

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

IN THE MATTER OF	)	OAH No. 13-1259-CSS
K D. N	)	CSSD No. 001135250
_____	)	

**DECISION AND ORDER**

**I. Introduction**

This case is K D. N’s appeal of an order modifying his child support obligation. The Child Support Services Division (Division) issued this order increasing Mr. N’s ongoing monthly obligation for the support of his child, U, from \$521 to \$899 for effective June 1, 2013.

On October 7, 2013, a formal hearing was held to consider Mr. N’s appeal.<sup>1</sup> Mr. N participated in the hearing. The custodial parent, J D, also participated. Erinn Brian, Child Support Services Specialist, represented the Division. The hearing was audio-recorded. The record closed at the end of the hearing.

Based on the evidence presented at the hearing, the administrative law judge concludes that Mr. N’s modified ongoing child support order should be affirmed. Modified ongoing child support should be set at \$899 per month effective June 1, 2013, based on the Division’s estimate of Mr. N’s current annual income, in accordance with the Division’s order. The evidence at the hearing showed that the annual income amount used in the calculation supporting the Division’s order increasing ongoing child support was correct. The fact that the child, U, was living with a third party when the modification was requested and processed is not good cause to move the effective date of the modification forward.

**II. Facts**

This case is an appeal of the Division’s order increasing Mr. N’s ongoing child support obligation through the modification process.<sup>2</sup> Mr. N’s child support for his child, U was set in 2007 at \$521 per month.<sup>3</sup>

---

<sup>1</sup> The hearing was held under Alaska Statute 25.27.190.  
<sup>2</sup> Alaska Civil Rule 90.3(h) governs child support modification actions.  
<sup>3</sup> Exhibit 1 & Recording of Hearing.

Ms. D filed a request for modification in May of 2013.<sup>4</sup> The Division issued notice of the petition for modification on May 17, 2013.<sup>5</sup>

The Division issued a Modified Administrative Child and Medical Support Order on August 2, 2013.<sup>6</sup> The Division set Mr. N's modified ongoing child support based on calculations using his annual income from reported earnings, which result in a monthly support amount of \$899 per month for one child.<sup>7</sup> This amount is more than a 15 percent increase from his current monthly amount of \$521.

Mr. N requested a formal hearing, explaining that U had not always been living with Ms. D and had not lived with her for several months before his appeal.<sup>8</sup> Mr. N was also concerned that the portion of his living allowance that is attributable to his marital status was used to calculate his modified child support.<sup>9</sup>

At the hearing, Mr. N was informed that the issue of whether U was living with a third party would not change his ongoing monthly child support obligation. Mr. N was already in the process of working with his Division caseworker in an attempt to change the adult who would receive child support for U for periods when she was not living with Ms. D.<sup>10</sup> Mr. N admitted in his request for a formal hearing that Ms. D had been awarded primary physical custody of U in an Alaska court order in case number 3XX-00-00000CI.<sup>11</sup> Mr. N has step-children in his household, but he has no other biological or adopted children.<sup>12</sup>

The Division's modification order was based on Mr. N's reported earnings, using his income as an E-6 on active duty.<sup>13</sup> Mr. N did not dispute that he earns an annual income at the amount the Division used to calculate his modified child support.<sup>14</sup> Based on the evidence in the record, I find that it is more likely than not the Division's calculation at Exhibit 4 and the income

---

<sup>4</sup> Exhibit 2.

<sup>5</sup> Exhibit 3.

<sup>6</sup> Exhibit 6.

<sup>7</sup> Exhibit 7.

<sup>8</sup> Mr. N's request for a formal hearing is found at Exhibit 5.

<sup>9</sup> Exhibit 8.

<sup>10</sup> Recording of Hearing – Testimony of Ms. Mr. N.

<sup>11</sup> Exhibit 5.

<sup>12</sup> Recording of Hearing – Testimony of Ms. Mr. N.

