the job, she resigned to avoid being terminated. She credibly explained that she and a co-worker were not compatible, and the school principal advised her to resign so she could still be hired by Employer D in a different job. Otherwise, she would be terminated and could not be re-employed in other Employer D positions.

Since losing that job, Ms. L has continued looking for work that offers health insurance and other benefits. She has applied for at least 10 jobs with employers such as Employer D, Employer B, ConocoPhillips, and MC Machinery. So far, she has not received another job offer.

In her job search, Ms. L met with a hiring agency, which advised her to get additional computer training to improve her job prospects. Ms. L left the workforce before it became highly computerized, so she needs training in Microsoft programs before she will be a serious candidate for certain positions.³ She has twice enrolled in local classes³ for that training, but both were cancelled before they began. In the meantime, Ms. L continues looking for a position that emphasizes administrative or customer service skills.

² Exhibit 8.

³ At home and for her volunteer work, Ms. L uses Apple products.

Ms. L has no physical or medical disabilities that prevent her from working full-time. She could work a full-time job earning minimum wage. However, she has not yet broadened her search to include that kind of work, as she hopes to find something that pays a higher wage and is better tailored to her education, skills, and interests.

B. Procedural History

Ms. L applied for CSSD's services in August 2018. CSSD issued an administrative order to provide financial information in September, and Mr. L submitted responsive information.⁴ On October 15, 2018, CSSD issued an Administrative Child Support and Medical Support Order.⁵ The order established Mr. L's obligation only for D, since he was the only child Ms. L identified in her application. It set Mr. L's ongoing and pre-order arrears obligation for D at \$2,022 per month, based on primary custody exercised by Ms. L.

Mr. L timely requested an administrative review hearing, which took place on December 10, 2018.⁶ On January 29, 2019, CSSD issued the administrative review hearing decision and Amended Administrative Child and Medical Support Order at issue in this appeal.⁷ The amended support order set Mr. L's obligation for D based on shared custody. After reviewing each parent's calendars showing D's overnight stays from August 2018 through December 2018, CSSD concluded that the parties have generally exercised a 64% mother, 36% father arrangement. It relied on Mr. L's actual 2018 gross wages to calculate his obligation under the shared custody formula. After deductions, including deductions for retirement contributions and Mr. L's cost for his own health insurance premiums, CSSD calculated his adjusted annual income at \$120,349.56.⁸ Mr. L does not dispute this determination.

CSSD determined Ms. L's income by adopting the \$16 hourly wage she earned in November 2018 and applying it to an average 20-hour weekly work schedule. This resulted in gross annual wages of \$16,640.00.⁹ After applicable deductions, Ms. L's adjusted annual income is \$16,236.72.

⁴ Exhibits 1, 2.

⁵ Exhibit 3.

⁶ Exhibit 4; Exhibit 8, p. 1.

⁷ Exhibit 8.

⁸ Exhibit 8, p. 12.

⁹ Exhibit 8, p. 11

Under a 64%-36% custody arrangement for D, the parents' respective incomes resulted in a support amount of \$1,779 per month for D, effective March 1, 2019. CSSD adopted the same calculation to set Mr. L's pre-order arrears for January and February 2019, when D was the only child on the order.

When it considered pre-order arrears for August 2018 through December 2018, CSSD concluded that F also must be included on the order since he was still 18 and enrolled in high school until December. Because the parents shared custody of D during this time, but Ms. L exercised primary custody of F, CSSD did a hybrid custody calculation for those five months.¹⁰ Under the hybrid custody formula, Mr. L's obligation for two children came to \$2,555 per month, effective August 2018 through December 2018.¹¹

Mr. L appealed.¹² The formal hearing took place on April 3, 2019. It was audio-recorded. Mr. L appeared telephonically and testified. He was represented by attorney Justin Eschbacher. Ms. L was represented by attorney Jennifer Wagner, who appeared in person. Ms. L participated telephonically and testified. Child Support Specialist Brandi Estes appeared in person and represented CSSD. CSSD's exhibits were admitted to the record, as were Mr. L's exhibits numbered 1, 2, and 4-6.

At the outset of the hearing, the Ls advised that they have a divorce case pending in superior court. They expect the superior court to issue a custody order and a child support order. The support order is likely to supersede this administrative determination. However, until the superior court issues a stay or a superseding child support order, CSSD will enforce its administrative order. Because Mr. L disagrees with CSSD's order and there is uncertainty about the timing of a superior court order, he opted to proceed with the formal hearing rather than stay the administrative case.

