

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

IN THE MATTER OF)	
B A. B)	OAH No. 13-0278-CSS
)	
_____)	CSSD No. 00115485

CORRECTED DECISION AND ORDER¹

I. Introduction

This case is B A. B's appeal of the modification of his existing child support order for his other child, B. The Child Support Service Division (Division) issued this order because M C. D, B's mother, requested a modification.

The modification order increased Mr. B's existing \$159 per month ongoing child support obligation, setting it at \$922 per month based on his estimated income.

Mr. B requested a formal hearing. This request was referred to the Alaska Office of Administrative Hearings. Administrative Law Judge Mark T. Handley was assigned to conduct the formal hearing, which was held on March 28, 2013. Mr. B participated. Ms. D also participated. Erinn Brian, Child Support Services Specialist, represented the Division. The hearing was audio-recorded. The record closed on April 22, 2013.

At the hearing, Mr. B was concerned that the Division had used more income than he would actually earn in 2013 to calculate his modified ongoing child support amount. At the hearing, Mr. B also explained that he did not pay federal income tax on what he earned from the tribe he works for. After the hearing, the record was re-opened based on additional information that Ms. D provided indicating that Mr. B was correct about the non-taxability of his earnings. Ms. D filed a letter regarding the taxability of Mr. B earnings from harvesting no name under the No Names's treaty rights, as a member of that tribe.

The Division then provided new calculations as requested. Having reviewed the record in this case and after due deliberation, I conclude that the Division's modification order should be

¹ A proposed Decision and Order in the Matter of B A. B was issued and distributed to the parties. No proposals for action were filed before the decision was adopted. There was a typographical error in the proposed order. The CSSD number for this case, which was provided in the heading, should have been 001115485, not 00115485. Therefore, this corrected decision is issued in place of the original and is adopted as the final decision in this matter. The correction appears in bold italic type. This corrected decision is issued under the authority of 2 AAC 64.350(a).

adjusted to \$959 per month based on the new calculations that the Division submitted after the hearing. These new calculations use an updated estimate of Mr. B's current income and do not give him a deduction for paying federal income taxes on his earnings from his tribal government.

II. Facts

This case is a modification action.² Mr. B's ongoing child support for his child, B was previously set in 2010 at \$159 per month.³

The Division initiated a modification action because Ms. D filed a request for modification in December of 2012.⁴ The Division issued notice of the petition for modification on December 17, 2012.⁵

The Division issued a Modified Administrative Child and Medical Support Order on February 8, 2013.⁶ The Division's order set Mr. B's ongoing child support obligation at \$922 per month, effective January 1, 2013.⁷

Mr. B requested a formal hearing. Mr. B provided information from his employer regarding his pay.⁸

At the hearing, Mr. B explained his employment history. Mr. B is currently working for his tribe as a no name. Mr. B only works about one day per week. Mr. B explained about all the reasons that his earnings could go down. These include possible changes in his contract, and the possibility that weather or red tide will temporarily shut down the fishery.⁹

After the hearing, the Division recalculated Mr. B's modified ongoing child support using his reported 2012 earnings and other income from his tribal government.¹⁰ Mr. B provided some information about his household's finances at the hearing. Mr. B has a child living with him and the mother's child who is younger than B. Mr. B takes care of this younger child when he is not

² Alaska Civil Rule 90.3(h) governs modification actions.

³ Exhibit 1.

⁴ Exhibit 2 & the Division's Pre-Hearing Brief, page 1.

⁵ Exhibit 3.

⁶ Exhibit 6.

⁷ Exhibit 6.

⁸ Mr. B's appeal is found at Exhibit 7.

⁹ Recording of Hearing- Testimony of Mr. B.

¹⁰ Exhibit 9.

working.¹¹

Information regarding the taxability for Mr. B, which was provided during and after the hearing resulted in the record being re-opened so that the parties could address that issue. After the hearing, Ms. D provided a transmittal from Mr. B's employer, the No Name, explaining that Mr. B earnings from his job with the tribe were not taxable because his employment was a treaty job.¹² The parents did not make any additional filings after the record was re-opened and they were notified that federal statute 26 U.S.C. § 7873 indicated that Mr. B earnings are not subject to federal income tax. Mr. B's understanding at the hearing was that these earnings were not subject to federal income tax. Before the record closed again, the Division filed new calculations with no deduction for federal income tax. These latest calculations resulted in the \$959 monthly amount, which is a slight increase from \$922, the monthly amount in the Division's modification order that Mr. B appealed.

