

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

IN THE MATTER OF: )

K. L. N. )

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OAH No. 09-0538-CSS

CSSD No. 001069413

**DECISION AND ORDER**

**I. Introduction**

The obligor, K. L. N., appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on August 26, 2009. The obligee child is J., who is 11 years of age.

The hearing was held on November 9, 2009. Both Mr. N. and the custodian of record, M. M. B., appeared in person. Andrew Rawls, Child Support Specialist, appeared for CSSD. The hearing was recorded and the record closed on November 16, 2009.

Based on the record and after careful consideration, Mr. N.' child support is modified to \$476 per month, effective March 1, 2009, based on the shared custody formula in Civil Rule 90.3(f)(1).

**II. Facts**

**A. History**

Mr. N.' child support obligation for J. was previously established at \$187 per month in July 2003.<sup>1</sup> On February 17, 2009, Ms. B. initiated a modification review of the order.<sup>2</sup> On February 25, 2009, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.<sup>3</sup> Neither party provided income information.<sup>4</sup> On August 26, 2009, CSSD issued a Modified Administrative Child Support and Medical Support Order that set Mr. N.' modified ongoing child support at \$733 per month for one child, effective March 1, 2009.<sup>5</sup> Mr. N. filed an appeal on October 2, 2009, asserting the parties share custody.<sup>6</sup>

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<sup>1</sup> Exh. 1.

<sup>2</sup> Exh. 2.

<sup>3</sup> Exh. 3.

<sup>4</sup> Pre-hearing brief at pg. 1.

<sup>5</sup> Exh. 4.

<sup>6</sup> Exh. 5.

## **B. Material Facts**

Mr. N. and Ms. B. are the parents of J., who is currently 11 years old. The parties have exercised 50/50 shared custody of J. since approximately November 2008.

Mr. N. has been working for S. since late 2008. Prior to that, he was a farm laborer in the Palmer area for ten years. He is a salaried employee – his base pay is \$1,213.33 per pay period – but Mr. N. also receives overtime. As of November 15, 2009, his year-to-date gross income was \$51,949.10.<sup>7</sup> Calculating that he would have three pay periods remaining in the calendar year, CSSD multiplied Mr. N.’ base rate times three to estimate he would earn an additional \$3,639.99 and his total annual income in 2009 would be \$55,589.09.<sup>8</sup> If this were a primary custody case, his child support calculated from that income figure would be \$684 per month.<sup>9</sup>

Mr. N. is married. His wife, C., has a 5 year old child from a prior relationship; in addition they have a 20 month-old son and are expecting the birth of a daughter at any time.

Ms. B. lives with her parents and in exchange for room and board; she helps them with their greeting card distribution business. She has been minimally employed in the past because she only has a 7<sup>th</sup> grade education and does not drive. Ms. B. has recently started work on her GED, but she does not know how long it will take her to complete. Ms. B. does not actively look for work because she believes that in this economic climate and with her educational level, she is not at all competitive in the job market. Ms. B. also suffers from occasional debilitating migraine headaches but she is able to treat them somewhat.

## **III. Discussion**

### **A. Modification**

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." In a modification situation, 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 such that the order may be modified. Mr. N.’ child support was originally set at \$187 per month, so any increase over \$215.05 presumes that a modification may be made.<sup>10</sup> This modification is effective March 1, 2009.<sup>11</sup>

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<sup>7</sup> Exh. 7.

<sup>8</sup> Post-hearing brief at pg. 1.

<sup>9</sup> Exh. 8. This calculation includes Mr. Nichols' 6% contribution to a 401(k) retirement account.

<sup>10</sup>  $\$187 + 15\% = \$215.05$ .

## B. Shared custody calculation

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.<sup>[12]</sup>

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.<sup>13</sup>

Shared custody child support is calculated by determining each parent's primary custody child support obligation to the other parent, as if each parent had primary custody of the child(ren). The figures are then inserted into a mathematical formula that calculates the paying parent's child support from a combination of both parents' primary custody support obligations and their individual shared custody percentages.

