

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

IN THE MATTER OF)

E S. Q)
_____)

OAH No. 11-0250-CSS
CSSD No. 001135844

DECISION AND ORDER

I. Introduction

This case is E S. Q's appeal of an order issued by the Alaska Child Support Service Division (Division). That order established his child support obligation for his son, K. Beginning on July 14, 2011, several hearings were held on Mr. Q's appeal.¹ Administrative Law Judge Mark T. Handley heard the appeal. The custodial parent, K L. C, participated in the some of the hearings, as did her mother, D F. Z, who had custody of K during some of the periods covered by this order. Mr. Q also participated. Erinn Brian, Child Support Services Specialist, represented the Child Support Service Division (Division). The hearings were audio-recorded. The record closed on October 27, 2011.

Having reviewed the record in this case and after due deliberation, the Administrative Law Judge concludes that the Division's Amended Administrative Child and Medical Support Order should be adjusted. This is an arrears only case, going back to 2005. Mr. Q's ongoing child support has been set by court order since August of 2010, the same month that Mr. Q was first provided notice that he should make his payments through the Division in the administrative child support order being appealed. Not all of Mr. Q's direct and in-kind payments can be credited in part due to the extended period of arrears before this notice. Mr. Q is now disabled. Mr. Q's arrears must be lowered to the amount of his direct of child support that can be documented in order to avoid manifest injustice. As a result, Mr. Q is not liable for any arrears for the period covered by this administrative child support order.

II. Facts

Ms. C applied for public assistance for her child, K, in February of 2005. At the hearing, Ms. C admitted that she failed to report direct and in-kind payments from Mr. Q and months when he was a member of her household and is in the process of reimbursing the State of Alaska

¹ The hearings were held under Alaska Statute 25.27.170.

for public assistance that she should not have claimed because of these payments. Paternity is not in dispute. Mr. Q's paternity of K was established in an administrative order after genetic testing.²

At the hearing, Mr. Q explained that he lived with K from August of 2005 through April of 2006 and paid for the apartment he and his mother lived in for several more months.³ Despite Mr. Q living with K for several months and providing financial support for K to Ms. C and Ms. Z, the Division records show that Ms. C applied for and received public assistance grants for K for most of the period of February of 2005 to August of 2010, when court ordered ongoing child support began.⁴

The Division initiated a child support order to establish Mr. Q's child support obligation because of the public assistance application filed by Ms. C.⁵ The Division served an Administrative Child and Medical Support Order on Mr. Q on August 5, 2010. The order set total arrears of \$20,968, charging Mr. Q arrears going back to February of 2005. In this order, the Division set Mr. Q's ongoing child support at \$733 per month effective November 1, 2009.⁶ The ongoing child support was superseded by the court custody and child support order issued in case number 3AN-08-00000CI on 00/00/2010.⁷

Mr. Q requested an administrative review. Mr. Q included documentation of some of his direct payments of child support. Mr. Q explained the he believed that most of the child support due had already been paid.⁸

The Division issued an Amended Administrative Child and Medical Support Order on May 23, 2011.⁹ Mr. Q requested a formal hearing.¹⁰ Mr. Q provided additional information on direct and in-kind payments of child support to Ms. C and Ms. Z prior to the hearing.¹¹

Prior to the hearing, the Division provided new calculations and a new summary of support obligation. These calculations showed new monthly amounts for some of Mr. Q's

² Division's Pre-hearing Brief, page 1 & Exhibit 5 & 6.

³ Exhibit 11 & Recording of Hearing –Testimony of Mr. Q and Ms. C.

⁴ Exhibit 14.

⁵ Division's Pre-hearing Brief, page 1.

⁶ Exhibit 7.

⁷ Exhibit 1.

⁸ Exhibit 8.

⁹ Exhibit 11.

¹⁰ Exhibit 12.

¹¹ See Exhibit 15. Not all of these documents were entered in the record as they are not well organized and are quite voluminous, but the Division provided a summary of some of the payments evidenced by these documents.

arrears based on updated income information. The new summary of support obligation gave Mr. Q credit for some of his direct payments of child support that he was able to provide evidence of, but Mr. Q's arrears still exceeded \$20,000.¹²

At the hearing, Mr. Q, Ms. C and Ms. Z described the custody situation and Mr. Q's history of providing support for K since February, 2005. There was no real dispute that Mr. Q has provided generous support not only in the form of direct cash and check payments of support, but also in-kind payments such as providing an apartment for Ms. C and K to live in for several months after Mr. Q moved out. Another example of these in-kind payments of support was Mr. Q buying a car for Ms. Z and paying for the insurance and repair for the car to help Ms. Z support and raise K while he was living with her.¹³

