



Mr. S.'s custody by the State of Alaska's Office of Children's Services as a result of court proceedings involving the children's parents.<sup>4</sup> Also, beginning in October, 2009, the household included one more child, another nephew, placed in the household by the No Name tribal court (which also confirmed Mr. S.'s custody of the other three children).<sup>5</sup> All four children are older than Q. All four were, at R. and L. S.'s request, returned to their parents early in 2010, one in January and the other three in March, based on the children's parents' improved circumstances.<sup>6</sup> Mr. S. received no payments from either the State of Alaska or the No Name tribal entity for the care of these children.<sup>7</sup>

In February, 2008, Q.'s mother applied for public assistance benefits and in that connection requested services from the Child Support Services Division and identified Mr. S. as Q.'s father.<sup>8</sup> Public assistance benefits were paid to M. S. beginning in April, 2008, and were terminated in April, 2009.<sup>9</sup> Mr. S. was served with a notice of paternity and financial responsibility on November 25, 2009.<sup>10</sup> He contested paternity, and an order establishing his paternity was issued on April 8, 2010.<sup>11</sup>

Mr. S. is seasonally employed as a truck driver and heavy equipment operator on construction projects in the Nome area, working for K.C. C.<sup>12</sup> During the construction season, he and his family rent premises in Nome, at a cost of approximately \$1,200 per month.<sup>13</sup> The rest of the year, essentially for the school year, the family lives in No Name City. While in No Name City, Mr. S.'s wife L. works part-time at the local school and Mr. S. receives unemployment compensation; however, the family relies on food stamps and public assistance to make it through the winter.<sup>14</sup>

In 2008, Mr. S.'s total annual income was \$92,084, consisting of wages (\$85,615), his Alaska Permanent Fund Dividend (\$2,069) and energy rebate (\$1,200), and unemployment

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<sup>4</sup> Ex. 6, p. 5.

<sup>5</sup> Testimony of R. S.; Ex. 6, p. 5.

<sup>6</sup> Ex. 6, p. 2. *See* Ex. 9.

<sup>7</sup> Ex. 6, p. 5.

<sup>8</sup> Summary of Support Obligation. *See* Ex. 1, p. 5 (Paternity Witness Statement).

<sup>9</sup> *See* Ex. 16.

<sup>10</sup> Ex. 1, p. 7.

<sup>11</sup> Ex. 4.

<sup>12</sup> Earnings Statement (9/24/2010); Ex. 6, p. 5. For example, in 2010, Mr. S. was laid off on August 12, although he did have one additional week of work in September. Ex. 7; Earnings Statement (9/24/2010). *See* Ex. 12, p. 1.

<sup>13</sup> *See* Ex. 6, p. 5 (2010 rental amount).

<sup>14</sup> Ex. 6, pp. 5-6.

compensation (\$3,200).<sup>15</sup> In 2009, his total annual income was \$61,229, consisting of wages (\$50,138), his Alaska Permanent Fund dividend (\$1,305), and unemployment compensation (\$9,786).<sup>16</sup> In 2010, his total annual income was approximately \$90,147, consisting of wages (\$82,607),<sup>17</sup> his Alaska Permanent Fund dividend (\$1,281), and unemployment compensation (\$6,259).<sup>18</sup> His anticipated total income in 2011 is approximately \$80,482, including (\$72,786), unemployment compensation (\$6,415), and an Alaska Permanent Fund dividend (\$1,281).

### 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.”<sup>19</sup> When adequate information is available, arrears may be based on the actual income received during the period for which arrears are due.<sup>20</sup>

#### A. Income

In this case, Mr. S.’s income for 2008 and 2009 was established by the evidence in the record and was not disputed by Mr. S. The division estimated Mr. S.’s 2010 income based on a partial year’s income information.<sup>21</sup> The division’s most recent estimate was that Mr. S. would earn \$12,059 in the fourth quarter of 2010, reflecting his average earnings in that quarter over the prior three years.<sup>22</sup> Mr. S. testified, however, that his only income in the fourth quarter was from a single short term stint as a construction laborer in which he earned \$21 per hour for six ten-hour days, or \$1,260,<sup>23</sup> and that he would not receive any additional unemployment compensation in 2010. His estimated total annual income of \$90,147 for 2010 reflects Mr. S.’s testimony and the evidence in the record. Because his income varies from year to year depending on the availability of construction work, it is appropriate to estimate his 2011 income based on his average wages and unemployment compensation over the past three years.<sup>24</sup>

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<sup>15</sup> Ex. 12, pp. 1, 3.

