

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

IN THE MATTER OF:

C. E. S.

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OAH No. 07-0678-CSS
CSSD No. 001145603

REVISED DECISION AND ORDER

I. Introduction

The Custodian of record, J. L. J., appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in Mr. S.'s case on October 30, 2007. The Obligee child is C., DOB 00/00/06.

The formal hearing was held on December 11, 2007. Ms. J. appeared by telephone; the Obligor, Mr. S., appeared in person. Andrew Rawls, Child Support Specialist, appeared for CSSD. The hearing was recorded and the record closed on January 2, 2008. On February 5, 2008, Mr. S. submitted additional evidence, so the record was reopened and subsequently closed again on February 22, 2008.

Kay L. Howard, Administrative Law Judge, Office of Administrative Hearings, conducted the hearing. Based on the record as a whole and after due deliberation, the following decision is issued.

II. Facts

A. History

Mr. S.'s child support obligation for C. was previously established at \$641 per month in April 2007.¹ On August 21, 2007, Mr. S. initiated a modification review of the order.² On August 29, 2007, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.³ Mr. S. provided income information.⁴ On October 30, 2007, CSSD issued a Modified Administrative Child Support and Medical Support Order that set Mr. S.'s modified

¹ Exh. 1.

² Exh. 2.

³ Exh. 3.

⁴ Exh. 4.

ongoing child support at \$477 per month, effective September 1, 2007, based on his current income information.⁵ Ms. J. filed an appeal and requested a hearing on November 13, 2007.⁶

B. Material Facts

Mr. S. began working for Midas as a mechanic in mid-2007. He works 40 hours per week, for which he is paid \$15 per hour. Up until 2006, Mr. S. worked on the North Slope, where he earned approximately \$70,000 annually, but he was fired in February 2007 after missing three flights to start his work rotation. He is married and his wife provides day care when the obligee C. is staying with him. Mr. S. has one prior child who lives in Germany, but the obligor does not pay support for the child.

Ms. J. has three children in the home; the obligee C. is the youngest. Her oldest child is six years of age and attends school. Ms. J. receives child care assistance for the two younger children while she attends college full time learning medical billing. Her eventual goal is to obtain a Business Management degree. Her schooling is being paid for mostly with grants and a scholarship from her Native corporation. In the past Ms. J. worked at the South Central Foundation in addition to going to school, but she cannot do that any longer because her available day care hours are limited. Ms. J. also receives financial support from her fiancé, who is presently incarcerated until mid April 2008.

The parties have recently been involved in custody litigation that was filed by Ms. J. On November 15, 2007, they agreed in a mediation session to change to a 50/50 shared custody scenario and they began implementing the arrangement that day. At the child support hearing, the parties stated they were scheduled to go to court for their custody trial on January 14, 2008.

On February 5, 2008, Mr. S. sent an email message to the administrative law judge stating he now had sole custody of C. and Ms. J. had been ordered to pay support. The record was reopened and Mr. S. was directed to document the change in custody. On February 19, 2008, he submitted a copy of a Custody and Visitation Order signed by Judge Joannides on February 13, 2008, that awarded him legal and physical custody of C. and granted Ms. J. daytime visitation, but no overnight stays.⁷

⁵ Exh. 5.

⁶ Exh. 6.

⁷ Received February 19, 2008 and copied to CSSD.

Mr. S. also submitted a copy of a statement Ms. J. made concerning the court's custody order. Ms. J. asserted there was an incident of domestic violence in the home in 2006, perpetrated by Mr. S., and that as a result, he should not have custody pursuant to AS 25.24.150.⁸ Ms. J. claimed the statute prohibits the court from awarding sole or joint custody of a child to a perpetrator of domestic violence.

The original proposed decision suspended Mr. S.'s child support obligation effective February 13, 2008. On March 28, 2008, he filed a request under AS 44.64.060 to change the effective date of the suspension to January 17, 2008. In support of his request, Mr. S. filed a copy of log notes from the court's proceeding on January 17, 2008, in which he was awarded sole legal and physical custody of C.⁹ This revised decision and order is being issued so as to adopt the date of January 17, 2008, as the date Mr. S.'s child support should be suspended.

