

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

IN THE MATTER OF: )

M L. M )

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OAH No. 12-0001-CSS

CSSD No. 001064756

**DECISION AND ORDER**

**I. Introduction**

The obligor, M L. M, appealed the November 21, 2011 denial by the Child Support Services Division (CSSD) of his request for modification of his child support order. The obligee children are S, 18, and C, 17. The other party is M J. O.

The hearing was held on January 23, 2012. Both parties participated by telephone. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after due deliberation, CSSD's Decision on Request for Modification Review is vacated and Mr. M's child support obligation is modified to \$1,117 per month for two children for October 2011 and \$827 per month for one child, beginning in December 2011, and ongoing.

**II. Facts**

*A. Procedural History*

Mr. M's child support obligation for S and C was set at \$904 per month in August 2006.<sup>1</sup> Mr. M requested a modification review on September 7, 2011, and CSSD notified Ms. O of the request.<sup>2</sup> Mr. M did not provide income information, so on November 21, 2011, CSSD denied the request for that reason.<sup>3</sup> Mr. M appealed, asserting he has additional deductions that CSSD did not take into consideration.<sup>4</sup>

*B. Material Facts*

Mr. M works in the construction industry. In a typical season, he works for several different employers and may be laid off for a few weeks to several months at a time. At the time

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<sup>1</sup> Exh. 1.

<sup>2</sup> Exh. 3.

<sup>3</sup> Exh. 4.

<sup>4</sup> Exh. 5.

of the hearing, he had just been laid off by the employer he worked for during the 4<sup>th</sup> quarter of 2011. He claimed that it is very difficult to obtain employment at this time, even non-union work, and that if he did take a non-union job, his standing in the union would be damaged.

Over the years Mr. M's income has ranged from about \$69,000 in 2008 to \$77,500 in 2010.<sup>5</sup> He believes the recent downturn in the economy has caused his income to be lower. His 2011 income was somewhat lower than in prior years, but not significantly. The biggest problem is that he is not employed year-round, but more on a seasonal basis. As a result, at times during the year his only source of income is unemployment benefits.

Mr. M was unemployed and receiving unemployment benefits from December 2010 through May 2011, and thereafter had four employers for the rest of 2011.<sup>6</sup> Mr. M provided his last 2011 year-to-date paystub after the hearing.<sup>7</sup> It shows that in addition to his other jobs, he received earnings of \$54,042.61, unemployment benefits of \$8,326, and the Permanent Fund dividend of \$1,174, for total income of \$63,542.61 in 2011. This total income figure is roughly \$10,000 less, on average, than his prior years.

CSSD inserted Mr. M's actual 2011 income figure into a child support calculation and the result is \$1,117 per month for two children and \$827 per month for one child.<sup>8</sup>

The two children in this child support matter are both in their late teens. His oldest child, S, stayed with Mr. M for a few months in 2011, and left his home about the third week in October 2011. S then turned 18 on 00/00/2011. She has not graduated from high school, but Ms. O testified that about a week before the hearing, S had started a GED program so she could eventually attend college.

Mr. M lives with his significant other, D, and their two children, who are 14 and 12 years old. D is not currently working and is receiving unemployment benefits. Other than their \$1,275 mortgage, their household bills are not at all extravagant.<sup>9</sup> They own two cars that are paid off and have only a \$500 credit card balance, but they are not able to make the minimum payments at this time. Mr. M has to pay \$600 per month toward his debt at a rent-to-own store where he

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<sup>5</sup> Exh. 7 at pg. 1.

<sup>6</sup> Exh. 7 at pg. 3.

<sup>7</sup> Exh. 9.

<sup>8</sup> Exh. 10.

<sup>9</sup> Exh. 6 at pg. 1.

purchased furniture about 6 months ago, apparently for S's room when she stayed with him during 2011.<sup>10</sup> One of Mr. M's vehicles is broken down.

