

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

IN THE MATTER OF:)
)
M. A. G.) OAH No. 09-0244-CSS
) CSSD Case No. 001155062
_____)

DECISION AND ORDER

I. Introduction

This case concerns the obligation of M. A. G. for the support of K. A. B. (DOB 00/00/2008). The custodian of record is A. L. B.

On April 2, 2009, the Child Support Services Division issued an amended administrative child support order establishing an ongoing support obligation in the amount of \$486 per month effective May 1, 2009, with arrears in the amount of \$6,311 for the period from February 1, 2008, through April 30, 2009.¹

Mr. G. filed an appeal and requested an administrative hearing. The Office of Administrative Hearings conducted a hearing on May 20, 2009. Erin Brian represented the division. Mr. G. appeared and Ms. B. participated telephonically.

Based on the testimony at the hearing and the evidence in the record, arrears are owed through December 31, 2008, at the rate of \$357 per month and arrears and ongoing child support are owed at the rate of \$437 per month effective January 1, 2009.

II. Facts

M. A. G. lives in Juneau, where he rents a two bedroom apartment, sharing the cost with a roommate. Mr. G. has two children. He has shared custody of his older child, born in 2004, who stays with him about 50% of the time. His younger child, K., is in his mother's sole custody.

Mr. G. works full time as a delivery driver for a Juneau business. His wage is \$16 per hour; his regular shift is 40 hours per week, but fluctuates depending on workload.² In 2008, his total wages were \$27,563; he also was paid \$1,035 in unemployment insurance benefits, but he did not receive an Alaska Permanent Fund dividend.³ Through April 13, 2009, his 2009 total wages were \$10,380. His reasonably anticipated 2009 total wages are \$33,380.

¹ Ex. 7.

² Ex. 6, p. 3; Ex. 8, p. 1.

³ Ex. 3, p. 7; Ex. 4, pp. 1, 3; Ex. 7, pp. 4,6; Ex. 8, p. 9.

III. 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.”⁴ When adequate information is available, arrears may be based on the actual income received during the period for which arrears are due.⁵

In this case, the division initially established Mr. G.’s 2008 income based on information in databases maintained by the Department of Labor and Workforce Development, which showed that Mr. G. had received unemployment compensation in 2008.⁶ Mr. G.’s wages as shown on his 2008 tax return are consistent with the department’s data; his tax return does not list income from unemployment insurance, but in his appeal papers he did not deny receiving it. Because there is no evidence that the database is incorrect, Mr. G. has not shown that the division’s amended order is erroneous because it included unemployment compensation in his 2008 income.

For 2009, the division calculated Mr. G.’s anticipated income by extrapolating his earned income through mid-April. Mr. G. argues that his hours fluctuate. However, Mr. G. is scheduled for a 40 hour work week and there is no evidence to suggest that his earnings through mid-April are not representative of what he can expect to make over a full year. Projecting his current wage of \$16 per hour for the full year yields anticipated 2009 income of \$33,280. Based on his actual income through April 13, his projected total 2009 wages are \$36,786. It is reasonable to anticipate earnings equivalent to full time work for the entire year, even if his actual income through mid-April suggests that his actual earnings may be a bit higher. Mr. G. has not shown that the division’s amended order was in error regarding 2009 income.

The primary issue in this case is not Mr. G.’s income, however, it is the custody status of his older child. Mr. G. testified, under oath, that the child spends the night at his place about half of the time. The child’s mother submitted a notarized statement supporting his assertion, as did Mr. G.’s roommates. Ms. B. believes that Mr. G. and the child’s mother are being untruthful, but according to information in the record she has primarily been in Anchorage since her child was born and there is no evidence that she has personal, non-hearsay knowledge of the actual facts.⁷

⁴ 15 AAC 125.030(a).

⁵ Duffus v. Duffus, 72 P.3rd 313, 321 (Alaska 2003); Spott v. Spott, 17 P.3rd 52, 56 (Alaska 2001).

⁶ Ex. 3, p. 4.

⁷ See Letter, L. V. to OAH, May 21, 2009.

It may reasonably be doubted whether Mr. G.'s older child actually lives with him 50% of time, but the preponderance of the evidence in the record is that he does.

