

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

IN THE MATTER OF:)
)
F. B. H. III)
)
) OAH No. 10-0301-CSS
) CSSD Case No. 001149030
_____)

DECISION

I. Introduction

This case concerns the obligation of F. H. III for the support of K. H. The custodian is K. A.

The Child Support Services Division issued an amended administrative child support order on May 13, 2010, establishing an obligation of \$505 per month for arrears beginning April 1, 2009, and ongoing support, based on shared custody.¹ Mr. H. appealed and the assigned administrative law judge conducted a hearing on July 7, 2010. Both Mr. H. and Ms. A. appeared and participated in person. Andrew Rawls represented the division.

Based on the evidence and the testimony at the hearing, administrative arrears are set at \$505 per month for April-August, 2009. Arrears and ongoing support after that time have been set by court order at \$444 per month.

II. Facts

F. B. H. III is a construction worker who lives in Juneau. Mr. H. is a member of the Operating Engineers Local 302. He works with various employers as needed for construction projects. Typically, work is less available in winter than during the rest of the year. In 2008 Mr. H. earned wages of \$39,368 and received unemployment compensation of \$1,290.² In 2009 Mr. H. earned wages of \$42,801 and received an Alaska Permanent Fund dividend (\$1,305) and unemployment compensation (\$3,904) for total income of \$48,010.³

Based on his 2009 income, Mr. H.'s anticipated 2010 monthly income is \$4,000, and his anticipated monthly income after taxes and union dues is \$3,139.⁴ His monthly household

¹ Exhibit 7.

² Exhibit 7, p. 7; Ex. 9, pp. 1-2.

³ Exhibit 7, p. 7; Ex. 9, pp. 1-2.

⁴ $\$48,010 \div 12 = \$4,000.83$. Mr. H.'s anticipated monthly taxes and dues are \$868.71. See Exhibit 7, p. 7.

expenses are about \$2,603, including rent (\$1,100), utilities (\$180), telephone and Internet access (\$120),⁵ food (\$400), and personal care (\$300). Mr. H. owns a 2004 Chevrolet pickup on which he owes \$9,000 and has a monthly payment of \$500. Gasoline, insurance and maintenance for the pickup cost about \$542 per month. Mr. H. has outstanding debts of \$18,500 for credit cards (\$9,000), a student loan (\$1,500), and a line of credit (\$8,000), with monthly payments due of about \$723. Including household expenses, his pickup truck and existing debt, Mr. H.'s monthly obligations are \$3,868.

K. A. is presently unemployed. She has a medical condition, first diagnosed in 2002, that limits her ability to work outside of the home.⁶ Effective March 1, 2009, through August, 2009, Ms. A. received \$449.34 monthly from the Social Security Administration's Supplemental Security Income (SSI) program.⁷ After separating from Mr. H., Ms. A.'s SSI payments were terminated as a result of an administrative error. Since June through August, 2009, Ms. A. received \$821 per month in cash adult public assistance and \$398 per month in food stamps,⁸ pending reinstatement of the SSI payments.⁹ From April through August Ms. A. lived rent-free with her mother.¹⁰

The couple shares custody of their child, age three, under a written custody agreement originally prepared by Ms. A. for use in court at the time they separated in May, 2009, and incorporated into a court order dated September 23, 2009.¹¹ Consistent with the court order, Mr. H. has custody approximately 43% of the time (three nights each week).¹² In June, 2010, the superior court issued a final child support order for support to be paid at the rate of \$444 per month.¹³

⁵ Mr. H. testified that his combined cost for a telephone and Internet service is \$120 per month. He also testified that he pays \$60 per month for a telephone.

⁶ Testimony of K. A. Ms. A. testified that she has intestinal cystitis and kidney disease, and that has had one kidney removed and her other kidney is not fully functional. She added that she was hospitalized in April, 2009, and has not been released to work by her physician. Ms. A.'s testimony is consistent with the award of SSI.

⁷ Supplemental Exhibit (award dated June 9, 2009); Post Hearing Brief.

⁸ Supplemental Exhibit, pp. 2, 3, 7.

⁹ Exhibit 1, p. 9; Exhibit 10; Post Hearing Brief.

¹⁰ Post Hearing Brief.

¹¹ Exhibit 6 (Custody and Visitation Settlement Agreement, H. v. A., No. 1JU XX-393 CI (May 14, 2009); Supplemental Exhibit.

