

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

IN THE MATTER OF:)

M K. D)

OAH No. 11-0325-CSS

CSSD No. 001100774

DECISION AND ORDER

I. Introduction

The obligor, M K. D, appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on July 21, 2011. The obligee child is M, who is 12 years old.

The hearing was held on September 13, 2011. Both Mr. D, who is represented by Jody A. Reausaw, and the custodian, P L. B, appeared telephonically. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after due deliberation, modification of Mr. D' child support is denied. The Modified Administrative Child Support and Medical Support Order CSSD issued on July 21, 2011, is vacated. Mr. D remains liable for child support in the amount of \$727 per month, as set *In The Matter of M K. D*, OAH No. 09-0494-CSS (Dept. of Revenue Feb. 1, 2010).

II. Facts

A. Background

Mr. D' child support for M was set at \$727 per month in January 2010, following a formal hearing before the undersigned administrative law judge in October 2009.¹

Ms. B requested a modification of the order on May 24, 2011.² On June 6, 2011, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.³ Mr. D provided current financial information.⁴ On July 21, 2011, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified Mr. D' ongoing child

¹ Exh. 1.
² Exh. 2.
³ Exh. 3.
⁴ Exh. 4.

support to \$1,170 per month, effective July 1, 2011.⁵ Mr. D appealed on August 17, 2011, asserting primarily that the health care and retirement deductions were incorrect and that his subsequent child is disabled.⁶

B. Material Facts

When Mr. D appeared before the OAH in 2009 he was working in New Jersey at a power plant operated by Conectiv Energy. He is currently employed by Atlantic City Electric (ACE), a Pennsylvania company. He started working there in May 2011 as an overhead linesman in a 3½ year apprenticeship program.

Mr. D and his ex-fiancé, S, have an 18 month-old daughter named K. She has a rare brain disorder and is developmentally delayed.⁷ She had surgery recently and also receives occupational and physical therapy and sees an eye therapist. Mr. D attends all of K's doctor appointments with S but the child's babysitter takes K to her therapy appointments. At the time of the hearing Mr. D had exhausted his annual leave and had to take leave without pay to attend K's appointments.

Mr. D is court-ordered to pay \$750 per month for child support for K.⁸ In addition his insurance covers all of K's medical care but he pays an increased amount for the deductible and co-pay obligations. Mr. D also pays K's babysitter \$200 per month. S is employed and earns about \$40,000 to \$45,000 annually.

As an apprentice, Mr. D earns \$26.91 per hour. He was required to work overtime for a period of three weeks earlier in the year due to the effects of Hurricane Irene on the East Coast. Working overtime is now voluntary for Mr. D, but he accepts overtime whenever it is available. Overtime is offered to the person with the lowest number of hours worked, so Mr. D does not get as much overtime work as before because currently he is the 4th lowest on the list rather than the lowest.

CSSD estimated Mr. D' total annual income for 2011 at \$109,333.60.⁹ This includes his year-to-date earnings through August 28, 2011 of \$73,309.14, as reflected on his paystub of that

⁵ Exh. 5. The effective date of a modification is the first month after CSSD issues the notice that a petition for modification has been filed. 15 AAC 125.321(d). *See* Exh. 3.

⁶ Exh. 6.

⁷ Obligor's Exh. E.

⁸ Obligor's Exh. B at pg. 5.

⁹ Exh. 8 at pg. 2.

date.¹⁰ CSSD estimated he would earn an additional \$36,024.46 through the end of the year from regular and overtime pay.¹¹ CSSD applied deductions for federal income taxes, Social Security and Medicare, plus additional deductions for his union dues, retirement and Pennsylvania state taxes.¹² Inserting these figures into CSSD's online child support calculator yields a draft child support amount of \$1,282 per month.¹³

Mr. D has reduced his living expenses since the 2009 child support hearing. He pays \$600 for rent; \$500 for food; \$100 for electricity; \$100 for cable; \$130 for a cell phone; \$325.48 for the payment on a 2008 Ford Fusion; \$275 for gasoline; \$100 for toll booth fees; \$150 for vehicle insurance; \$60 for personal care items; and \$378 for the minimum payments on credit cards and bank loans, with a total amount owing of approximately \$6,000.¹⁴ He has stopped getting allergy shots because he cannot afford the co-payment.

M, the obligee child in this case, spent six weeks with Mr. D during the summer of 2011, from June 21st – September 4th. Mr. D supported M during that time but it does not appear that Mr. D requested any temporary relief from child support during the visit, as allowed by Civil Rule 90.3(a)(3).

The custodian, P L. B, has four children, including M. J, the father of her two youngest children, also lives in the home. He is employed and brings home \$3,000-\$4,000 per month. Ms. B is self-employed and travels back and forth to California for her work. She indicated that she has zero net income at this time, but there is no documentation of this. At the time of the 2009 hearing she testified that her average monthly income was approximately \$1,600.¹⁵ The rent is \$1,500 and she pays \$600 for food and \$300 for school lunches and snacks. Ms. B testified she pays \$400-\$500 per month for entertainment costs and the same amount for personal care items. She purchased a 2005 Jaguar in March 2011. It is paid for, but Ms. B has to pay \$40 per day for gasoline for it. She added that the family also utilizes public transportation. She said that she has an \$11,000 student loan, for which she pays \$60 monthly, and that she has high costs

¹⁰ Obligor's Exh. D at pg. 10. Mr. D' paystubs were difficult to read so he replaced this last one at the request of the administrative law judge after the hearing. It was received on November 7, 2011 and marked as Exh. D, pg. 10 of 10. It replaces Exh. D, pg. 9 of 9.

