

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

IN THE MATTER OF:)

D J. B)

) OAH No. 11-0411-CSS

) CSSD No. 001136577

DECISION AND ORDER

I. Introduction and Procedural Background

The Obligor, D B, challenges the September 28, 2011 Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (“CSSD”) issued. Effective August 1, 2011, this order increased Mr. B’ monthly child support obligation to \$659 from \$472 per month. Mr. B appealed, arguing that CSSD overstated his income and that an increase will impose a financial hardship on his subsequent family. The Custodian is M J. B. The Obligee child is K, who is 7 years old.

At Mr. B’ request a hearing was held on November 3, 2011. Mr. B and Ms. B participated by phone, and Andrew Rawls, Child Support Specialist, represented CSSD. Mr. B’ request for a hardship variance is denied. His income results in a monthly child support obligation for one child in the amount of \$696 effective August 1, 2011.

II. Facts

A. Background

Mr. B’ child support obligation for K was set at \$472 per month effective April 1, 2005.¹ Ms. B’s request for modification was made on July 11, 2011.² On July 14, 2011, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order requesting current financial information.³ Mr. B did not provide the requested information.

On September 28, 2011, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified Mr. B’ ongoing child support to \$659 per month, effective August 1, 2011.⁴ Based on the information available, CSSD determined Mr. B’ 2011 income to

¹ *In re D J. B.*, OAH No. 08-0782-CSS (November 9, 2005).

² Exhibit 2.

³ Exhibit 3.

⁴ Exhibit 4. 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).

be \$48,240.67. CSSD arrived at this figure by annualizing Mr. B' 2011 first, second, and third quarter earnings as reported by the Alaska Department of Labor, plus the 2011 Permanent Fund Dividend (PFD).⁵

Mr. B appealed on October 11, 2011, requesting a hardship variance and challenging the amount of income attributed to him for purposes of child support. He asserted that any calculation should take into account the child in his home.

B. *Material Facts*

Mr. B is employed by the no name. He earns an annual base salary of \$39,946 which is paid bi-weekly. He also receives a tax free cost of living allowance in excess of \$4,200 a year. Finally, when worked, he earns overtime and shift differentials.⁶ When extrapolated and adjusted for bi-weekly pay periods, Mr. B is anticipated to earn \$49,654.17 in 2011.

Mr. B lives with his girlfriend and their daughter, age 19 months. His girlfriend is employed full time as a recorder at a title company.⁷ Mr. B testified that his regular monthly expenses are \$500 for his half of the rent; \$400 for food; \$100 for electricity and gas; \$133.88 for cable/internet and a cell phone; \$160 for vehicle gasoline; \$173.30 for vehicle insurance; \$122.53 for health insurance; and \$170 for entertainment and personal care.⁸ Mr. B also owes \$13,807.49 for two vehicles. His monthly payments for both vehicles total \$528.11. He also has credit card debt in the amount of \$1,009.62 which he is paying down in monthly installments of \$40. Mr. B' monthly expenses total \$2,327.77.

III. Discussion

Mr. B has requested a hardship variance. Before his request can be considered it must be determined what his gross income and monthly child support obligation would be without a variance for the period in question. It is from this starting point that Mr. B' request for hardship will be analyzed.

⁵ Exhibit 4 at 6, 8.

⁶ Exhibit 8 (submitted at hearing – pay period earning and leave statements for the pay periods ending August 13, 2011 through October 22, 2011; 2009 & 2010 W-2 Forms; D's birth certificate (subsequent child); and completed formal expense worksheet).

⁷ B Testimony.

⁸ B Testimony/Formal Expense Worksheet.

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.”⁹ 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.¹⁰ A parent is obligated both by statute and common law to support his or her children.¹¹

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.”¹² Child support determinations calculated under Civil Rule 90.3 from an obligor’s actual income figures are presumed to be correct. As of October 22, 2011, Mr. B had reported earnings in the amount of \$41,021.69. When adjusted for bi-weekly pay periods, averaged, and then annualized, it is more likely than not that Mr. B will earn \$49,654.17 in 2011. This is a \$4,986.61 increase over 2010 earnings; his 2010 earnings increased by \$4,468.74 from 2009. Each year Mr. B’ annual income increased. The amount of increase anticipated in 2011 is reasonable and in line with past annual increases.¹³

The best indicator of the income which will be earned when the child support is to be paid is Mr. B’ earnings history, ending October 22, 2011¹⁴. Therefore, Mr. B’ child support calculation should be based on total gross income in the amount of \$49,654.17. Mr. B requested any calculation take into account his subsequent children. Support for subsequent children is not an allowable deduction but may, in certain circumstances not present here, support a variance.¹⁵

⁹ AS 25.27.190(e).

