

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

IN THE MATTER OF:)
)
 B. T. G.) OAH No. 10-0362-CSS
) CSSD No. 001124399
_____)

DECISION AND ORDER

I. Introduction

The Obligor, B. T. G., appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on June 21, 2010. This order increased Mr. G.'s support obligation from \$50 to \$289 per month for one child. The Obligee child is C., who is 7 years of age.

The hearing was held on August 10, 2010. The Custodian, J. M., participated in person, Mr. G. participated by telephone. Andrew Rawls, Child Support Specialist, appeared for CSSD. The record remained open to provide CSSD with an opportunity to obtain a copy of a court record.¹ Mr. G. and CSSD submitted a post hearing briefs. The record closed on September 10, 2010.

Based on the record as a whole and after careful consideration, Mr. G.'s child support is modified to \$238 per month, effective May 1, 2010 and \$385 per month, effective August 1, 2010 and ongoing. His claim of financial hardship is denied.

II. Facts

A. History

Mr. G.'s child support obligation for C. was set at \$50 per month commencing March 2007.² Ms. M. initiated modification of the order on April 13, 2010.³ CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order on April 19, 2010.⁴ As requested, Mr. G. provided income information.⁵ On June 21, 2010, CSSD issued a Modified

¹ Exh. 8.
² Exh. 1.
³ Exh. 2.
⁴ Exh. 3.
⁵ Exh. 5.

Administrative Child Support and Medical Support Order that set Mr. G.'s modified ongoing child support at \$289 per month, effective May 1, 2010.⁶ Mr. G. filed an appeal on June 28, 2010, asserting the modified child support amount is too high and his income is overstated. He also claims that his current income is insufficient to meet expenses and an increase in child support.⁷

B. Material Facts

From January 2010 thru mid July 2010, Mr. G. worked at the A. C. for \$9 per hour, working on average 30 hours a week.⁸ According the Alaska Department of Labor, Mr. G. had reported earnings for the first two quarters totaling \$6,795.36. In July, Mr. G. left the Alaska Club for a position with B. M. Co., earning \$12 per hour, working on average 40 hours per week. Mr. G. testified that his position is a seasonal position but that some summer employees are retained over the winter. He did not think B. would employ him over the winter because he did not have a commercial driver's license. In 2009 he had reported earnings totaling \$13,365.25 working for several different employers.

Mr. G. lives with his girlfriend in an apartment he rents for \$675. She does not contribute to the rent. His rent includes most utilities. His monthly expenses are minimal, totaling \$1,036.50.⁹ In addition to his rent, he has the following monthly expenses: \$200 for food; \$60 for internet and phone; \$50 for electricity; \$24 for personal expenses, \$7.50 for tobacco, and \$20 for court ordered restitution upon which there is an outstanding balance in excess of \$6,000.

Ms. M. lives with her two parents and her two children in a home she rents for \$1,200. All four are claimed as dependents on her taxes. Her monthly expenses total \$3,048.¹⁰ In addition to rent, she has the following monthly expenses: \$800 for food and personal care; \$70 for internet, cable, and phone; \$80 for electricity; \$40 for renter's insurance; \$283 for health insurance; \$200 for entertainment and \$30 per month for tobacco. She owns a vehicle on which she makes monthly payments on the outstanding balance of \$20,000 in the amount of \$375.

⁶ Exh. 4.

⁷ Exh. 5.

⁸ *Id.*

⁹ Monthly expense amounts are as testified to by Mr. G.

¹⁰ Monthly expense amounts are as testified to by Ms. M.

Monthly expenses for vehicle insurance, maintenance and gas total \$530. Ms. M. has \$400 per month in consumer debt.¹¹

III. Discussion

A. Mr. G.'s Income

A parent is obligated both by statute and at common law to support his or her children.¹² Civil Rule 90.3(a)(1) provides that an obligor parent's child support amount is to be calculated based on his or his "total income from all sources." Modification of child support orders may be made upon a showing of "good cause and material change in circumstances."¹³ If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) presumes a material change in circumstances has occurred and the order may be modified.