For one child, a parent's presumptive support obligation is 20% of that parent's adjusted annual income,⁸ that is, total income after allowable deductions.⁹ Civil Rule 90.3 contains two separate provisions allowing a deduction from total income for child support for children from prior relationships. Civil Rule 90.3(a)(1)(B) allows a deduction for "child support...arising from prior relationships which are required by other court or administrative proceedings and actually paid." Civil Rule 90.3(a)(1)(C) allows a deduction for "child support for children from prior relationships living with the parent, calculated by using the formula provided by this rule." Neither provision expressly addresses shared custody situations.

In this case, Mr. G. is not entitled to a deduction under Civil Rule 90.3(a)(1)(B), because no child support order is in effect for his older child. Where there is no child support order in existence, Civil Rule 90.3(a)(1)(C) could be interpreted to provide for: (1) no deduction; or a deduction of (2) 50%¹⁰ or (3) 75%¹¹ of the standard amount.

Given these alternatives, the better approach is to treat shared custody of a prior child as an unusual circumstance within the meaning of Civil Rule 90.3(a)(1), and to select the alternative that seems most appropriate under the circumstances.¹² Treating shared custody of a prior child as an unusual circumstance enables the agency to take heed of the premise of Civil Rule 90.3 "that the total funds necessary to support children will be substantially greater when custody is shared"¹³ in light of the specific circumstances of the case.

Mr. G. did not provide any evidence of expenditures he has made for the support of his prior child, and it can therefore be argued that alternative (1) should be selected, and he should be given no credit for the support of his child while in his custody. This approach, however, overlooks the underlying premise of Civil Rule 90.3, which is that parents are generally presumed to spend a portion of their income on the child, and a showing of actual expenditures is

⁸ 15 AAC 125.070(a); Civil Rule 90.3(a)(2)(A).

⁹ 15 AAC 125.070(a); -.065; Civil Rule 90.3(a)(1).

¹⁰ The 50% figure represents the percentage of time that the child resides with Mr. G..

¹¹ Because shared custody is presumed to impose greater costs on both parents, Civil Rule 90.3(b)(3) provides for a 50% increase in the amount of support owed. See Civil Rule 90.3, Commentary at V(B). A 50% increase to the deduction Mr. G. would normally receive for the time his prior child lives with him (50%) would yield a support obligation that is 75% of the normal amount.

¹² This is the approach taken in prior cases of this nature. See, e.g., In Re Faulkner, OAH No. 05-0368 (Department of Revenue, May 22, 2006); In Re H.J.M., CSSD No. 970835 (April 17, 2000).

¹³ Civil Rule 90.3, Commentary at V(B).

generally not required. By contrast, in this case the presumption of increased expenses in shared custody situations should not be applied, because there is evidence that to the extent Mr. G. incurs expenses while the child is in his custody, those expenses are not greater than due to the shared custody situation: indeed, it appears that the shared custody situation reduces his actual expenses, since because he has only limited custody Mr. G. is able to keep his prior child with him in a two bedroom apartment that he shares with a roommate, rather than providing a separate space for the child, as he would likely have to do if he had primary custody. Thus, Mr. G. should receive a deduction in the amount of 50% of the standard deduction for a child in the home, rather than an enhanced deduction of 75% of the standard deduction.

IV. Conclusion

Under the unusual circumstances of this particular case, Mr. G. should be provided a credit of 50% of the standard amount for a child in the home. Because the division's post hearing calculation for 2008 omits unemployment compensation, the amount owed for that year has been recalculated, as set forth in Appendix A. The division's post-hearing calculation for 2009 is adopted.

CHILD SUPPORT ORDER

1. The Amended Administrative Child Support and Medical Support Order dated April 2, 2009, is **AMENDED** as follows; in all other respects, that order is **AFFIRMED**.
2. Arrears for the period from February 1-December 31, 2008, are set at \$357 per month, and for the period from January 1-July 31, 2009, are set at \$437 per month.
3. Mr. G.'s ongoing support obligation is set at \$437 per month, effective August 1, 2009.

DATED: July 10, 2009.

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 30th day of July, 2009.

By: Signed
Signature
Andrew M. Hemenway
Name
Administrative Law Judge
Title

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