

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

IN THE MATTER OF:)	
)	OAH No. 11-0160-CSS
J D. M)	CSSD No. 001163883
_____)	

REVISED DECISION AND ORDER

I. Introduction

The custodian, M M, appealed an Amended Administrative Child and Medical Support Order that the Child Support Services Division (CSSD) issued in Mr. M’s case on April 13, 2011. The obligee children are C, 4, and A, 2.

The hearing was held on June 7, 2011. Both parties appeared telephonically; Mr. M is represented by counsel. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

The proposed decision was issued on June 28, 2011, after which Ms. M filed a proposal for action. Among other things, she claimed that the child support calculation of \$1,274 per month was incorrect. An examination of CSSD’s calculation worksheet, combined with the military pay worksheet that annualizes a military member’s base pay and entitlements, reveals that she is correct – Mr. M’s Basic Allowance for Subsistence (BAS) of \$223.04 per month, or \$2,676.48 per year, was not included in his income. The correct child support amount was determined to be \$1,334 per month. The proposed decision was transmitted to the Commission of Revenue for final action, noting the mistake in the calculation.

On July 27, 2011, Deputy Commissioner Jerry Burnett remanded the appeal to the administrative law judge to “take additional evidence about the cost of living in Japan;” and to “make additional findings about Mr. M’s gross income[.]” The supplemental hearing was held on September 1, 2011. Both parties appeared by telephone; Andrew Rawls again represented CSSD.

This revised decision replaces the original decision and order in its entirety. Based on the record and after careful consideration, CSSD’s April 13, 2011, Amended Administrative Child and Medical Support Order is affirmed, with one adjustment: Mr. M’s child support is set at \$1,334 per month for all time periods in this appeal. Ms. M’s request for an upward variance

based on a higher cost of living in Japan is denied. Also, Mr. M's promotion to Major and increased pay does not result in a 15% increase in the child support amount such that it should be adjusted in 2011.

II. Facts

A. Procedural Background

Ms. M applied for child support services on behalf of C and A on November 16, 2009.¹ After conducting genetic tests that established Mr. M's paternity of the children,² CSSD issued an Administrative Child Support and Medical Support Order on February 15, 2011, that set Mr. M's child support at \$1,917 per month, with arrears of \$18,880.08.³ He requested an administrative review and provided income information.⁴ On April 13, 2011, CSSD issued an Amended Administrative Child and Medical Support Order that adjusted Mr. M's ongoing child support to \$1,274 per month, with arrears of \$6,226.78 for the period from November 2009 through April 2011.⁵ Ms. M filed an appeal on April 14, 2011, asserting the order is incorrect for multiple reasons, as will be discussed below.⁶

*B. Material Facts*⁷

Mr. M is in the military – in March 2011 he was promoted to the rank of Major and he now has 10 years of service.⁸ He is currently stationed at No Name AFB in England, but at the time of the hearing was deployed to a remote location.⁹

Mr. M testified that although he is an officer, he is not entitled to receive a housing allowance (OHA). The reason is because his work responsibilities of necessity keep him close to the base, but the only approved housing for officers is more than an hour's drive away. As a result, Mr. M had to rent what is considered substandard housing close to the base and because it is not approved housing, he must pay his own rent.

¹ Exh. 1.

² Exhs. 2-4.

³ Exh. 6.

⁴ Exhs. 7-8.

⁵ Exh. 9.

⁶ Exh. 10.

⁷ The material facts are taken either from the parties' hearing testimony or the documentary evidence, as cited.

⁸ Exh. 8 at pg. 1.

⁹ Testimony of Mr. M.

Ms. M claims that the obligor is living in cheaper housing in order to lower his income for child support purposes. She claims he will vacate his current housing and move to a higher-quality location for which he will receive a housing allowance as soon as this appeal is completed. Mr. M credibly denied her claim; there is nothing in the evidence or in his testimony to suggest that he is purposefully living in substandard housing in order to lower his income and her resulting child support award.

The parties were divorced pursuant to an order issued by the Alaska Superior Court on February 11, 2011.¹⁰ Mr. M has since remarried but his wife, who is also in the military, is stationed elsewhere and they do not currently reside in the same place. His wife's income is unknown.

Ms. M and the children live in Japan. She works for the Japanese government on a United States Marine Corps base as a purchasing agent and receives \$2,792 per month. She also gets a bonus in June each year in the amount of 190% of her monthly salary. In December each year she gets a bonus of 205% of her monthly salary. Her employer pays her transportation costs. The child C is attending an early educational program known as the Kumon school. Ms. M apparently has family members who live within a 2-hour drive.

III. Discussion

Ms. M is challenging the calculation of Mr. M's child support amount, specifically, CSSD's failure to include in his income the housing allowance to which he would be entitled; CSSD's failure to take his current wife's income into consideration; and failure to consider Ms. M's lower income and high cost of living in Japan. The person who files the appeal, in this case, Ms. M, has the burden of proving by a preponderance of the evidence that the agency's calculations are incorrect.¹¹

A. Mr. M's Income

A parent is obligated both by statute and at common law to support his or her children.¹² By regulation, CSSD collects support from the date the custodial parent requested child support

¹⁰ Obligor's Exh. A. This document was not marked with an exhibit stamp when filed, so it has been marked as Obligor's Exhibit A by the undersigned.

¹¹ 15 AAC 05.030(h).