III. Discussion

A. CSSD may modify Mr. S.'s child support order

Ms. J. claims that in court proceedings on August 2, 2007, the judge denied Mr. S.'s request to lower his child support amount, so his child support order should remain at \$856 per month.¹⁰ In response, Mr. S. asserts the judge did not specifically deny his request to lower his child support, but simply told him his child support obligation would remain at the same figure calculated by CSSD. This is why Mr. S. submitted a petition for modification to CSSD on August 21, 2007.

Mr. S.'s request of CSSD to administratively modify his child support order may proceed. Judge Joannides did not issue an order specifically denying Mr. S.'s request to lower his child support amount, so there is no impediment to his requesting – and obtaining – a modification of the child support order pursuant to Civil Rule 90.3(h), so long as his income supports the adjustment.

Mr. S. initiated this administrative modification of his child support order on August 21, 2007 and CSSD sent both parties notice of the petition on August 29, 2007, so the modification is effective as of September 1, 2007.¹¹ The two recent custody changes between the parties also

⁸ *Id.*

⁹ Received March 28, 2008, at pg. 3 of 5.

¹⁰ Mr. S. prior child support amount was \$641 per month. CSSD indicated during the hearing that the \$856 per month figure Ms. J. cited included a portion of the arrears that CSSD was collecting from Mr. S. every month.

¹¹ 15 AAC 125.321(d); *see also* Exh. 5 at pg. 1.

affect Mr. S.'s child support obligation in this case. First, the parties each agreed during the hearing that they began exercising 50/50 shared custody of C. following a mediation session on November 15, 2007. Based on the parties' exercise of shared custody, Mr. S.'s child support should be calculated using the shared custody provisions of Civil Rule 90.3(f)(1) as of December 1, 2007.

The second custody change occurred on January 17, 2008, when Judge Joannides awarded Mr. S. legal and physical custody of C. and granted Ms. J. daytime visitation. This change switched primary custody to Mr. S., so his child support obligation should be suspended as of January 17, 2008¹², and should remain suspended so long as he has custody of C.¹³

Thus, Mr. S. is liable for modified child support based on Ms. J. having primary custody from September 1, 2007, through November 30, 2007. The child support amount then reverts to the shared custody formula for the period from December 1, 2007, through January 17, 2008, at which time it should be suspended based on Mr. S. being awarded legal and physical custody of C. in court on that date.¹⁴

B. Child support calculations

1. Primary custody

Civil Rule 90.3(a)(1) provides that an Obligor's child support amount is to be calculated based on his or her "total income from all sources." If the child support amount calculated from an obligor's current income is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes that "good cause and material change in circumstances" has occurred and allows the modification to be made.

CSSD calculated Mr. S.'s modified child support at \$477 per month for the period of time Ms. J. had primary custody of C. after the modification was initiated. The figure is based on Mr.

¹² Typically, adjustments to child support amounts are made on the first of the month following the change, as in 15 AAC 125.321(d). However, since Judge Joannides' February 13, 2008, custody order constituted a wholesale change in legal and physical custody to Mr. S., his child support obligation should be suspended as of that day. He should not be liable for support for the second half of February, after he was awarded sole custody.

¹³ Any child support owed by Ms. J. must be addressed in a separate child support case under her name, not Mr. S.'s.

¹⁴ AS 25.24.150 requires that in divorce or dissolution proceedings, a court consider several factors in awarding custody, one of which is the existence of domestic violence in the home. It is assumed Ms. J.'s evidence was before the court in the custody proceeding and that the judge considered it as a factor in awarding custody. Even if that evidence was not before the court, this administrative child support hearing is not the proper forum to raise that issue. Neither CSSD nor the administrative law judge may deviate from the court order awarding Mr. S. custody of C. Thus, Mr. S.'s child support order must be suspended as of January 17, 2008.

S.'s 2007 payroll data and the 2007 PFD, which total \$34,819.36.¹⁵ According to the income information provided, this calculation is correct and should be adopted for the months of September 2007 through November 2007.

2. Shared custody

When parents exercise shared custody of their children, Civil Rule 90.3 provides that child support is to be calculated differently than in the situation in which one parent has primary custody. The rule defines shared custody as follows:

A parent has shared physical custody of children for purposes of this rule if the children reside with that parent for a period specified in writing of at least 30 percent of the year, regardless of the status of legal custody.^[16]

Thirty percent (30%) of the year is 110 days. In order for a visitation day to count toward the required 30% of the year, the child(ren) must stay overnight with the respective parent.¹⁷

Although in hindsight it is obvious the parties in this case did not exercise shared custody of C. for very long, the agreement they reached in mediation to share custody on a 50/50 basis should be honored for the period of time it was in place, which, for child support purposes, equates to the period from December 1, 2007 through January 17, 2008.