### III. Discussion

Child support orders may be modified upon a showing of “good cause and material change in circumstances.”<sup>11</sup> If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes “material change in circumstances” has been established and the order may be modified. As the person who filed the appeal in this case, Mr. M has the burden of proving by a preponderance of the evidence that CSSD issued the Decision on Request for Modification Review in error and that Mr. M's child support should, in fact, be modified.<sup>12</sup>

#### A. *Child Support Calculation*

Mr. M did not provide income information,<sup>13</sup> so for the modification review, CSSD accessed his recent wage data from the Alaska Department of Labor and Workforce Development to run a draft child support calculation. The result was \$829 per month for two children and \$614 per month for one child.<sup>14</sup> Based on these numbers, CSSD denied the petition for modification because the calculated child support amount did not reach the 15% minimum change needed to warrant modification.<sup>15</sup>

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,” minus mandatory deductions such as taxes, Social Security and union dues. Mr. M's actual 2011 income is now known – \$63,542.61 for the year, consisting of wages of \$54,042.61, unemployment benefits of \$8,326, and the Permanent Fund dividend of \$1,174. From this figure, CSSD has correctly calculated a child support amount of \$1,117 per month for two children and \$827 per month for one child.<sup>16</sup>

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<sup>10</sup>

*Id.*

<sup>11</sup>

AS 25.27.190(e).

<sup>12</sup>

15 AAC 05.030(h).

<sup>13</sup>

Exh. 4 at pg. 2.

<sup>14</sup>

Exh. 4 at pg. 3.

<sup>15</sup>

Mr. M's prior child support amount was \$904 per month for two children. A reduction to \$768 would have been necessary to trigger the 15% minimum change ( $\$904 \times .85 = \$768.40$ ).

<sup>16</sup>

Exh. 10.

*B. Mr. M's Liability for Supporting S*

Mr. M raised two issues regarding S, the oldest child in this case. First, he claims that he should not be liable for her support during the months that she lived with him, from June through October 2011. Ms. O testified S lived with him for a shorter period of time, from August through the third week of October 2011.

A modification is effective beginning the month after the parties are served with notice that a modification has been requested.<sup>17</sup> In this case, the notice of an impending modification was issued to Ms. O on September 9, 2011.<sup>18</sup> As a result, the modification of Mr. M's support obligation is not effective until October 1, 2011, and his support order cannot be modified prior to that date. To be entitled to an adjustment for having S in his home, Mr. M should have filed the modification request sooner in the year.

Even though the modification is effective in October 2011 and S was still in his home, Mr. M's support obligation for her cannot be adjusted downward for that month. Civil Rule 90.3(a)(3) provides that the court or tribunal may grant an obligor parent a "visitation credit" of up to 75% of the monthly support amount "for any period in which the obligor parent has extended visitation of over 27 consecutive days." Mr. M testified S stayed with him almost to the end of October, just before her birthday. Ms. O claims S was not with him that long, that she stayed there only until the third week in October. Without more information, the evidence is not sufficient to establish that S was there for at least 27 consecutive days during that month, so Mr. M is obligated to pay support for S for October 2011.

Mr. M's second issue concerns his obligation to support S after she turned 18 on 00/00/2011. CSSD's statutes provide that support may be paid:

for the care of an unmarried 18-year-old child who is actively pursuing a high school diploma or an equivalent level of technical or vocational training while living as a dependent with a parent, guardian, or designee of the parent or guardian . . . ."<sup>19</sup>

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<sup>17</sup> 15 AAC 125.321(d).

<sup>18</sup> Exh. 3.

<sup>19</sup> AS 25.24.910.

The Alaska General Educational Development (GED) test is administered by the Alaska Department of Labor and Workforce Development.<sup>20</sup> The GED is the “official department high school equivalency test.”<sup>21</sup> A person who meets the eligibility criteria and passes the five-part test is able to receive an “Alaska high school diploma by examination.”<sup>22</sup> Thus, the Alaska GED qualifies as a “high school diploma” for purposes of AS 25.24.910. And even though the statute does not specifically list it, pursuit of the Alaska GED qualifies as one of the activities that entitles an unmarried 18-year-old to the payment of support through CSSD.

