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

IN THE MATTER OF	)	
R D. D	)	OAH No. 11-0346-CSS
	)	CSSD No. 001172312

DECISION AND ORDER

I. Introduction

This case is R D. D's appeal of an order issued by the Alaska Child Support Service Division (Division). That order established his child support obligation for his child, A. On September 21, 2011, a formal hearing was held on Mr. D's appeal.[1] Administrative Law Judge Mark T. Handley heard the appeal. The custodial parent, C L. W, did not participate in the hearing.[2] Mr. D traveled from no name city to appear in-person.[3] Andrew Rawls, Child Support Services Specialist, represented the Child Support Service Division (Division). Allyson "Janae" Franklet, Child Support Specialist for Central Tlingit & Haida Tribes of Alaska also participated. The hearing was audio-recorded. The record closed at the end of the hearing.

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. Mr. D owes no ongoing child support because he has court ordered custody and court ordered ongoing child support from Ms. W. Mr. D's arrears going back to November of 2010 must also be removed because he has had custody of the child by court order since November 1, 2010.

I also concluded that Mr. D's child support arrears for September 2005 through December of 2006 should be set at $0 per month because the family was intact during that period. Mr. D's child support arrears for January 2007 through April of 2008 should be set at $169 per month, but his direct in-kind contributions for that period exceed his child support obligation. Mr. D's child support arrears for May 2008 through October of 2010 should be set at

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[1] The hearing was held under Alaska Statute 25.27.170.

[2] Ms. W did not appear at the hearing or provide a phone number as directed by the notice sent to her at her address of record. Ms. W did not answer at either of her phone numbers of record at the time set for the hearing.

[2] Mr. D also brought witnesses to the hearing, but since Ms. W did not appear, there was no need for them to provide testimony in support of the evidence that Mr. D provided.

$0 per month because the he has had primary custody of A since April of 2010. As a result, Mr. D is not liable for any arrears for the period covered by this administrative child support order.

II. Facts

Ms. W applied for public assistance for her child, A, in September of 2005. Paternity is not in dispute. Mr. D is named as A's father on her birth certificate. [4]

At the hearing, Mr. D explained that he and Ms. W lived together from before A's birth through December of 2006. Mr. D and Ms. W both had substance abuse problems in 2006, but Mr. D was able to stay in recovery after starting to seek help beginning in 2007. Mr. D earned only about $9,500 per year in 2007 and 2008. Mr. D believes that Ms. W has not worked since he met her in 2005. [5]

In January of 2007, Ms. W and Mr. D broke up because of Ms. W's substance abuse problems and a dangerous situation that resulted from Ms. W being involved in a plan to sell methamphetamines. Mr. D was convicted of being drunk and disorderly as a result of the altercation that led to the break up. A one year restraining order was issued prohibiting direct contact between the parents. Ms. W went into drug treatment and A was placed by the Office of Children's Services in the custody of Mr. D's cousin, who lived in Mr. D's apartment building, for three months. Then the parents agreed on a custody arrangement with A spending the weekdays with Ms. W and the weekend, including two nights, with Mr. D.[6]

For the year that this arrangement lasted, Mr. D provided about $260 per month in direct in-kind payments of child support to Ms. W. These payments were made in the form of a five-day supply of groceries and diapers that Mr. D delivered with A every week when she was dropped back off with Ms. W. [7]

In April of 2008, Mr. D decided not to return A to Ms. W's custody after a weekend because he realized that she was not sober enough to care for her. Ms. W only had two one-hour-long supervised visits with A before Mr. D and A moved to no name city in 2008. During these visits it appeared to Mr. D that Ms. W's substance abuse problems were ongoing. [8]

After the move, Ms. W only called A intermittently until 2010 when calls became more frequent and it appeared to Mr. D that Ms. W was in recovery and taking more interest in A

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4 Division's Pre-hearing Brief, page 1 & Exhibit 2, page 10.
5 Exhibit 3, page 1 & Recording of Hearing –Testimony of Mr. D.
6 Recording of Hearing –Testimony of Mr. D.
7 Recording of Hearing –Testimony of Mr. D.