III. Discussion

As the party appealing CSSD's decision, Mr. L bears the burden of demonstrating that the amended support order is incorrect.¹³ His appeal raised three primary issues.

¹⁰ Exhibit 8, pp. 14-15.

¹¹ The amended child support order also calculated a medical credit which reduces Mr. L's net monthly obligation for pre-order arrears and the ongoing amount. The amount of the medical credit is not at issue in this appeal.

¹² Exhibit 9.

¹³ 15 AAC 05.030(h).

A. Inclusion of F

Due to deficits in the areas of communication and organizational skills, F received special education services in high school. In the fall of his senior year, F's school counselor informed the Ls that his courses qualified him to graduate in May 2018.¹⁴ However, the counselor also stated that his classes would not qualify him for certain programs and benefits, including the Alaska Performance Scholarship and programs called the Tapestry and the ACE/ACT programs.¹⁵

After discussing this, the Ls jointly decided during the fall of 2017 that F should take a year-long, online science class starting in January 2018 to better position himself for post-high school options. To do this, he would need to remain an enrolled student of the Anchorage School District through the 2018 fall semester. The Ls therefore agreed F would not receive his diploma in May 2018 when his peers did. Instead, he would defer the diploma and continue taking the science class through the next fall semester, which ended in December 2018.

By May 2018, when his peers received their diplomas, F was already 18 years old. He walked in the May 2018 graduation ceremony with his classmates, but he did not receive his diploma. He remained an enrolled ASD student, and he completed the science course in December 2018. His ASD transcript identifies him as a 12th grade student during the fall semester.¹⁶ F received his high school diploma in December 2018, just before he turned 19 years old.¹⁷ The additional course appears on his transcript, and it factored into his grade point average.¹⁸ Because of the course, F qualified for the Alaska Performance Scholarship and the other programs.¹⁹

Mr. L argues that his duty to financially support F ended in May 2018, when F could have received his high school diploma. He asserts that CSSD erred by including him in the order, because F was 18 years old and no longer actively pursuing a high school diploma after May. He also suggests that F was no longer a dependent of Ms. L's after that time.

¹⁴ T L testimony; L Exhibits 1, 2.

¹⁵ T L testimony.

¹⁶ L Exhibit 2.

¹⁷ See L Exhibit 2, p. 2.

¹⁸ L Exhibit 2 (ASD transcript shows "Forensic Science I Online" course).

¹⁹ T L testimony.

In general, a parent’s duty of support exists only until the child is emancipated or reaches the age of majority, which is 18 years.²⁰ However, AS 25.24.140(a)(3) creates an exception to this general rule. In relevant part, it provides for an award of child support:

. . . for unmarried 18-year-old children of the marriage who are actively pursuing a high school diploma or an equivalent level of technical or vocational training and living as dependents with the spouse or designee of the spouse, if there is a legal obligation of the other spouse to provide support.

For purposes of child support, this statute postpones the age of majority for dependent children who are living at home and pursuing a high school diploma or similar degree.²¹

1. F was actively pursuing a high school diploma until December 2018.

Mr. L argues unpersuasively that F was no longer “actively pursuing” his diploma after May 2018, because he had earned enough credits to graduate by May. He could not reconcile this position with the undeniable facts that F remained an enrolled high school student, he continued to take a course that counted toward graduation and scholarship opportunities, the class factored into his grade point average, and he was not actually awarded his diploma until December. These facts, plus Mr. L’s role in jointly approving the plan to extend F’s high school tenure, all point to the conclusion that F remained a student who was actively pursuing his high school diploma until December 2018.

The fact that he *could have* graduated the prior semester does not change this conclusion, because the reality is that he did not do so. Despite his credits, F remained an enrolled student so he could benefit from an additional class. There were good reasons for this decision, as shown by the F’s resulting program options and scholarship.

F’s participation in the spring graduation ceremony also does not change the analysis. The school district’s policy for such participation is not in the record. However, that event does not necessarily define the moment of graduation. At least for purposes of determining whether a duty of child support exists, AS 25.24.140(a)(3) makes the award of the diploma the critical event.

Until he completed all high school courses and received his high school diploma in December 2018, F was actively pursuing his high school diploma.

