

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

In the matter of: )  
)  
K A. X )  
)  
\_\_\_\_\_ ) OAH No. 13-0521-CSS  
CSSD Case No. 001174728

**DECISION AND ORDER**

**I. Introduction**

This case concerns the obligation of K A. X for the support of his son, E. Mr. X has shared custody of E with D D. E-R.

The Child Support Services Division issued an amended administrative child support order dated August 29, 2011, for ongoing support in the amount of \$656 per month, based on sole custody.<sup>1</sup> The order was affirmed in a decision dated January 12, 2012.<sup>2</sup> Mr. X filed a request for modification,<sup>3</sup> and on March 1, 2013, the division granted the request and issued a modified order in the amount of \$7 per month, based on shared custody.<sup>4</sup>

Ms. E-R appealed and requested a formal hearing. The case was referred to the Office of Administrative Hearings, and the assigned administrative law judge conducted a hearing on May 6 and July 24, 2013. Both Mr. X and Ms. E-R participated. Russell Crisp represented the division.

On appeal, Ms. E-R argues that Mr. X has income that he is not reporting, and that he is underemployed. However, the preponderance of the evidence does not support her assertions. The division's decision is therefore sustained.

**II. Facts**

A. Custody and Background

In 2009, K A. X was living in Oregon, working as a radiology assistant for Dr. N J. T. Dr. T decided to relocate his practice to No Name, and he asked Mr. X to make the move with him and to act as his assistant in No Name while Dr. T was getting

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<sup>1</sup> Ex. 2, p. 3.  
<sup>2</sup> Ex. 3.  
<sup>3</sup> Ex. 5.  
<sup>4</sup> Ex. 14, p. 1.

established. Mr. X agreed, and in June, 2010 he moved to No Name and began working at Dr. T's new office, No Name Urology.<sup>5</sup> After moving, Mr. X retained ownership of the house in Oregon in which he had been living prior to moving to Alaska. Anticipating a return to Oregon, Mr. X left the bulk of his personal property at his Oregon house and did not rent it out.<sup>6</sup>

Soon after arriving in No Name, Mr. X became involved in a relationship with D E-R. Ms. E-R became pregnant with their child and at some point moved into Mr. X's apartment. The couple's son, E, was born early in 2011.<sup>7</sup>

The relationship between Mr. X and Ms. E-R has been fraught with conflict. Ms. E-R has filed three petitions for *ex parte* domestic violence protective orders against Mr. X.<sup>8</sup> Ms. E-R filed a formal complaint asserting that Mr. X improperly accessed her private health records,<sup>9</sup> while Mr. X filed a police complaint asserting that Ms. E-R had stolen items from his apartment after moving out.<sup>10</sup> Shortly after E's birth, Ms. E-R left Mr. X's residence and obtained public assistance benefits,<sup>11</sup> which led the division to issue, on May 9, 2011, a child support order establishing Mr. X's support obligation in the amount of \$712 per month.<sup>12</sup>

Mr. X filed a custody action<sup>13</sup> and asked that the division review his support order. Following the administrative review, the division issued an amended support order on August 29, 2011, setting Mr. X's support obligation at \$656 per month.<sup>14</sup> Mr. X filed

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<sup>5</sup> Written Statement of Ms. E-R, February 4, 2013; Testimony of K. X.

<sup>6</sup> Testimony of K. X. See Fax 5/16/2013, pp. 50 (K. X text message, 10/7/2011), 86 (2/4/2013 Statement).

<sup>7</sup> See, Fax, 5/16/2013, p. 5 (Written Statement of Ms. E-R, May 15, 2013, p. 3).

<sup>8</sup> Fax, 5/16/2013, pp. 143-144 (No. 1XX-10-000 CI); pp. 46-49 (No. 1XX-11-00 CI); pp. 145-152 (No. 1XX-11-000 CI). A long term order was denied in the first case following a hearing in December, 2010. *Id.*, p. 153. The third case resulted from an incident in which Mr. X allegedly threw a baby blanket at Ms. X. *Id.*, pp. 43-45, 139 (12/10/2011 NNPd Log Note).

<sup>9</sup> Fax 5/16/2013, pp. 60-72. The allegation was confirmed by Dr. T, who informed Ms. E-R, and the hospital, that he had sanctioned his staff, including Mr. X, for their conduct. Letter, N. T to D. E-R, January 12, 2012.

