

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

IN THE MATTER OF )  
D M ) OAH No. 12-0744-CSS  
) CSSD No. 001120242  
\_\_\_\_\_)

**DECISION AND ORDER**

**I. Introduction**

This case is D M’s appeal of an order denying a request to change his ongoing monthly child support obligation. The Child Support Services Division (Division) did not reduce Mr. M’s ongoing support obligation for his child, K, because the parents did not timely provide income information.

On November 5, 2012 a formal hearing was held to consider Mr. M’s appeal.<sup>1</sup> Mr. M participated in the hearing. The custodial parent, D M. T, did not participate.<sup>2</sup> Russell Crisp, Child Support Services Specialist, represented the Division. The hearing was audio-recorded. The record closed at the end of the hearing.

Based on the evidence in the record, the administrative law judge concludes that Mr. M’s ongoing child support should be set at the minimum because he is in jail. Modified ongoing child support should be set at \$50 per month, effective January 1, 2012.

**II. Facts**

Mr. M’s existing child support for K was set in 2003 at \$165 per month.<sup>3</sup> Ms. T filed a request that his child support be modified in December of 2011.<sup>4</sup> The Division issued a notice of the petition for modification on December 15, 2011.<sup>5</sup>

The Division issued a Decision on Request for Modification Review on August 22, 2012.<sup>6</sup> The Division left Mr. M’s ongoing child support for K at the minimum of \$165 per

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<sup>1</sup> The hearing was held under Alaska Statute 25.27.190.

<sup>2</sup> Ms. T did not provide a contact number for the hearing as instructed on the notice sent to her. Ms. T was not available at her phone number of record at the time set for the hearing.

<sup>3</sup> Division’s Pre Hearing Brief, page 1, & Exhibit 1.

<sup>4</sup> Division’s Pre Hearing Brief, page 1, & Exhibit 2.

<sup>5</sup> Exhibit 3.

<sup>6</sup> Exhibit 4.

month because the parents did not provide any income information.<sup>7</sup>

Mr. M's requested a formal hearing.<sup>8</sup> At the hearing, Mr. M explained that he was in jail and would not be released until May 15, 2012.<sup>9</sup>

At the hearing, the Division recommended that Mr. M's ongoing child support be modified and set at \$50 per month, effective January 1, 2012 based on his incarceration and lack of income. Mr. M agreed with this recommendation.<sup>10</sup>

Based on the evidence in the record, I find that it is more likely than not that Mr. M's estimated 2012 income results in a minimum child support order of \$50 per month.<sup>11</sup>

### **III. Discussion**

Mr. M asked for a downward modification to reduce his monthly child support because he is in prison and could not earn the level of income on which his monthly obligation of \$165 was set.

The effective date of a modification cannot predate the service of the petition for modification even when it would clearly prevent an injustice.<sup>12</sup> Mr. M would have been entitled to have his ongoing child support modified and set at the minimum during all of his incarceration had he requested a modification earlier, when he first incarcerated, but a petition for modification had not yet been issued. However, Ms. T did not request a modification until December of 2011.

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.<sup>13</sup>

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

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<sup>7</sup> Exhibit 4.

<sup>8</sup> Exhibit 5.

<sup>9</sup> Recording of Hearing.

<sup>10</sup> Recording of Hearing.

<sup>11</sup> Recording of Hearing.

<sup>12</sup> *See State, Dept. of Revenue, Child Support Enforcement Div. v. Schofield*, 993 P2d 405, (Alaska 1999).

<sup>13</sup> *Alaska Dept. of Revenue, CSED v. Kevin Lyn Dillon* 977 P 2d 118, (Alaska 1999).

minimum.

Mr. M's child support obligation should be set at to the minimum amount of \$50 per month based on his continued lack of income due to his incarceration. The law requires that child support be set at no less than \$50 per month, and the Alaska Supreme Court has said that a minimum order is generally appropriate when an obligor is incarcerated.<sup>14</sup> Once it has been demonstrated that an obligor can no longer earn an income, it is not appropriate to impute income to him.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> The evidence in the record shows that a material change of circumstances has occurred since Mr. M's ongoing child support was set at \$165 per month in 2003.

#### **IV. Conclusion**

Mr. M's ongoing child support should be decreased due to the decrease in his earnings and earning capacity while he is in prison. Mr. M's modified ongoing child support should be set at \$50 per month, effective January 1, 2012. This child support amount was calculated using the primary custody formula in Civil Rule 90.3(a).

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

The Administrative Child Support and Medical Support Order issued on September 8, 2003 is modified as follows, as other provisions remain in effect.

1. The Division's Decision on Request for Modification Review on August 22, 2012 is overturned.
2. The Notice of the Petition for Modification issued on December 15, 2011 is granted.
3. Mr. M's modified ongoing child support for K is set at \$50 per month, effective January 1, 2012.

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<sup>14</sup> See *Bendixen v. Bendixen*, 962 P.2d 170 (Alaska 1998) & *Douglas v. State, Department of Revenue* 880 P.2d 113 (Alaska 1994).

<sup>15</sup> *Bendixen v. Bendixen*, 962 P. 2d 170 (Alaska 1998).

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

<sup>17</sup> Alaska Civil Rule 90.3, Commentary X.

4. The Division will give the parties the appropriate debit or credit for their out-of-pocket expenses for providing health insurance coverage for K.

DATED this 15<sup>th</sup> day of November, 2012.

By: Signed  
Mark T. Handley  
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 4<sup>th</sup> day of December, 2012.

By: Signed  
Signature  
Mark T. Handley  
Name  
Administrative Law Judge  
Title

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