

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

In the matter of: )

E G )

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) OAH No. 13-0849-CSS

) CSSD No. 001155092

**DECISION AND ORDER**

**I. Introduction**

E G appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on April 30, 2013, increasing his support obligation from \$50 to \$243 per month effective May 1, 2013. The obligee children are N, born 00/00/06, and W, born 00/00/08. The custodial parent is C B.

The hearing took place on July 8, 2013. Erinn Brian, Child Support Specialist, represented CSSD. Mr. G participated by telephone. Ms. B did not participate. Following the hearing, the record remained open, with CSSD given until July 12, 2013 to submit new support calculations based on the new information about child birth order that came out at the hearing. CSSD did submit new calculations, but did so six days after the deadline and attempted in the revised calculations to raise new matters beyond the birth order issue. CSSD sought a revised support amount of \$414 per month.

The main concerns Mr. G raised on appeal were the fact that he is presently unemployed and his belief that the proposed increase in his child support would cause hardship for his new family. This decision concludes that Mr. G does have intermittent employment income, which should be taken into account in setting support, and that no unusual hardship has been shown. His support obligation must therefore increase. A revised support amount has been calculated using his 2012 income as a likely guide to his future earning capacity, with an appropriate prior-child deduction in the calculation of W's support owing to the new birth order information. Assertions by CSSD that did not have proper evidentiary support have been disregarded.

**II. Wage and Unemployment Income**

*A. Facts*

E G, who lives in the small village of No Name, has a long history of intermittent employment. When he does get work, the pay can be quite high—up to \$34 per hour—but the

work is part-time and/or short-lived. Some of this may be due to the nature of the jobs, and some of it is due to Mr. G's poor performance in some of the jobs.<sup>1</sup>

In 2009, Mr. G earned \$12,270 from four periods of employment, two with No Name and two with No Name, Inc. In 2010 he earned \$5302, all of it with No Name, Inc. In 2011 he earned \$9760 from No Name, most of it late in the year, and received \$2821 of unemployment benefits early in the year. In 2012 he earned \$11,710 from two employers, and also received unemployment benefits of \$2834.<sup>2</sup>

In 2013, Mr. G has received unemployment benefits of \$4593 (which have now run out), and also seems to have had some part-time work in the second quarter, substituting in the community store for \$15 per hour.<sup>3</sup> He is applying for other jobs and hopes to get hired.<sup>4</sup>

When the agency calculated Mr. G's child support for N and W for the order under review, it projected \$7512.88 in annual wage income for Mr. G's future earnings, as well as \$4593 in unemployment benefits.<sup>5</sup> The basis for this wage projection is unclear. The agency has since abandoned it, and now advocates taking the occasional substitute work at \$15 per hour and projecting it for the remainder of the year as though it were full-time, yielding \$15,600 in wages.<sup>6</sup>

### *B. Discussion*

Child support is calculated based on "the income which will be earned when the support is to be paid"—that is, actual or potential *future* income.<sup>7</sup> There is no basis in the record to suppose, as CSSD advocates, that the substitute work will become full-time. It is also unlikely that Mr. G will see annual unemployment benefits of \$4593 in the foreseeable future. He may collect some benefits after future jobs end, but his current eligibility is exhausted.

A more reasonable approximation of Mr. G's practical earning capacity in the future is found by looking at his calendar year 2012 earnings. 2012 was Mr. G's highest overall earnings year of the last four years, but the wages and the unemployment component are both within the normal range for him. The likely scenario for the foreseeable future is that his employment will

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<sup>1</sup> Testimony of Mr. G.

<sup>2</sup> Ex. 7.

<sup>3</sup> Ex. 4, 7.

<sup>4</sup> Testimony of Mr. G.

<sup>5</sup> Ex. 5, p. 6.

<sup>6</sup> CSSD Late-Filed Proposed Calculations.

<sup>7</sup> Civil Rule 90.3 Commentary, Part III-E.

continue to be intermittent, but he can realistically strive to equal his 2012 earnings level. The 2012 wage and unemployment figures will be used in the support calculation in Part IV.