Mr. N.' primary custody support amount for 2009, as discussed above, is \$684 per month. Ms. B.'s primary custody support amount for 2009 is \$50 per month, based on her income that is below the poverty level. CSSD requested at the hearing that income of \$7.25 per hour be imputed to her, but the prerequisite for imputing income is that first a finding must be made that the parent is voluntarily and unreasonably unemployed or underemployed.<sup>14</sup>

In cases in which CSSD is claiming voluntary unemployment, the court or administrative law judge must determine whether the parent has engaged in voluntary conduct "for the purpose of becoming or remaining unemployed."<sup>15</sup> If the parent is voluntarily unemployed or underemployed, it is also necessary to determine whether the parent's unemployment is unreasonable. An integral part of the analysis is whether the parent's lack of employment is a result of "economic factors," as in being laid off, or of "purely personal choices."<sup>16</sup> It is not

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<sup>11</sup> A modification is effective beginning the month after the parties are served with notice that a modification has been requested. 15 AAC 125.321(d). CSSD sent the parties a notice of the modification on February 25, 2009, so the modification is effective March 1, 2009. See Exh. 3.

<sup>12</sup> Civil Rule 90.3(f)(1).

<sup>13</sup> Civil Rule 90.3, Commentary V.A.

<sup>14</sup> Civil Rule 90.3, Commentary III.C.

<sup>15</sup> *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

<sup>16</sup> *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

necessary to prove the individual was purposefully avoiding a support obligation, or acting in bad faith, in order to impute income to a noncustodial parent.<sup>17</sup>

The Alaska Supreme Court further explained the essence of the analysis in *Beaudoin v. Beaudoin*<sup>18</sup> by stating that “the relevant inquiry under Civil Rule 90.3 is . . . whether a parent's current situation and earnings reflect a voluntary and unreasonable decision to earn less than the parent is capable of earning.” At the same time, however, the court thought it important to point out that:

. . . Rule 90.3(a)(4) does not rigorously command pursuit of maximum earnings. The rule's more modest objective is to give courts broad discretion to impute income based on realistic estimates of earning potential in cases of voluntary and *unreasonable* unemployment or underemployment.<sup>[19]</sup>

The commentary to Civil Rule 90.3 directs that tribunals adjudicating child support “shall consider the totality of the circumstances in deciding whether to impute income.”<sup>20</sup>

Based on the “totality of the circumstances,” the evidence in this appeal does not support a finding that Ms. B. is voluntarily and unreasonably unemployed. Although she does appear to be voluntarily unemployed, Ms. B. does not seek employment because she believes her current level of education and work experience render her unemployable. Given her circumstances, this is not unreasonable. Ms. B. should have the opportunity to complete her high school education before being required to maintain a work search that defeats a finding of voluntarily and unreasonably unemployed. Ms. B.’s portion of the shared custody child support calculation should be based on the \$50 per month order. Inserting the parties’ respective primary custody support amounts into the shared custody formula results in Mr. N. being obligated to pay \$476 per month.

#### **IV. Conclusion**

Mr. N. met his burden of proving by a preponderance of the evidence that CSSD’s Modified Administrative Child Support and Medical Support Order is incorrect, as required by 15 AAC 05.030(h). The parties are exercising 50/50 shared custody of J. Using their respective incomes and resulting primary custody calculations, Mr. N.’ modified ongoing child support

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<sup>17</sup> *Kowalski*, 806 P.2d at 1371.

<sup>18</sup> 24 P.3d 523 (Alaska 2001).

<sup>19</sup> *Beaudoin*, 24 P.3d at 528 (emphasis in original).

<sup>20</sup> Civil Rule 90.3, Commentary III.C.

obligation is now correctly calculated at \$476 per month, effective March 1, 2009. This amount should be adopted.

**V. Child Support Order**

- Mr. N.' child support is modified to \$476 per month, effective March 1, 2009, and ongoing;
- All other provisions of CSSD's August 26, 2009, Modified Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 7th day of December, 2009.

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 28<sup>th</sup> day of December, 2009.

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

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