<sup>16</sup> Ex. 12, pp. 1-2.

<sup>17</sup> Earnings Statement (9/24/2010); Testimony of R. S.

<sup>18</sup> Ex. 12, p. 2; Testimony of R. S.

<sup>19</sup> 15 AAC 125.030(a).

<sup>20</sup> Duffus v. Duffus, 72 P.3<sup>rd</sup> 313, 321 (Alaska 2003); Spott v. Spott, 17 P.3<sup>rd</sup> 52, 56 (Alaska 2001).

<sup>21</sup> The division’s 2010 calculation for the amended administrative support order was based on information for the first two quarters. *See* Ex. 8, p. 9. The division subsequently updated its estimate for 2010, based on income information for the first three quarters. *See* Ex. 12.

<sup>22</sup> *See* Ex. 15, p. 4.

<sup>23</sup> Mr. S. also testified that his net pay was \$770, which appears consistent with gross earnings of \$1,260.

<sup>24</sup> *See* 15 AAC 125.050(c)(2).

B. Support Obligation Under 15 AAC 125.070

For one child, a parent's presumptive support obligation under 15 AAC 125.070 is 20% of that parent's adjusted annual income,<sup>25</sup> that is, total income after allowable deductions.<sup>26</sup> Civil Rule 90.3(a)(1)(D), incorporated by 15 AAC 125.070(a), provides that a parent is entitled to a deduction from total income for the cost of providing support "for children from prior relationships living with the parent."<sup>27</sup>

A "prior relationship" within the meaning of Civil Rule 90.3(a)(1)(D) is a relationship of the parent; that is, the child must be the parent's own biological or adoptive child from a prior relationship in order to qualify for the deduction. Thus, Mr. S. is not entitled to a deduction under the rule for the cost of supporting his nephews or niece.

Mr. S. lives with three biological children of his marriage, which is a relationship that existed prior to the birth of Q. Two of those children (R. and C.) are older than Q.; one (L.) is younger. The division argues that the deduction under Civil Rule 90.3(a)(1)(D) is limited to children of a prior relationship who are older than the child that is the subject of the order, rather than to all children of a prior relationship. Whether the division's interpretation is correct has not been decided by the Alaska Supreme Court. Regarding the parallel deduction in Civil Rule 90.3(a)(1)(C) for child support paid under a court order "arising from prior relationships", a prior decision of the commissioner states:

The circumstances that bear on the award of child support are myriad, and not all are directly addressed by Civil Rule 90.3. The commentary to Civil Rule 90.3 suggests that the architects of the rule contemplated sequential completed relationships, and did not intend in Civil Rule 90.3(a)[(1)(C)] to address the situation...where a married person has a child outside of the marriage and subsequently has another child within the marriage, before a support obligation has been established for the intervening child. Accordingly, such a situation should be treated as an unusual circumstance, within the meaning of Civil Rule 90.3(c)(1)(A).<sup>[28]</sup>

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<sup>25</sup> 15 AAC 125.070(a); Civil Rule 90.3(a)(2)(A).

<sup>26</sup> 15 AAC 125.065(a); 15 AAC 125.070(a); Civil Rule 90.3(a)(1).

<sup>27</sup> Civil Rule 90.3(a)(1)(D).

<sup>28</sup> In Re L. S., OAH No. 06-0630-CSS at 4 (Commissioner of Revenue 2006). See Civil Rule 90.3, Commentary at VI(B)(2) (referencing "subsequent children" as "children...who were born or adopted after the support obligation arose."); State, Department of Revenue, Child Support Enforcement Division v. Kovac, 984 P.2d 1109, 1111 (Alaska 1999) (child support obligation begins at birth).

