

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

IN THE MATTER OF)	
J P R)	OAH No. 10-0615-CSS
)	
_____)	CSSD No. 001047118

DECISION AND ORDER

I. Introduction

This case is J P R’s appeal of the Division’s modification of his \$394 per month ongoing child support order for his child T, which raised the monthly amount to \$1,225. On January 4, 2011, a formal hearing was held to consider Mr. R’s appeal.¹ Mr. R appeared. The custodial parent, B J, did not participate in the hearing but filed some information after the hearing. Erinn Brian, Child Support Services Specialist, represented the Child Support Service Division (Division). The hearing was audio-recorded. The record closed on February 1, 2011.

Having reviewed that record and after due deliberation, I have concluded that the Division’s Modified Administrative Child and Medical Support Order issued on November 22, 2010, should be affirmed. This means that Mr. R’s modified ongoing child support will remain at \$1,225 per month per month effective September 1, 2010.

II. Facts

A. History

Mr. R’s monthly child support obligation was set at \$394 per month in 1997.² The Division reviewed this child support order at Ms. J’s request.³ The Division issued a Notice of Petition for Modification on August 25, 2010.⁴

The Division issued a Modified Administrative Child and Medical Support Order on November 22, 2010. The Division determined that Mr. R’s ongoing monthly child support

¹ The hearing was held under Alaska Statute 25.27.190.
² Exhibit 1.
³ Exhibit 2.
⁴ Exhibit 3.

should be increased to \$1,225 per month. The Division based its calculation of Mr. R's modified ongoing monthly child support on his 2010 income.⁵

Mr. R requested a formal hearing.⁶ At the hearing, Mr. R contested the Division's calculations, explaining that the estimate of his annual income used in the Division's calculations was based on his high earnings of 2010 which he will not earn in 2011 or 2012. Mr. R provided a letter from his employer prior to the hearing estimating that Mr. R's earnings if he only worked his regular schedule with no additional overtime or bonuses would be \$79, 899.⁷

After the hearing as requested, the Division re-calculated Mr. R support obligation using his employer's estimate of his earnings if Mr. R worked only a regular schedule and received no bonuses. These new calculations result in child support of \$933 per month.

Mr. R also provided some information about his household's financial circumstances and complained of the difficulty he would have paying increased child support.⁸

Mr. R lives with his wife. Mr. R has one step child who is 18 years old, who Mr. R is helping support, while the step-child is attending vocational school. In 2010, Mr. R's income was more than \$108,000. Mr. R's income for the past three years has been over \$100,000 each year. Mr. R's wife is not currently working. Mr. R testified that he hoped to work less overtime in the future than he has the past few years. Mr. R explained that he has paid off a great deal of debt over the past five years, by working all of the hours that he could. Mr. R also has concerns about whether he will receive as much in bonuses as he did in 2010. Mr. R's bonus would be lower if he works less overtime and his employer's new production targets, on which the bonuses are dependent, will be more difficult to meet.⁹

After the hearing, a post hearing order was issued giving the parents until February 1, 2011 to provide additional information and respond to the other parties' submissions. Ms. J filed information about her financial circumstances. Ms. J has four children living in her

⁵ Exhibit 4.

⁶ Mr. R's appeal is found at Exhibit 5.

⁷ Exhibit A.

⁸ Recording of Hearing- Testimony of Mr. R.

⁹ Recording of Hearing.

home. T, who will be 17 years old this month, is her oldest child. Her youngest is eight years old. Ms. J works part-time for \$11.25 per hour.¹⁰

B. Findings

Based on the evidence in the record, I find that it is more likely than not that the Division's calculation that are based on his 2010 income, concluding that Mr. R's ongoing support obligation under Alaska Civil rule 90.3(a) is \$1,225 per month, are correct. I also find that it is more likely than not that Mr. R will earn an income equal to or higher than his 2010 income in 2011 and 2012.

I find this case does not present unusual circumstances of the type contemplated by Alaska Civil Rule 90.3. Mr. R did not present clear and convincing evidence that manifest injustice will result if the child support amount calculated under Civil Rule 90.3(a) is not reduced.¹¹

III. Discussion

In a child support hearing, the person who filed the appeal, in this case, Mr. R, has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.¹² Mr. R did not meet his burden of proving that the Division's order setting modified ongoing child support at \$1,225 per month was calculated using too much annual income.

