

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

IN THE MATTER OF: )

P. A. )

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) OAH No. 10-0166-CSS

) CSSD No. 001139593

**DECISION AND ORDER**

**I. Introduction and Procedural Background**

The Obligor, P. A., challenged a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (“CSSD”) issued in his case on March 16, 2010. Effective November 1, 2009, this order increased Mr. A.’s monthly child support obligation to \$435 from \$271 per month. Mr. A. appealed, arguing that he cannot afford this increase because it would impose a financial hardship on his subsequent family. The Custodian is K. M. J. The Obligee child is P., who is 6 years old.

At Mr. A.’s request a hearing was held on April 29, 2010. Mr. A. participated in person; Ms. J. participated by phone, and Andrew Rawls, Child Support Specialist, represented CSSD. At the hearings conclusion, Mr. A. testified that in 2009 he earned \$3,500 income from commercial fishing that he had not reported to CSSD. When calculating child support, the obligor’s annual gross income must be established. Therefore, the record remained open to permit Mr. A. to submit his 2009 federal income tax return and any supporting documentation. The parties agreed that CSSD would provide a new calculation based on his 2009 tax return and that if Mr. A. objected, he was to file his objection by June 11, 2010.

Mr. A. did not provide his 2009 tax return as directed, rather he filed a 2009 W-2 from his most recent employer.<sup>1</sup> CSSD filed a post hearing brief requesting that the Modified Administrative Child Support and Medical Support Order issued March 16, 2010 be affirmed because Mr. A. did not meet his burden of establishing that the order was incorrect. The record closed without further participation from Mr. A.

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<sup>1</sup> Exhibit 9.

## II. Facts

### A. Background

Mr. A.'s child support obligation for P. was set at \$271 per month effective February 1, 2005.<sup>2</sup> This amount was based on statistical wage data for a carpenter.<sup>3</sup> Ms. J.'s request for modification was made on October 5, 2009.<sup>4</sup> On October 15, 2009, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order requesting current financial information.<sup>5</sup> Mr. A. did not provide the requested information.

On March 16, 2010, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified Mr. A.'s ongoing child support to \$435 per month, effective November 1, 2009.<sup>6</sup> Based on the information available, CSSD determined Mr. A.'s 2009 income to be \$31,460.70. CSSD arrived at this figure by annualizing Mr. A.'s 2009 third and fourth quarter earnings as reported by the Alaska Department of Labor plus the 2009 Permanent Fund Dividend (PFD).<sup>7</sup>

Mr. A. appealed on March 31, 2010 requesting a hardship variance. He asserted that he could not meet monthly living expenses if his child support obligation were increased and that any calculation should take into account the child in his home or the cost of living "in Bush Alaska."<sup>8</sup>

### B. Material Facts

Mr. A. is employed by H.A.S., Inc. as a ramper. He is paid hourly at the rate of \$16 per hour. For the period from January 1, 2010 through April 30, 2010 Mr. A. earned \$9,100.<sup>9</sup>

Mr. A. lives with his girlfriend and their daughter, age two years. They are expecting another child in June 2010. His girlfriend does not work. Mr. A. testified that his regular monthly expenses are \$950 for rent; \$350 for food; \$255 for electricity and oil; \$113 for a cell phone; \$139.50 for water, waste water, and trash; \$400 for vehicle gasoline and maintenance;

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<sup>2</sup> *In re Paul A.*, OAH No. 06-0419-CSS (October 5, 2006).

<sup>3</sup> *Id.* at 1(October 5, 2006).

<sup>4</sup> Exhibit 2.

<sup>5</sup> Exhibit 3.

<sup>6</sup> Exhibit 4. The effective date of a modification is the first month after CSSD issues the notice that a petition for modification has been filed. 15 AAC 125.321(d).

<sup>7</sup> Exhibit 4 at 6; Exhibit 7.

<sup>8</sup> Exhibit 5.

<sup>9</sup> Exhibit 8.

