

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

IN THE MATTER OF	)	
L L. N	)	OAH No. 13-1107-CSS
	)	
_____	)	CSSD No. 001182943

**DECISION AND ORDER**

**I. Introduction**

This case is L L. N’s appeal of an order issued by the Alaska Child Support Services Division (Division). That order established his child support obligation for his child, K. On September 4, 2013, a formal hearing was held on Mr. N’s appeal.<sup>1</sup> D Z, the custodial parent, participated in the hearing. Mr. N also participated. Erinn Brian, Child Support Specialist, represented the Division. The hearing was audio-recorded. The record closed on September 30, 2013.

Having reviewed the record in this case and after due deliberation, the Administrative Law concludes that the Division’s Amended Administrative Child and Medical Support Order should be affirmed. The calculations and income used to set monthly arrears and ongoing child support amounts in that order are not in dispute, but there is clear and convincing evidence that it would work an injustice for child support to be set in those amounts.

Although Mr. N’s has enough income to pay child support in these monthly amounts set in the Division’s order without causing a hardship to his younger children who are currently living in his household that would in itself work an injustice, there are unusual circumstances in this case, which would make it unjust to give K the priority over his younger siblings that would normally be given to an older child of another relationship. A noncustodial parent’s decision to take on the financial burden of subsequent children generally does not decrease his pre-existing duty to support an older child of a different relationship. The circumstances of this case did not make it just to give his support priority over Mr. N’s duty to support K’s siblings.

These circumstances require that Mr. N’s younger children be given the older child priority over K in order to avoid an injustice. This will work out more favorably for K than giving him a quarter of the portion of N’s income that is available for the support of his children,

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<sup>1</sup> The hearing was held under Alaska Statute 25.27.170.

using the under the third custody formula provided under Alaska law. That would divide equally a four child order between Mr. N's four children for the period covered by this order. The Third Party Custody calculation would only provide \$532 per month for K instead of \$793 per month he would receive if the children living in Mr. N's home are given the older-child priority.

## **II. Facts**

The Division established a child support order for Mr. N's child, K because Ms. Z filed an application for services on dated June 14, 2012.<sup>2</sup> Paternity is no longer in dispute. Mr. N was determined to be K's father in a paternity order after genetic testing.<sup>3</sup>

The Division issued an Administrative Child and Medical Support Order on March 8, 2013<sup>4</sup> Mr. N appealed his child support order.<sup>5</sup>

The Division issued an Amended Administrative Child and Medical Support Order on May 20, 2013.<sup>6</sup> The Division set Mr. N's monthly ongoing child support at \$1,212. The order also established arrears beginning in June of 2012.<sup>7</sup> Mr. N requested a formal hearing.<sup>8</sup>

Mr. N works at No Name. Mr. N earned over \$104,000 in 2012. He lives with his wife, who stays at home to care for their young three children. These children are all younger than K. K is 13 and the children living in Mr. N's household are 2 to 7 years old.<sup>9</sup>

In an affidavit filed with his request for a formal hearing, Mr. N explained that he was 14 or 15 years old and Ms. Z was 19 when K was conceived. At that time, Mr. N's parents were concerned about his relationship with Ms. Z and sent Mr. N away from No Name. Mr. N did not learn that Ms. Z had a child until K was two years old. At about that time, Mr. N contacted Ms. Z and was told by her that K's father was another man, and asked not to contact her again. Mr. N later married and had three children. His work requires him to be absent from his home for about 14.5 hours per day. His wife cares for their children and does not have regular work outside their home.<sup>10</sup>

Mr. N did not dispute the calculations that the Division used to set his child support for

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<sup>2</sup> Exhibit 1.

<sup>3</sup> Division's Pre-hearing Brief, page 1, Exhibits 2-5 & Recording of Hearing.

<sup>4</sup> Exhibit 6.

<sup>5</sup> Exhibit 7.

<sup>6</sup> Exhibit 10.

<sup>7</sup> Exhibit 10.

<sup>8</sup> Exhibit 12.

<sup>9</sup> Recording of Hearing & Exhibit 12.

<sup>10</sup> Exhibit 12.

K. Mr. N argued that setting child support in this monthly amount, \$1,212, would make it difficult to meet his current financial obligations, including the support of his three children in his home.<sup>11</sup>

Mr. N provided information about his household finances. Mr. N's household does not have significant debt. One of his younger children has special needs.<sup>12</sup>

Ms. Z also provided household financial information. Ms. Z is the mother of three children living in her home. Ms. Z works seasonally and lives with her partner, who has her own business and also helps raise and support the children in their household. Ms. Z's household also has enough income to support K as well as Ms. Z's other children that are living with her. Ms. Z and her partner do not earn as much as Mr. and Ms. N. Depending on the how much seasonal employment Ms. Z works they earn about \$55,000 per year, but there are no children in their home that are not at least of school age, and Ms. Z works out of their home. Both adults currently work, and Ms. Z could work year-round instead of just seasonally. This means that both households have adults that could earn more, but the families have chosen to have one adult work less in order to provide for other needs that the children in the household have.<sup>13</sup>

