

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

IN THE MATTER OF:)

J. A. N.)

) OAH No. 11-0002-CSS

) CSSD No. 001162832

DECISION AND ORDER

I. Introduction

The obligor, J. A. N., appealed an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on December 9, 2010. The obligee children are E., 6, and H., 4. This is a non-federal foster care case so the other party to this action is the State of Alaska.

The hearing was held on February 28, 2011. Mr. N. appeared in person. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record as a whole and after careful consideration, Mr. N.'s request for a good cause variance in his child support obligation is granted. He is thus liable for child support for E. and H. from October 2009 through June 2010, in the amount of \$500 per month for two children or \$350 per month for one child.

II. Facts

A. Procedural history

Mr. N.'s children, E. and H., were in state foster care from October 14, 2009, through June 10, 2010.¹ CSSD began the process of establishing Mr. N.'s support obligation by requesting financial information from him and issuing an administrative child support order on June 3, 2010.² He requested an administrative review, after which CSSD issued an Amended Administrative Child and Medical Support Order on December 9, 2010, that set Mr. N.'s ongoing child support at \$1,457 per month for two children from October 2009 through June 2010.³ Mr. N. appealed on January 4, 2011, asserting CSSD's child support order is an

¹ Pre-Hearing Brief at pg. 1; testimony of Mr. N.

² Exhs. 1-2.

³ Exh. 4.

insufferable burden because the children are back in his home and he should not have to reimburse the state for taking the children against his will.⁴

B. Material facts

Mr. N. is in the military.⁵ His October 2010 Leave and Earnings Statement (LES) indicates that he is an E-6 with 14 years of service in the United States Army.⁶ In 2009, Mr. N. received base pay of \$35,929.80,⁷ which is taxable; and monthly nontaxable benefits consisting of Basic Allowance for Sustenance (BAS) of \$323.87; Basic Allowance for Housing (BAH) of \$1,961;⁸ plus a Cost of Living Allowance (COLA) of \$20.23 per day.⁹ These figures result in total income from his employment of \$70,731.46.¹⁰ Adding the 2009 PFD of \$1,305 results in total annual income from all sources of \$72,036.46.¹¹ When this figure is inserted into CSSD's online child support calculator (in the correct taxable and nontaxable categories) it yields a child support amount of \$1,457 per month for two children and \$1,079 for one child.¹²

Mr. N. served two tours of duty in Iraq and was wounded there in 2007. He still suffers from shrapnel wounds, tinnitus, mild traumatic brain injury and Post Traumatic Stress Disorder (PTSD), and he is currently receiving ongoing medical treatment. Mr. N. and his ex-wife were divorced in November 2007 and he was awarded custody of their two children, E. and H.

In October 2009, Mr. N.'s daycare provider contacted the Office of Children's Services (OCS) to report a potential abuse situation. The state of Alaska took custody of E. and H. on October 14, 2009, placed them into foster care and initiated a Child in Need of Aid (CINA) action in the Superior Court. The children were released back to Mr. N. on June 10, 2010 and the CINA case was dismissed two months later.¹³ The matter did not go to a hearing and no findings were made substantiating the abuse allegations.

⁴ Exh. 7.

⁵ The facts are taken from Mr. N.'s hearing testimony unless otherwise indicated.

⁶ Exh. 3 at pg. 6.

⁷ Exh. 3 at pg. 7.

⁸ Exh. 3 at pg. 6.

⁹ Exh. 6 at pg. 6. The COLA figure reflected on Mr. N.'s October 2009 LES ($\$765.70 \div 31 \text{ days} = \24.70 per day) is higher than CSSD's amount, which was apparently taken from online military pay charts. *See* Exh. 6 at pg. 7. Since only the amount for that one month is shown on the LES, CSSD's figure should be used because it reflects annual totals.

¹⁰ *Id.*

¹¹ Exh. 6 at pg. 7.

¹² *Id.*

¹³ Exh. 5.