During the hearing, Mr. S. claimed that Ms. J. was voluntarily unemployed during that period of time because she was capable of working at the same time she attended college, and had previously done so. He requested that income be imputed to her for the shared custody calculation due to her alleged voluntary unemployment. Ms. J. responded that she did not have adequate day care to work full-time in addition to attending school.

Alaska law allows CSSD to use a parent's "potential income" if a finding is made that the parent is voluntarily and unreasonably unemployed or underemployed.¹⁸ A primary goal of imputing income, according to the Alaska Supreme Court, is to compel the parent to find full-time employment by attaching an unpleasant result – a higher child support payment, or, in a shared custody case, a lower child support payment – to the parent's continued lack of

¹⁵ Exh. 5 at pg. 6.

¹⁶ Civil Rule 90.3(f)(1).

¹⁷ Civil Rule 90.3, Commentary V.A.

¹⁸ Civil Rule 90.3(a)(4).

employment.¹⁹ The commentary states the court or administrative law judge should consider “the totality of the circumstances” when deciding whether to impute income to the parent.²⁰

The facts of this case do not support a finding that Ms. J. has been voluntarily and unreasonably unemployed or underemployed. The need for such a finding – goading a parent into full-time employment after a period of inaction – is not present here. Ms. J. appears to be a well motivated individual who does not need to be compelled to find work. She is attending college full-time and has worked at the same time in the past. Ms. J. testified, credibly, that the reason she was not fully employed when the parties shared physical custody of C. was because full-time day care assistance was not available to her.

The other reason income should not be imputed to Ms. J. is that according to the commentary to Civil Rule 90.3, potential income may not be used in a child support calculation for a parent who is “caring for a child under two years of age to whom the parents owe a joint legal responsibility.”²¹ This provision of the commentary prevents parents from being forced to obtain employment when caring for an obligee child who is especially young. Since C. is less than two years of age, this provision of Civil Rule 90.3 applies to Ms. J.’s situation and income should not be imputed to her.

At the direction of the administrative law judge, CSSD filed two sets of draft shared custody calculations after the hearing. The first calculation utilizes the parties’ actual income figures and yields a child support amount for Mr. S. of \$320 per month.²² The second imputes income to Ms. J. in the amount of \$10 per hour for half-time work in addition to her other income and yields a child support amount for Mr. S. of \$257 per month.²³ Ms. J.’s actual income figures should be used in the draft shared custody calculations CSSD prepared. According to those calculations, the correct child support amount for the shared custody period is \$320 per month.

IV. Conclusion

As the person who filed the appeal, Ms. J. had the burden of proving by a preponderance of the evidence that Mr. S.’s child support obligation was calculated incorrectly. Her goal was to

¹⁹ *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).

²⁰ Civil Rule 90.3, Commentary III.C.

²¹ Civil Rule 90.3, Commentary III.C.

²² Exh. 8 at pgs. 1-4.

²³ Exh. 9 at pgs. 1-4.

keep the child support calculation at \$641 per month, but the facts of this case support a reduction based on Mr. S.'s income and the parties' exercise of shared custody.

Mr. S.'s modified child support is now correctly calculated at \$477 per month for the period from September 1, 2007, through November 30, 2007, based on Ms. J. having primary custody. He is also liable for modified child support in the amount of \$320 per month from December 1, 2007, through January 17, 2008, to reflect shared custody of C. Mr. S.'s child support should be suspended effective January 17, 2008, based on Mr. S. being awarded legal and physical custody of C. in court. These calculations should be adopted.

V. Child Support Order

- Mr. S. is liable for modified child support in the amount of \$477 per month for the period from September 1, 2007, through November 30, 2007; and in the amount of \$320 per month from December 1, 2007, through January 17, 2008;
- Mr. S.'s child support should be suspended effective January 17, 2008, based on Mr. S. being awarded legal and physical custody of C. in court;
- All other provisions of CSSD's October 30, 2007, Modified Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 3rd day of April, 2008.

By: Signed
Kay L. Howard
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 21st day of April, 2008.

By: Signed
Signature
Kay L. Howard
Name
Administrative Law Judge
Title

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