\$98 for vehicle insurance; \$80 for health insurance; \$30 for tobacco; and \$4,000 in court fines which he is currently not paying.<sup>10</sup> Mr. A. relies on his father for most personal care items including diapers for his daughter. He is fortunate in that he can purchase most of his dry goods in Anchorage and ship them to his home in No Name City through his employer for no cost. Mr. A.'s monthly expenses total \$2,415.50.<sup>11</sup>

Ms. J. lives with P. She testified that her regular monthly expenses are \$100 for the mortgage; \$350 for food; \$590 for electricity and oil; \$45 for telephone; \$76 for water, trash, and waste water; \$255 for a car payment on a vehicle that does not run; \$332.50 for entertainment, personal care items, and tobacco; and \$190 per month in consumer debt.<sup>12</sup> Ms. J.'s monthly expenses total \$ 1,938.50 per month. In 2009, Ms. J. worked two jobs and earned \$28,000.<sup>13</sup> She does not expect to earn as much in 2010 because she lost one job and her hours have been reduced for her remaining job.<sup>14</sup> She testified that she depended upon the child support.

### **III. Discussion**

Mr. A. has requested a hardship variance. Before his request can be considered it must be determined what his gross income and monthly child support obligation would be without a variance for the period in question. It is from this starting point that Mr. A.'s request for hardship will be analyzed.

#### *A. Income for Purposes of Child Support Calculations.*

Modification of child support orders may be made upon a showing of "good cause and material change in circumstances."<sup>15</sup> If the newly calculated child support amount is more than 15% different than the previous order, the Rule assumes a material change in circumstances has occurred and the support amount may be modified.<sup>16</sup> A parent is obligated both by statute and at common law to support his or her children.<sup>17</sup>

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<sup>10</sup> A. Testimony.

<sup>11</sup> Mr. A. testified that his electric bill varies from \$40 to \$70 per month. The amount of \$55 was used for purposes of calculating average monthly expenses.

<sup>12</sup> Ms. J. testified that her phone bill varies from \$40 to \$50 per month. The amount of \$45 was used for purposes of calculating average monthly expenses.

<sup>13</sup> J. Testimony.

<sup>14</sup> *Id.*

<sup>15</sup> AS 25.27.190(e).

<sup>16</sup> Civil Rule 90.3(h).

<sup>17</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.

When calculating child support, the obligor's annual gross income must be established. Determining an obligor's annual income for purposes of child support is "necessarily... speculative because the relevant income figure is expected future income."<sup>18</sup> Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. In 2009, Mr. A. had reported earnings for the third and fourth quarters totaling \$15,077.85.<sup>19</sup> Mr. A. has provided a printout showing that in the first quarter 2010 he earned \$7,106 and that by the end of April, 2010 he had year to date earnings of \$9,100. These income figures result in four possible child support calculations.

The first possible calculation is the calculation offered in support of the Modified Administrative Child Support and Medical Support Order.<sup>20</sup> In this calculation CSSD calculated total gross income by combining Mr. A.'s annualized 2009 reported earnings plus the 2009 PFD, which resulted in an annual gross income totaling \$31,460.70. When adjusted for allowable deductions, this resulted in a monthly child support obligation for one child in the amount of \$435.<sup>21</sup>

The second possible calculation is found in CSSD's post hearing brief. This calculation is not based on Mr. A.'s annualized 2009 earnings. Rather, it takes his earnings for six months plus the 2009 PFD and \$3,500 from commercial fishing. When totaled, these figures result in an annual gross income totaling \$19,882.85. When adjusted for allowable deductions, this calculation resulted in a monthly child support obligation for one child in the amount of \$292.<sup>22</sup>

The third possible calculation for purposes of child support is to annualize Mr. A.'s first four months of earnings plus the 2009 PFD and his commercial fishing income. This calculation results in a total gross income of \$32,105. When adjusted for allowable deductions, this calculation resulted in a monthly child support obligation for one child in the amount of \$448.<sup>23</sup>

Finally, Mr. A.'s total gross income for purposes of child support could be calculated based on quarterly reported earnings plus the 2009 PFD and commercial fishing income. This

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18     *See* Civil Rule 90.3, Commentary III.E.