The factual question remains whether S is “actively pursuing a high school diploma” as required by AS 25.24.910. The parties’ testimony differs in this regard: Ms. O testified that S started a GED program one week before the hearing. Mr. M claims that S is not attending classes. The administrative law judge made a preliminary ruling at the hearing affirming that S had emancipated on 00/00/2011, and that as a result, Mr. M would not be liable for her support thereafter. The evidence as a whole is not sufficient to establish that S is, in fact, “actively pursuing a high school diploma.” When the parties’ testimony is combined, it leads to the conclusion that although S had apparently started the GED program, she was not attending classes. This would tend to negate the possibility that she is “actively” pursuing the diploma. Thus, S is an unmarried 18-year-old who is not “actively pursuing a high school diploma.” As a result, Mr. M is not liable for her support beginning as of the first month after she turned 18, or, December 2011.

*D. Financial hardship variance*

The final issue in this appeal is whether Mr. M is entitled to a reduction in his child support obligation based on a financial hardship, pursuant to 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>23</sup> A finding of “unusual

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<sup>20</sup> AS 44.31.020(6).

<sup>21</sup> 8 AAC 99.110.

<sup>22</sup> 8 AAC 99.120(a)(2).

<sup>23</sup> Civil Rule 90.3(c).

circumstances” may also provide sufficient basis for a finding of good cause to vary the calculated child support amount.<sup>24</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>25</sup>

Based on the evidence in its entirety, Mr. M has not 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.

Mr. M maintains that he is incapable of paying the child support amount because his income is not sufficient to meet all of his financial obligations, especially after having been laid off from his only remaining job just before the hearing. It is also problematic that his significant other has been unemployed at the same time. However, Mr. M’s financial stresses appear to be mostly seasonal in nature because he works in the construction trade. He is laid off and rehired by certain construction companies on a fairly regular basis.<sup>26</sup> There is nothing about his situation, including being laid off, that appears to be long-term or permanent in nature. In spite of regularly spending time in layoff status, Mr. M has earned an average of \$72,115.94 during the last three years.<sup>27</sup>

His current financial situation is undoubtedly stressful for Mr. M. Based on the totality of circumstances, however, Mr. M’s situation does not constitute “unusual circumstances” pursuant to Civil Rule 90.3(c) such that his child support calculated under the Rule should be lowered. Mr. M’s duty to support S and C takes priority over other debts and obligations, including having younger-born children in the home.<sup>28</sup> S and C are entitled to receive child support in an amount commensurate with Mr. M’s ability to pay, as calculated pursuant to Civil Rule 90.3. The denial of Mr. M’s request for an adjustment in his child support obligation is balanced by the finding that he is not liable for supporting S following her emancipation in 00/00/2011.

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<sup>24</sup> Civil Rule 90.3(c)(1).

<sup>25</sup> Civil Rule 90.3, Commentary VI.B.

<sup>26</sup> See Exh. 7.

<sup>27</sup>  $\$77,501.47 + \$68,912.50 + \$69,933.86 = \$216,437.83 \div 3 = \$72,115.94$ .

<sup>28</sup> See *Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

#### **IV. Conclusion**

Mr. M met his burden of proving by a preponderance of the evidence that CSSD's Decision on Request for Modification Review was issued in error. Now that Mr. M's actual 2011 income has been established, CSSD correctly calculated his child support at \$1,117 per month for two children for October 2011 and \$827 per month for one child, beginning in December 2011. His obligation for one child is based on S's emancipation in 00/00/2011. CSSD's calculations are correct and should be adopted.

Mr. M is not entitled to a variance based on Civil Rule 90.3(c) due to a financial hardship. He did not prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."

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

- CSSD's November 21, 2011 Decision on Request for Modification Review is vacated;
- Mr. M's child support obligation for S and C is modified to \$1,117 per month for two children for October 2011 and \$827 per month for one child, beginning in December 2011, and ongoing;
- All other provisions of the prior order in effect in Mr. M's case, the Modified Administrative Child Support and Medical Support Order dated August 25, 2006, remain in full force and effect.

DATED this 25<sup>th</sup> day of April, 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 14<sup>th</sup> day of May, 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.]