At the hearing, Mr. R provided evidence that his income in 2011 and 2012 may be less than it was in 2010. Although Mr. R appeared to be sincere when he explained that he hoped to work less voluntary overtime now that he had most of his bills and debts paid off, it is more likely that his hopes will be outweighed by his desire to maximize his earnings to support himself and his family. There is no earnings history to show that Mr. R earnings actually have been reduced. At this time, Mr. R's 2010 income provides the best estimate of his ongoing income.

Child support should be set based the income earned when the child support will be paid.¹³ This modification is effective beginning in September of 2010. The Division correctly calculated Mr. R's modified ongoing child support on his 2010 income. Mr. R may request a modification if his income drops significantly before T becomes an adult.

¹⁰ Ms. J.'s post hearing filing.

¹¹ Recording of Hearing.

¹² Alaska Regulation 15 AAC 05.030(h).

¹³ Alaska Civil Rule 90.3, Commentary III.E.

At the hearing, Mr. R asserted that having to pay \$1,225 per month in ongoing child support would cause a hardship. Mr. R did not provide detailed information about his household's financial situation.¹⁴

Ongoing child support should be calculated based on Mr. R's estimated future income unless good cause exists to raise child support above or reduce it below the amounts calculated using the income formula in Civil Rule 90.3(a). To establish good cause, the claimant must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."¹⁵

Mr. R did not show that it would be unjust to require him to pay \$1,225 per month in ongoing child support. Mr. R did not show that he and his wife will be unable to support themselves and Mr. R's step child if Mr. R's ongoing child support for T is increased to \$1,225 per month.¹⁶ While paying \$1,225 per month in ongoing child support may require some adjustments, Mr. R's duty to pay the correct percentage of his income toward the ongoing support of his biological child, T, takes precedence over his debts and other financial obligations, including his obligation to support his step child.¹⁷ Under Alaska Civil Rule 90.3(a) &(c), Mr. R has an obligation to pay 20% of his adjusted gross income in child support to T.

Civil Rule 90.3 allows a child support amount to be modified if the party requesting the change shows that a material change of circumstances has occurred.¹⁸ The rule states that a material change of circumstances "will be presumed" if the modified support amount would alter the outstanding support order by 15 percent.¹⁹ Monthly child support of \$1,225 would be more than a 15 percent increase from the current order of \$394 per month.

At the hearing, Mr. R argued that the Division should have denied Ms. J's request for a modification review because she did not timely provide her income information. In some situations the Division has the authority to decline to complete its review of a request for modification when, as in this case, the party requesting the review does not provide all of the required income information.²⁰ However, the Division's authority to decline to complete its

¹⁴ Recording of Hearing- Testimony of Mr. R.

¹⁵ Alaska Civil Rule 90.3(c).

¹⁶ Recording of Hearing.

¹⁷ Alaska Civil Rule 90.3 Commentary VI.B.2.

¹⁸ Alaska Civil Rule 90.3(h)(1).

¹⁹ Alaska Civil Rule 90.3, Commentary X.

²⁰ Alaska Regulation 15 AAC 125.316(e).

review of a request for modification based on the requesting party's failure to timely provide income information does not include cases like this one where more than three years have passed since the ongoing child support was last set.²¹ Mr. R's ongoing child support was last set in 1996.

Furthermore, it would have been an abuse of the Division's authority to decline to complete its review of a request for modification because of Ms. J's failure to timely provide income information, even if three years had not past since ongoing child support was modified. As the Division pointed out at the hearing and in its post hearing brief, Ms. J has primary custody and her income information was not needed for the Division to complete the modification review process.

A support order cannot be modified retroactively.²² The effective date of a modification cannot predate the service of the petition for modification, even when a delay in processing a modification request occurred.²³ Generally, a new monthly child support amount in a modification action should be effective the month after the parties are served with the petition. This modification should be effective September 1, 2010, because the petition was served in August of 2010.²⁴

IV. Conclusion

I conclude that the Mr. R's ongoing child support should be modified to \$1,225 effective September 1, 2010, based on his current income.

²¹ Alaska Regulation 15 AAC 125.316(e).

²² Alaska Civil Rule 90.3(h)(2).

²³ *State, Dept. of Revenue, Child Support Enforcement Div. v. Schofield*, 993 P2d 405, (Alaska 1999).

²⁴ Alaska Regulation 15 AAC 125.321.

V. Child Support Order

The Division’s Modified Administrative Child Support and Medical Support Order issued on November 22, 2010, is affirmed.

DATED this 11th day of March, 2011.

By: Signed
Mark T. Handley
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 30th day of March, 2011

By: Signed
Signature
Mark T. Handley
Name
Administrative Law Judge
Title

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