

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

IN THE MATTER OF	)	OAH No. 11-0014-CSS
B E T	)	CSSD No. 001165248
	)	
	)	
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**DECISION AND ORDER**

**I. Introduction**

On January 25, 2011, a hearing was held to consider the child support obligation of B E T for his child, A. Mr. T participated. C N K, the custodial parent, did not participate in the hearing.<sup>1</sup> The Division was represented by Andrew Rawls, Child Support Services Specialist. The hearing was audio-recorded. The record closed on February 11, 2011.

This case is Mr. T's appeal of the Division's order establishing his child support. The Administrative Law Judge concludes that the Division's order should be adjusted to set Mr. T's ongoing child support at \$845 per month based on updated income information using an average of Mr. T's last three years. Mr. T's arrears for 2010 should remain at \$920 per month. Mr. T's did not provide clear and convincing evidence that his arrears for 2010 must be reduced to avoid an injustice.

**II. Facts**

A was born in 2007, but Mr. T only consistently paid child support directly to Ms. K for the first six months after he was born.<sup>2</sup> In January of 2010, Ms. K applied for the Division's services for A.<sup>3</sup> Paternity is not in dispute.<sup>4</sup> Mr. T is named as A's father on his birth certificate.<sup>5</sup>

The Division served Mr. T with an Administrative Child and Medical Support Order on September 30, 2010.<sup>6</sup> Mr. T appealed his child support order.<sup>7</sup>

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<sup>1</sup> Ms. K did not appear at the hearing or provide a phone number as directed by the notice sent to her at her address of record. Ms. K did not answer her phone numbers of record at the time set for the hearing. The record was held open after the hearing and a post hearing was issued giving the parents until February 11, 2011 to submit additional information. Ms. K did not file anything.

<sup>2</sup> Exhibit 1, page 4.

<sup>3</sup> Division's Pre Hearing Brief, page 1 & Exhibit 1.

<sup>4</sup> Exhibit 7.

<sup>5</sup> Division's Pre Hearing Brief, page 1.

<sup>6</sup> Division's Pre Hearing Brief, page 1 & Exhibit 3.

The Division issued an Amended Administrative Child and Medical Support Order on December 17, 2010.<sup>8</sup> The Division set Mr. T's monthly ongoing child support for A at \$910. The order also established arrears beginning in January of 2010. Arrears for 2010 were also set at \$910 per month.<sup>9</sup> Mr. T requested a formal hearing.<sup>10</sup>

At the hearing, Mr. T explained that he has two children in his home who are younger than A and that he has A at his home about two nights per week. Mr. T admitted that he does not have A with him enough to qualify for a shared custody calculation. Mr. T explained that he and Ms. K are currently in mediation over custody of A.<sup>11</sup>

Mr. T provided detailed information about his household finances. Mr. T's household includes his wife and his two younger children as well as A during weekly periods of visitation. Mr. T's wife does not work, and does not plan to go back to work until their children are in school. Although Mr. T earns a good income as a union carpenter, the household finances are strained.<sup>12</sup>

Based on the evidence in the record, I find that the Division's calculations at exhibit 6 page 11 are correct and are based on the best available estimates of Mr. T's income for 2010. I find that the calculations at exhibit 11, resulting in a monthly support amount of \$845, which use an average of Mr. T's last three years of income, are correct and are based on the best estimate of Mr. T's income for 2011 and ongoing. I also find that Mr. T did not show by clear and convincing evidence that it would be unjust to set his child support arrears for 2010 at \$910, the monthly amount calculated at exhibit 6, page 7 or that his ongoing child support should be further adjusted.<sup>13</sup>

### **III. Discussion**

At the hearing, Mr. T argued that his ongoing child support should be reduced because he works for different employers as a union carpenter and his income goes up and down

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<sup>7</sup> Exhibit 4.  
<sup>8</sup> Exhibit 6.  
<sup>9</sup> Exhibit 6.  
<sup>10</sup> Exhibit 7.  
<sup>11</sup> Recording of Hearing – Testimony of Mr. T.  
<sup>12</sup> Exhibit 9.  
<sup>13</sup> Exhibits 6, 9 & 11 & Recording of Hearing.

depending on the projects he is hired for. Mr. T does not believe he will earn as much in 2011 as he did in 2010 because the project he was working on is about to end.

