

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

IN THE MATTER OF	)	OAH No. 13-0735-CSS
K R. M	)	CSSD No. 001171307
	)	
_____	)	

**DECISION AND ORDER**

**I. Introduction**

This case is B N's appeal of an order denying her request for an upward modification of K M's existing child support order for their son, H. The Child Support Services Division (Division) issued this order because it determined that there had not been a material change in circumstances since ongoing child support was set at \$240 per month.

Ms. N 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 June 18, 2013. Mr. M did not participate. Ms. N participated. Erinn Brian, Child Support Services Specialist, represented the Division. The hearing was audio-recorded. The record closed on July 2, 2013.

Prior to the hearing, the Division filed a pre hearing brief in which the Division admitted that there were problems with calculations on which it based its order denying Ms. N's request. These calculations were based on Ms. N's current income rather than Mr. M's. The Division also provided updated income information reported from Mr. M's employers. At the hearing, Ms. N was concerned that this reported income did not appear to include the tips Mr. M would have received from the clients of the fishing charters he captained. At the hearing, Ms. N explained that she had served as a deckhand on similar charters. Ms. N, based on this experience and her knowledge of Mr. M's employment situation, estimated that he would receive an average of \$150 per day in tips in addition to his earnings.

At the hearing, the Division recalculated Mr. M's child support obligation for H, based on Mr. M's estimated annual income. This estimate includes the last four quarters of earnings reported by Mr. M's employers, his estimated tips of \$150 per day for 90 days of charters, the unemployment compensation he received during those four quarters, and a PFD. These calculations result in a monthly child support amount of \$523.

A post hearing order was issued with the new calculations. This order gave the parties an

opportunity to file additional arguments or documentation, including a motion to have an additional hearing. No additional filings were made.

Having reviewed the record in this case and after due deliberation, I conclude that the Division's modification order should be adjusted to \$523 per month based on the new calculations the Division made during the hearing.

## **II. Facts**

This case is a modification action.<sup>1</sup> Mr. M's ongoing child support for his child, H, was previously set in 2011 at \$240 per month.<sup>2</sup>

The Division initiated a modification action because Ms. N filed a request for modification through a UIFSA petition from Pennsylvania in March of 2012.<sup>3</sup> The Division issued notice of the petition for modification on April 2, 2012.<sup>4</sup>

The Division issued a Decision on Modification Review Administrative Child and Medical Support Order on November 15, 2012.<sup>5</sup> The Division's order denied the request to change Mr. M's ongoing child support obligation.<sup>6</sup>

Ms. N requested a formal hearing.<sup>7</sup>

At the hearing, Ms. N explained Mr. M's employment history and provided an estimate of the tips he receives. Mr. M is currently working as a charter fishing boat captain who crews for himself during the summer months and works for a boat repair shop during the winter months.<sup>8</sup>

At the hearing, the Division recalculated Mr. M's child support obligation for H, based on the updated income information provided by Mr. M's employers and Ms. N. This estimate includes the last four quarters of earnings reported by Mr. M's employers, his estimated tips of \$150 per day for 90 days of charters, the unemployment compensation he received during those four quarters, and a PFD. These calculations result in a monthly child support amount of \$523.<sup>9</sup>

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<sup>1</sup> Alaska Civil Rule 90.3(h) governs modification actions.

<sup>2</sup> Exhibit 1.

<sup>3</sup> Exhibit 2 & the Division's Pre-Hearing Brief, page 1.

<sup>4</sup> Exhibit 3.

<sup>5</sup> Exhibit 4.

<sup>6</sup> Exhibit 4.

<sup>7</sup> Ms. N's appeal is found at Exhibit 5.

<sup>8</sup> Recording of Hearing & Exhibit 6.

<sup>9</sup> Recording of Hearing & Exhibit 7.

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 correct income information. These new calculations use the best estimate of Mr. M's current annual income.<sup>10</sup> As noted above, these calculations result in a monthly child support obligation for Mr. M for H of \$523.<sup>11</sup>

### **III. Discussion**

The evidence provided by the Division and Ms. N showed that the Division's order was incorrect. Based on updated income information, the Division filed new calculations based on Mr. M's 2012 earnings.

An argument could be made that Mr. M is not taking full advantage of his earning capacity, because he does not appear to be employed all year.<sup>12</sup> Absent a stronger showing of unreasonable under-employment, however, Mr. M's ongoing child support should be based on the best estimate of his current income.<sup>13</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>14</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>15</sup> Monthly child support of \$523 would be more than a 15 percent increase from the current order of \$240 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 May 1, 2012, because the petition was issued in April of 2012.

This case is an appeal of the Division's decision not to modify Mr. M's ongoing child support. Based on the evidence in the record, a modification should be made, despite Mr. M's lack of participation. The Division's pre hearing brief should have put Mr. M on notice that the Division had changed its position on its denial of the modification order, yet Mr. M did not participate in the hearing. He did not provide a phone number for the hearing as directed on the

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<sup>10</sup> Recording of Hearing & Exhibits 6 & 7.

<sup>11</sup> Exhibit 7.

<sup>12</sup> Alaska Civil Rule 90.3(a)(4).

<sup>13</sup> Alaska Civil Rule 90.3, Commentary III.E.

<sup>14</sup> Alaska Civil Rule 90.3(h)(1).

notice sent to him. There was no answer at his phone number of record when he was called for the hearing. Mr. M also did not respond to the post hearing order giving him an opportunity, before the record closed, to respond to updated income information discussed at the hearing and the Division's latest calculations.

#### **IV. Conclusion**

Ongoing child support should be increased due to the increase in Mr. M's earnings that has occurred since the ongoing monthly support amount was set in 2011. Mr. M's modified child support should be adjusted based on the new calculations that the Division submitted at the hearing. This child support amount was calculated using the primary custody formula in Civil Rule 90.3(a).

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

1. The Division's Decision on Request for Modification Review issued on November 15, 2012 denying modification is overturned.
2. Notice of Petition for Modification of Child Support issued on April 3, 2012, is granted.
3. Mr. M's modified ongoing child support for H is set in the monthly amount of \$523, effective May 1, 2012.
4. The Division will give the parties the appropriate debit or credit for their out-of-pocket expenses for providing health insurance coverage for H.
5. All other provisions of the Division's Administrative Child and Medical Support Order issued on March 14, 2011 remain in effect.

DATED this 29<sup>th</sup> day of July, 2013.

By: Signed \_\_\_\_\_  
Mark T. Handley  
Administrative Law Judge

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<sup>15</sup> Alaska Civil Rule 90.3, Commentary X.

**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 29<sup>th</sup> day of August, 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.]