²⁰ *Sanders v. Sanders*, 902 P.2d 310 (Alaska 1995); *Streb v. Streb*, 774 P.2d 798 (Alaska 1989).

²¹ *Sanders*, 902 P.2d at 314. In such cases, Civil Rule 90.3 provides the appropriate formula for determining the support amount. *Id.*

2. F was living at home as a dependent while pursuing his diploma.

While F took the additional science class during the fall of 2018, he also worked a part-time job. Throughout the fall, he worked approximately two days per week and earned \$14 per hour.²² Due to his relatively poor communication and organizational skills, however, he often failed to turn in his weekly timecard at work. Consequently, he would not receive a paycheck. After repeated lapses, Ms. L concluded that F did not appreciate the value of money or the importance of regularly receiving his paycheck.

To help him learn an important lesson, in November or December 2018 she began requiring him to pay her \$500 per month. She called this payment “rent,” but she used that term only to teach F about adult financial responsibilities. F paid her in cash one or two times, either \$500 or \$1,000. Ms. L keeps that money in an envelope with F’s name on it. She does not intend to use it herself; she sees it as forced savings for F as he learns to handle adult responsibilities like turning in timesheets, receiving a paycheck, and budgeting money.

This evidence does not establish that F was functioning as an independent adult or that he was no longer a dependent during the fall of 2018. Despite his part-time job and limited payments to Ms. L, F was living at home as a dependent while he pursued his high school diploma. Therefore, between August and December 2018, F satisfied the exception at AS 25.24.140(a)(3). CSSD correctly included him in the child support order.

B. Shared Custody Determination for 2019

When there is no court order regarding custody or a written agreement between the parents, their actual periods of overnight custody determine whether shared custody exists and, if so, the percentage of shared custody each party exercises.

Mr. L does not dispute CSSD’s determination that he and Ms. L shared custody of D on a 64% - 36% schedule between August and December 2018. He argues that the arrangement shifted to equal shared custody in January 2019, and the support order should reflect this change. Since January 1st, he asserts that he and Ms. L have generally shared custody on a week-on, week-off basis, with some variations to accommodate D’s travel and Mr. L’s business travel. The weekly schedule contemplates custody exchanges on Friday evenings.

Ms. L agreed that a week-on, week-off schedule has loosely been the parties’ practice since January. However, she points out exceptions and notes that Mr. L has traditionally traveled

²² T L testimony.

extensively for business. She is doubtful he will be able to consistently exercise equal custody. Both parents agree that D's frequent travels for hockey further complicate their custody schedule. Due to D's age, they feel that at least one parent should accompany him on those trips.

Mr. L's job requires regular travel. He acknowledged that Ms. L exercised custody 64% of the time during the fall largely because of his business trips. However, he testified credibly that he and his employer agreed in January 2019 to concentrate his business travel, to the maximum extent possible, on the weeks he does not have D.

This agreement has helped Mr. L more regularly exercise custody during his scheduled weeks. He submitted calendars showing the parents' actual custody practices from January through March 2019.²³ They show the parents are trying to adhere to a week-on, week-off schedule with exchanges on Friday nights. However, they also show ongoing flexibility, with regular changes to accommodate some business travel by Mr. L, D's hockey trips, and episodic other events.

The calendars and hearing testimony show the following overnights with each parent:

<u>Month</u>	<u>Ms. L</u>	<u>Mr. L</u>
January	18	13
February	13	15
March	19	12

When each parent's overnights are combined and divided by 90 total nights, the 2019 practice to-date reflects a 56% (mother), 44% (father) arrangement. This is the best evidence of the parties' actual practice, and it should be adopted for the 2019 and ongoing calculation.

C. Income Determination for Ms. L and Child Support Calculations

Under Civil Rule 90.3, a parent's child support obligation is calculated based on his or her total income from all sources during the period for which the support is being paid.²⁴ By its nature, this determination can be a somewhat uncertain endeavor, since the relevant calculation includes an assessment of expected future income.²⁵ Once a parent's total income is determined,

²³ L Exhibit 4. Mr. L's March calendar should be corrected to show overnights with Ms. L on March 29-31, rather than with Mr. L. H L testimony.

²⁴ See also 15 AAC 125.020, 15 AAC 125.030.

²⁵ Civil Rule 90.3, Commentary III.E.