¹² *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

services.¹³ In this case, Ms. M filed a child support petition with CSSD in November 2009, so that is the first month Mr. M must pay support for C and A through CSSD.¹⁴

Civil Rule 90.3 specifically provides 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."¹⁵ The base pay figure is taxable income; the other benefits are generally nontaxable but are included in the obligor's total gross income.¹⁶ In the United States, for a soldier living off base in the local community, his or her housing allowance is included in the soldier's gross pay figures and reflected in the Leave and Earnings Statement (LES). If the soldier lives rent-free in base housing, CSSD treats the housing as an in-kind contribution, and its value, for child support purposes, is considered to be the same amount the soldier would receive for BAH while living off base.¹⁷ The reason for including the non-pay benefits, especially the BAH, in the child support calculation is because they reduce the parent's living expenses and allow a military member to use the remainder of his or her cash pay to cover other expenses.

Mr. M's situation is different because he is stationed overseas. He credibly testified that he does not receive a housing allowance because he does not live in an area where approved housing is available to him. This is not merely because of a personal choice, but because Mr. M is essentially on-call due to the demands of his work and the need for him to live close to the base. As a result, Mr. M pays for his own housing and he is not compensated or otherwise reimbursed for it. Thus, the housing allowance to which he would be entitled as an officer living overseas should not be included in his income for child support purposes. In the event the nature of his employment changes in the future and he begins receiving a housing allowance, he should notify CSSD immediately so that his child support obligation can be modified.

B. Child Support Variance

The other issues in Ms. M's appeal can be grouped together under the general category regarding a variance in the child support award. She is requesting that Mr. M's child support be varied from the amount calculated under Civil Rule 90.3 because he has a new spouse, the

¹³ 15 AAC 125.105(a)(1)-(2).

¹⁴ See Exh. 1.

¹⁵ Civil Rule 90.3, Commentary III.A.29 (emphasis added).

¹⁶ See Exh. 9 at pg. 6.

¹⁷ See Civil Rule 90.3, Commentary III.A.19.

custodian has a lower income figure, and she and the children are living in Japan, where the cost of living is higher than in the United States.

Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. A parent may obtain an upward or downward variance in the amount calculated, but only if he or she shows that "good cause" exists for the change. 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."¹⁸ It is appropriate to consider all relevant evidence, including the circumstances of the custodian and obligee child(ren), 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).¹⁹

Ms. M has not met her burden of proving by clear and convincing evidence that Mr. M's child support obligation should be varied upward. The calculation is accurate based on his income and other benefits. Civil Rule 90.3 was designed to reflect an obligor parent's total income and ability to pay support. While it is true that some states calculate child support based on the relative income figures and assets of the parents, Alaska law does not follow those other states. Ms. M's move to a different city in Japan may have reduced her income, but that does not automatically mean that Mr. M's child support should be increased. Alaska law only requires that Mr. M support his children; he is not similarly obligated to support Ms. M if her own income goes down.

Ms. M claimed initially that the cost of living in Japan is more than twice as high as it is in United States but after the supplemental hearing asserted "groceries are at least 2 or 3 times higher price than US grocery stores and packages are a lot smaller than US."²⁰ For example, she wrote that 33 ounces (.8 liter) of whole milk costs \$3.59US where she lives. This figure does appear to be higher than the cost for a similar quantity of milk in the United States, at least in Anchorage, but her evidence does not establish that her food costs are 2-3 times higher than the United States. It is difficult to compare the cost of living as between Japan and the United States. Ms. M submitted an article discussing the fact that Japan has four cities listed in the top 10 most expensive cities in the world. This fact does not necessarily impact the custodian,

¹⁸ Civil Rule 90.3(c).

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

²⁰ Letter filed Sept. 6, 2011, at pg. 2.

however, because the study “compares the costs of living for expatriates maintaining a standard of living on a par with developed countries . . .” and was designed to assist employers from other countries such as the United States in establishing salary and benefits packages for *their expatriates* living around the world.²¹ Ms. M is not a foreign national living in Japan and seeking to recreate her standard of living there. She is a Japanese citizen living in her own country, so the study she submitted provides little usefulness to this appeal. Ms. M provided a list of her specific living expenses, but they do not appear to be significantly higher than Alaska. She did not include information on expenses in any U.S. location, so the only basis for comparison is the undersigned’s anecdotal information from living in the Anchorage area.

Ms. M also wants the obligor’s child support amount to reflect the fact that he has remarried and his wife is also in the military. His wife’s income is irrelevant to his child support obligation. If he were not working at all and instead relying on his wife’s income to support himself over a long period of time, then under Civil Rule 90.3 it would be possible for CSSD to look to her income in order to calculate his support obligation.²² But that provision of the law does not apply here because Mr. M is fully employed.

The custodian testified that she and Mr. M are still considered to be married in Japan because the Alaska divorce decree did not include a custody order for the children. She claims that because they are still married, she is not able to receive the assistance she could get in Japan as a single mother, so his child support should be higher. There is insufficient evidence in this case to ascertain whether Ms. M’s claims are correct. Regardless, however, the fact remains that the parties are divorced under Alaska law and Mr. M can only be required to pay child support for the children.

IV. Conclusion

Ms. M did not meet her burden of proving by clear and convincing evidence that “good cause” exists for an upward variance in Mr. M’s child support obligation. She did not prove that “manifest injustice would result if the support award were not varied.” Other than the initial mistake regarding Mr. M’s BAS, CSSD has accurately determined his total income from all sources and used that income to calculate his child support obligation for C and A. CSSD’s Amended Administrative Child and Medical Support Order should be affirmed, with one

²¹ Custodian’s Proposal for Action, pg. 3.

²² See Civil Rule 90.3, Commentary VI.B.5.

adjustment based on correcting the BAS amount – Mr. M’s child support should be \$1,334 per month for all time periods.

V. Child Support Order

CSSD’s April 13, 2011, Amended Administrative Child and Medical Support Order is affirmed, with one adjustment – Mr. M’s child support should be \$1,334 per month for all time periods.

DATED this 9th day of September, 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 September, 2011.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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