¹⁰ Civil Rule 90.3(h).

¹¹ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.

¹² See Civil Rule 90.3, Commentary III.E.

¹³ The \$500 difference between the increase from 2010 to 2011 and 2009 to 2010 increase is likely explained by the transfer away from tax free cost of living allowance and to taxable locality pay for Alaska’s Federal workforce. The worker is to notice no actual reduction in pay, so wages have been increased to account for the taxable locality pay. This information can be found in the Federal Register. A party objecting to the taking of official notice of these facts may file an objection and submit evidence or authority to refute the officially noticed facts. Any such filing should be made prior to the date set in this case for submission of proposals for action under AS 44.64.060(e), and should be submitted separately from any proposal for action filed under that provision.

¹⁴ Exhibit 8.

¹⁵ “A child support order for children of a second marriage should take into account an order to pay support to children of a first marriage but not vice-versa.” Civil Rule 90.3, Commentary III.D. As discussed below, Mr. B did

The new amount of \$696¹⁶ is more than 15% higher than Mr. B' prior obligation so modification is appropriate.¹⁷ Effective August 1, 2011, Mr. B' monthly child support should be \$696 for one child; it is from this amount that Mr. B' request for a hardship variance will be considered.

B. Mr. B 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, the parent must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."¹⁸ 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^[19]

It is appropriate to consider all relevant evidence 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).²⁰

In 2011, Mr. B' adjusted monthly gross income is projected to average \$3,479.²¹ His monthly expenses are \$2,327 so his monthly income exceeds his monthly expenses by \$1,152. When child support is considered, his monthly income exceeds his monthly expenses by \$456. Even with a positive balance Mr. B believes he is incapable of meeting the child support obligation without causing hardship to his present child.

Mr. B argues that his subsequent child living in his home should be considered good cause to vary his child support obligation calculated in accordance with Civil Rule 90.3. Subsequent children are not considered for purposes of calculating child support unless the

not establish by clear and convincing evidence that failure to vary the child support amount would result in a substantial hardship.

¹⁶ Attachment A.

¹⁷ Civil Rule 90.3(h).

¹⁸ Civil Rule 90.3(c).

¹⁹ Civil Rule 90.3(c)(1).

²⁰ See Civil Rule 90.3, Commentary VI.E.1.

²¹ \$3,479 = (\$49,654.17/12) - \$426.76 [Fed. Income Tax] - \$207.92 [FICA] - \$16.72 [Unemployment] - \$6.92 [Retirement].

obligor can establish that failure to vary the child support will cause a substantial hardship to the subsequent children.²² Mr. B failed to present evidence sufficient to establish that failure to vary the support amount would cause a substantial hardship to the subsequent children.

Moreover, 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.²³ Here, the mother of the subsequent child is employed full time. If Mr. B' request for a variance was granted and the child support amount lowered, it would in essence mean that K is financing Mr. B' household and their financial decisions, which is an unfair result for the child. 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.²⁴ Mr. B' child support should not be lowered. The obligor has a duty to support K, and this duty takes priority over other debts and obligations, including subsequent children. K is entitled to receive child support in an amount commensurate with Mr. B' ability to pay, as calculated pursuant to Civil Rule 90.3.

Accordingly, based on the evidence presented, this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. B 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 K.

IV. Conclusion

Mr. B did establish by a preponderance of the evidence that the gross income figures used by CSSD were incorrect. When correctly calculated, Mr. B' child support should be modified to \$696 per month effective August 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 \$696 per month effective August 1, 2011.

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

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

²⁴ *See Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

- All other provisions of CSSD's September 28, 2011, Modified Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 4th day of November 2011.

By: Signed
Rebecca L. Pauli
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 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.]