again. Ms. W and Mr. D arranged for A to have a short visit with Ms. W at the end of the summer of 2010 before A was scheduled to start school in no name city. Mr. D spoke with his daughter every night during her visit, but when he drove to the airport to pick her up she was not there. [9]

Mr. D had to obtain a temporary custody order and writ of assistance to get A back. The Juneau police dispatched five police officers to execute the writ because of the violent criminal history of the man Ms. W was living with. As a result of the delay in A's agreed return, Ms. W had custody of Angela for about 35 days in 2010. Effective November of 2010, Mr. D was granted primary custody of A by court order and Ms. W was ordered to pay child support to Mr. D. [10]

Despite Mr. D having had custody of A for all but about 16-months, during which he had A on weekends and provided generous in-kind contributions of support for at least 12 months, the Division records show that Ms. W applied for and received public assistance grants for A from September of 2005 through October of 2010. Ms. W never paid any child support to Mr. D during this period. [11]

Despite paying public assistance to Ms. W for five years, four of which Ms. W was apparently claiming that A was in her custody when she was in Mr. D's, primary custody, no action was taken to initiate a child support order against Mr. D until November 10, 2010. This was after the effective date of the court order granting custody and child support to Mr. D.[12] The court order requires Ms. W to pay $50 per month in child support to Mr. D. [13]

The Division initiated a child support order to establish Mr. D's child support obligation because it received a petition under the Uniform Interstate Family Support Act (UIFSA) from the Central Tlingit & Haida Tribes of Alaska dated November 10, 2010. This petition asked for ongoing child support and 39 months of arrears going back to September of 2005, including November of 2010.[14]

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8 Recording of Hearing –Testimony of Mr. D.
9 Exhibit 3, page 1 & Recording of Hearing –Testimony of Mr. D.
10 Exhibit A & Exhibit 4 & Recording of Hearing –Testimony of Mr. D.
11 Exhibit 2, page 10 & Recording of Hearing –Testimony of Mr. D.
12 Division's Pre-hearing Brief, page 1, Exhibit 4 & Recording of Hearing – Testimony of Mr. D.
13 Exhibit 4, page 2.
14 Exhibit 1.

The Division issued an Administrative Child and Medical Support Order on March 10, 2011. The order set total arrears of $35,662, charging Mr. D arrears for all of the months of September of 2005 through March of 2011. In this order, the Division set Mr. D's ongoing child support at $619 per month effective April 1, 2011.[15]

Mr. D requested an administrative review. Mr. D included documentation showing the court orders regarding custody and child support and explaining the custody situation since A's birth. [16]

The Division simply upheld its Administrative Child and Medical Support Order in an Administrative Review Decision issued on June 2, 2011, advising Mr. D to work with Central Tlingit & Haida Tribes of Alaska.[17] Mr. D did attempt to work with Central Tlingit & Haida Tribes of Alaska resulting in the waiver of some of the claimed arrears.[18]

Mr. D also requested formal hearing.[19] Mr. D provided additional information his earnings, the family expenses he paid, and the custody situation at the hearing. At the hearing, the Division calculated that Mr. D's monthly support obligation for 2007 and 2008 would be $169 based on his actual earnings for those years plus a PFD. [20]

Based on the evidence in the record, I find that it is more likely than not that the Division's latest calculations of Mr. D's 2007 and 2008 monthly child support amount based on his actual income are correct. Mr. D has court ordered custody and court ordered ongoing child support from Ms. W effective November 1, 2010. Mr. D's monthly child support for January 2007 through April of 2008 should be set at $169 per month. Mr. D made in-kind direct payments of child support of $260 per month for at least twelve months of that period. Mr. D has had primary custody of A since April of 2010. [21]

III. Discussion

In a child support hearing, the person who filed the appeal, in this case Mr. D had the burden of proving by a preponderance of the evidence that the Division's order was incorrect.[22] Mr. D met his burden to show that his child support order arrears should be adjusted.

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15 Exhibit 2.
16 Exhibit 3 & 4.
17 Exhibit 5.
18 Exhibit 7.
19 Exhibit 6.
20 Recording of Hearing.
21 Exhibit 4 & Recording of Hearing.
22 Alaska Regulation 15 AAC 05.030(h).