¹² Exhibit 6, pp. 2, 4. The court's order provides that each party will have custody 50% of the time, but does not allocate the nights equally, as would be required for actual custody to be 50%-50%. Rather, the court order provides for four days nights with Ms. A. ("Tuesday, Wed, Thursday Friday, half of Saturday") and three days and nights ("half day on Saturday, Sunday, Monday & part of Tuesday") with Mr. H. Supplemental Exhibit (Child Support Order, p. 2).

¹³ Supplemental Exhibit (Order Regarding Child Support, June 27, 2010).

II. Discussion

A. The Superior Court Order Controls, Effective September 23, 2009

Because a court order has been issued setting child support at the rate of \$444 per month, the division lacks authority to alter the support amount from the date the order went into effect. A court order for child support, like any other court order, takes effect prospectively, that is, from the date it is entered and ongoing, unless a prior effective date is stated in the order.¹⁴

In this case the superior court distributed two orders on June 28, 2010: (1) a Child Support Order on a court-provided form, which had been submitted to the court as a proposed order by Ms. A. and was signed by Justice Carpeneti, sitting as a superior court judge, on September 23, 2009; and (2) an Order Regarding Child Support, signed by Judge Pallenberg on June 27, 2010. Judge Pallenberg's order explains that Justice Carpeneti had declined to sign the proposed order when it was first presented to him at a hearing on June 19, 2009, because it was not accompanied by income information, and that neither party had subsequently submitted income information. In view of the parties' failure to provide income information, Judge Pallenberg ordered child support at the requested amount, \$444 per month. Judge Pallenberg's order makes no mention of the September 23, 2009, order signed by Judge Carpeneti.

Neither of the orders distributed on June 27, 2010 states an effective date for the court-ordered support. However, a written court order (unless preceded by an oral order) is effective the date it is signed.¹⁵ Because no oral order for child support was issued at the June 19 hearing, it follows that the September 23 order was effective on the date it was signed. Thus, support is due under court order beginning in September, 2009, and this proceeding is limited to the determination of pre-order administrative arrears for the period April 1-August 31, 2009.¹⁶

B. Pre-Order Arrears Are Set at \$505 Monthly

¹⁴ Civil Rule 58.1(a).

¹⁵ Civil Rule 58.1(a)(2).

¹⁶ It is possible that the order Justice Carpeneti signed on September 23, 2009, did not include a specific amount of support, or a different amount than \$444, and that the clerk (at Judge Pallenberg's direction) wrote in the amount at the time of Judge Pallenberg's order: an entry in that line is crossed out, and the handwriting and pen used for the dollar amount shown appear similar to the clerk's writing in the notice of distribution. If that is what occurred, then Judge Pallenberg likely intended his own order to have effect *nunc pro tunc* to September 23, 2009, just as the court rules provide in the absence of a stated contrary intent.

Mr. H. does not object to the amount of income attributed to him, nor does he object to the division's determination that he has custody 43% of the time. Rather, he argues that Ms. A. is not disabled and that the amount of income attributed to her is too low.

1. In April-August, 2009, Ms. A. Was Unable to Work

Ms. A.'s testimony was that she had two significant medical issues, one of which caused her to be hospitalized in April, 2009. In June, 2009, Ms. A. was determined to be disabled and was found eligible for Supplemental Security Income benefits. Those benefits were discontinued in August, 2009, and beginning in June Ms. A. received adult public assistance payments under a state disability benefit program. Persons receiving benefits under the Supplemental Security Income program and the state disability program need not be permanently disabled. In fact, both programs encourage individuals receiving benefits to seek employment to the extent they are able, and provide vocational rehabilitation aids.

Ms. A.'s testimony indicated that the primary effect of her medical condition is that she is susceptible to blood infections. She has not been released to work by her treating physician, but she is able to care for her child and has no significant mobility issues. However, during the period from April to August, 2009, she was hospitalized on more than one occasion and she travelled to Anchorage for treatment. During this time, even leaving aside her medical condition, her repeated hospitalization and related travel precluded regular full time employment, and she did not have prior employment from which she could take leave. Moreover, even after August, her treating physician did not release her to return to the workforce. Under these circumstances, the preponderance of the evidence is that Ms. A. was not voluntarily unemployed during the period of arrears.

2. Ms. A. Had No Income in April-August, 2009

Generally, when a person was not voluntarily unemployed and adequate information is available, arrears are based on the actual income received during the period for which arrears are due.¹⁷ In this particular case, Mr. H. did not dispute the income attributed to him in 2009. From April-August, 2009, Ms. A. was not voluntarily unemployed, and there is sufficient evidence of her actual income during that period of time. Therefore, her child support obligation for that period should be based upon her actual income at the time.