At the hearing, Mr. T showed that the best estimate of his 2011 income would be an average of his past three years of income. Child support should be set based the income earned when the child support will be paid.<sup>14</sup> Ongoing child support will be paid in the future. The best estimate of Mr. T's 2011 and future income is an average of his last three years income, rather than his 2010 income, because of the unusually high amount of overtime that he earned in 2010.

Furthermore, the nature of Mr. T's employment, construction, makes his annual income rise and fall erratically. When past annual income is erratic, as it is in this case, it is appropriate to average past income to estimate future income.<sup>15</sup> The most accurate estimate is presumptively achieved by averaging the last three years of income.<sup>16</sup>

After the hearing, as requested, the Division filed new calculations using the average of Mr. T's income for the past three years as his estimated annual future income. Ongoing modified child support based on these calculations is \$845 per month.<sup>17</sup>

Mr. T's monthly arrears for 2010 were set at \$910, based on his annual earnings in 2010. Mr. T's 2010 child support arrears should be calculated based on his actual 2010 income unless good cause exists to reduce his child support below the amounts calculated using the income formula in Civil Rule 90.3(a). To establish good cause, Mr. T was required to prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."<sup>18</sup>

Mr. T did not show that it would be unjust to require him to pay \$910 per month in child support arrears for 2010. Mr. T did not show that he and his wife will be unable to support themselves and their children if Mr. T's ongoing child support for A is based on an average of his last three years income and his 2010 arrears are based on his 2010 income.<sup>19</sup>

Mr. T's household finances are under stress, but there is not clear and convincing evidence that having to pay \$910 per month in child support arrears for 2010 and \$845 in

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<sup>14</sup> Alaska Civil Rule 90.3, Commentary III.E.

<sup>15</sup> Alaska Civil Rule 90.3, Commentary III.E.

<sup>16</sup> Alaska Regulation 15 AAC 125.030(d).

<sup>17</sup> Exhibit 11.

<sup>18</sup> Alaska Civil Rule 90.3(c).

<sup>19</sup> Recording of Hearing.

ongoing child support will cause Mr. T and the other members of his household to suffer a financial hardship that would make setting support in these amounts a manifest injustice. Mr. T's take home pay is close to his household expenses including child support; Mr. T's wife could seek employment; and Mr. T's household expenses indicate that they could realize some savings if they made some reductions on discretionary expenditures. For example, Mr. T and his wife spend \$40 per month for tobacco products and \$52 per month for cable T.V. <sup>20</sup>

While paying off \$910 per month in child support arrears in addition to his ongoing child support obligation may require some difficult adjustments, Mr. T's duty to pay the correct percentage of his income toward the ongoing support of his oldest child, A, takes precedence over his debts and other financial obligations, including his obligation to support his younger children.<sup>21</sup> Under Alaska Civil Rule 90.3(a) &(c), Mr. T has an obligation to pay 20% of his adjusted gross income in child support to A.

As discussed at the hearing, if the custody arrangement for A changes, the parties should contact the Division and request a modification.

#### **IV. CHILD SUPPORT ORDER**

1. Mr. T's ongoing child support for A is set at \$845 per month effective April 1, 2011.
2. Mr. T is liable for child support arrears for A in the monthly amounts of \$910 for the months of January 2010 through December of 2010 and \$845 per months for January and March of 2011.
3. The Division should give the parties the appropriate debit or credit for their out-of-pocket expenses for providing health insurance coverage for A.
4. All other provisions of the Amended Administrative Child and Medical Support Order issued on December 17, 2010 remain in effect.

DATED this 7<sup>th</sup> day of March, 2011.

By: *Signed* \_\_\_\_\_  
Mark T. Handley  
Administrative Law Judge

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<sup>20</sup> Exhibit 9.

<sup>21</sup> Alaska Civil Rule 90.3 Commentary VI.B.2.

**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 28<sup>th</sup> 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.]