Based on the evidence in the record, it is more likely than not that the Division's calculations are correct and that the income amounts used in these calculations are the best estimates of Mr. N's 2012 income.<sup>14</sup> Mr. N did show by clear and convincing evidence that it would be manifestly unjust to set his arrears and ongoing child support at \$1,212 per month based on a calculation that gives his child support obligation for K priority over his obligation to provide for his other three children.<sup>15</sup>

### **III. Discussion**

Although Mr. N has raised the issue of his young age when K was conceived and being the victim of a crime, he did not seem to be arguing that he should not pay any support for his son. Mr. N is responsible for K's support even if he himself was the victim of a crime.

Alaska Statute 25.27.040(b)(1) provides:

- (b) The agency may not attempt to establish paternity in any case
- (1) involving incest or forcible rape, unless the mother of the child is legally competent and

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<sup>11</sup> Recording of Hearing & Exhibit 9.  
<sup>12</sup> Recording of Hearing & Exhibits 9 & 12.  
<sup>13</sup> Recording of Hearing & Exhibit 15.  
<sup>14</sup> Recording of Hearing.  
<sup>15</sup> Recording of Hearing & Exhibits 12 & 15.

requests the establishment of paternity; in this paragraph, "forcible rape" means sexual assault in the first degree under AS 11.41.410 or a conviction under a law or ordinance from another jurisdiction with similar elements; "forcible rape" includes adjudications of delinquency for acts with elements similar to AS 11.41.410.

The Division's authority to establish paternity and child support when the child is conceived as the result of certain sex crimes is limited. As can be seen from the language above, in certain types of cases the Division cannot establish paternity without a request of the mother.<sup>16</sup> This limitation of the Division's authority is itself limited to crimes of incest and forcible rape. In Alaska, the crime of forcible rape is Sexual Assault in the First Degree, AS 11.41.410. An element of AS 11.41.410 is that violence, or the threat of violence, was used to coerce the victim.<sup>17</sup>

The Division's authority to establish paternity is not limited in cases where the child is conceived as the result of the crime of sexual abuse of a minor, where the victim was below the age of consent, but was not coerced with threats.

Mr. N explained that the child in this case was conceived as the result of being a victim of what is commonly called statutory rape, a violation of AS 11.41.436(a)(1), Sexual Abuse of a Minor in the Second Degree. This crime is not listed in AS 25.27.040(b), the statute which limits the Division's authority to establish paternity in certain cases.

Furthermore, male statutory rape victims cannot use AS 25.27.040(b) as a shield to prevent the Division from establishing a paternity or child support for their biological children. The language of AS 25.27.040(b) gives only female victims of forcible rape or incest the right to prevent the Division from establishing that the perpetrator is the father of her child. Female victims can waive this right, but they cannot prevent the Division from establishing a child support order against them if their child is in the custody of the father or a third party. Mr. N being a victim is therefore only relevant to the extent that the circumstances surrounding K's conception are part of the unusual circumstance of this case.

Mr. N argued that his child support order should be lower than the amount set by the Division. In a child support hearing, the person who filed the appeal, in this case, Mr. N, has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.<sup>18</sup> Mr. N did not argue that the Division's calculations were incorrect; rather he argued that it was

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<sup>16</sup> AS 25.27.040(b).

<sup>17</sup> AS 11.41.470(a).

<sup>18</sup> Alaska Regulation 15 AAC 05.030(h).

not fair to his younger children to set his child support for K at that amount.

A parent may obtain a reduction in the amount calculated in a primary custody calculation only if he or she shows that “good cause” exists for the reduction. In order to establish good cause, the parent must prove by clear and convincing evidence that “manifest injustice would result if the support award were not varied.”<sup>19</sup> These are unusual circumstances in this case that require that child support for K be set below \$1,212 per month to avoid an injustice.

Good cause includes a finding of unusual circumstances. The circumstances in this case are unusual. Mr. N was a child himself when K was conceived. Mr. N did not know that he had fathered a child as a child until after he had established his family and had three other children. As a child, Mr. N could not be expected to go to the same lengths to establish whether he had fathered a child as a result of his relationship with Ms. Z, but still it appears that he did make reasonable efforts to determine whether he was the father once he learned that she had a child. These efforts were rebuffed and he was told that he was not the father. Mr. N had no reason to disbelieve Ms. Z when she told him this.

There was some dispute as to when Ms. Z first let Mr. N know that she believed that he was K’s biological father, but the circumstances did not make it unreasonable for Mr. N to assume that he did not have a duty to support another child until after he established his family.

Mr. N is the sole provider for his household. He works longer hours than a regular full-time worker so that his wife can stay at home with their young children. Mr. N’s household’s finances were established before he was aware that he had another child to support. This means that there may be a more of a negative impact on the household with his younger children than there would have been if he had known of this obligation earlier.