19     Exhibit 7; Exhibit 9.

20     Exhibit 4.

21     Exhibit 4 at 6.

22     Exhibit 10.

23     Attachment A.

would result in a total annual gross income of \$35,331.47.<sup>24</sup> When adjusted for allowable deductions this calculation resulted in a monthly child support obligation for one child in the amount of \$489.<sup>25</sup>

The best indicator of the income which will be earned when the child support to be paid is Mr. A.'s earning history ending April 30, 2010, the third possible calculation discussed above.<sup>26</sup> This is because the first, second, and fourth calculations all include Mr. A.'s 2009 reported third quarter earnings which may not represent a full three months of employment. It is unknown when Mr. A. commenced employment with his present employer. The third quarter reported earnings are \$5,692 and the fourth quarter reported earnings are \$9,385.85. When these figures are compared to the 2010 first quarter reported earnings of \$7,106, it is reasonable to conclude that the third quarter earnings are for less than a full quarter. Therefore, using those income figures would not result in the most accurate income prediction for 2010. Also, the second calculation was not extrapolated to account for year-round employment. Therefore, Mr. A.'s child support calculation should be based on total gross income in the amount of \$32,105. Mr. A. requested any calculation take into account his subsequent children. Support for subsequent children is not an allowable deduction but may, in certain circumstances not present here, support a variance.<sup>27</sup>

The new amount of \$448 is more than 15% higher than Mr. A.'s prior obligation so modification is appropriate.<sup>28</sup> Effective November 1, 2009, Mr. A.'s monthly child support should be \$448 for one child and it is from this amount that Mr. A.'s request for a hardship variance will be considered.

*B. Mr. A. Did Not Establish Manifest Injustice Would Result If The Support Award Were Not Varied.*

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<sup>24</sup> If Mr. A.'s reported earnings for the third and fourth quarters of 2009 (exhibit 7) and the first quarter of 2010 (Exhibit 8) are annualized, this results in an annual gross income in the amount of \$34,383.47.  $(\$15,077.85 + \$7,106) / 3 \times 4 + \$1,305 \text{ (PFD)} + \$3,500 \text{ (commercial fishing income)}$ .

<sup>25</sup> Attachment B.

<sup>26</sup> Exhibit 8.

<sup>27</sup> "A child support order for children of a second marriage should take into account an order to pay support to children of a first marriage but not vice-versa." Civil Rule 90.3, Commentary III.D. As discussed below, Mr. A. did not establish by clear and convincing evidence that failure to vary the child support amount would result in a substantial hardship.

<sup>28</sup> Civil Rule 90.3(h).

A parent may obtain a reduction in the amount calculated, but only if he or she shows that “good cause” exists for the reduction. In order to establish good cause, the parent must prove by clear and convincing evidence that “manifest injustice would result if the support award were not varied.”<sup>29</sup> The presence of “unusual circumstances” in a particular case may be sufficient to establish “good cause” for a variation in the support award:

Good cause may include a finding . . . that unusual circumstances exist which require variation of the award in order to award an amount of support which is just and proper for the parties to contribute toward the nurture and education of their children . . . .<sup>[30]</sup>

It is appropriate to consider all relevant evidence, including the circumstances of the custodian and obligee child to determine if the support amount should be set at a different level than provided for under the schedule in Civil Rule 90.3(a).<sup>31</sup>

In 2010, Mr. A.’s adjusted monthly gross income is projected to average \$2,240.33.<sup>32</sup> His monthly expenses are \$2,415.50 so his monthly expenses exceed his adjusted monthly income by \$175.17. When child support is considered, his monthly expenses exceed his monthly income by \$623.27. Because of this discrepancy Mr. A. believes he is incapable of meeting the child support obligation without causing a hardship to his present children.

