

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

IN THE MATTER OF:)
)
R. J. A.)
)
) OAH No. 08-0028-CSS
) CSSD Case No. 001147177
_____)

DECISION AND ORDER

I. Introduction

This case concerns the obligation of R. J. A. for the support of her children A. A., Jr. (DOB 00/00/90), A. A. (DOB 00/00/91), D. A. (DOB 00/00/95), G. A. (DOB 00/00/97), and B. A. (DOB 00/00/99).

The Child Support Services Division issued an amended administrative child support order dated December 26, 2007, establishing a support obligation for arrears in the amount of \$2,395 for the period from September 1, 2006, through September 30, 2007.¹

Ms. A. appealed and the case was referred to the Office of Administrative Hearings. The assigned administrative law judge conducted a telephonic hearing on February 20, 2008. Both parents participated. David Peltier represented the division.

Based on the facts and the unusual circumstances of this case, arrears are set at zero.

II. Facts

R. and A. A., who divorced in 2007, live in SmallCity, Alaska. They are the parents of five children: A., Jr., A., D. (adopted),² G. and B.. The couple receives \$572 monthly as an adoption subsidy for D.'s care.³ A. A. works part time as a trash collector for the City of SmallCity,⁴ and R. A. works full time as a teacher's aide.⁵ In 2006, R.

¹ Exhibit 9.

² Exhibit 7, page 1.

³ Exhibit 7, page 1; Exhibit 8, page 13.

⁴ Exhibit 7, page 2. A. A. works about 17 hours a week, and earns \$13 per hour. This is equivalent to \$221 per week, or \$11,492 per year. This is approximately what the court based his child support obligation on. *See* Appendix A.

A.'s income was about \$21,364⁶ and A. A.'s income was about \$3,560,⁷ for total income in 2006 of \$25,532, including wages (\$22,134), unemployment compensation (\$1,184), and their Alaska Permanent Fund dividends (\$2,214).⁸ In addition to his earned income, Mr. A. provided subsistence support for the family.⁹

In the summer of 2006, R. A. temporarily relocated to Anchorage, bringing three of the children with her.¹⁰ In September, 2006, A. A. applied for and began receiving public assistance benefits for the children in his care. In November, 2006, R. A. returned to the family home in SmallCity. She went back to work in January, 2007, and the family remained intact in the family home until the end of the school year.

After the end of the school year, the couple separated permanently. Ms. A. temporarily relocated to Anchorage; she filed a complaint for divorce there on June 25, 2007.¹¹ Two of her children, A. and A., Jr., went with her¹² and stayed with her until the end of July, and the other three children remained with their father at the family home in SmallCity. The family home in SmallCity is a four bedroom house.¹³ In the summer of 2007, A. A.'s two older daughters (both over age 18) and their two children (ages 1 and 3) live were living with A. A. there, along with the A. children.¹⁴

In August, 2007, R. A. returned to SmallCity and resumed working full time at the School District.¹⁵ She moved into a separate residence (her recently deceased father's house)¹⁶ from her husband, and all five children spent their time equally with both parents.¹⁷

⁵ Exhibit 8, page 9.

⁶ Exhibit 10, page 1.

⁷ Exhibit 10, page 3.

⁸ Exhibit 8, page 8. The parties' 2006 joint income tax return shows "other income" of \$7,749, which appears to be the combined Alaska Permanent Fund dividends for all seven family members: the 2006 dividend was \$1,107.

⁹ Exhibit 7, page 2.

¹⁰ Testimony of R. A. (10:45).

¹¹ Exhibit 8, page 17.

¹² Exhibit 5, page 1; Exhibit 7, page 1; Exhibit 8, page 16.

¹³ Exhibit 7, pages 1-2.

¹⁴ Exhibit 7, page 1.

¹⁵ Exhibit 5, page 1.

¹⁶ Exhibit 7, page 8; Exhibit 8, page 16.

¹⁷ In August, 2007, R. A. claimed (and provided support letters) that the children were living with her. Exhibit 5, page 1; Exhibit 8, pages 2-5. She repeated this claim in October, 2007. Exhibit 8, page 16. Also in October, 2007, A. A. claimed (and provided supporting letters) that the children lived with him, and that only D. lived with R. A.. Exhibit 7, page 1, 3-5. Another letter provided by A. A. asserts that all five children were living with him in October, 2007. Exhibit 7, page 6. At the hearing, however, both parties

The A. divorce was finalized in an order issued by the superior court on October 11, 2007.¹⁸ The court awarded custody of all five children to R. A. and ordered that A. A. pay child support in the amount of \$390 per month¹⁹ based on potential or estimated income of about \$13,429.²⁰ R. A.'s income in 2007 was \$24,957.²¹

II. Discussion

The division establishes a child support obligation based upon "the expected actual annual income that the parent will earn or receive when the child support award is to be paid."²² When adequate information is available, arrears may be based on the actual income received during the period for which arrears are due.²³

A. Presumptive Support Amount

1. *Income*

The parties' income in 2006 is based on their joint tax return and information obtained by the division from the Department of Labor and Workforce Development. Ms. A.'s income in 2007 is based on information obtained by the division from the department; Mr. A.'s income in 2007 is based on the superior court's support order, which implicitly incorporates a finding of actual or potential income.