Civil Rule 90.3 calculates the parent's adjusted annual income by subtracting specified deductions.²⁶

When parents exercise shared custody, each parent's adjusted annual income and child support obligation is first determined under the primary custody formula. That information is then used in the shared custody formula.²⁷

There is no dispute regarding Mr. L's adjusted annual income for 2018 and 2019. The income determination for Ms. L is difficult, because she is in the process of transitioning back into the workforce after more than 20 years away from it. She is well-educated and, before too long, she is likely to be a competitive applicant for jobs requiring administrative or customer service skills. However, she also faces some obstacles, including her lack of any significant recent work experience and her need for additional computer skills.

Mr. L argues that Ms. L could be working a full-time job, but she chooses not to. He questions the diligence of her job search and her efforts to obtain computer training, pointing out that she has traveled frequently since the parties separated nine months ago – both for personal reasons as well as for D's hockey tournaments. Because administrative and customer service jobs are available in Anchorage, he believes Ms. L's income for 2018 and 2019 should be based on her prior wage of \$16 per hour over a full-time schedule, resulting in gross annual wages of \$33,280. At a minimum, he argues she could be earning minimum wage and working full time. In 2019, this would result in gross wages of \$20,571.20.²⁸

1. 2018 income determination for Ms. L

As a general rule, a parent's support amount for pre-order arrears should be calculated based on the parent's actual total income during the relevant time period.²⁹ If the agency has complete income information for the year in question, it is to use it in the calculation even if the

²⁶ See Civil Rule 90.3(a)(1). Deductions include, for example, federal income taxes, Social Security and Medicare withholding, retirement plan contributions, and the parent's cost for his or her own health insurance premiums.

²⁷ Civil Rule 90.3(b)(1), (b)(3).

²⁸ \$9.89/hour x 40 hours/week x 52 weeks = \$20,571.20.

²⁹ 15 AAC 125.050(b).

parent worked only sporadically during that time.³⁰ There is no dispute that Ms. L's actual 2018 income was \$2,692.43 from her three-week job with the school district, plus the PFD.³¹

An exception to the general rule applies when the agency determines that the parent was voluntarily and unreasonably unemployed or underemployed during the time period in question. This determination can apply to the pre-order arrears as well as the ongoing support calculation. If a parent was voluntarily and unreasonably unemployed or underemployed, CSSD is to determine potential income by considering the parent's past income, skills, work history, education, and job opportunities in the parent's community of residence.³²

CSSD did not expressly find that Ms. L was voluntarily and unreasonably unemployed or underemployed in 2018 or 2019, but its income determination is based on imputed income at her \$16 hourly wage from the Employer D job over an average 20-hour workweek for a full year.³³ Ms. L does not argue that CSSD erred by setting her 2018 and expected 2019 wage income at \$16,640; she argues it should not be any higher.

For purposes of calculating pre-order arrears, this decision adopts CSSD's determination. Mr. L has not shown that CSSD erred or that Ms. L's wage income should be higher than \$16,640. In light of all the circumstances in this case, including the fact that the parties did not separate until the summer of 2018, it would be unreasonable to expect that Ms. L could have earned more than \$16,640 during the relevant time period.

Because Ms. L's 2018 income determination remains \$16,640, there is also no error in CSSD's calculation of Mr. L's child support amount for D and F under the hybrid custody formula. For the months of August 2018 through December 2018, it remains \$2,555.³⁴

2. Hybrid custody calculation and unusual circumstances

Civil Rule 90.3(b)(3) states that hybrid custody is an unusual circumstance that requires consideration of a variance under Civil Rule 90.3(c)(1).

³⁰ 15 AAC 125.050(b)(1). If it has incomplete income information, the agency may estimate the parent's total income by looking to other information. That is not the case here, as there is no dispute about Ms. L's actual 2018 wage income.

³¹ Exhibit 10; Exhibit 8, p. 11.

³² 15 AAC 125.050; 15 AAC 125.060(a); 15 AAC 125.020(b). *See also* Civil Rule 90.3(a)(4) (requiring consideration of work history, qualifications, and job opportunities).

³³ \$16/hour x 20 hours/week x 52 weeks = \$16,640/year.

³⁴ Exhibit 8, pp. 14-15.

In this case, the evidence does not support a reduction of Mr. L's \$2,555 monthly obligation. Though F's extended high school experience was somewhat unusual, it also was short term – lasting only for five months from August through December. There is no evidence that the normal calculation would result in financial hardship to Mr. L or that it would be manifestly unjust. Conversely, a reduced obligation would have a significant adverse impact on Ms. L's household, given her lack of regular income. Accordingly, the support amount should not be varied.

