

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

IN THE MATTER OF)
W H. S)

) OAH No. 11-0054-CSS
) CSSD No. 001170299
)

DECISION AND ORDER

I. Introduction

This case is W H. S's appeal of an order issued by the Alaska Child Support Services Division (Division). That order established his child support obligation for his children, A, S and Z. On March 21, 2011, a formal hearing was held on Mr. S's appeal.¹ The other parent did not participate in the hearing. This is a foster care case. For the period covered by this order, some of the children were in state custody and the State of Alaska was the custodian. Mr. S participated. Erinn Brian, Child Support Specialist, represented the Division. The hearing was audio-recorded. The record closed on April 13, 2011.

Having reviewed the record in this case and after due deliberation, the arrears and ongoing child support amount set in the Division's Amended Administrative Child and Medical Support Order must be adjusted based on updated information regarding income and custody. Also, Mr. S's arrears and ongoing child support obligation must be further adjusted to avoid an injustice. Mr. S's child support arrears should be set at \$37.50 for the months of September through November of 2010, and 12.50 per month from December 2010 through April of 2011. Mr. S's ongoing child support is set at \$12.50 per month per child in third party custody.

II. Facts

A and S went into state custody in September of 2010. Z went into state custody at the end of August 2010. There is a fourth child, I, who was living with Mr. S until January 26, 2011, but I has not yet been added to this child support order. I, therefore, is not part of this order except for the purpose of making the third party custody calculations for the other three children who have been included in this order.

¹ The hearing was held under Alaska Statute 25.27.170.

Paternity is not in dispute. Mr. S is named as A, S and Z's father on the children's birth certificates.²

The Division issued an Administrative Child and Medical Support Order on November 17, 2010.³ Mr. S appealed his child support order.⁴

The Division issued an Amended Administrative Child and Medical Support Order on January 19, 2011.⁵ The Division set Mr. S's monthly ongoing child support at \$1,204. The order also established arrears beginning in September of 2010.⁶ Mr. S requested a formal hearing.⁷

Mr. S works as a union ironworker. Mr. S usually earns less than \$20,000 per year. He lives in a cabin with his wife, who is disabled, and those of his children who are not in state custody.⁸ The family's cabin is in Salsha, east of Fairbanks, and they need to drive 70 miles per week for the children's therapy sessions. The family's cabin has electricity but no running water. The family has only one car, built in 1999, which they are still making payments on. Mr. S owns the cabin and the land it is on, but he is about \$23,000 in debt. Mr. S is currently unemployed and is receiving unemployment benefits. Mr. S believes that he will get work as soon as the construction season picks up in the Interior.⁹

Mr. S has always effectively had custody of at least one of his four children. After the two girls were removed from the family home in September of 2010, the parents were told that their daughters could not be returned to the same household as their oldest son. Mr. S and his wife rented a separate apartment for the two girls to live in with their mother on November 11, 2010. Mr. S paid all the expenses for both households while he had I living with him until his older son was placed in state custody on January 26, 2011. The two girls and his wife were allowed to move back in with him in March of 2011. Z was placed in state custody in September of 2010, but he is expected to return to the family household in late April of 2011. There are no definite plans for I to move back home in the foreseeable future.¹⁰

² Division's Pre-hearing Brief, page 1 & Recording of Hearing.

³ Division's Pre Hearing Brief, page 1 & Exhibit 3.

⁴ Exhibit 4.

⁵ Exhibit 6.

⁶ Exhibit 6.

⁷ Exhibit 7.

⁸ Recording of Hearing – Testimony of Mr. S.

⁹ Recording of Hearing – Testimony of Mr. S.

¹⁰ Recording of Hearing – Testimony of Mr. S.

Mr. S explained that the income that the Division had used to set his 2011 and ongoing support was more than he would probably be able to earn this year. Mr. S also explained that the Division had incorrectly included as income \$2300 in subsistence reimbursements that he received to pay his extra expenses for housing and food at a remote job site. Mr. S estimated that his income in 2011 is likely to be closer to an average of what he earned in 2009 and 2010.