2. *Custody*

The parties' testimony confirmed the custody of the children. During August and September, 2006, three of the children resided with Ms. A. in Anchorage, and two with Mr. A. in SmallCity. In June and July, 2007, two of the children resided with Ms. A. in Anchorage, and three with Mr. A. in SmallCity. In August and September, 2007, all five children split their time with the two parents in SmallCity. Thus, Ms. A. had divided

testified that the children went back and forth between their parents' homes, spending about half their time with each. (13:30, 16:40, 24:00)

¹⁸ Exhibit 1.

¹⁹ Exhibit 1, page 2.

²⁰ The court awarded child support in the amount of \$390 per month for five children pursuant to Civil Rule 90.3(a) or (b). That level of support, applying standard calculations and deductions, reflects actual or potential income of about \$13,429, including \$11,775 in wages plus an Alaska Permanent Fund dividend. See Appendix A. The division had previously estimated A. A.'s income in 2007 as \$7,113 and found his actual income to be \$7,553. Exhibit 10, page 4; Exhibit 12, page 2.

²¹ Earned income (\$22,711.22) plus unemployment insurance (\$592) and an Alaska Permanent Fund dividend (\$1,654). Exhibit 12, page 1; Exhibit 10, page 2.

²² 15 AAAC 125.030(a).

²³ Duffus v. Duffus, 72 P.3d 313, 321 (Alaska 2003); Spott v. Spott, 17 P.3d 52, 56 (Alaska 2001).

custody during the first four months (3 of 5 children, then 2 of 5) and shared custody (50%-50%) for the last two months.

3. *Calculation*

In 2006, a divided custody calculation applied to the parties' actual income determines the presumptive support obligation. Based on 2006 income to Ms. A. of \$21,364, and to Mr. A. of \$3,560, the divided custody calculation yields a presumptive support obligation for Ms. A. of \$319, as shown in on Exhibit 3, page 3.

In 2007, a divided custody calculation applies for two months. Based on 2007 income to Ms. A. of \$24,957, and actual or potential income to Mr. A. of \$13,429, the divided custody calculation yields a presumptive support obligation for Ms. A. of \$254 per month, as shown on Appendix B. Also in 2007, a shared custody calculation applies for two months, yielding a presumptive support obligation for Ms. A. of \$222 per month, as shown on Appendix C.

Ms. A.'s total pre-order arrears are \$1,690, at the presumptive support amount.²⁴

B. Unusual Circumstances

Ms. A. argues that she should not be held liable for pre-order arrears under the circumstances of this case. The presumptive support obligation (including the obligation for pre-order arrears) may be adjusted upon a showing by clear and convincing evidence of manifest injustice due to unusual circumstances.²⁵

In this case, the parties were married for a number of years and raised their children together. They did not permanently separate until May, 2007. For a brief two or three month period in the fall of 2006, Ms. A. temporarily resided in Anchorage, but the couple had not permanently separated. During that period of time, and for another two months after her return to SmallCity, Ms. A. was unemployed, but the record indicates that until the couple permanently separated Ms. A. was the primary wage earner in the family and that she contributed a substantially greater than Mr. A. did for financial support of the family as a whole. (Mr. A. made substantial non-monetary subsistence contributions to the support of the family.) Application of the presumptive support obligation for the short period Ms. A. was out of the family residence in the fall of 2006

²⁴ \$738 (two months @ \$319) + \$508 (two months @ \$254) + \$444 (two months @ \$222) = \$1,690.

²⁵ 15 AAC 125.075(a)(2).

would not accurately reflect her actual role in providing financial support over the longer term. Arguably, the family should be considered to have remained intact during that time. But even if the family unit was not intact at that time, custody was divided, and divided custody is *per se* an unusual circumstance,²⁶ warranting consideration of a variation from the presumptive amount.

In this case, in addition to these considerations, application of the presumptive amount would fail to take into account the substantial adoption subsidy that the couple received for D.. The monthly adoption subsidy of \$572 is well in excess of the combined support obligation of both parents for a single child; it effectively substituted for their own obligation for D. and left them with financial responsibility for only their own four children. For this reason, Ms. A.'s obligation should not exceed the presumptive amount for four children.

But even a reduction to the presumptive amount for four children would be manifestly unjust, because at this time, Ms. A. has custody of all five children. To order her to pay arrears for an obligation accrued prior to the time the superior court awarded her custody would reduce the amount of income she has available to support the children today: given her limited income, this is not in the best interests of the children and would be contrary to the primary purpose of child support proceedings.²⁷

IV. Conclusion

There is clear and convincing evidence of unusual circumstances, such that imposition of the presumptive support amount would be manifestly unjust. Therefore, the division's order should be reversed, and arrears should be set at zero.

CHILD SUPPORT ORDER

1. The division's amended support order dated December 27, 2007, is REVERSED.
2. Ms. A.'s liability for arrears accrued beginning September 1, 2006 through September 30, 2007, is zero.

²⁶ Civil Rule 90.3, Commentary at V(D) ("A divided custody case should be treated as an unusual circumstance under which support will be varied if such a variation is 'just and proper...').

²⁷ See, e.g., Bennett v. Bennett, 6 P.3d 724, 727-728 (Alaska 2000).

DATED: March 18, 2008

Signed

Andrew M. Hemenway
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 4th day of April, 2008.

By: Signed
Andrew M. Hemenway
Administrative Law Judge

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