At the hearings, Mr. Q also explained his current disability. Mr. Q is unable to work and is borrowing money from his mother to support himself. He hopes to undergo an operation in a few months that may eventually allow him to return to work. The Division is currently working with Mr. Q to petition the court for a downward modification of his ongoing child support obligation for K.¹⁴

Based on the evidence in the record, I find that it is more likely than not that the Division's latest calculations of Mr. Q's ongoing monthly child support amount based on his reported income are correct.¹⁵ Based on the evidence in the record, I find that it is more likely than not that Mr. Q made at least \$19,715 in direct payments of child support to Ms. Z and Ms. C during the period covered by this order and also made significant in-kind payments of support at their requests. Mr. Q also showed by clear and convincing evidence that it would be manifestly unjust to set his arrears higher than the \$19,715 in direct payments of child support that the Division was willing to credit him for.¹⁶

III. Discussion

In a child support hearing, the person who filed the appeal, in this case Mr. Q had the burden of proving by a preponderance of the evidence that the Division's order was incorrect.¹⁷ Mr. Q met his burden to show that his child support order arrears and credits for direct payments

¹² Exhibit 14.

¹³ Recording of Hearing–Testimony of Mr. Q, Ms. Z and Ms. C.

¹⁴ Recording of Hearing–Testimony of Mr. Q.

¹⁵ Exhibit 15 & Recording of Hearing–Testimony of Mr. Q.

¹⁶ Exhibit 15 & Recording of Hearing–Testimony of Mr. Q, Ms. Z and Ms. C.

should be adjusted.

Credits for direct payments of child support are allowed even after an obligor has a child support order and has been notified that he should pay through CSSD, as long as the payments are not for a period when the children were receiving public assistance and the obligor provides clear and convincing evidence that the payments were made.¹⁸ These strict rules that apply to credits for direct and in-kind payments of child support do not all apply to payments made prior to the establishment of a child support order.¹⁹ The Division cites Alaska Regulation 15 AAC 125.125(c), the regulation on a request for relief, and the statute on waiver of child support, for the proposition that direct payments of child support paid without a written waiver cannot be credited for periods when public assistance was paid for the support of the child. These provisions do not, however, govern credits for direct or in-kind child support payments or credit for payments made prior to a support order.

Two regulations that explicitly govern credits for direct or in-kind child support payments are 15 AAC 125.465 and 15 AAC 125.470. These regulations, however, pertain to credits for periods that follow, or credits sought after the issuance of a child support order. These regulations are found in the provisions governing the enforcement, rather than the establishment of child support orders. The language of these regulations also implies that they do not pertain to credits for payments made before a child support order is in effect. The regulation on credit for direct payments, 15 AAC 125.465(a) requires the Division to grant credits for direct payments against an obligor's child support obligation with language that implies the credit being described are credits against an order that is already in effect. Regulation 15 AAC 125.465(b) explicitly refers back to the regulation on the establishment of pre-order arrears as a distinct procedure for granting these credits before the child support order is issued that does not have the same limitations on granting the credit as part of an enforcement action. Similarly, 15 AAC 125.470, the regulation on credits for in-kind payments, uses language that implies that the limits it imposes on credits apply to post-order payments.

The regulations that do specifically apply to credit for direct and in-kind payments when establishing pre-order arrears are 15 AAC 125.105 (b), (c), & (d). This case is an appeal of the

¹⁷ Alaska Regulation 15 AAC 05.030(h).

¹⁸ Alaska Regulation 15AAC 125.465.

¹⁹ See *State of Alaska, Department of Revenue, Child Support Enforcement Division v. Campbell* 931 P.2d 416, *Ogard v. Ogard*, 808 P.2d 815, 817 (Alaska 1991) & Alaska Regulation 15AAC 125.105(b) & (c).

establishment of pre-order arrears. Ongoing child support was established by court order effective the same month that the obligor, Mr. Q was first served with the Division's administrative child support order.

Credit for direct payments against pre-order arrears are granted on a mere showing that it is likely that the payments were made under 15 AAC 125.105(b). Mr. Q provided persuasive evidence that he provided direct payments of child support far in excess of the amounts credited to him by the Division or that he was able to document. Ms. Z and Ms. C testified that Mr. Q made cash payments of child support.