There is really no dispute that the Division's order was incorrect. For example, the Division's order sets ongoing child support and arrears for Mr. D that are in direct contradiction to the court custody and child support orders. The monthly child support amounts during the only period covered by the Division's order when Mr. D was not a custodial parent, January 2007 through April of 2008, were based on estimates of his earning capacity rather than estimates of his actual income.

In its waiver review, the Central Tlingit & Haida Tribes of Alaska apparently concluded that there were some periods of public assistance.[23] Neither this period in 2007 and 2008, when Mr. D had A only for weekends for a year, nor the period in 2010, when Ms. W had visitation with A, were periods when it would be appropriate to base child support on a shared custody calculation. Shared custody exists when a child resides with a parent at least 30, but no more than 70, percent of the year.[24] In calculating the percentage of the time a child is with a parent only overnights count. This means a child must spend at least 110 overnights in the year in order for there to be shared custody.[25]

When one parent has primary or shared custody of a child for less than a year and receives public assistance, it could create a child support obligation for the other parent. It would not be not be appropriate this case, however, to establish child support arrears against the parent who had primary custody that year and for the years before and after 2010, a year when some visitation occurred with the other parent that totaled less than 110 overnights. In this case, viewing Ms. W as exercising custody during time A lived with her in the fall of 2010 is not appropriate. That characterization looks at those three months in isolation rather than as a small portion of the first year that Mr. D tried to provide Ms. W some visitation since he and A had moved in 2008. Ms. W provided no support and had no custody during the two years that proceeded this period of visitation. This is not a case were the family was intact except for part of three months when the obligor was living away from the children. This is a case where the child was in Mr. D's custody for more than 90% of the overnights during 2010 and lived with Ms. W less that 10% of the overnights.[26]

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[23] Exhibit 7, page 6.

[24] Alaska Civil Rule 90.3(f).

[25] Alaska Civil Rule 90.3 Commentary V.

[26] 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 during than a month or a few months.

Mr. D did not exercise primary or shared custody from January 2007 through April of 2008 and the family was not intact. Mr. D only had A two overnights per week during the last twelve months of this period and only visited her during the day when she was in state custody, placed with his family. This visitation did not meet the minimum threshold for shared custody of 30 percent of the overnights on an annual basis.

At the hearing, the Division recalculated Mr. D's monthly child support obligation at $169 based on his actual income for this period, which is the correct approach when setting arrears. In the Administrative Child and Medical Support Order on appeal, the Division set Mr. D's monthly child support obligation at $522 for 2008 and $619 for 2008 based on estimated earning capacity due to lack of income information. Mr. D made direct in-kind contributions of child support of $260 for at least twelve months of this period. That means that while Mr. D's total child support obligation for the period of January 2007 through April of 2008 is $2,704, he made total direct in-kind contributions of child support of at least $3,121 during this same period.

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.[27] 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.[28]

Mr. D's direct in-kind payments were made in 2007 and 2008, years before he was served with the Administrative Child and Medical Support Order.[29] Mr. D did not know that Ms. W was receiving public assistance for A in 2007 and 2008, or that he had a duty to pay anyone child support in excess of the amount that he was paying in in-kind contributions of diapers and groceries. Mr. D explained that he provided these diapers and groceries to ensure that A would have food and diapers for the five-days-periods between his visitations, because he had good reasons to be concerned that these needs would not be taken care of if he provided Ms. W with cash. Mr. D should not be penalized for paying more than his share of child support during this period in the manner calculated to provide for his child, by being made to pay this child support

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27 Alaska Regulation 15AAC 125.465.

28 *Ogard v. Ogard*, 808 P.2d 815, 817 (Alaska 1991) & Alaska Regulation 15AAC 125.105(b) & (c).

twice - - once in in-kind direct payments, and once to reimburse public assistance that was obtained without his knowledge.