### **III. NANA Dividend**

CSSD calculated its original modification order without including any income other than wages, unemployment benefits, and the Permanent Fund Dividend. At the very end of the hearing, CSSD asked a question about Native corporation shares, eliciting testimony that Mr. G holds 100 shares of NANA stock. CSSD did not explore the matter further. CSSD asked to submit revised calculations to account for the birth order issue discussed in Part IV below, but did not ask to supplement the record regarding the NANA stock.

In its revised calculations submitted after the hearing, CSSD added \$7.72 per share to Mr. G's income for a dividend that, according to CSSD, was paid in April of 2013, prior to the effective date of the order under review.

Even if CSSD submitted this calculation timely (as it happened, the calculation was submitted after the record had closed), the additional income could not be added to this order. There is no *evidentiary* support in the record that would even show payment of a dividend in April of 2013, still less any evidence from which a trier of fact could infer that such dividends are likely to continue into the future. An unsupported statement in an advocate's brief or worksheet is not evidence.<sup>8</sup>

CSSD may well have evidence that NANA dividends are paid regularly and should be viewed as an ongoing source of income. If so, it is not precluded from initiating modification of the support amount set by this order, as provided in 15 AAC 125.316(b)(2)(F).

### **IV. Birth Order and Prior Child Deduction**

#### *A. Facts*

In the order under review, CSSD calculated support as though any other children of Mr. G's who might be living with him in his present home were born subsequent to the children subject to this order. Based on the evidence developed at the hearing, it is now undisputed that D

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<sup>8</sup> Although 15 AAC 05.030(h) assigns Mr. G the overall burden of proof in this case to show that CSSD's order under review is erroneous, it is important to note that the order under review did not ascribe any income to the NANA dividend. This is an entirely new issue that CSSD brought to the table for the first time at the hearing, with CSSD seeking a change in its own order. Hence, the burden of producing evidence on the issue would fall on the agency.

J was born on 00/00/08, just prior to W. D is a biological child of Mr. G (D's birth certificate lists him as the father), and D lives in Mr. G's present household.

*B. Discussion*

Under Civil Rule 90.3(a)(1)(D), Mr. G is entitled to a deduction from his income for “child support for children from prior relationships living with the parent, calculated by using the formula provided by [Rule 90.3].” With respect to W—but not N—D is a child living with the obligor parent who comes from a prior relationship, and thus the cost of supporting D (as determined by the Rule 90.3 formula) is a deduction when calculating W's support, but not N's support. This is accomplished by calculating N's support by itself (20% of adjusted income with no prior child deduction), then calculating what D's support would be if Mr. G were paying support for him with N as a prior child by another relationship, and then using the hypothetical support figure for D as a deduction when calculating the income available to support W.<sup>9</sup> As the second child on the support order, W carries an incremental child support obligation of 7% of Mr. G's adjusted income after this deduction.<sup>10</sup> The total support obligation is the support figure calculated for N plus 7% of the lower income figure calculated for W.<sup>11</sup>

The base income figures used in the calculation are as follows:

Wages (see Part II)	\$11,710.48
Unemployment (see Part II)	\$2834.00
Projected Permanent Fund Dividend	\$878.00
Total projected income	\$15,422.48

The calculation of presumptive child support under Rule 90.3(a) is as follows:

Gross Income used for N calculation	\$15,422.48/year
Deductions for N calculation	\$126.48/month
Adjusted income for N calculation	\$13,904.72/year
Times .20, divided by 12 = support for N	\$232.00/month <sup>12</sup>

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<sup>9</sup> See Civil Rule 90.3 Commentary at III-D.

<sup>10</sup> See Civil Rule 90.3(a)(2).

<sup>11</sup> CSSD advocated and used this *methodology* in its post-hearing proposed calculations, but used different income figures than the ones that will be used in this order.

<sup>12</sup> Details of the calculation are on Attachment A to this order.