Under 15 AAC 125.105(c), credits for in-kind payments of child support against pre-order arrears are limited to in-kind contributions of support that were agreed on in writing by the parents. Credits for in-kind payments cannot be given during a period when the child received public assistance, but there is no similar prohibition on credits for direct payments made when the child was receiving public assistance. The definition of "in-kind" contributions found in 15 AAC 900(a)(17) describes in-kind payments as contributions of goods and services, and payments to third parties. Some of Mr. Q's contributions of child support meet this definition. For example, Mr. Q's purchase of a car for Ms. Z and paying third parties to maintain and insure this vehicle, and paying other third parties to cover Ms. C's and K's living expenses. Ms. Z and Ms. C both testified that Mr. Q paid for household expenses for them while K was living with them.

Credits for in-kind and direct payments against pre-order arrears are limited to the amount of total pre-order arrears established in the order under 15 AAC 125.105(d). This means that any excess credited payments that Mr. Q made during the period covered by this order cannot be credited against his ongoing child support obligation.

The Alaska Supreme Court has held that the strict rules that apply to credits for in-kind payments of child support do not necessarily apply to payments made prior to the establishment of a child support order.²⁰ In this case there is really no dispute that Mr. Q has provided generous support to his son, and to the maintenance of the households where his son lived, during the period covered by this order. The circumstances of this case are unusual. Now that he is disabled, Mr. Q cannot afford to pay child support for the same period twice, once in the form of

²⁰ *Ogard v. Ogard*, 808 P.2d 815, 817 (Alaska 1991)

voluntary in-kind and direct contributions of child support before he was served with a child support order, and then again in the form of pre-order arrears that cannot adequately account for those contributions. Mr. Q seeks either more of his payments to be credited or an adjustment of the monthly amounts of his arrears.

A parent may obtain a reduction in the amount calculated using the correct percentage of adjusted gross income 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.”²¹ 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^[22]

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.^[23]

In applying the above language to Mr. Q’s arrears, there is clear and convincing evidence in the record that manifest injustice would result if the support award is not reduced to release him from the obligation to pay more than the direct payments that have been credited against his account.

At the hearing, the Division admitted that the evidence in the record shows that the first

²¹ Alaska Civil Rule 90.3(c).

²² Alaska Civil Rule 90.3(c).

²³ Civil Rule 90.3, Commentary VI.E.1.

time that Mr. Q would have been notified that he should make child support payments through Division was when he was served with the child support order. This was in the last month that is covered by this administrative child support order.

During the period covered by this order, Mr. Q knew that he had a duty to support his son. During that period, Mr. Q fulfilled that obligation by making direct and in-kind contributions of support. Unfortunately, unknown to Mr. Q, not all of these contributions were being reported on the public assistance applications filed for his son. Mr. Q did not know that he should keep better records of his direct payments and to avoid in-kind contributions until tens of thousands of dollars of arrears had accrued during periods when public assistance was paid.

After that order for child support arrears was served on him, Mr. Q became disabled, and became unable to pay even the ongoing child support set in the court order. The financial pressure of these arrears appears to be delaying Mr. Q's potential to return to the work force by making it more difficult to afford medical treatment. Mr. Q will not be able to provide adequate ongoing child support for K until he is able to go back to work.

Noncustodial parents such as Mr. Q should be encouraged to support their children before they are served with an order to pay support through the Division, rather than being discouraged by the consideration that they may be required to pay arrears without an adequate offset for the support they provided before they were served with an order. Mr. Q's arrears for the periods covered by this order should be reduced to equal the direct payments that the Division was able to document in its post hearing filing at exhibits 15 and 16. This can be easily accomplished by taking the total of these credit payments, \$19,715, and dividing that amount by 66, which is the total number of months covered by this order. The resulting monthly amount should be rounded down slightly to \$298.70 to avoid under offsetting the arrears with the credit. This rounding will not result in an excess credit, because under regulation 15 AAC 125.105(d), Mr. Q cannot receive the small excess credit that results.

IV. CHILD SUPPORT ORDER

1. Mr. Q's ongoing child support obligation for K is set in an Alaska court order.
2. Mr. Q is liable for child support arrears for K in the monthly amount of \$298.70 for the month of February 2005 through July 2010.
3. Mr. Q should receive total credits for direct payments of child support for the months of February 2005 through July 2010 of \$19,715.

4. Mr. Q should therefore have no liability for child support arrears for the period of February 2005 through July 2010 in excess of the amount he was credited for direct payments of child support for those months.
5. All other provisions of the Division's Amended Administrative Child and Medical Support Order issued on May 23, 2011 remain in effect.

DATED this 16th day of December, 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 5th day of January, 2012

By: Signed
Signature
Mark T. Handley
Name
Administrative Law Judge
Title

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