Mr. N. has net pay of about \$5,821.56 per month, including his non-taxable benefits.¹⁴ From that figure he makes payments via allotments totaling \$3,069.55, and then brings home about \$2,751.51.¹⁵ He listed regular monthly expenses of about \$5,567.72, which includes \$1,950 for rent; \$450 for food; \$100 for Internet service; \$74 for cable; \$124 for cell phone; \$630 for the payment on a 2008 Dodge Ram 1500; \$450 for gasoline; \$58 for vehicle maintenance; \$95 for vehicle insurance; \$30 for renter's insurance; \$50 for entertainment; \$110 for personal care items; \$31.72 for dental insurance; \$27 for mandatory life insurance; \$700 for child care; \$50 for the children's school; \$100 for incidentals; \$100 for legal fees; and \$438 for the payments on three credit cards or personal loans.¹⁶

III. Discussion

Mr. N. has challenged the calculation of his support obligation for October 2009 through June 2010, when E. and H. were in OCS custody. As the person who filed the appeal, Mr. N. has the burden of proving by a preponderance of the evidence that CSSD's Amended Administrative Child Support and Medical Support Order is incorrect.¹⁷

A. *Child Support Calculation*

Mr. N. claims OCS wrongfully removed E. and H. from his custody and kept them for eight months, which caused him great expense in getting them returned and significant emotional trauma for his family. He asserts having to pay child support on top of having the children removed just adds insult to injury because "the State is essentially forcing me to pay the costs of the other side, even though I prevailed in this matter"¹⁸

Whether OCS can be faulted for its actions in Mr. N.'s case is not an issue for this tribunal, but rather for the court in the CINA action. The purpose of this administrative decision is to determine only whether Mr. N. is liable for reimbursing the state for supporting his children during the months they were in OCS custody and if so, in what amount.¹⁹

A parent is obligated both by statute and at common law to support his or her children.²⁰ The parent is liable to reimburse the state for maintaining his or her child(ren) in a foster home.²¹

¹⁴ See Exh. 3 at pg. 6: Total pay of \$6,444.17, minus deductions of \$622.61 (not including mid-month pay).

¹⁵ *Id.*

¹⁶ Obligor's hardship questionnaire, received on February 28, 2011.

¹⁷ 15 AAC 05.030(h).

¹⁸ Exh. 7 at pg. 2.

¹⁹ See AS 25.27.180(a).

²⁰ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

CSSD collects support from the date public assistance or foster care was initiated, up to six years prior to the date the action was initiated.²² In this case, Mr. N.'s children were in OCS custody receiving foster care from October 14, 2009 through June 10, 2010. Thus, those are the months during which the obligor is liable for paying support through CSSD. His support obligation is designed to reimburse the state for those foster care services.

Civil Rule 90.3(a)(1) provides that an Obligor's child support amount is to be calculated from his or her "total income from all sources," minus mandatory deductions. The rule states specifically that a military parent's total income from all sources includes "Armed Service Members base pay *plus* the obligor's allowances for quarters, rations, COLA and specialty pay."²³ The reason for including the non-pay benefits in the child support calculation is because they significantly reduce the parent's living expenses and allow the military member to use the remainder of his or her pay for other expenses.

When this action was initially established, CSSD calculated Mr. N.'s 2009 child support at \$882 per month for two children and \$653 for one child.²⁴ These figures appear to be incorrect because they were based only on the taxable earnings reported by the military to the Alaska Department of Labor and Workforce Development.²⁵ CSSD's amended order contains the correct income figures as well as the correct methodology in that the calculation included both taxable and nontaxable sources of income, as directed by the commentary to Civil Rule 90.3.²⁶ With these adjustments, Mr. N.'s child support obligation for 2009 and 2010 is now correctly calculated at \$1,457 per month for two children and \$1,079 for one child.²⁷

B. Good Cause Variance

The second issue in this case concerns whether Mr. N.'s child support obligation should be adjusted now that custody of E. and H. has been returned to him. 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

21 AS 25.27.120(b).

22 15 AAC 125.105(a)(1)-(2).

23 Civil Rule 90.3, Commentary III.A.29 (emphasis added).

24 Exh. 2 at pg. 8.

25 *Id.*

26 *See* n.24.

support award were not varied." Civil Rule 90.3(c). A finding that "unusual circumstances" exist 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 . . .