Gross Income used for D calculation	\$15,422.48/year
Deductions for D calculation	\$358.48/month
Adjusted income for D calculation	\$11,120.72/year
Times .20, divided by 12	
= hypothetical support for D	\$185.00/month <sup>13</sup>

Gross income used for W calculation	\$15,422.48/year
Deductions for W calculation	\$311.48/month
Adjusted income for W calculation	\$11,684.72/year
Times .07, divided by 12	
= support increment for W	\$68.16/month <sup>14</sup>

Support for N	\$232.00/month
Increment for W	\$68.00/month <sup>15</sup>
TOTAL FOR 2 CHILDREN	\$300.00/month

**V. Hardship**

*A. Facts*

The above calculation uses the standard formula in Alaska Civil Rule 90.3(a). The facts below, drawn largely from testimony, are those that relate to possible adjustment of that result on the basis of hardship.

Mr. G lives in a home with three adults and two of his children. The family receives about \$1500 per month in food stamps,<sup>16</sup> to which must be added his own intermittent income, noted above. No precise information was provided about income of the other adults in the household, but there was testimony indicating that one or both of the other adults is able to contribute to the joint housing cost,<sup>17</sup> and Mr. G's girlfriend (the mother of the children) has part-time employment as a substitute at the No Name Store.

Mr. G's total monthly expenses, excluding child support, are modest. He has to contribute \$100 per month toward housing cost. He is able to use his parents' snow machines

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<sup>13</sup> Details of the calculation are on Attachment B to this order.

<sup>14</sup> Details of the calculation are on Attachment C to this order.

<sup>15</sup> Rounded to whole dollars.

<sup>16</sup> G testimony.

<sup>17</sup> Mr. G testified that housing cost is \$230 per month, of which he contributes \$100.

and ATVs, although he does have to supply gas. Heating fuel is expensive for the household in the winter, but there is no indication that Mr. G has to bear all of this cost, and there was testimony that the household receives Energy Assistance.

By comparison, Ms. B is not employed at all.<sup>18</sup> Mr. G attributes this to laziness, but he has provided no support for this view, and one must bear in mind that she is caring for two small children that he fathered.

### *B. Discussion*

A child support obligation may be varied from the standard calculation if unusual circumstances exist and those circumstances make application of the usual formula unjust.<sup>19</sup> The injustice, characterized as “manifest injustice” in the rule, must be demonstrated by clear and convincing evidence.<sup>20</sup> The tribunal must consider the circumstances of the custodial parent when making the evaluation of whether there would be manifest injustice in applying the usual formula.<sup>21</sup> The rule goes on to permit the tribunal to weigh the “amount of support which is just and proper for the parties to contribute toward the nurture and education of their children.”<sup>22</sup> This inquiry is not limited to the child subject to the order: the tribunal “should reduce child support if the failure to do so would cause substantial hardship to the ‘subsequent’ children” of the obligor.<sup>23</sup>

In this case, Mr. G has not shown that the children living with Ms. B are less in need of the support funds than the children living with him. The presumptive \$300 per month support obligation is attainable for Mr. G and is a minimal contribution to the raising of his two children living with Ms. B. There is no basis to adjust that figure.

## **VI. Conclusion**

Mr. G’s child support obligation for N and W should be modified to \$300 per month beginning in May, 2013. This child support amount was calculated under Civil Rule 90.3(a).

## **VII. Child Support Order**

1. E G is liable for child support in the amount of \$300 per month for two children

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<sup>18</sup> Ex. 6, p. 1.

<sup>19</sup> Civil Rule 90.3 Commentary, Part VI-B.

<sup>20</sup> Alaska R. Civ. P. 90.3(c)(1).

<sup>21</sup> Civil Rule 90.3 Commentary, Part VI-B.

<sup>22</sup> Alaska R. Civ. P. 90.3(c)(1).

<sup>23</sup> Civil Rule 90.3 Commentary, Part VI-B-2.

effective May 1, 2013 and ongoing.

2. All other terms of the Modified Administrative Child Support and Medical Support Order dated April 30, 2013 remain in full force and effect.

DATED this 30<sup>th</sup> day of July, 2013.

By: Signed \_\_\_\_\_  
Christopher Kennedy  
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 within 30 days after the date of this decision.

DATED this 16<sup>th</sup> day of August, 2013.

By: Signed \_\_\_\_\_  
Signature  
Christopher Kennedy \_\_\_\_\_  
Name  
Administrative Law Judge \_\_\_\_\_  
Title

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