Mr. N and his wife are able to provide financial support for the children living in their home. The evidence in the record shows that Mr. N’s household has enough income to support these children without financial hardship and to pay his child support obligation to his older child. However, given the showing that it is unjust to give K the older-child priority over his younger siblings, it is more just to give the younger children the priority over K, than it is to treat this case as a third party custody case.

One reason that an older child of a prior relationship normally receives priority is that a

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<sup>19</sup> Alaska Civil Rule 90.3(c).

child should not have his support decreased by a parent's decision to assume the new obligation of starting another family. That consideration simply does not apply to the unusual circumstances of this case. If Mr. N did not have younger children, there would be no injustice in his having to pay the K monthly support calculated with no deduction for the support of his other siblings. Given the unusual circumstance of this case, it would unjust to those younger children to have their household finances reduced to that extent without any relief for the cost of their own support.

The Commentary to Civil Rule 90.3 points out the potential for an injustice in the unusual circumstance of having to establish a support order for an older child that the obligor parent did not know about before he had subsequent children. Civil Rule 90.3(a). Civil Rule 90.3, Commentary VI.E.1. provides:

**Retroactive Establishment of Child Support.**

It will sometimes be necessary for the court to establish support for a time when no complaint or petition for support had yet been served, and there was no other court or administrative order in effect. The court has determined that Civil Rule 90.3 applies to such calculations. *Vachon v. Pugliese*, 931 P.2d 371, 381-2 (Alaska 1996). However, in some circumstances unfairness may result from rigid application of the rule. The court should consider all relevant factors in such a situation, including whether the obligor was aware of the support obligation, especially if the obligor had children subsequent to that child. See also Commentary VI.B.2.

This portion of the commentary deals specifically with establishing significant pre-order arrears, which is happening only to a degree in this case, however, the end reference in this portion of the commentary refers back to the portion of the general commentary on subsequent children, which includes the caution that “the circumstances of a particular case involving subsequent children might constitute unusual circumstances justifying a variation of support.”

Although Mr. N provided clear and convincing evidence of unusual circumstances would make it unjust to give K the priority normally given an older child, to the detriment of his younger siblings, there is evidence that the circumstances of this case do justify treating the younger siblings as older children and giving them a priority over K, rather than treating this as one would a third-party custody situation and dividing the income available for child support evenly between his four children.

Ms. Z's household has the same number of children and adults, but has a much lower, if adequate annual income. In contrast to Mr. N's household, the main breadwinner does not have

a legal obligation to support any of the children in the household. There are other adults, living outside K's household, who have a financial obligation to support the children in Ms. Z's household. Mr. N is only one of these adults, but he is apparently the only one paying significant child support. K is at an age when his expenses are high relative to younger children. Furthermore, Mr. N's legal obligation to provide support for K will only last a few more years.

Civil Rule 90.3(i) sets out how child support should be calculated in third-party custody situations, which include situations where children are in state custody. This calculation divides the money that the parent earns that is available for child support equally between the parent's children. Using this approach is the best way to avoid an injustice in this case.

Since there are four children to whom Mr. N owes a duty of support, three who live with him and one who is in the custody of another parent, Mr. N's support obligation for K would be calculated by dividing Mr. N's support obligation for four children by four. In this case since Mr. N's order of using the Division's latest income estimate his support obligation for K would be only \$532 per month.

Given the disparity of income and earning capacity between the two households and K's needs as a teenager, who will be an adult and will no longer have a claim for ongoing support in a few years, it is more fair to simply give Mr. N the deduction for supporting his children, that he would get if they were older than K. This approach results in a child support amount of \$793 per month and is more consistent with the theory behind the civil rule, as his younger children are from the relationship that created the first legal duty to provide support for children that Mr. N was aware of, due to the unusual circumstance of this case.

#### **IV. Conclusion**

I conclude that the Division's order should be adjusted. Mr. N presented clear and convincing evidence showing that child support for K must be set below \$1,212 per month to avoid an injustice. Child support amount in the amount of \$1,212 per month is what was calculated using the primary custody formula in Civil Rule 90.3(a). Child support should be set at \$793 per month. The amount in this order, \$793 per month for all the months covered by the order, was set through a variance under Alaska Civil Rule 90.3(c).

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

The Division's Amended Administrative Child and Medical Support Order issued on May 20, 2013, is adjusted as follows. All other provisions remain in effect.

1. Mr. N's ongoing child support for K is at \$793 per month effective December 1, 2013.
2. Mr. N is liable for child support arrears for K in the monthly amount of \$793 for June 2012 through December of 2012 and January through November of 2013.
3. The Division should give the parties the appropriate debit or credit for their out-of-pocket expenses for providing health insurance coverage for K.

DATED this 2<sup>nd</sup> day of December, 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 17<sup>th</sup> day of December, 2013.

By: Signed  
Signature  
Angela M. Rodell  
Name  
Commissioner  
Title

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