Similarly, Mr. S. is not entitled to a mandatory deduction for L., but his pre-existing relationship with her mother will be considered as a possible ground to vary the support obligation.

Applying the standard deductions for applicable taxes (federal income tax, Social Security, and unemployment insurance) and for his two prior children in the home, Mr. S.'s monthly support obligation determined under 15 AAC 125.070 is \$829 in 2008,<sup>29</sup> \$585 in 2009,<sup>30</sup> \$818 in 2010,<sup>31</sup> and \$757 in 2011.<sup>32</sup> His total arrears through the end of February, 2011, would be \$26,981.

C. Unusual Circumstances

The support obligation may be reduced if the amount as calculated under 15 AAC 125.070 would result in a manifest injustice due to unusual circumstances.<sup>33</sup> The obligor must provide clear and convincing evidence of manifest injustice.<sup>34</sup> Manifest injustice is shown when “a reasonable person would be convinced that the award is either unjustly large or unjustly small after carefully evaluating the award amount with reference to the considerations set out in the Commentary to Alaska Rule of Civil Procedure 90.3 and 15 AAC 125.075(a)(2) and (b).”<sup>35</sup>

This case includes a variety of factors that are identified in the Commentary to Civil Rule 90.3 and in 15 AAC 125.075 as appropriate considerations in weighing whether the support obligation calculated under 15 AAC 125.070 is manifestly unjust. First, in addition to his children in the home, Mr. S. also supports an older child, from a prior relationship, who lives with Mr. S.'s mother.<sup>36</sup> Second, for about six months Mr. S. had legal custody for four additional children for whom he had a legal responsibility to provide support and for whom he received no support payments.<sup>37</sup> Third, Mr. S. supports a younger child from a prior relationship living in his home.<sup>38</sup> Fourth, in this case the division seeks to establish arrears for a period of three years, including nearly two years prior to the date Mr. S. was notified of the initiation of

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<sup>29</sup> See Ex. 13, p. 2; Appendix A-1, A-2 (appendices are attached to this decision).

<sup>30</sup> See Ex. 14, p. 4; Appendix B-1, B-2.

<sup>31</sup> See Appendix C-1, C-2.

<sup>32</sup> See Appendix D-1, D-2.

<sup>33</sup> 15 AAC 125.075(a)(2).

<sup>34</sup> 15 AAC 125.075(a); see Civil Rule 90.3(c)(1).

<sup>35</sup> 15 AAC 125.080.

<sup>36</sup> See Civil Rule 90.3, Commentary at III(D) (“Support which is paid voluntarily without a court order or administrative order may be considered under Civil Rule 90.3(c).”).

<sup>37</sup> See Civil Rule 90.3, Commentary at III(D).

<sup>38</sup> See Civil Rule 90.3, Commentary at VI(B)(2).

the administrative support proceeding;<sup>39</sup> retroactive establishment of a support obligation for such a lengthy period of time is unusual and can result in unfairness.<sup>40</sup> Considering all of these factors, imposition of the presumptive amount of support for the entire period of arrears would result in a support obligation for arrears that is unjustly large.

To calculate a support obligation for arrears that more accurately and reasonably reflects Mr. S.'s actual support responsibilities during the period the arrears accumulated, a modified application of the child support guideline will be utilized.<sup>41</sup>

One approach to alleviate the potentially unjust effect of a strict application of the child support guideline where there are multiple relationships and support obligations is to provide support equally to each of the children being supported, based on the total number of children.<sup>42</sup> Using this approach, an individual's support obligation is based on the total percentage of income that would normally be expected to be paid for support of a given number of children under Civil Rule 90.3(a)(2) (*i.e.*, 33% for three children plus 3% for each additional child), divided by the number of children. Mr. S.'s pro rata support obligation would be 7.8% of adjusted income for each of five children ( $39\% \div 5 = 7.8\%$ ), 6.4% for each of seven children ( $45\% \div 7 = 6.4\%$ ), 6% for each of eight children ( $48\% \div 8 = 6\%$ ), and 5.6% for each of nine children ( $51\% \div 9 = 5.6\%$ ). Applying these percentages, the total amount of arrears would be \$443 per month in 2008 (7.8% of adjusted income),<sup>43</sup> \$312 through August, 2009, (7.8% of adjusted income),<sup>44</sup> \$240 in September (6% of adjusted income),<sup>45</sup> and \$224 in the last quarter of 2009 (5.6% of adjusted income);<sup>46</sup> \$314 in January (5.6% of adjusted income),<sup>47</sup> \$336 in