<sup>10</sup> Fax, 5/16/2013, pp. 27-36 (6/29/2011 No Name Police Department report), 137 (7/1/2011 NNPd Note). The matter was resolved when Ms. E-R returned the items allegedly stolen. Fax 5/16/2013, p. 36 (police report).

<sup>11</sup> Ms. E-R received benefits under the Alaska Temporary Assistance Program (ATAP) in April and May, 2011. Ex. 1, p. 8.

<sup>12</sup> Ex. 1, p. 7.

<sup>13</sup> Ex. 4 (No. 1XX-11-0000 CI). See Fax 5/16/2013, p. 47 (Court notes, 7/20/11 hearing in No. 1XX-11-000-CI).

<sup>14</sup> Ex. 2, pp. 1, 6, 8.

an appeal, and following an administrative hearing a decision was issued on January 12, 2012, reducing the support obligation to \$569 per month.<sup>15</sup> The parties' custody case came before the superior court for a hearing on June 1, 2012. Both parties were represented by counsel. They stipulated to shared physical and legal custody, with the matter of child support to be addressed by the division.<sup>16</sup> Mr. X then requested modification of the administrative support order.<sup>17</sup> On March 1, 2013, the division granted the request and issued a modified order in the amount of \$7 per month, based on shared custody and 2012 total income for Mr. X of \$40,957.50 and for Ms. E-R of \$39,770.<sup>18</sup>

In 2012-2013, Mr. X travelled frequently, primarily accompanying Dr. T when he conducted clinics in outlying communities in No Name Alaska, but also to Seattle or other destinations in the Lower 48 for personal reasons.<sup>19</sup> Mr. X's regular work schedule for No Name Urology during this time was 32 hours per week. His normal work days are Monday through Thursday, but he often assists Dr. T when he has surgery scheduled at the hospital on Fridays.<sup>20</sup> Mr. X is paid \$25 per hour.<sup>21</sup>

B. Mr. X's Income

1. 2010

In the last two quarters of 2010, Mr. X earned total wages in Alaska of \$38,853.91, from No Name Urology (\$18,422.50), No Name Regional Hospital (\$20,281.41) and No Name Bone and Joint Center (\$150.00).<sup>22</sup>

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<sup>15</sup> Ex. 3, p. 3.

<sup>16</sup> Ex. 4.

<sup>17</sup> Ex. 5.

<sup>18</sup> Exhibit 14, pp. 1, 6, 9-10.

<sup>19</sup> See Fax 5/16/2013, pp. 12 (emails, K. X to D. E-R, 7/9/2012 @ 12:21 p.m., 11:17 p.m.) (No Name, No Name clinics); 17 (K. X text message, 1/31/2012) (February 23-25, 2012); 21 (Seattle, March 29-April 1, 2012) (doctor's appointment); 26 (May 11, 18) (clinic in No Name); 23 (June 18-22); 18-19, 104-107 (K. X text messages, 1/31/2012, 2/6/2012 *et al.*) (February 16-18, 2012). In particular, Mr. X twice travelled to Texas for professional education, at his own expense. Testimony of K. X; see Fax 5/16/2013, pp. 25, 115 (email, K. X to D. E-R, January 31, 2013 @ 8:01 a.m.) (March 4-8, 2012); 24, 112 (email, K. X to D. E-R, 11/2/2012 @ 1:19 a.m.) (December 2-8, 2012); 15, (email, K. X to D. E-R, 3/1/13 @ 6:35 p.m) (Texas, March 9, 2013).

<sup>20</sup> Testimony of K. X. See, e.g., Fax 5/16/2013, p. 11 (email, K. X to D. E-R, 7/13/2012 @ 3:37 a.m.).

<sup>21</sup> Ex. 8, p. 6; Ex. 18, pp. 1-2.

<sup>22</sup> Ex. 17, p. 1.