Because of these in-kind direct payments of child support is not necessary to adjust the monthly support amounts to prevent manifest injustice in this case, but it is useful to apply the unusual circumstances provisions found in the commentary to Alaska Civil Rule 90.3(c) to the circumstances of this case to demonstrate that the conclusion that Mr. D has no liability for child support arrears is not only the correct result, but also a just one. As a general rule, the purpose of child support orders is to make money flow from the noncustodial parent to the custodial parent for the benefit of their child. When, as in the case of the order under appeal, the result is to cause money to flow in the other direction -- from the parent providing the child with a home to the noncustodial parent, the order should be reviewed to ensure both that no mistake has been made in an application child support guidelines under Alaska Civil Rule 90.3(a) and that there is not clear and convincing evidence of manifest injustice, which would require an adjustment under Alaska Civil Rule 90.3(c).

A parent may obtain a reduction in the amount of child support 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." Civil Rule 90.3(c). 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 . . . .[30]

While Mr. D has always fulfilled his obligation to support his daughter financially since she was born, Ms. W has not done so and appears to have obtained public assistance for years through fraud in order to support a drug habit. The fact that public assistance was fraudulently obtained by the noncustodial parent does not make it more appropriate to establish child support arrears against the custodial parent or ignore direct payments of child support made in good faith.

It would be inconsistent with Alaska Civil Rule 90.3 to charge Mr. D any child support for arrears because Mr. D's household includes the child of this order and there are other unusual

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29 Ex. 2.

30 Alaska Civil Rule 90.3(c)(1)(A).

circumstances that would require that support reduced to avoid an injustice even if the time that the child spent with her mother in 2007, 2008 and 2010 created a child support obligation for Mr. D that was not exceeded by his direct payments of support.[31]

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.[32]

In applying the above language to Mr. D's arrears, several factors would have to be taken into consideration. Five years passed between the first date of public assistance and when Mr. D was served with any paperwork indicating he might have a child support obligation. During those five years Mr. D would not otherwise have had any indication that he was accruing child support arrears because he was providing for A by being the parent who had primary custody or by providing generous in-kind contributions during the period that his regular visitation fell just below shared custody.

The child is now living with Mr. D, so any child support the obligor has to pay on this case would deprive the child of the support she should have as a member of Mr. D's household. This essentially makes the child bear the current burden of those arrears. Some of the claimed arrears would go to Ms. W who has a history of substance abuse problems and did not any provide support for A for the last three years that Mr. D had custody. Mr. D has little chance of obtaining any reimbursement from Ms. W for her obligation to him for child support arrears going back to 2008. Mr. D continues to support the child in his household with little assistance from Ms. W.

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31 Under Civil Rule 90.3(c)(1).

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

The Alaska Supreme Court holds that factors such as these, which relate to the well being of the child of the order, 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."[33] 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).[34]

Mr. D proved by clear and convincing evidence that manifest injustice would result if he were required to pay arrears in this case. It would make little sense and it would be unjust to burden Mr. D's household by adding child support debt to his current obligation to support the child in the home with minimal, if any, contributions from the other parent. Even if application of the normal rules regarding child support and credit for direct in-kind payments of child support did not result in zero liability for child support arrears, lowering Mr. D's child support arrears to below his in-kind payments would be the only way to avoid an injustice under Civil Rule 90.3(c).

However, as noted above, it is not necessary to make any variance to the arrears that Mr. D accrued through application of Civil Rule 90.3(a), because his in-kind contributions of direct child support exceeded his child support obligation based on his actual income for the only period since A's birth when he was not living with her. There is no ongoing support due because Mr. D has custody of the child and is entitled to receive child support by court order.

IV. CHILD SUPPORT ORDER

1. Mr. D's has no ongoing child support obligation for A by court order effective November 1, 2010.
2. Mr. D is liable for child support arrears for A in the monthly amount of $0 for the month of September 2005 through December 2006 because the family was intact during this period.
3. Mr. D is liable for child support arrears for A in the monthly amount of $169 for the month of January 2007 through April 2008, but he is entitled to credits for direct in-kind contributions of child support equal to his child support liability for this period.

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

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

4. Mr. D is liable for child support arrears for A in the monthly amount of $0 for the months of May 2008 through October 2010 because he exercised primary custody of A during this period.
5. All other provisions of the Administrative Child and Medical Support Order issued March 10, 2011 and the Administrative Review Decision issued on June 2, 2011, remain in effect.

DATED this 29th day of September, 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 30th day of October, 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.]