Mr. G.'s child support previously was set at \$50 per month in 2007 for one child. Pursuant to the petition for modification, CSSD calculated his modified child support at \$289 per month, based on Mr. G. earning \$9 per hour and working full time (2080 hours) which totaled \$18,720.¹⁴ This income figure, plus the PFD equals \$20,025.¹⁵ Because did not work full time, CSSD's calculation disregarded Mr. G.'s actual current income information.

The division should use "the best information available" when determining a parent's income from all sources.¹⁶ When, as here, the division has partial income information for the year for which support is being calculated, the best available information is based on such factors as the parent's actual earnings, job skills and work history.¹⁷ Using actual earnings there are two potential annualizing calculations. One alternative is to take Mr. G.'s wages for the first six months of the year and double the figure to calculate an expected annual income. This calculation results in a total anticipated gross income of \$14,896.69.¹⁸ The second alternative is annualizing Mr. G.'s present pay rate. Using his current earnings would result in an estimated

¹¹ Ms. M. testified that she owes \$3,000 in consumer debt and makes monthly payments of \$400 on the balance.

¹² *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹³ AS 25.27.190(e).

¹⁴ Exh. 4 at 6.

¹⁵ *Id.*

¹⁶ 15 AAC 125.050(a).

¹⁷ See 15 AAC125.050.

¹⁸ $\$6,795.78 \times 2 = \$13,591.96$; $\$13,591.96 + \$1,305 \text{ PFD} = \$14,896.69$.

annual income of \$24,960.¹⁹ This income figure, plus the PFD, equals \$26,265 in total anticipated income for 2010.

At the hearing CSSD agreed that while working at the Alaska Club Mr. G. was not working 40 hours per week and his monthly child support obligation should be based on a 30 hour work week to reflect his actual earnings. However, CSSD proposed that ongoing child support should reflect Mr. G.'s current earnings at \$12 per hour and working 40 hours a week. CSSD reasoned that Mr. G. is familiar with the modification process and should his earnings change he can petition for modification.

Mr. G. testified that he did not expect this position to last into October, but there was a possibility that it could. At this time, he is employed earning \$12 per hour working 40 hours per week. He could not identify when his employment would end. His testimony regarding a reduced income in the future without corroboration is speculative and therefore it will be disregarded for purposes of this calculation.²⁰ Any child support calculation should be based on the premise that Mr. G.'s employment will continue. Moreover, there is no reason to believe that he could not find other employment at a similar wage. Should Mr. G.'s income fall and he is unable to meet his support obligations or there is a change in circumstance satisfying Civil Rule 90.3(h), he may petition for modification.²¹

However, the order on appeal is effective May 1, 2010. At that time Mr. G. was earning \$9 per hour and working 30 hours per week. In July 2010 he began earning \$12 per hour and working 40 hours per week. Therefore, it is appropriate to consider two periods for purposes of calculating child support. The first period is from May 2010 thru July 2010, and the second period is from August 2010 and ongoing. For each period child support should be based upon actual earnings. This is the best available information upon which to determine Mr. G.'s ability to pay child support during the period for which it is owed.²²

When child support is calculated using an annual income amount of \$14,896, and after mandatory allowable deductions, Mr. G.'s monthly child support obligation for one child is \$238

¹⁹ \$12 x 2080 hours = \$24,960.

²⁰ *Virgin v. Virgin*, 990 P.2d 1040, 1049 (Alaska 1999) (concluding it was not an abuse of discretion to find testimony regarding reduced overtime availability in the future was speculative to support a finding that income would decline).

²¹ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 n. 6 (Alaska 1991).

²² In determining earning capacity for purposes of calculating child support, the tribunal has the discretion to choose "the best indicator of ... future earning capacity" based on the evidence before it. *Coghill v. Coghill*, 836 P.2d 921, 926 (Alaska 1992).

per month.²³ This figure for the period from May 2010 thru July 2010 for one child is more than a 15% change from \$50 for one child so there is a presumptive material change in circumstances. When child support is calculated using an annual income amount of \$26,265, and after mandatory allowable deductions, Mr. G.'s monthly child support obligation for one child is \$385 per month.²⁴ This figure effective August 2010 and ongoing for one child is more than a 15% change from \$238 for one child so there is a presumptive material change in circumstances.

Mr. G.'s child support obligation is now correctly calculated and it is from these figures that his request for a variation based on financial hardship should be considered.