2. 2011

In 2011, Mr. X had total income of \$45,068,<sup>23</sup> consisting of his wages from No Name Urology (\$43,630)<sup>24</sup> and No Name Hospital (\$1,438.35).<sup>25</sup> The wages from No Name Hospital represent earnings through July, and Mr. X was not employed by the hospital after that month.<sup>26</sup>

3. 2012

In 2012, Mr. X had total income of \$41,158,<sup>27</sup> consisting of his wages (\$40,280) from No Name Urology (\$40,079.50),<sup>28</sup> No Name Spine and Pain Center (\$165.00)<sup>29</sup> and a firm in Texas (\$34.88),<sup>30</sup> plus his Alaska Permanent Fund dividend (\$878).

C. Ms. E-R's Income

1. 2011.

Ms. E-R's 2011 income was \$32,722, consisting of wages (\$31,545) and dividends and interest (\$1,177).<sup>31</sup>

2. 2012

In 2012, Ms. E-R was employed by No Name Court, earning \$18.30 per hour.<sup>32</sup> Her total income was at least \$39,770, consisting of her wages (\$38,892) and an Alaska Permanent Fund dividend (\$878).<sup>33</sup>

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<sup>23</sup> Ex. 20, p. 15 (2011 Form 1040).

<sup>24</sup> Ex. 20, p. 14 (2011 W-2).

<sup>25</sup> Ex. 20, p. 13 (2011 W-2).

<sup>26</sup> See In Re K X, OAH No. 11-0376-CSS, at 2 (Commissioner of Administration 2012) (Exhibit 3, p. 2).

<sup>27</sup> Ex. 20, p. 11 (2012 1040).

<sup>28</sup> Ex. 20, p. 10 (2012 W-2).

<sup>29</sup> Ex. 20, p. 9 (2012 W-2).

<sup>30</sup> Ex. 20, p. 10 (2012 W-2)

<sup>31</sup> This is the amount stated in what purports to be an unsigned, undated copy of her 2011 tax return. Ex. 7, p. 8. The amount reported as dividends appears to be an Alaska Permanent Fund dividend, which in 2011 was \$1,174.

<sup>32</sup> See Ex. 7, pp. 18-23.

<sup>33</sup> These are the amounts stated in what purports to be an unsigned, undated copy of her 2011 federal income tax return. See Ex. 7, p. 2. However, Ms. E-R's paystubs suggest that her actual income may have been somewhat more than is shown. The total amount of wages shown on her year-to-date paystub through November 5, 2012 was \$38,585.15. Exhibit 7, p. 18. However, that paystub also shows leave cash-in totaling \$2,671.80. Excluding leave cash-in, her total wages through mid-November (46 weeks) were \$35,913.70, or approximately \$780.73 per week ( $\$35,913.70 \div 46$ ). This extrapolates to annual wages of approximately \$40,598 ( $52 \times \$780.73$ ). With her leave cash-in, her total income for 2012 extrapolates to \$44,143 ( $\$40,598 + \$2,761.80 + \$874 = \$44,143.80$ ).

## II. Discussion

The division may modify a support obligation when there has been a material change in circumstances.<sup>34</sup> When the child support obligation changes by an amount greater than 15% of the existing order, a material change of circumstances is presumed and the division will modify the order.<sup>35</sup> But even if the amount has not changed by at least 15%, the division will modify the order if “other circumstances exist that justify a modification of the support obligation.”<sup>36</sup> In this case, the existing order was issued on February 1, 2012, based on 2011 income, with primary custody in Ms. E-R. Because custody changed from primary custody to shared custody, there was a material change of circumstances sufficient to warrant modification of the support order.

A parent’s presumptive support obligation is based on their adjusted annual income, that is, total income after allowable deductions.<sup>37</sup> The presumptive support obligation for one child in a shared custody case is based on 20% of the adjusted annual income of both parents, and the amount of time the children spend with each.<sup>38</sup> The support obligation may be based upon a parent’s potential income, rather than actual income, if the parent is voluntarily and unreasonably unemployed or underemployed.<sup>39</sup>

In determining a parent’s income, the division will use income information from all sources that it determines are reliable.<sup>40</sup> In this case, the evidence of Mr. X’s income includes his child support affidavits and sworn testimony, his federal income tax returns from 2011 and 2012, Department of Labor records,<sup>41</sup> bank account statements, and time cards and paystubs. Ms. E-R asserts that these are not reliable indicators of Mr. X’s actual income or his earning potential, and that Mr. X is either failing to maximize his income or is receiving income that is not being reported.

