

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

IN THE MATTER OF:	)	
	)	OAH No. 11-0450-CSS
K D. R	)	CSSD No. 001170420
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	)	

**DECISION AND ORDER**

**I. Introduction**

K D. R has appealed an Amended Administrative Child and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on October 25, 2011. The obligee child is D, 12. The other party and custodial parent is A C. R.

The formal hearing was held on December 20, 2011. Both parties participated by telephone. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded.

Based upon the record and after careful consideration, Mr. R's child support is set at \$300 per month for one child, effective May 2010 through September 2011, which reflects a variance under Civil Rule 90.3(c) from the amount calculated from his actual income for those years. Mr. R's ongoing support is set at \$50 per month, effective October 2011, based on his income, but this amount does not reflect a variance under Civil Rule 90.3(c). Mr. R has not proven the parties exercise shared custody, so his request for a shared custody calculation is denied. A direct pay credit of \$2,950 is granted.

**II. Facts**

*A. Procedural History*

Ms. R applied for public assistance for D in May 2010.<sup>1</sup> CSSD initiated a child support action on her behalf, which culminated in the division issuing an Amended Administrative Child and Medical Support Order on November 10, 2011.<sup>2</sup> That order set Mr. R's ongoing child support at \$50 per month, effective November 1, 2011, with arrears totaling \$2,743 for the period from May 2010 through October 2011.<sup>3</sup> Mr. R appealed, asserting that he is disabled and cannot work, and that the parties share custody of the child.<sup>4</sup>

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<sup>1</sup> Pre-Hearing Brief at pg. 1.

<sup>2</sup> Exh. 7.

<sup>3</sup> *Id.*

<sup>4</sup> Exh. 7.

*B. Material Facts*

Mr. R and Ms. R are the parents of D, 12. According to a written agreement the parents entered into in November 2011, they will be exercising 50/50 shared custody of D, with her spending the school year with her mother here in Alaska, and holidays and summer vacations in Michigan with Mr. R.<sup>5</sup>

Mr. R is disabled. He was diagnosed with Huntington's disease in 2008. In a letter dated August 16, 2011, his doctor explained that Huntington's disease is a "hereditary, degenerative neurological disorder characterized by uncontrollable abnormal movements."<sup>6</sup> She added that as a result of his diagnosis, that "it would be very difficult, if not impossible," for Mr. R to compete in a competitive job market as well as to perform his job duties.<sup>7</sup> Ms. R testified that she believes the obligor could still work, but that it would have to be as something other than a business professional because of the outward symptoms of the disease.

Mr. R is an architect by trade. He is currently unemployed, and for purposes of this child support obligation, he has proven by a preponderance of the evidence that he is unemployable. His last long-term employment was in 2008. He worked for the first two months of 2009, but was laid off in February. He later worked for a different employer from June through September of 2009, but not at all in 2010.

The parties separated in May 2010 after an incident involving a domestic dispute. At that time, Mr. R moved to Michigan to live with his parents, where his father provides full-time care for his mother, who also suffers from Huntington's disease. Mr. R came back to Alaska in early 2011 for a job as a Senior Project Manager, but the employer terminated the project he was to work on, and he returned to Michigan soon thereafter. He has not been employed since then, although he has submitted applications for work to numerous employers, both as an architect and in other professional positions.<sup>8</sup> Mr. R has received several interviews, but has not been hired. He even interviewed for a position as an architect in Canada, but was told specifically that he was not selected for the position because of having Huntington's disease.

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<sup>5</sup> Exh. 8 at pg. 4-5.

<sup>6</sup> Exh. 8 at pg. 2.

<sup>7</sup> *Id.*

<sup>8</sup> See documentation of Mr. R's work search in a letter received on January 3, 2012.

In 2010, Mr. R did not receive any earnings from wages. However, he received unemployment benefits in the total amount of \$20,481, and the PFD of \$1,281, for total income of \$21,762.<sup>9</sup> A child support amount calculated from this total 2010 income is \$339 per month.<sup>10</sup> In 2011, Mr. R received wages of \$6,073.26, and unemployment benefits of \$17,420, but no PFD, so his total income for the year was \$23,493.26.<sup>11</sup> A child support amount calculated from his total 2011 income equals \$357 per month.<sup>12</sup>

### **III. Discussion**

#### *A. Child Support Calculation*

Civil Rule 90.3(a)(1) provides that an obligor's child support amount is to be calculated based on his or her "total income from all sources." An obligor parent has the burden of proving his or her earning capacity.<sup>13</sup> An obligor who claims he or she cannot work or pay child support because of a disability or similar impairment must provide sufficient proof of the medical condition such as testimony or other evidence from a physician.<sup>14</sup> Mr. R met his burden of proving that he suffers from Huntington's disease and that he is disabled from work, based primarily on the letter written by his doctor. This finding is also based on the testimony of Ms. R, who described the difficulties she perceived he would encounter in a working environment.

Mr. R is not currently working, but he did receive unemployment benefits and some wages during the time period at issue in this appeal. In supplemental calculations submitted after the hearing, CSSD proposed that Mr. R's child support be set at \$339 per month from May 2010 through September 2011, then at \$50 per month, as of October 2011, and ongoing.<sup>15</sup> CSSD's calculations for 2010 and 2011 are correct, as they are based on Mr. R's actual income for those years. The division did not state it directly, but the \$50 per month support amount it proposed for the time period as of October 2011 appears to be the ongoing child support amount based on the obligor's Huntington's disease and his doctor's statement that, in essence, he cannot work. This calculation is also correct; Mr. R's inability to work, coupled with the fact that he has been

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<sup>9</sup> Exh. 9 at pg. 2.