Ms. J. does not know what her anticipated 2010 earnings will be other than she believes they will be less than her 2009 earnings in the amount of \$28,000. However, this amount will be used for initial comparative purposes and results in a monthly adjusted gross income of \$2,037.26.<sup>33</sup> Her monthly expenses are \$1,938.50. Ms. J.’s monthly income exceeds her adjusted monthly income by \$98.76.

Mr. A. argues that the cost of living associated with residing in No Name City and his subsequent child living in the home should be considered good cause to vary his child support obligation calculated in accordance with Civil Rule 90.3. However, subsequent children are not considered for purposes of calculating child support unless the Obligor can establish that failure to vary the child support will cause a substantial hardship to the subsequent children.<sup>34</sup> Mr. A.

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<sup>29</sup> Civil Rule 90.3(c).

<sup>30</sup> Civil Rule 90.3(c)(1).

<sup>31</sup> See Civil Rule 90.3, Commentary VI.E.1.

<sup>32</sup> \$2,240.33 = (\$32,105/12) - \$249.65 [Fed. Income Tax] - \$174.04 [FICA] - 11.38 [Unemployment].

<sup>33</sup> \$2,037.36 = (\$29,305/12) - \$214.65 [Fed. Income Tax] - \$178.50 [FICA] - 11.38 [Unemployment].

<sup>34</sup> 15 AAC 125.075(a)(2)(F); See Civil Rule 90.3, Commentary VI.B.2.

failed to present evidence sufficient to establish that failure to vary the support amount would cause a substantial hardship to the subsequent children.

Moreover, the commentary to Civil Rule 90.3 provides that when considering whether substantial hardship to subsequent children exists it is appropriate to consider the income of both parents of the subsequent children.<sup>35</sup> Here, however, the mother of the children does not work. If Mr. A.'s request for a variance were granted and the child support amount lowered it would in essence mean that P. is financing Mr. A.'s household and their financial decisions, which is an unfair result for the child. A person who has brought a child into the world does not have the freedom to make life choices that deprive the child of support.<sup>36</sup> Mr. A.'s child support should not be lowered. The obligor has a duty to support P., and this duty takes priority over other debts and obligations, including subsequent children. P. is entitled to receive child support in an amount commensurate with Mr. A.'s ability to pay, as calculated pursuant to Civil Rule 90.3.

The custodian's income used for comparative purposes exceeded her expenses. Even so, Mr. A.'s situation does not warrant shifting his burden of support to the custodian and in turn, P. Mr. A. may have to make difficult budgeting decisions in light of his child support obligation and to support his subsequent children their mother may have obtain employment or he may have to get a second job.<sup>37</sup>

Accordingly, based on the evidence presented, this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. A. did not prove by clear and convincing evidence that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 were not varied. There are no "unusual circumstances" present to warrant varying his child support calculated under Civil Rule 90.3 for P.

#### **IV. Conclusion**

Mr. A. did establish by a preponderance of the evidence that the gross income figures used by CSSD were incorrect. When correctly calculated, Mr. A.'s child support should be modified to \$448 per month effective November 1, 2009. He has not met his burden of proving

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<sup>35</sup> Civil Rule 90.3, Commentary VI.B.2.

<sup>36</sup> See *Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

<sup>37</sup> Income from a second job if it is specifically to care for a subsequent family, may be a defense to an upward modification. Civil Rule 90.3, Commentary VI.B.2.

by clear and convincing evidence that manifest injustice would result if his modified child support amount calculated under Civil Rule 90.3 were not varied.

**V. Child Support Order**

- The obligor's child support is modified to \$448 per month effective November 1, 2009.
- All other provisions of CSSD's March 16, 2010, Modified Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 8<sup>th</sup> day of July, 2010.

By: Signed  
Rebecca L. Pauli  
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 26<sup>th</sup> day of July, 2010.

By: Signed  
Signature  
Christopher Kennedy  
Name  
Administrative Law Judge  
Title

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