

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

IN THE MATTER OF:)

W R. H)

) OAH No. 11-0347-CSS

) CSSD No. 001137097

DECISION AND ORDER

I. Introduction and Procedural Background

The Obligor, W R. H, challenged a Modified Administrative Child Support and Medical Support Order issued on August 10, 2011 by the Child Support Services Division (“CSSD”). This order increased Mr. H’s monthly child support obligation to \$489 from \$300 per month effective July 1, 2011. Mr. H appealed, arguing that he cannot afford this increase because it would impose a financial hardship on his subsequent family. The Custodian is A G. The Obligee child is G, who is 6 years old.

On October 6, 2011, a hearing was held on Mr. H’s appeal. Mr. H and Ms. G participated by phone; Andrew Rawls, Child Support Specialist, represented CSSD. Mr. H’s 18 year-old daughter was sworn in as Mr. H’s translator.

II. Facts

A. Background

Mr. H’s child support obligation for G was set at \$300 per month effective January 1, 2006.¹ This amount was set based on a finding of “unusual circumstances that require a variation in the Civil Rule 90.3(a) methodology in order to avoid manifest injustice.”² The Administrative Law Judge (ALJ) reached this conclusion after considering the policy interests of Civil Rule 90.3 that provides a deduction for children of the obligor that are older, but not younger, than the obligee child are likely to fail when, as here, the Obligee child is only a few weeks older than the younger child. He also considered Mr. H’s family size, seven; annual income, \$30,000; annual expenses; and Ms. G’s financial situation. Balancing these factors, the ALJ found that there were unusual circumstances supporting a reduction of \$39 in Mr. H’s

¹ *In re H*, OAH No. 06-0297-CSS (August 18, 2006), Exh. 1.

² *Id.* at 3.

monthly child support obligation. The ALJ believed it would be enough to help with Mr. H's situation while not substantially reducing his support obligation to G.³

B. Material Facts

It has been five years since Mr. H's child support obligation to G was reviewed. During this time his subsequent family has grown. There are now six children in the house: ages 19, 18, 14, 6, 4, and 1. The two oldest children are Mr. H's step daughters.

Mr. H's annual income has also increased with the passage of time. In 2006, Mr. H's child support was based on earning \$30,000 per year. Mr. H now earns in excess of \$48,000 per year.

Regardless of how his income is calculated, Mr. H testified that he is unable to financially provide for his family with the present \$300 per month child support. When asked about expenses Mr. H offered that he and his wife are buying their home. Their mortgage is \$2,020 per month. In addition to the mortgage payment, Mr. H testified that the family's regular monthly expenses are \$500 for food (in addition to what he purchases, he testified he relies upon the local food bank); \$280 for gas and electricity, \$207 for water, trash, and wastewater; \$140 for phone, internet and cable; \$260 for insurance (auto, home, & health); \$100 for gas; \$120 for entertainment and personal care items; and \$138 for child care. He owns two vehicles. Both are 2004 models. One vehicle is paid in full; the other vehicle was purchased this year and carries a monthly payment of \$600. Mr. H's monthly expenses before child support total \$4,555.

Ms. G lives in no name with her fiancé in a house her father owns. Her father does not charge them rent. In addition to G, Ms. G has three younger children ranging in age from 3 years to six months. She is unemployed and does not plan on returning to work for another year until her youngest is at least 18 months old. Her fiancé earns \$900 per month. Ms. G testified that she has the following out-of-pocket expenses: \$400 for food; \$350 for wood/oil and electricity; \$20 for trash; \$250 for cable and cellular service; \$650 for entertainment and personal care items⁴; \$60 for gas for her four wheeler; and a school loan that has been deferred until August 2012.⁵

³ Mr. H's support obligation would have been \$329 under Civil Rule 90.3(a). *Id.* at 2 n.4.

⁴ This includes \$100 for alcohol and tobacco.

⁵ G Testimony.

III. Discussion

Mr. H is seeking a hardship variance. Before his request can be considered, his gross income and monthly child support obligation without a variance must be calculated. It is from these figures that Mr. H's request for hardship will be assessed.

A. Income for Purposes of Child Support Calculations.

Modification of child support orders may be made upon a showing of "good cause and material change in circumstances."⁶ 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 but there must still be good cause.⁷ A parent is obligated both by statute and at common law to support his or her children.⁸

When calculating child support, the obligor's annual gross income must be established. Determining an obligor's annual income for purposes of child support is "necessarily... speculative because the relevant income figure is expected future income."⁹ Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct.

Based on the exhibits, including Mr. H's actual income as of July 1, 2011, and Mr. H's testimony, there are three possible calculations to arrive at Mr. H's annual income for purposes of child support. The first is an extrapolation of Mr. H's first and second quarter earnings for 2011. In the first two quarters Mr. H had earnings (overtime, vacation, shift differentials) totaling \$29,498.29 for an annual income of \$58,996.58.¹⁰ The second method is the one proposed by CSSD. CSSD took Mr. H's first quarter 2011 earnings totaling \$12,241 and extrapolated that amount for an anticipated annual income of \$48,964.¹¹ The third method takes into consideration Mr. H's unchallenged testimony that his employer no longer offers overtime. As of July 2, 2011, Mr. H had overtime earnings totaling \$4,718.87. Excluding this amount reveals that Mr. H has earned \$24,779.42 (including shift differentials and holiday pay) in the

⁶ AS 25.27.190(e).

⁷ Civil Rule 90.3(h).