[28]

Civil Rule 90.3 also states that when establishing support arrears, the court or tribunal should consider all the relevant factors in the case. The Commentary provides:

It will sometimes be necessary for the court to establish support for a time when no complaint or petition for support had yet been served, and there was no other court or administrative order in effect. The court has determined that Civil Rule 90.3 applies to such calculations. Vachon v. Pugliese, 931 P.2d 371, 381-382 (Alaska 1996). However, in some circumstances unfairness may result from rigid application of the rule. The court should consider all relevant factors in such a situation, including whether the obligor was aware of the support obligation, especially if the obligor had children subsequent to that child. See also Commentary VI.B.2.^[29]

In applying the above language to Mr. N.'s arrears, factors other than just the child support calculation must be taken into consideration. The children are back living with the obligor, so any child support arrears he has to pay on this case would deprive E. and H. of the current support they should have as members of Mr. N.'s household. This essentially makes the children bear the current financial burden of those arrears, as well as the burden on into the future, as the reimbursement rate will require the obligor to make monthly payments for quite some time.

The Alaska Supreme Court holds that factors such as these, which relate to the well being of an obligee, are especially important in determining whether there is good cause to vary the child support amount. The court has stated:

The meaning of the term "good cause," however, is to "be determined by the context in which it is used."³⁰ That context, for Civil Rule 90.3 purposes, must focus first and foremost on the

²⁷ Mr. N.'s total income for 2010 is not available, so the 2009 amount will be used for both years.

²⁸ Civil Rule 90.3(c)(1).

²⁹ Civil Rule 90.3, Commentary VI.E.1.

³⁰ Citing *Coats v. Finn*, 779 P.2d 775, 777 (Alaska 1989).

needs of the children. See Civil Rule 90.3, commentary at sec. I(B).^{31]}

Applying the Supreme Court's standard of focusing "first and foremost on the needs of the children[.]" this case presents unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. N. proved by clear and convincing evidence that manifest injustice would result if he were required to pay the full arrears in this case. It makes little sense and it would be unjust to burden his household by adding more child support debt to his current legal obligation to support E. and H. in the home. Thus, setting Mr. N.'s child support at \$500 per month for two children, or \$350 per month for one child, constitutes a reasonable measure of his ability to pay support under Civil Rule 90.3(c). This amount multiplied times the nine months E. and H. were out of the home results in total arrears of about \$4,500, exclusive of interest charges, which means that under CSSD's amortization chart he should have to pay about \$205 per month on the debt.³² If he is careful, Mr. N. has just enough left over from his net income to pay that amount.

There is no ongoing support due because Mr. N. now has custody of E. and H. Ongoing child support as of July 1, 2010 will be suspended. It will remain in place so in the event Mr. N. ever becomes liable for paying support in the future, CSSD can begin immediate income withholding.

IV. Conclusion

Mr. N. met his burden of proving by clear and convincing evidence that manifest injustice would result if his child support amount calculated under Civil Rule 90.3 were not varied. There is good cause to reduce Mr. N.'s child support to \$500 per month for two children or \$350 per month for one child, effective for the period from October 2009 through June 2010, when the obligees E. and H. were in OCS custody receiving foster care services. Ongoing support as of July 1, 2010, should be suspended because the children have been returned to Mr. N.'s home, and should remain suspended so long as Mr. N. has custody.

V. Child Support Order

- Mr. N. is liable for support for E. and H. in the amount of \$500 per month for two children or \$350 per month for one child for October 2009 through June 2010;
- Ongoing support is suspended as of July 1, 2010, and it will remain suspended so long as Mr. N. has custody of the children;

³¹ *Doyle v. Doyle*, 815 P.2d 366 (Alaska 1991).

- All other provisions of the Amended Administrative Child Support and Medical Support Order dated December 9, 2010, remain in full force and effect.

DATED this 4th day of April, 2011.

By: Signed
Kay L. Howard
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 22nd day of April, 2011.

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

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