

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

IN THE MATTER OF)
A A. P) OAH No. 12-0070-CSS
_____) CSSD No. 001138894

DECISION AND ORDER

I. Introduction

This case is E M. W's appeal of an order granting the request of A A. P to reduce his ongoing monthly child support obligation because he was in jail. The Child Support Services Division (Division) did reduce Mr. P's ongoing support obligation for his child, T, because it appeared that incarceration was ongoing.

On April 5, 2012 a formal hearing was held to consider Ms. W's appeal.¹ Mr. P did not participate in the hearing.² The custodial parent, E M. W, did participate. Andrew Rawls, Child Support Services Specialist, represented the Division. The hearing was audio-recorded. The record closed on April 5, 2012.

Based on the evidence in the record, the administrative law judge concludes that Mr. P's ongoing child support should be modified based on the increase in his earnings since his release from prison. Modified ongoing child support should be set at \$317 per month, effective January 1, 2012 Mr. P's income.

II. Facts

The Division granted Mr. P's request to reduce his ongoing child support obligation.³ Mr. P's existing child support for T was set in 2005 at \$228 per month.⁴ Mr. P filed a request that his child support be decreased in October of 2011.⁵ The Division issued a notice of the petition for modification on December 14, 2011.⁶

The Division issued a Modified Administrative Child Support and Medical Support

¹ The hearing was held under Alaska Statute 25.27.190.

² Mr. P did not provide a contact number for the hearing as instructed on the notice sent to him, and his phone numbers of record were not in service at the time set for the hearing.

³ See Exhibits 2 & 5. Alaska Civil Rule 90.3(h) governs child support modification actions.

⁴ Division's Pre Hearing Brief, page 1, & Exhibit 1.

⁵ Division's Pre Hearing Brief, page 2, & Exhibit 2.

⁶ Exhibit 3.

Order on March 2, 2012.⁷ The Division set Mr. P's modified ongoing child support for T at the minimum of \$50 per month based on his incarceration.⁸

Ms. W requested a formal hearing.⁹ At the hearing, Ms. W explained that Mr. P had been in jail for three years, but had been released in November of 2011 and started working again in December of 2011, before the effective date of the modification. Ms. W also stated that it was her understanding that Mr. P intended to start paying more than \$50 per month after he started with his new job. Mr. P has worked full-time since December of 2011, earning \$10.50 per hour.¹⁰ The Division filed new calculations based on an estimate of Mr. P's income in 2012, earning full-time wages in his new job.¹¹

At the hearing, the Division recommended that Mr. P's ongoing child support be modified and set at \$317 per month, effective January 1, 2012 based on these calculations. Ms. W agreed with this recommendation.¹²

Based on the evidence in the record, I find that it is more likely than not the Division's latest calculations based on Mr. P's estimated 2012 income are correct.¹³

III. Discussion

Mr. P apparently requested a downward modification to reduce his monthly child support for the time he was in prison and could not earn the level of income that had been on which his monthly obligation of \$228 was set.¹⁴ The laws governing Alaska child support cannot provide Mr. P with the relief he sought because of the timing of his request for modification. The effective date of a modification cannot predate the service of the petition for modification even when it would clearly prevent an injustice.¹⁵ Mr. P would have been entitled to have his ongoing child support modified and set at the minimum during his incarceration had he requested a modification earlier, when he still had many month to serve on his sentence. However, Mr. P did not request a modification until the month before his release, and the

⁷ Exhibit 5.

⁸ Exhibit 6.

⁹ Exhibit 5.

¹⁰ Recording of Hearing- Testimony of Ms. W & Exhibit 4, page 1.

¹¹ Exhibits 8.

¹² Recording of Hearing.

¹³ Recording of Hearing & Exhibits 4 & 8.

¹⁴ Recording of Hearing & Exhibit 8.

¹⁵ *See State, Dept. of Revenue, Child Support Enforcement Div. v. Schofield*, 993 P2d 405, (Alaska 1999).

petition was not issued until the month after his release, the month during which he obtained his current employment.

In setting modified ongoing child support, it is important to recognize the forward looking nature of a modification action. The focus in setting ongoing child support in a modification action is on the obligor's ability to pay and the child's needs in the months following the effective date of the modification. Child support should be set based on the obligor's ability to pay during the period when that support will be paid.¹⁶ Generally, a new monthly child support amount in a modification action should be effective the month after the parties are served with the petition. Following this general rule, the modification would be effective January 1, 2012, because the petition was issued in December of 2011.¹⁷

In a child support hearing, the person who filed the appeal, in this case, Ms. W, has the burden of proving by a preponderance of the evidence that the Division's order is incorrect. Ms. W met her burden of proof to show that the ongoing monthly amounts of Mr. P's child support should be set higher.

Ongoing child support should be calculated using the best estimate of Mr. P's income. The Division correctly recommended that Mr. P's ongoing child support be increased to the amount reflected in its latest calculations based on his income since the effective date of the modification.

Civil Rule 90.3 allows a child support amount to be modified if the party requesting the change shows that a material change of circumstances has occurred.¹⁸ The rule states that a material change of circumstances "will be presumed" if the modified support amount would alter the outstanding support order by 15 percent.¹⁹ The evidence in the record shows that a material change of circumstances has occurred since Mr. P's ongoing child support was set at \$228 per month in 2005. In 2005 Mr. P's child support was based on estimated income of full-time Alaska minimum wage income plus a PFD. Mr. P not eligible for a 2012 PFD and he is now earning more than the minimum wage. The new monthly modified support amount of \$317 reflects this change.

¹⁶ Alaska Civil Rule 90.3, Commentary III.E.

¹⁷ *Alaska Dept. of Revenue, CSED v. Kevin Lyn Dillon* 977 P 2d 118, (Alaska 1999).

¹⁸ Alaska Civil Rule 90.3(h)(1).

¹⁹ Alaska Civil Rule 90.3, Commentary X.

IV. Conclusion

Mr. P's ongoing child support should be increased due to the increase in his earnings from his new job. Mr. P's modified ongoing child support should be set at \$317 per month, effective January 1, 2012 based on the Division's latest calculations. This child support amount was calculated using the primary custody formula in Civil Rule 90.3(a).

V. Child Support Order

The Division's Modified Administrative Child Support and Medical Support Order issued on March 2, 2012 is adjusted as follows, as other provisions remain in effect.

1. Mr. P's modified ongoing child support for T is set at \$317 per month, effective January 1, 2012.
2. The Division will give the parties the appropriate debit or credit for their out-of-pocket expenses for providing health insurance coverage for T.

DATED this 6th day of April 2012.

By: Signed
Mark T. Handley
Administrative Law Judge

Non-Adoption Options

A. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, declines to adopt this Decision and Order, and instead orders under AS 44.64.060(e)(2) that the case be returned to the administrative law judge to

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 2012.

By: _____

Signature

Name

Title

B. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060 (e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

Modified ongoing child support should be set at \$254 per month, effective January 1, 2012. This takes into account an adjustment for the amount paid to support an older child.

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 8th day of May, 2012.

By: Signed _____

Signature

Angela M. Rodell _____

Name

Deputy Commissioner _____

Title

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