¹¹ Exh. 8 at pg. 2.

¹² Exh. 8 at pgs. 1-2.

¹³ Exh. 8 at pg. 1.

¹⁴ Obligor's Exh. A at pg. 1.

¹⁵ *In The Matter of M K. D*, OAH No. 09-0494-CSS at pg. 4 (Dept. of Revenue Feb. 1, 2010).

for school supplies and M's school uniforms. Ms. B receives child support of \$528 per month for her 10 year-old daughter.

III. Discussion

A. Mr. D' Income

Modification of child support orders may be made upon a showing of "good cause and material change in circumstances."¹⁶ If the newly calculated child support amount is more than 15% different than the previous order, the rule assumes a material change in circumstances has occurred and the support amount may be modified.¹⁷

Mr. D' child support was set at \$727 per month in January 2010. In response to the current petition for modification, CSSD issued an order setting Mr. D' modified child support at \$1,170 per month, effective July 1, 2011.¹⁸ Following the hearing, CSSD estimated Mr. D' 2011 income at \$109,333.60, a figure that yields a revised child support calculation of \$1,282 per month for one child.¹⁹ In the absence of an adjustment for hardship, CSSD's latest calculation is correct.

B. Child Support Variance

Mr. D argued he cannot afford the modified child support amount CSSD set in its modification order. His argument will be applied to the revised calculation of \$1,282 per month as discussed above.

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."²⁰ The presence of "unusual circumstances" in a particular case may be sufficient to establish "good cause" for a variation in the support award:

¹⁶ AS 25.27.190(e).

¹⁷ Civil Rule 90.3(h).

¹⁸ Exh. 5.

¹⁹ *Id.*

²⁰ Civil Rule 90.3(c).

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^[21]

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).²²

Although not a part of the actual rule, the Commentary to Civil Rule 90.3 indicates that it may be possible for an obligor parent to successfully defend against an upward modification upon proving he or she has taken on additional income for the purpose of providing for a subsequent family:

[T]he interests of [a] subsequent family may be taken into account as a defense to a modification action where an obligor proves he or she has taken a second job or otherwise increased his or her income specifically to better provide for a subsequent family. This defense to an upward modification action should not be allowed to the extent that . . . the obligor's increase in income is limited to ordinary salary increases.

In considering whether substantial hardship to "subsequent" children exists, or whether the existence of a subsequent family should defeat a motion to increase child support, the court should consider the income, including the potential income, of both parents of the 'subsequent' children.^[23]

According to the Alaska Supreme Court, the tribunal must determine whether the obligor parent increased his or her income for the "express purpose" of providing for a new family.²⁴

Mr. D claimed in his 2009 hearing that his child support should not be increased at that time due to the imminent birth of his subsequent child. That argument was rejected because Mr. D' child had not yet been born. Ironically, however, at this time Mr. D' argument is relevant to this appeal because he does, indeed, have a subsequent child – his daughter, K, who is about 21 months old.

21 Civil Rule 90.3(c)(1).

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

23 Civil Rule 90.3, Commentary VI.B.2.

24 *Schuyler v. Briner*, 13 P.3d 738, 743 (Alaska 2000).

Based on the evidence presented, this case presents unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. D proved by clear and convincing evidence that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 were not varied. The evidence shows that there are "unusual circumstances" present to warrant varying the amount of Mr. D' child support obligation for M as calculated under Civil Rule 90.3.

Mr. D' daughter K is a "special needs" child who is developmentally delayed. He attends all of K's doctor appointments with her mother and has used so much annual leave that he has to take leave without pay to go to them. He pays \$750 per month for her support, plus increased insurance premiums and co-payments, as well as \$200 per month for her babysitter. He can no longer afford the regular allergy shots he was previously taking.

Mr. D has reduced his living expenses since the 2009 hearing, but he cannot afford all of his financial obligations at this time. Significantly, he is now living alone and does not have anyone sharing his household expenses. Also, Mr. D is no longer receiving a maximum amount of overtime, so it appears as though his annual income will stabilize in the near future. Until such time as it is known where that stabilization point is, Mr. D' child support should remain unmodified. Finally, this result represents the fairest balance as between Mr. D and Ms. B when her circumstances are considered.

IV. Conclusion

Mr. D met his burden of proving CSSD's Modified Administrative Child Support and Medical Support Order was incorrect. Mr. D met his burden of proving by clear and convincing evidence that manifest injustice would result if his modified child support amount calculated under Civil Rule 90.3 were not varied.

Mr. D has taken on additional income for the "express purpose" of providing for his subsequent family. At this time the circumstances of his case represent an adequate defense against an upward modification of his child support obligation for M. Mr. D' child support should remain at \$727 per month for the time being.

V. Child Support Order

- CSSD's Modified Administrative Child Support and Medical Support Order dated July 21, 2011, is VACATED;
- Mr. D remains liable for child support for his son M in the amount of \$727 per

month, as set *In The Matter of M K. D*, OAH No. 09-0494-CSS (Dept. of Revenue Feb. 1, 2010).

DATED this 5th day of December, 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 23rd day of December, 2011.

By: Signed
Signature
Rebecca L. Pauli
Name
Administrative Law Judge
Title

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