Ms. E-R made substantially the same claims in connection with the existing order, in 2012. The administrative law judge’s decision in that case noted that Ms. E-R had “explained her reasons for suspecting that Mr. X might be earning more than he had

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<sup>34</sup> Civil Rule 90.3(h)(1).

<sup>35</sup> 15 AAC 125.325(b)(1). *See* Civil Rule 90.3(h)(1).

<sup>36</sup> 15 AAC 125.325(b)(2)(B).

<sup>37</sup> 15 AAC 125.065, -.070(a); Civil Rule 90.3(a)(1).

<sup>38</sup> 15 AAC 125.070(b); Civil Rule 90.3(b)(1).

<sup>39</sup> 15 AAC 125.060(a); Civil Rule 90.3(a)(4).

<sup>40</sup> 15 AAC 125.020(a).

<sup>41</sup> Ex. 17.

reported, but she did not provide persuasive evidence that contradicted the documentary evidence submitted by Mr. X.”<sup>42</sup> Little has changed with respect to Ms. E-R’s suspicions, but Mr. X has submitted additional documentary evidence to support his assertions with respect to his income, in the form of bank statements and federal income tax returns.

As articulated in this case, Ms. E-R’s assertion that Mr. X’s reported earnings do not reflect his actual or potential income is based on a variety of circumstances that she finds suspicious. For example, she claims that in the past Mr. X “had multiple sources of income due to contract work and out of state employers” and that he also received bonuses from employer.<sup>43</sup> She is concerned that Mr. X’s personal relationship with Dr. T could have led Dr. T to assist Mr. X by under-reporting income or by providing in-kind compensation, for example airline mileage.<sup>44</sup> She states that during their relationship, Mr. X owned rental property in Washington from which he derived income.<sup>45</sup> In addition, she asserts that his reported income is inconsistent with his reported work schedule,<sup>46</sup> and that his reported work schedule is inconsistent with his actual work schedule, in that he actually regularly works on Fridays at No Name Regional Hospital.<sup>47</sup>

Ms. E-R’s suspicions reflect the acrimony that has characterized her relationship with Mr. X, but they are not borne out by the evidence in the record. It is apparent that during the second half of 2010, when Ms. E-R and Mr. X were in a relationship, Mr. X earned substantially more than he did during similar periods of time in 2011 and 2012, after their relationship ended. According to Department of Labor records during the last two quarters of 2010 (July-December), Mr. X earned wages of \$38,853.91, about half from No Name Urology and half from No Name Hospital.<sup>48</sup> This is equivalent to annual income of around \$78,000, in comparison to his reported income in 2011 and 2012 of \$45,068 and \$41,158, respectively. The drop in Mr. X’s income from the second half of 2010 to subsequent years occurred because he no longer had income from No Name

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<sup>42</sup> In Re K X, OAH No. 11-0376-CSS, at 2 (Commissioner of Administration 2012) (Exhibit 3, p. 2).

<sup>43</sup> Ex. 15.

<sup>44</sup> Ex. 15; Fax 5/16/2013, pp. 5-6, 37, 117 (K. X text message). Mr. X denied that he had used Dr. T’s miles for personal travel, although the text message indicates this did occur.

<sup>45</sup> Fax 5/16/2013, p. 7 (5/15/2013 letter, p. 5).

<sup>46</sup> Supp. p. 7.

<sup>47</sup> Ex. 15; Fax 5/16/2013, pp. 4, 7 (5/15/2013 letter, pp. 2, 5); Ex. 19, p. 2 (4/21/2013 letter).

<sup>48</sup> Ex. 17, p. 1.

Regional Hospital, not because of a reduction in his income from No Name Urology.<sup>49</sup> But that Mr. X no longer had income from No Name Regional Hospital after the end of 2010 does not necessarily mean that he was unreasonably underemployed: he continued to work 32 hours a week at No Name Urology.