⁸ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.

⁹ See Civil Rule 90.3, Commentary III E.

¹⁰ Exhibit 6 at 2.

¹¹ This amount was derived by taking the annual income used by CSSD, \$48,964, and dividing that number by 4 to arrive at earnings per quarter. Exhibit 5 at 6. $\$48,964/4 = \$12,241$.

first two quarters of 2011. These earnings result in an anticipated annual income in the amount of \$49,558.85.

The best indicator of the income which will be earned when the child support is to be paid is the third method. The modification will be effective from July 1, 2011. This method is based upon earnings over a longer period of time (six months) as well as the most recent earnings (as of July 1, 2011) and is the most accurate indicator supported by the record of Mr. H's income to be earned when the support is paid.

Using this income figure and carrying forward the deduction for two older children, Mr. H's monthly child support obligation for G is \$494.¹² The new amount is more than 15% higher than Mr. H's prior obligation. Therefore, modification is presumed appropriate.¹³ As calculated under Civil Rule 90.3(a), Mr. H's monthly child support should be \$494 for one child effective July 1, 2011.

B. Mr. H Did Not Establish Manifest Injustice Would Result If The Support Award Were Not Varied.

A 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 in this context, the parent must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."¹⁴ The presence of "unusual circumstances" 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^[15]

In 2011, Mr. H's adjusted monthly gross income is projected to average \$3,381.80.¹⁶ His monthly expenses are \$4,555. Therefore, his monthly expenses exceed his adjusted monthly income by \$1,173.20. When support for G, \$494, is included as a deduction, his monthly adjusted gross income is reduced to \$2,887.80 and his monthly expenses exceed his adjusted

¹² See Appendix A (2 pages).

¹³ Civil Rule 90.3(h).

¹⁴ Civil Rule 90.3(c).

¹⁵ Civil Rule 90.3(c)(1).

¹⁶ $\$3,381.80 = (\$49,558.85/12) - \$514.77$ [Fed. Income Tax] - \$233 [FICA]. These are Washington wages so unemployment insurance (SUI) is not deducted.

monthly income by \$1,667.20. Because of this difference Mr. H contends that he is incapable of meeting his obligation to G without also causing a hardship to his present children. This, he argues, would be manifestly unjust.

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).¹⁷ Ms. G has chosen not to work until her youngest child is 18 months old. Her monthly household expenses total over \$1,700. Her fiancé brings home \$900 per month. She lives in an area with high unemployment and a high cost of living. Ms. G testified that she does have the opportunity for temporary employment if she chooses to work. She, like Mr. H, has an obligation to support G.

Subsequent children are not considered for purposes of calculating child support unless the Obligor can establish that failure to vary the child support will cause a substantial hardship to the subsequent children.¹⁸ The commentary to Civil Rule 90.3 provides that when considering whether substantial hardship to subsequent children exists it is appropriate to consider the income of both parents of the subsequent children.¹⁹ The mother of the subsequent children does not work.

The difficulty presented is that if Mr. H's request for a variance is granted and the child support amount lowered it would in essence mean that G is supporting Mr. H's household and their financial decisions, which is an unfair result for G. Similarly, when viewing Ms. G's household, the amount of income does not meet the monthly expenses. Here, neither household can meet its current expenses, in part attributable to the young ages of subsequent children making it difficult for both parents in each household to work out of the home. However, the support to be paid is for G, not Ms. G.

Mr. H failed to present evidence sufficient to establish that failure to vary the support amount will cause a substantial hardship to the subsequent children.

A person who has brought a child into the world does not have the freedom to make life choices that deprive the child of support.²⁰ Mr. H's child support should not be lowered. His

¹⁷ See Civil Rule 90.3, Commentary VI.E.1.

¹⁸ 15 AAC 125.075(a)(2)(F); See Civil Rule 90.3, Commentary VI.B.2.

¹⁹ Civil Rule 90.3, Commentary VI.B.2.

²⁰ See *Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

duty is to support G and this duty takes priority over other debts and obligations, including subsequent children. G is entitled to receive child support in an amount calculated pursuant to Civil Rule 90.3.

Mr. H's situation does not warrant shifting his burden of support to the custodian, and in turn, G. Mr. H may have to make difficult budgeting decisions in light of his child support obligation and his subsequent children. Ms. H may have to obtain employment, or he may have to get a second job. If Mr. H were to get a second job, it is possible that income from that job, if used specifically to care for his subsequent family, would not be included for purposes of child support in the future.²¹

Accordingly, based on the evidence presented, this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. H did not prove by clear and convincing evidence that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 were not varied. There are no "unusual circumstances" present to warrant varying his child support calculated under Civil Rule 90.3 for G.

IV. Conclusion

Mr. H did establish by a preponderance of the evidence that the gross income figures used by CSSD were incorrect. When correctly calculated, Mr. H's child support should be modified to \$494 per month effective July 1, 2011. He has not 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.

V. Child Support Order

- The obligor's child support is modified to \$494 per month effective July 1, 2011.
- All other provisions of CSSD's August 10, 2011, Modified Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 2nd day of November, 2011.

By: Signed
Rebecca L. Pauli
Administrative Law Judge

²¹ Income from a second job, if it is specifically to care for a subsequent family, may be a defense to an upward modification. Civil Rule 90.3, Commentary VI.B.2.

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 21st day of November, 2011.

By: Signed
Signature
Kay L. Howard
Name
Administrative Law Judge
Title

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