Based on the evidence in the record, I find that it is more likely than not that the Division's latest calculations are correct and are based on the correct income information. These new calculations use the best estimate of Mr. B's current annual income. As noted above, these calculations result in monthly child support obligation for Mr. B for B of \$959. I also find that Mr. B did not provide clear and convincing evidence that manifest injustice would result if the support award is set at this monthly amount.¹³

III. Discussion

The evidence provided by the Division and Mr. B showed that the Division's order was incorrect. Based on updated income information, the Division's filed new calculations based on his 2012 earnings. The evidence showing that Mr. B's earnings are not subject to federal income tax is consistent with the federal law that exempts earnings of a member of a tribe that comes from exercising tribal fishing rights under a treaty from income and self employment taxes.¹⁴ Because his tribal earnings are not subject to federal taxation, Mr. B is not entitled to the deduction for paying federal income taxes that the Division applied when it first calculated his modified child support

¹¹ Recording of Hearing- Testimony of Mr. B.

¹² Exhibit 8.

¹³ Recording of Hearing & Exhibits 6-10.

¹⁴ 26 U.S.C. § 7873.

obligation.

Mr. B ongoing child support should be based on the best estimate of his current income.¹⁵ Mr. B correctly points out that the nature of his employment makes it unusually difficult to predict his future income. Predicting future income is always a somewhat speculative endeavor. Using Mr. B income in 2012 to estimate his annual earnings for the modification may over or under estimate his earnings in 2013 and future years, but the evidence in the record shows that it is the best estimate of his future earnings that can be made based on the information available at this time. If there is a change in Mr. B employment that results in a change in his income, he may request another modification.

Mr. B should be aware, however, that even with his current employment, an argument could be made that that he is not taking full advantage of his earning capacity, because he is only working for earnings one day per week. Even a material reduction in his income while he is not employed full-time would not necessarily result in a downward modification, because income would be imputed to him if he was found to be voluntarily and unreasonably underemployed.¹⁶

Ongoing child support should be calculated based on Mr. B's current annual income unless good cause exists to raise child support above or reduce it below the amounts calculated using the income formula in Civil Rule 90.3(a). To establish good cause, the claimant must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."¹⁷

Mr. B did not show that it would be unjust to require him to pay \$959 per month in ongoing child support. Mr. B did not show that he and his younger child's mother will be unable to support themselves and Mr. B's younger child if Mr. B's ongoing child support for B is increased to \$959 per month. Mr. B earns a good income and could find other part-time work if he needed to help support his household.¹⁸

While paying \$959 per month in ongoing child support may require some adjustments, Mr. B's duty to pay the correct percentage of his income toward the ongoing support of his older

¹⁵ Alaska Civil Rule 90.3, Commentary III.E.

¹⁶ Alaska Civil Rule 90.3(a)(4).

¹⁷ Alaska Civil Rule 90.3(c).

¹⁸ Recording of Hearing.

child, B, takes precedence over his debts and other financial obligations. Under Alaska law, Mr. B's obligation to support his younger child would not lower his monthly support obligation for B unless a reduction is required to prevent a substantial hardship.¹⁹ Under Alaska Civil Rule 90.3(a) &(c), Mr. B has an obligation to pay 20% of his adjusted gross income in child support to B, without a deduction for paying child support for his younger child.

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.²⁰ 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.²¹ Monthly child support of \$959 would be more than a 15 percent increase from the current order of \$159 per month.

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, 2013, because the petition was issued in December of 2012.

IV. Conclusion

Ongoing child support should be increased due to the increase in Mr. B's earnings that has occurred since the ongoing monthly support amount was set in 2010. Mr. B's modified child support should be adjusted based on the new calculations that the Division submitted after the hearing. There is not clear and convincing evidence that manifest injustice would result if the support award is set in accordance with these calculations. This child support amount was calculated using the primary custody formula in Civil Rule 90.3(a).

V. Child Support Order

1. Mr. B's modified ongoing child support for B in the monthly amount of \$959, effective January 1, 2013.
2. The Division will give the parties the appropriate debit or credit for their out-of-pocket expenses for providing health insurance coverage for B.

¹⁹ Alaska Civil Rule 90.3 Commentary VI.B.2.

²⁰ Alaska Civil Rule 90.3(h)(1).

²¹ Alaska Civil Rule 90.3, Commentary X.

All other provisions of the Division's Modified Administrative Child and Medical Support Order issued on February 8, 2013 remain in effect.

DATED this 17th day of May, 2013.

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 17th day of May, 2013.

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

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