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<sup>39</sup> See Civil Rule 90.3, Commentary at VI(E)(1) (when establishing pre-order arrears, "[T]he court should consider...whether the obligor was aware of the support obligation, especially if the obligor had children subsequent to that child."). Mr. S.'s affidavit states that he "did not realize I had another child." Ex. 6, p. 6. There is no explanation in the record for the eighteen month gap between the date Margaret S. applied for public assistance and the date Mr. S. was notified of the administrative proceeding to establish a support obligation.

<sup>40</sup> See Civil Rule 90.3, Commentary at VI(E)(1).

<sup>41</sup> Various modified version of the standard calculation have been used in other cases involving unusual circumstances. See, e.g., In Re D.S., OAH No. 06-0671-CSS (Commissioner of Revenue 2006); In Re B.F., OAH No. 05-0368-CSS (Commissioner of Revenue 2005); In Re H.J.M., CSSD No. 970835 (April 17, 2000).

<sup>42</sup> See, e.g., In Re M.G., OAH No. 06-0288-CSS (Commissioner of Revenue 2006).

<sup>43</sup> See Ex. 13, p. 2 ( $\$68,122 \times .078 = \$5,313$ ;  $\$5,313 \div 12 = \$443$ ). During this time, Mr. S. was supporting four biological children, three in the home and one (Shane) outside the home.

<sup>44</sup> See Ex. 14, p. 4 ( $\$48,072 \times .078 = \$3,749$ ;  $\$3,749 \div 12 = \$312$ ). Mr. S. continued to support four biological children during this time.

<sup>45</sup> See Ex. 14, p. 4 ( $\$48,072 \times .06 = \$2,884$ ;  $\$2,884 \div 12 = \$240$ ). In September, Mr. S. took in three additional children; he was supporting six children in the home, plus Shane.

<sup>46</sup> See Ex. 14, p. 4 ( $\$48,072 \times .056 = \$2,692$ ;  $\$2,692 \div 12 = \$224$ ). In October, Mr. S. took in one more child; he was supporting seven children in the home, plus Shane.

February and March (6% of adjusted income),<sup>48</sup> \$437 beginning in the second quarter of 2010 (7.8% of adjusted income),<sup>49</sup> and \$405 effective January, 2011.<sup>50</sup> Thus, under the total number of children approach, Mr. S.'s total arrears through the end of February, 2011 would be \$14,010.

An alternative approach, which was broached at the hearing, would be to provide a deduction for the cost of support for Mr. S.'s nephews and niece and younger child in the home, and his older child outside of the home. The division did not object to this approach, at least to the extent of providing a deduction for the nephews and niece in the home, which is reflected in the division's post-hearing calculations.<sup>51</sup> But limiting the deduction to his niece and nephews fails to take into account the support that Mr. S. was actually providing for both his older child out of the home (A.) and his younger child of a prior relationship who was in the home (L.). Support paid voluntarily for a child outside the home may be considered as an unusual circumstance under Civil Rule 90.3,<sup>52</sup> as can the cost of supporting a subsequent child born before the support obligation was established, particularly when the obligor did not previously know of the support obligation.<sup>53</sup> Moreover, even if a deduction were provided for all of the children for whom Mr. S. was providing support, the effect on his obligation for arrears to Q. would not substantially alleviate his unjustly large obligation for arrears: the arrears through February, 2011, would total \$22,972 as compared with \$26,981, a reduction of less than 15% (less than would have warranted a prospective modification).<sup>54</sup> Accordingly, the support obligation for arrears will be set using the total number of children approach, as described above.