<sup>10</sup> Exh. 11 at pg. 1.

<sup>11</sup> Exh. 9 at pg. 1; *see also*, Exh. 11 at pg. 2, showing updated unemployment benefits.

<sup>12</sup> Exh. 11 at pg. 2.

<sup>13</sup> *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

<sup>14</sup> *Id.* at 1371.

<sup>15</sup> Exh. 11.

unable to find employment, is sufficient to establish that his ongoing monthly child support should be set at this minimum amount as of October 2011. Ms. R suggested that the obligor should be able to find any work, but the record does not support her claim. He eventually may qualify to work part-time in a program specifically designed for disabled individuals, but it is not reasonable to expect that he will be competitive in the overall job market any longer, especially given the elevated unemployment rates in Michigan.

*B. Shared Custody*

Where parents exercise shared custody of their children, Civil Rule 90.3 provides that child support is to be calculated differently than where one parent has primary custody. The rule defines shared custody as follows:

A parent has shared physical custody of children for purposes of this rule if the children reside with that parent for a period specified in writing of at least 30 percent of the year, regardless of the status of legal custody.<sup>[16]</sup>

In order for a visitation day to count toward the required 30% of the year, the child(ren) must stay overnight with the respective parent.<sup>17</sup> One year is equal to 365 days, so 30% of the overnights in one year equal 110 overnights. This is the minimum number of overnights needed on an annual basis to reach the threshold definition of shared custody.

In this case, Mr. R submitted a written agreement that as of August 2011, the parties would be sharing custody of D. Ms. R did not contest his claim, but in order to find that shared custody exists in this case, the record must contain evidence that shared custody is actually occurring. The parties' agreement was not signed until November of 2011, so there was not enough time for them to have actually shared custody of D such that it could be established that the agreement was in place. In any event, Mr. R's child support obligation as of October 2011 has been set at the minimum amount of \$50 per month, so the shared custody agreement has no effect on it.

*C. Credit for direct payments*

Mr. R submitted copies of checks showing that he made direct payments to Ms. R in the total amount of \$2,950 between May 2010 and August 2011.<sup>18</sup>

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<sup>16</sup> Civil Rule 90.3(f)(1).

<sup>17</sup> Civil Rule 90.3, Commentary V.A.

<sup>18</sup> Exh. 2.

CSSD may give the obligor credit for direct payments made “before the time the obligor is ordered to make payments through the agency,” so long as the direct payment was not made before the first date support is due in the administrative child support action.<sup>19</sup> An obligor who requests such credit must prove by clear and convincing evidence that he or she actually made the payments.<sup>20</sup> Mr. R’s check copies are sufficient to establish that he made direct child support payments to Ms. R in the total amount. He is therefore entitled to a direct payment credit in the amount of \$2,950.

*D. Good Cause Variance*

CSSD’s Post-Hearing Brief also suggested that Mr. R’s arrears be considered for a variance under Civil Rule 90.3(c). 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.”<sup>21</sup> A finding of “unusual circumstances” may also provide sufficient basis for a finding of good cause to vary the calculated child support amount.<sup>22</sup> It is appropriate to consider all relevant evidence, including the circumstances of the custodian and obligee children, to determine if the support amount should be lowered from the amount calculated pursuant to Civil Rule 90.3(a).<sup>23</sup>

Based on the evidence in its entirety, Mr. R has proven by clear and convincing evidence that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 were not reduced. His ongoing child support has been set at \$50 per month, but the direct pay credit is only \$2,950, so his arrears up to October 2011 total \$2,813. Hopefully he will soon qualify for Social Security Disability, but there is no guarantee that he will, or when that might occur. Mr. R appears to have no source of income at this time, so a slight reduction in the support amount, to \$300 per month, should assist him somewhat.

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<sup>19</sup> AS 25.27.020(b).

<sup>20</sup> *Id.*

<sup>21</sup> Civil Rule 90.3(c).

<sup>22</sup> Civil Rule 90.3(c)(1).

<sup>23</sup> Civil Rule 90.3, Commentary VI.B.

#### **IV. Conclusion**

Mr. R met his burden of proving by a preponderance of the evidence that CSSD's Amended Administrative Child Support and Medical Support Order was incorrect. His child support should be set at \$300 per month from May 2010 through September 2011, which reflects a variance proven by clear and convincing evidence under Civil Rule 90.3(c) in order to avoid manifest injustice. Ongoing child support should be set at \$50 per month, effective October 2011, but this amount is income based and does not reflect a variance under Civil Rule 90.3(c). Mr. R is also entitled to a direct pay credit of \$2,950 from May 2010 through August 2011. If he made direct payments in addition to that total amount that has not been made a part of the record in this appeal, CSSD should credit him with those payments, as well.

#### **V. Child Support Order**

1. Mr. R is liable for child support for D in the amount of \$300 per month, effective May 2010, through September 2011; and \$50 per month, effective October 2011, and ongoing;
2. Mr. R is entitled to a direct pay credit of \$2,950 from May 2010 through September 2011;
3. All other provisions of the Amended Administrative Child Support and Medical Support Order dated October 25, 2011, remain in full force and effect.

DATED this 8<sup>th</sup> day of June, 2012.

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 25<sup>th</sup> day of June, 2012.

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

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