B. Financial hardship

Mr. G. testified that he cannot afford to pay child support in the amount set in the modification order and requested a variance pursuant to Civil Rule 90.3(c).

Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. The 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."²⁵ 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^[26]

The obligor has the burden of proving his or her earning capacity and establishing that he or she cannot meet their child support obligation.²⁷ Mr. G. did not meet his burden. The evidence submitted is insufficient to support a finding that by clear and convincing evidence manifest injustice would result if the support award were not varied.

²³ Attachment A.

²⁴ Attachment B.

²⁵ Civil Rule 90.3(c).

²⁶ Civil Rule 90.3(c)(1).

²⁷ *Kowalski v. Kowalski*, 806 P.2d 1368, 1371 – 1372 (Alaska 1991).

It is appropriate to consider all relevant evidence, including the circumstances of the custodian and obligee child(ren) 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).²⁸

Mr. G.'s adjusted monthly income for the two periods (\$1,191.82 and \$1,926.16)²⁹ exceeds his monthly expensed exclusive of child support. Once his child support obligation is considered, for the period from May 2010 thru July 2010, Mr. G.'s expenses will exceed his income by \$82.68. Conversely commencing August 2010 once child support is considered his adjusted monthly income exceeds his monthly expenses by \$504.66. Mr. G.'s monthly expenses appear reasonable and not extravagant.

The custodian's income used for comparative purposes exceeded her expenses. Even so, Mr. G.'s situation does not warrant shifting his burden of support to the custodian and in turn, C.. To lower the child support amount would in essence mean that C. is financing Mr. G.'s household, 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.³⁰ Mr. G. may have to make difficult budgeting decisions in light of his child support obligation. While his child support obligation will strain his finances, he could ease the strain by insisting that his roommate contribute to household expenses.

C. is entitled to receive child support in an amount commensurate with Mr. G.'s ability to pay, as calculated pursuant to Civil Rule 90.3. Mr. G.'s financial situation does not constitute "unusual circumstances" pursuant to Civil Rule 90.3(c) such that his child support calculated under the Rule should be lowered.

C. Arrears

At the hearing and in his post hearing brief, Mr. G. questioned whether CSSD properly implemented the May 2007 Modified Administrative Child Support and Medical Support Order that modified his child support downward to \$50 per month. Attached to his post hearing brief were several pages with the title "Alaska Child Support Services Division Automated Audit Summary Report." While no foundation has been laid for this report, it would appear that Mr. G. is relying upon these documents to show that contrary to the May 2007 Order setting support at

²⁸ See Civil Rule 90.3, Commentary VI.E.1.

²⁹ Attachment A; Attachment B

³⁰ See *Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

\$50 per month, that from March 2007 thru May 2007 he was charged \$246 per month in child support. In June 2007 this charge was reduced to \$50 per month and in November 2007 it was raised to \$87 per month where it remained until the June 2010 Order was issued. The scope of this proceeding is limited to Mr. G.'s appeal of the June 21, 2010 Modified Administrative Child Support and Medical Support Order. Without further explanation from CSSD the documents submitted by Mr. G. raise the question of how CSSD implemented the May 2007 order. It may be beneficial for Mr. G. to contact his case worker and request an explanation of how the charges on the Automated Audit Summary Report were calculated.

IV. Conclusion

Mr. G. has met his burden of proving by a preponderance of the evidence that the child support as calculated by CSSD in support of the June 21, 2010 Modified Administrative Child Support and Medical Support Order was in error. However, once his income is correctly calculated and his circumstances are considered, he has not met his burden of proving by clear and convincing evidence that manifest injustice would result if his child support were not varied pursuant to Civil Rule 90.3(c).

Mr. G.'s child support should be modified to \$238 per month, effective May 1, 2010 and \$385 per month, effective August 1, 2010 and ongoing. His claim of financial hardship should be denied.

V. Child Support Order

- Mr. G.'s child support for one child is modified to \$238 per month effective May 1, 2010 and further modified to \$385 per month effective August 1, 2010, and ongoing;
- All other provisions of CSSD's May 17, 2010, Modified Administrative Child Support and Medical Support Order remain in full force and effect.

DATED the 15th day of September, 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 4th day of October, 2010.

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

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