Mr. S.'s total obligation for arrears through February, 2011 as calculated using the total number of children approach is \$14,010. His presumptive ongoing support obligation is \$757 per month. If the entire amount of arrears remains unpaid, Mr. S.'s monthly payment in 2011

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<sup>47</sup> See Appendix C-1 ( $\$67,276 \times .056 = \$3,767$ ;  $\$3,767 \div 12 = \$314$ ). Mr. S. continued to support eight children.

<sup>48</sup> See Appendix C-1 ( $\$67,276 \times .06 = \$4,036$ ;  $\$4,036 \div 12 = \$336$ ). One of Mr. S.'s nephews returned home in January. Beginning in February Mr. S. was providing support for six children in the home, plus Shane.

<sup>49</sup> See Appendix C-1 ( $\$67,276 \times .078 = \$5,247$ ;  $\$5,247 \div 12 = \$437$ ). Two nephews and a niece returned to their home in March; Mr. S. continued to support four biological children, three in the home plus Shane.

<sup>50</sup> See Exhibit D-1 ( $\$62,260 \times .078 = \$4,856$ ;  $\$4,856 \div 12 = \$405$ ). Mr. S. continued to support four biological children.

<sup>51</sup> See Ex. 16.

<sup>52</sup> See Civil Rule 90.3, Commentary at III(D).

<sup>53</sup> See note 39, *supra*.

<sup>54</sup> The support obligation would be \$727 per month in 2008 (App. A-1, A-3), \$513 in 2009 through August (App. B-1, B-3), \$441 in September (App. B-1, B-4), \$417 from October through December (App. B-1, B-5), \$583 in January, 2010 (App. C-1, C-5), \$617 in February and March (App. C-1, C-4), \$718 beginning in April (App. C-1, C-3), and \$664 in January and February, 2011 (App. D-1, D-3).

would be about \$1,132, including ongoing support (\$757), arrears (\$305), and interest (\$70).<sup>55</sup> Mr. S. proposed paying \$100 per month towards arrears (including interest) in addition to his ongoing support obligation (based on an assumed ongoing support obligation of \$800 per month), for a total payment of \$900 per month.<sup>56</sup> While his combined obligation for support, arrears, and interest may be somewhat greater than Mr. S. previously proposed, he has not shown that imposition of ongoing support in the amount of \$757, as provided in 15 AAC 125.070, is manifestly unjust.

#### **IV. Conclusion**

Mr. S. has established by undisputed evidence the existence of circumstances that make it unjust to impose the standard amount of support in accordance with 15 AAC 125.070 for the full period of arrears. Calculating his support obligation for arrears according to the total number of children Mr. S. was supporting during the period the arrears accrued will more accurately reflect his actual support responsibilities. Mr. S. did not show that it would be manifestly unjust to set his ongoing support obligation in accordance with 15 AAC 125.070.

#### **CHILD SUPPORT ORDER**

The Amended Administrative Child Support and Medical Support Order dated September 10, 2010, is **AMENDED** as follows; in all other respects, the Amended Administrative Child Support and Medical Support Order dated September 10, 2010, is **AFFIRMED**:

1. Mr. S.'s monthly arrears are set at \$443 effective February 1, 2008 through December 31, 2008; \$312 effective January 1 through August 31, 2009; \$240 in September, 2009; \$224 effective October 1 through December 31, 2009; \$314 in January, 2010; \$336 in February and March, 2010; \$437 effective April 1 through December 31, 2010; and \$405 effective January 1 through February 28, 2011.

2. Amended ongoing child support is set at \$757 per month, effective March 1, 2011.

DATED: February 28, 2011.

*Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

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<sup>55</sup> See 15 AAC 125.545(a) (monthly withholding for arrears); 15 AAC 125.840, AS 25.27.025 (establishing 6% annual interest rate on accumulated arrears from the date of the final administrative order establishing the amount of arrears).

<sup>56</sup> Ex. 6, p. 6.

## 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 18<sup>th</sup> day of March, 2011.

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

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