

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

IN THE MATTER OF:)
) OAH No. 11-0101-CSS
 N P) CSSD No. 001124525
)
_____)

DECISION AND ORDER

I. Introduction

This case involves the obligor N P's appeal of a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on January 6, 2011. The obligee child is L, who is 7 years old. The custodian is K R. X.

The hearing was held on April 19, 2011. Both parties appeared by telephone; Ms. X had to leave the hearing early, but she called later to obtain a copy of the digital recording of the hearing. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after careful consideration, Mr. P's child support is modified to \$650 per month, effective December 1, 2010. His request for a variance due to financial hardship is granted.

II. Facts

A. Procedural Background

Mr. P's child support for L was set at \$591 per month in June 2007.¹ Ms. X requested a modification review on September 30, 2010.² On November 5, 2010, CSSD issued a Notice of Petition for Modification of Administrative Support Order to the case parties.³ Mr. P did not respond or provide financial information.⁴ On January 6, 2011, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified Mr. P's ongoing child support to \$837 per month, effective December 1, 2010.⁵ He appealed on February 17, 2011, and March 4, 2011, stating he has returned from being deployed from July

¹ Exh. 1.
² Exh. 2.
³ Exh. 3.
⁴ CSSD's Pre-Hearing Brief at pg. 1.
⁵ Exh. 4.

2009 through July 2010, that his income has decreased since being stationed at Ft. Benning, Georgia, and that increasing his child support will create a financial hardship.⁶

*B. Material Facts*⁷

Mr. P is in the military – he is an E-5 with 8 years of service.⁸ He was deployed from July 2009 through July 2010 and in October 2010 was relocated to Ft. Benning, Georgia.

Mr. P is married. He and his wife Q have been separated since 2008 but they have not yet divorced. They do not have any children together. He has an 11 year-old daughter named W who has been staying with Q, but Q is not W's biological mother. Mr. P testified that he would be sending for W to come to Georgia and live with him permanently after her 2010-2011 school year was completed. Two of Mr. P's allotments from his pay go to Q – the payment of \$502 per month on her 2004 Dodge Durango, plus another \$502 per month that is for her and W's support.⁹

Mr. P's base pay and entitlements total \$4,307.54 per month.¹⁰ His deductions, including taxes, Social Security, Medicare and a child support garnishment of \$863.23, total \$1,347.36 per month.¹¹ In addition, Mr. P has allotments totaling \$1,482.87 paid out for: his car payment (\$370.86), Tricare (\$31.72), a military loan (\$76.29), his wife's car payment (\$502) and support to his wife and prior child W (\$502).¹² All of the above deductions and allotments total \$2,830.23, which leaves him \$1,477.31 in cash per month with which to pay bills totaling \$1,419.¹³ After these payments have been accounted for, Mr. P is left with only \$58.31 per month to purchase food, clothing, personal care necessities and any other miscellaneous items.

Ms. X was not able to stay until the end of the hearing because she had to take the obligee L to the doctor. During the time she was present Ms. X testified that she is unemployed due to her health and that she relies on the child support that Mr. P provides to pay for their living

⁶ Exh. 5.

⁷ The material facts are taken from Mr. P's hearing testimony or the documentary evidence, as cited.

⁸ Ms. X claimed at the hearing that Mr. P has 10 years of service, but his Leave and Earnings Statement from March 2011 does not agree. *See* Exh. 8 at pg. 2.

⁹ Exh. 8 at pg. 2; Exh. 7 at pgs. 3-4.

¹⁰ Exh. 8 at pg. 2.

¹¹ *Id.* His mid-month pay was taken out of this figure for purposes of the discussion and will be added to his end-of-month pay.

¹² *Id.*

¹³ \$750 for rent; \$100 for natural gas; \$150 for electricity; \$180 for cell phone service; \$75 for car insurance; \$69 for an AAFES loan and \$95 for a furniture loan. Exh. 7 at pg. 1.

expenses. She later received a copy of the digital hearing recording and by listening to it would have received the administrative law judge's verbal instructions as to how to supplement her testimony but Ms. X did not submit any other evidence after the hearing.

III. Discussion

Mr. P is challenging the upward modification of his previous child support amount, requesting specifically that he be granted a variance in the child support award due to financial hardship. The person who filed the appeal, in this case, Mr. P, has the burden of proving by a preponderance of the evidence that the agency's calculations are incorrect.¹⁴

A. *Mr. P's Income*

A parent is obligated both by statute and at common law to support his or her children.¹⁵ Civil Rule 90.3(a)(1) provides that an Obligor's child support amount is to be calculated based on his or her "total income from all sources." Child support orders may be modified upon a showing of "good cause and material change in circumstances."¹⁶ If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes "material change in circumstances" has been established and the order may be modified. If the 15% change has not been met, CSSD may, but is not required, to modify the child support obligation. A modification is effective beginning the month after the parties are served with notice that a modification has been requested,¹⁷ so CSSD this modification is effective as of December 2010 because the notice was issued on November 5, 2010.¹⁸

Mr. P's child support was set at \$591 per month for one child in 2007. He was an E-4 with four years of service at the time¹⁹ and his gross income for child support purposes was \$42,492.98, including the PFD.²⁰ Mr. P is now an E-5 with eight years of service.²¹ In response to this petition for modification review, CSSD modified his child support to \$837 per month.²² There is no dispute that this figure is incorrect because it was calculated using just the income

¹⁴ 15 AAC 05.030(h).