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

Food stamps and Supplemental Security Income payments are not included as income,¹⁸ even for purposes of arrears.¹⁹ The value of rent-free housing provided as compensation is included as income, but rent-free housing provided as a one-time gift is not.²⁰ Ms. A.'s income, for child support purposes, during the period from April-August, 2009, was zero.

3. *Mr. H.'s Presumptive Arrears Obligation is \$505*

Mr. H.'s presumptive support obligation for arrears is determined by calculating both parties' presumptive support obligation for full-time custody, adjusting those amounts by the time the child spends in each parent's custody, and that multiplying the difference by 1.5 in order to adjust for the increased cost of supporting a child in two homes. Mr. H.'s presumptive support obligation for that period is \$628 per month, and Ms. A.'s is \$50 per month. Thus, Mr. H.'s presumptive obligation for the period of arrears is \$505, as shown on Exhibit 7, pages 7-9.

2. *Mr. H.'s Income is Sufficient to Meet His Obligations*

Mr. H.'s current monthly household expenses (\$2,603) and vehicle expense (\$542) are about equal to his current monthly after-tax income exclusive of child support (\$3,139). With reasonable adjustments to his living expenses, it appears that Mr. H. could meet his ongoing support obligation of \$444 per month, although it may not be possible for him to do so while also paying down his substantial debt burden. Moreover, the additional amount of withholding due to the arrears on the administrative order will not substantially increase his monthly payment: arrears at the amount of \$505 per month for the period from April 1 through August 31, 2009, would total \$2,525, resulting in additional withholding of \$135 per month for the administrative arrears.²¹ (Additional withholding would occur as a result of arrears on the court support order, and Mr. H.'s total monthly withholding might be as high as \$674 per month.)

In establishing pre-order arrears, "unfairness may result from rigid application of the rule [governing calculation of child support]."²² Where substantial pre-order arrears have accrued, imposition of the full presumptive support obligation for the entire period of pre-order arrears may be manifestly unjust, depending on the circumstances.²³ In this particular case, Mr. H. has

¹⁸ 15 AAC 125.030(b)(3).

¹⁹ 15 AAC 125.030(e)(2).

²⁰ See 15 AAC 125.030(19).

²¹ See 15 AAC 125.545.

²² Civil Rule 90.3, Commentary at VI(E).

²³ See, e.g., In Re B.B., OAH No. 09-0273-CSS (Department of Revenue 2009); In Re A.W.B., OAH No. 09-0184-CSS (Department of Revenue 2009); In Re Y.D., OAH No. 09-0105 (Department of Revenue 2009); In Re

not shown that imposition of the full amount of administrative arrears in the amount would be manifestly unjust. Most importantly, Mr. H. agreed at the hearing that he had agreed to pay monthly support in the amount of \$444. The difference between that amount and \$505 per month for the five months at issue is only \$305. Arrears accrued only because Mr. H. did not make the payments that he had agreed to make while the matter was pending in court, and Mr. H. shares responsibility for the delay in entry of a judicial support order, because he did not timely provide income information. Finally, because the amount was agreed upon, Mr. H. had notice that he would need to substantially alter his financial arrangements in order to meet his obligation, and there is no indication that he did so. Under these circumstances, imposition of the full amount of administrative arrears is not manifestly unjust.

IV. Conclusion

Mr. H.'s presumptive support obligation for April 1-August 31, 2009 is \$505 per month, based on his and Ms. A.'s actual income during that time. There is not clear and convincing evidence of facts under which imposition of the presumptive support obligation for administrative arrears is manifestly unjust.

CHILD SUPPORT ORDER

The Amended Administrative Child Support and Medical Support Order dated May 13, 2010, is **AMENDED** as follows; in all other respects, the Amended Administrative Child Support and Medical Support Order dated May 13, 2010, is **AFFIRMED**:

1. Mr. H.'s administrative arrears are set at \$505 per month from April 1 through August 31, 2009.
2. Mr. H.'s arrears and ongoing support effective September 1, 2009, and ongoing have been set by court order at \$444 per month.

DATED: September 17, 2010.

Signed

Andrew M. Hemenway
Administrative Law Judge

J.E.C., OAH No. 09-0084-CSS (Department of Revenue 2009); In Re G.S., OAH No. 06-0367-CSS (Department of Revenue 2006); In Re D.J.M., OAH Nos. 04-0157/0158-CSS (Department of Revenue 2005).

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 14th day of October, 2010.

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

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