Contrary to her suspicion that Mr. X's income tax returns would reveal that he has rental income,<sup>50</sup> Mr. X's income tax returns for 2011 and 2012 show no income other than wages, and Mr. X denied under oath that he had rental income from properties in another state, although he does own real estate there.<sup>51</sup> The bank statements submitted into evidence do not cast serious doubt upon his sworn testimony.<sup>52</sup> And while the Department of Labor reports are, as Ms. E-R has observed, at times incomplete or misleading,<sup>53</sup> Mr. X's W-2 statements are reliable evidence of his actual wages. Ms. E-R's suggestion that Mr. X has substantial income from contract employment apart from No Name Urology, such as from No Name Hospital or No Name Bone and Joint Center,<sup>54</sup> is not supported by the evidence in the record, which shows only minimal income from other employers.<sup>55</sup> Ms. E-R's speculation that Dr. T would falsify his business records based on a personal relationship with Mr. X disregards the fact that the office manager verified his hours and wages,<sup>56</sup> as well as the fact that to falsify income records would be a criminal offense. That Mr. X frequently assists Dr. T on Fridays at No Name Regional Hospital does not mean that he is paid by the hospital as an employee or as an independent contractor, nor does it prove that Mr. X is regularly employed by

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<sup>49</sup> See notes 23-27, *supra*.

<sup>50</sup> Fax 5/16/2013 at p. 7 (5/15/2013 Letter, p. 5).

<sup>51</sup> Mr. X's bank statements reflect mortgage payments of \$505.45 and \$573.49, as well as home equity loan payments of \$200.00. Ex. 20, pp. 3, 20, 23.

<sup>52</sup> Mr. X submitted bank statements for three months, January through March, 2013. The amounts deposited to his account in those months are substantially consistent with his earnings from No Name Urology: \$400.00 (Paypal Transfer, 12/28/2012); \$952.10 (12/31/12); \$1,090.33 ([1]2/26/31); \$1,143.30 (1/25/2013); \$1,356.84 (2/1/2013); \$1,245.62 (No Name Urolog[y] Quickbooks, 2/13/2013); \$431.35 (No Name Urolog[y] Quickbooks, 2/21/2013); \$1,269.26 (No Name Urolog[y] Quickbooks, 2/27/2013); \$500.00 (Paypal Transfer, 3/4/2013); \$1,365.31 (No Name Urolog[y] Quickbooks, 3/13/2013). Ex. 20, pp. 2, 4, 7. The total amount of his deposits is (\$7,711.68) is similar to his year to date net pay through April 7, 2013 (\$7,748.34). See Ex. 18, p. 1.

<sup>53</sup> See Fax 5/16/2013 at p. 7 (5/15/2013 Letter, p. 5). The Department of Labor information for 2012, for example, omits any income from No Name Urology for the third quarter of 2012 and thus substantially understates his actual wages in 2012. Compare Ex. 17, p. 2 with Ex. 20, p. 10.

<sup>54</sup> See, e.g., Ex. 15; Fax 5/16/2013 at 4 (5/15/2013 Letter, p. 2).

<sup>55</sup> See notes 30-31, *supra*.

<sup>56</sup> Ex. 8, p. 6.

Dr. T for more than 32 hours a week in total since his standard work week can be adjusted to maintain a total of approximately 32 hours per week including Fridays.

The evidence does not support Ms. E-R's speculation that Mr. X is receiving income that he is not reporting. There is some evidence of underemployment, in that Mr. X's standard work schedule is four day week for eight hours a day, and that he regularly works for a total of 32 hours a week. Mr. X's schedule, however, reflects the fact that he has shared custody, and is consistent with his parental responsibilities. It is also consistent with the reduction in Ms. E-R's income since her son was born.<sup>57</sup> In light of the record as a whole, Mr. X is not unreasonably underemployed.

#### **IV. Conclusion**

Ms. E-R has not shown that the Mr. X's support obligation should be increased. Accordingly, the division's decision should be affirmed.

#### **CHILD SUPPORT ORDER**

1. The division's Modified Administrative Child and Medical Support Order, dated March 1, 2013, is **AFFIRMED**.
2. Mr. X's modified ongoing child support obligation remains at \$7 per month.

DATED: September 5, 2013.

*Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

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<sup>57</sup> See Ex. 17, p. 2 (2010 wages of \$55,186.75; 2012 wages of \$38,891.64).

## 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 1<sup>st</sup> day of October, 2013.

By: Signed \_\_\_\_\_  
Signature  
Andrew M. Hemenway \_\_\_\_\_  
Name  
Administrative Law Judge \_\_\_\_\_  
Title

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