¹⁵ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁶ AS 25.27.190(e).

¹⁷ 15 AAC 125.321(d).

¹⁸ Exh. 3.

¹⁹ Exh. 1 at pg. 7.

²⁰ *Id.*

²¹ Exh. 8 at pg. 2.

information supplied by the Alaska Department of Labor, not the comprehensive pay and benefits figures found on his Leave and Earnings Statement (LES).

After the hearing, CSSD was directed to recalculate Mr. P's modified child support using his March 2011 LES to estimate his total 2011 pay and benefits at his duty station in Georgia. The agency estimated his total 2011 income at \$51,690.48, which includes base pay of \$33,606 and nontaxable benefits of \$18,084.48 for BAH (housing) and BAS (subsistence).²³ He does not receive a cost-of-living allowance (COLA).²⁴ This income figure yields a child support amount of \$776 per month.²⁵ This figure is correct because it was based on Mr. P's actual income as reflected in his LES and calculated pursuant to Civil Rule 90.3, Alaska's rule regarding child support calculations. This figure also exceeds a 15% difference from the prior support amount of \$591 per month, so a modification of his child support is allowed. It is from this calculation that Mr. P's request for a variance based on financial hardship should be considered.

B. Financial Hardship

The primary issue in this appeal is whether Mr. P is entitled to a reduction in his child support obligation based on a financial hardship, pursuant to Civil Rule 90.3(c). His modified child support is now correctly calculated at \$776 per month.

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 support award were not varied."²⁶ It is appropriate to consider all relevant evidence, including the circumstances of the custodian and obligee child, to determine if the support amount should be set at a different level than provided for under the schedule in Civil Rule 90.3(a).²⁷

As can be seen from an examination of his March 2011 LES and list of expenses, Mr. P's financial situation is pretty dire at this point. He has less than \$60 per month with which to pay

²² Exh. 4 at pg. 6.

²³ Exh. 9 at pg. 1.

²⁴ *Id.*

²⁵ Exh. 9 at pg. 2.

²⁶ Civil Rule 90.3(c).

²⁷ *See* Civil Rule 90.3, Commentary VI.E.1.

for food, clothing, personal care necessities and any other miscellaneous items he needs on a day-to-day basis. It appears that Mr. P would be in a much better position – and he would be able to squeak by financially – if he did not have to make his wife’s \$502 per month car payment. However, it is possible that his name is also on the car loan, which may limit the option of him getting out from under that payment.

Mr. P’s other payment to Q for her and W’s support seems fairly straightforward, given the military’s usual requirement that soldiers support their families. Almost certainly Mr. P would be well served by going forward with his divorce. If that is still a long-range prospect, another source of relief at this point is to go forward with his plan to have W come to live with him. Granted, his expenses would increase, but as soon as Mr. P provided documentary proof that W was living in his home,²⁸ he would be entitled to a modification of his child support obligation that would include a deduction for supporting a prior child in the home.²⁹ If based on his current income information, Mr. P’s child support for L might go down as much as \$150 per month.³⁰

Little is known of Ms. X’s situation at this point. She testified that she is currently unemployed due to her health and that she relies on the child support that Mr. P pays to help cover their living expenses. She did not supplement her testimony to explain whether her health problems are temporary or permanent, whether she has any unusually high expenses for herself or L, or whether she is receiving any other source of financial support. Without at least some of this information, the evidence Mr. P provided in support of his request for a variance in the child support amount outweighs the evidence on Ms. X’s side that his support order should not be varied from the \$776 per month figure.

Based on all the evidence presented, Mr. P proved by clear and convincing evidence that manifest injustice would result if he were required to pay the entire modified child support amount of \$776 per month. In applying the legal standard to Mr. P’s case, a primary factor to be taken into consideration is that after covering all of his expenses, the obligor only has \$58 remaining with which to pay for food and other necessities. Thus, Mr. P should be granted some

²⁸ Documents typically meeting this requirement include copies of travel itineraries, boarding passes, and day care or school enrollment records. Regardless of how he proves she is currently *living* with him, Mr. P would first need to provide a copy of Vanessa’s birth certificate or other documentation proving that she is, indeed, his biological daughter.

²⁹ See Civil Rule 90.3(a)(1)(D).

relief under Civil Rule 90.3(c). Still, his child support should be increased somewhat, given the fact that his income has increased since his last child support calculation. Under these circumstances, Mr. P's modified child support should be set at \$650 per month. This amount effectively splits the difference between \$591 per month and \$776 per month. It will relieve some of the financial burden on Mr. P yet it will also provide Ms. X with at least a modest increase in financial support for L.

IV. Conclusion

Mr. P met his burden of proving by clear and convincing evidence that manifest injustice would result if his child support obligation were not varied from the amount calculated by CSSD. A modified ongoing child support amount of \$650 per month represents a balance of the totality of the circumstances in this case and should be adopted.

V. Child Support Order

- Mr. P is liable for modified ongoing child support for L in the amount of \$650 per month, effective December 1, 2010, and ongoing;
- All other provisions of CSSD's Modified Administrative Child Support and Medical Support Order dated January 6, 2011, remain in full force and effect.

DATED this 28th day of June, 2011.

By: Signed
Kay L. Howard
Administrative Law Judge

³⁰ This figure is provided for informational purposes only and is not meant to be binding on CSSD in the future.

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 25th day of July, 2011.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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