3. 2019 income determination for Ms. L

Appropriate determination of Ms. L's income for 2019 is challenging, and both parents raised relevant considerations. The parties have been separated for nine months. Ms. L is capable of working. However, she also remains in a period of transition, and she continues to require some training. Even if she had stayed with Employer D, the job was not a full-time, year-round position.

Ms. L's future employment prospects are good. She is well-educated and possesses many personal qualities and skills that should make her a desirable employee. Her ongoing unemployment reflects a desire for a particular kind of job that pays more than minimum wage and offers benefits. This involves a degree of voluntary unemployment. However, particularly since she is starting a new career after 20-plus years out of the workforce, it is not unreasonable for her to focus her search on professional-level jobs that will be well-tailored to her education, skills, and interests. This search requires some time. As a result, CSSD correctly declined to attribute income to Ms. L based on a full-time job at significantly more than minimum wage.

CSSD's income determination sought to balance Ms. L's duty of support with the other challenges she faces while she continues her job search and transition into the workforce. It recognized Ms. L's earning potential by adopting a \$16 hourly wage but factored in the significant uncertainty about her future work schedule and the timing of a new job by adopting an average 20-hour workweek over a full year.

In light of Ms. L's abilities, the time since the parents separated, and the general availability of jobs in Anchorage, this decision adopts a slightly different analysis. It concludes that Ms. L's 2019 child support obligation for D should be based on the income she would earn

if she worked a full-time job at minimum wage. This raises her 2019 income determination to \$20,571.20, which is \$3,931.20 more than CSSD calculated.³⁵

Like CSSD's finding, this income determination seeks to recognize the uncertainty in Ms. L's circumstances. It increases the amount in order to remain consistent with the expectations set in other Office of Administrative Hearings decisions. After applicable deductions, this income results in a monthly support amount of \$323 for one child.³⁶ This is a 19% change from Ms. L's 2018 obligation for D under the primary custody formula.³⁷

4. 2019 Shared Custody Calculation

Under the shared custody formula and 2019 custody arrangement, the parents' reciprocal child support obligations result in a monthly support amount of \$1,471 for one child, owed by Mr. L.³⁸ This calculation should be adopted for the 2019 pre-order arrears amount and the ongoing obligation.

IV. Conclusion

CSSD correctly included F in the child support order until he turned 19 and received his high school diploma. This required a hybrid custody calculation under Civil Rule 90.3(b)(3) for August 2018 through December 2018 since Ms. L exercised primary custody of F but shared custody of D. For this calculation, Mr. L did not show that Ms. L's income should be higher than CSSD determined. As a result, the \$2,555 monthly obligation for two children is upheld, effective August 2018 through December 2018. A variance under Civil Rule 90.3(c) was considered but rejected.

For 2019, Mr. L showed that the shared custody arrangement for D has changed. It is now a 56% (mother), 44% (father) schedule. Mr. L also showed that Ms. L's expected 2019 income should be adjusted. When these changes are included, the calculation results in a 2019 child support obligation of \$1,471 for one child, owed by Mr. L. This calculation was done pursuant to Civil Rule 90.3(b)(1) without variation.

³⁵ \$20,571.20 - \$16,640 = \$3,931.20.

³⁶ Attachment A. The calculation was done on CSSD's online child support calculator at <https://webapp.state.ak.us/cssd/guidelinecalc/form>. Attachment A adopts the amount of the 2018 PFD as the most reliable indicator of the expected 2019 PFD. It is identified as "other taxable income" on the calculation. Though the Governor has proposed a higher amount, the final amount is uncertain at this time.

³⁷ See Exhibit 8, p. 11. $(\$323 - \$271)/\$271 = 19.18\%$

³⁸ Attachment B.

V. Child Support Order

- Mr. L is liable for child support of \$2,555 per month for D and F, effective August 1, 2018 through December 31, 2018;
- Mr. L is liable for child support of \$1,471 per month for D, effective January 1, 2019 and ongoing;
- All other provisions of the Amended Administrative Child and Medical Support order dated January 29, 2019, remain in full force and effect.

DATED: April 16, 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 1st day of May, 2019.

By: Signed
Name: Lawrence A. Pederson
Title: Administrative Law Judge

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