After the hearing, as requested, the Division provided new calculations based on this updated income and custody information using an average of Mr. S's 2009 and 2010 income. These calculations result in monthly child support for A, S and Z in the amount of \$561 for the months of September through November of 2010. These calculations result in monthly child support of \$187 per month for December 2010 and \$147 for January 2011 through April 2011 for just Z.¹¹

Based on the evidence in the record, it is more likely than not that the Division's latest calculations are correct and that the income amounts used in these calculations are the best estimates of Mr. S's 2010 and 2011 income.¹² Also, I was in the custody of Mr. S during the months of September 2010 through January of 2011, and the two daughters have been in his custody since November 11, 2010. Furthermore, Mr. S showed by clear and convincing evidence that it would be manifestly unjust to set his arrears and ongoing child support above \$12.50 per month for each of his four children that was or will be in state custody.¹³

III. Discussion

Mr. S argued that his child support order should be lower than the amount set by the Division. In a child support hearing, the person who filed the appeal, in this case, Mr. S has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.¹⁴ Mr. S met his burden of showing that his child support order should be adjusted.

Mr. S provided in-kind contributions of child support to the children when his wife was living with their daughters during those three months. Mr. S's wife is unable to provide financial support for the children living in their home because she is disabled. Mr. S's wife also has a

¹¹ Recording of Hearing & the calculations that the Division filed with its post hearing brief, which I have marked as Exhibit 9.

¹² Recording of Hearing & Exhibit 9.

¹³ Exhibit 9 & Recording of Hearing.

¹⁴ Alaska Regulation 15 AAC 05.030(h).

child support order for these children.¹⁵ Mr. S's household now includes the children of this order. These are unusual circumstances that would require that support be set at \$12.50 per child to avoid an injustice.^[16]

A parent may obtain a reduction in the amount calculated in a third party custody calculation 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."¹⁷ 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^[18]

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.^[19]

In applying the above language to Mr. S's arrears, several factors must be taken into consideration. All the children of this order are probably now living with Mr. S, so any child support the obligor has to pay on this case would deprive these children of the support they should have as a member of Mr. S's household. Mr. S has been and will continue to be the sole

¹⁵ Alaska Civil Rule 90.3 Commentary IV & V define primary and shared custody based on the time each parent has custody during a year rather than a month or a few months.

¹⁶ Under Civil Rule 90.3(c)(1)(B) the minimum monthly obligation is \$50. This \$50 obligation can then be multiplied by the percentage of the children in third party custody as indicated under Civil Rule 90.3(i). In this case this approach results in a minimum order of \$12.50 for each child in third party custody.

¹⁷ Alaska Civil Rule 90.3(c).

¹⁸ Alaska Civil Rule 90.3(c).

support for the children financially when they are not in state custody. This essentially makes the children, who are at risk and are living in difficult circumstances in a household that is under financial stress, bear the current burden of those arrears.

The Alaska Supreme Court holds that factors such as these, which relate to the well being of the children, 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.”²⁰ That context, for Civil Rule 90.3 purposes, must focus first and foremost on the needs of the children. See Civil Rule 90.3, commentary at sec. I(B).^[21]

Based on all the evidence, this case presents unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. S 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 Mr. S’s household by adding child support debt to his current obligation to support the children and his disabled wife in their home. Setting Mr. S’s third party custody child support at the minimum monthly amount of \$12.50 per month per child in state custody is the only way to avoid an injustice under Civil Rule 90.3(c).

IV. CHILD SUPPORT ORDER

1. Mr. S’s ongoing child support for A, S and Z is set at \$12.50 per month per child effective May 1, 2011.
2. The Division will only charge Mr. S ongoing child support for the children who are not living in his household.
3. Mr. S is liable for child support arrears for A, S and Z in the monthly amounts of \$37.50 for the months of September through November of 2010, and \$12.50 per month for Z from December 2010 through April of 2011.

¹⁹ Civil Rule 90.3, Commentary VI.E.1.

²⁰ Citing *Coats v. Finn*, 779 P.2d 775, 777 (Alaska 1989).

²¹ *Doyle v. Doyle*, 815 P.2d 366 (Alaska 1991).

4. All other provisions of the Amended Administrative Child and Medical Support Order issued on January 19, 2011 remain in effect.

DATED this 19th day of April, 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 6th day of May, 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.]