<sup>13</sup> Exhibit 5, page 8.

<sup>14</sup> Recording of Hearing & Exhibit 5, page 8 & Exhibit 8.

amounts used in this calculation are correct.<sup>15</sup>

### **III. Discussion**

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>16</sup> Mr. N did not meet his burden of proof to show that the ongoing monthly amount in the Division's order was incorrect. The Division calculated Mr. N's child support based on his reported earnings, including his income as an active duty member of the military that was not included in his taxable income such as his housing allowance. Mr. N agreed that the income used in the Division's modification calculation was correct, but argued that the portion of his housing allowance that was due to his being married should not have been included when calculating his modified child support.

Ongoing child support should be calculated based using the best estimate of Mr. N's income unless there is a showing by clear and convincing evidence that a variance of the calculated amount based on the child support guidelines is needed to prevent an injustice. The new monthly amount calculated by the Division is correct. There is not clear and convincing evidence in the record showing that an injustice will occur if ongoing child support is set at this amount.<sup>17</sup>

In addition to his basic pay, Mr. N receives additional pay for housing and food, which do not show up on his W-2 as income. If Mr. N was not employed by the military, he would not receive the housing and food benefits and would be required to pay those living expenses out of his basic wage. That is why OHA, BAQ, BAS, VHA or COLA, which is received by a full-time active duty member, are included as income for child support purposes.

The Alaska Civil Rule Commentary explains that the first step in determination of child support is calculating a "parent's total income from all sources." This phrase is interpreted broadly. The income used to calculate child support includes Armed Service Members' base pay

---

<sup>15</sup> Recording of Hearing & Exhibit 5.

<sup>16</sup> Alaska Regulation 15 AAC 05.030(h).

<sup>17</sup> See Alaska Civil Rule 90.3(c) for the standards to establish good cause to vary the presumptive child support amount.

plus allowances for quarters, rations, COLA and specialty pay.<sup>18</sup> Mr. N marital status increases his allowances, but all of these allowances are included as income for the purpose of calculating his ongoing child support obligation for U.

Most of Mr. N request for a formal hearing detailed the amount of time that the child spent living with third parties. Mr. N did not exercise visitation and he has already started working with his Division caseworker do address the issue of who should receive the child support he pays for U. There is apparently a child custody order in this case.<sup>19</sup> Mr. N would be eligible for a visitation credit only if the custody order or an agreement with Ms. D provided at least 27 consecutive days of visitation with the child.<sup>20</sup> Mr. N would also actually have to exercise visitation in order to qualify for this credit.<sup>21</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>22</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>23</sup> The evidence in the record shows that a material change of circumstances has occurred since Mr. N’s ongoing child support was set at \$521 per month. The modified ongoing amount calculated at \$899 per month for one child is more than a 15 percent change from the outstanding order of \$521 per month. A material change of circumstances justifying an upward modification of ongoing child support has occurred.

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 should be effective June 1, 2013, because the petition was issued in May of 2013.

The effective date of a modification cannot predate the service of the petition for

---

<sup>18</sup> See Alaska Civil Rule 90.3 Commentary III.A.28 *Defining Income*.

<sup>19</sup> Recording of Hearing.

<sup>20</sup> See *Turinsky v. Long*, 910 P2d 590, (Alaska 1996), which states: “Child support awards should be based on a custody and visitation order.”

<sup>21</sup> This requirement is found in Alaska Civil Rule 90.3(a)(3) and discussed in Alaska Civil Rule 90.3 Commentary IV.B.

<sup>22</sup> Alaska Civil Rule 90.3(h)(1).

<sup>23</sup> Alaska Civil Rule 90.3, Commentary X.

modification even when it would clearly prevent an injustice.<sup>24</sup> The effective date of a modification can, however, be moved forward upon a mere showing that there is good cause to do so.<sup>25</sup> Moving the effective date of a modification forward from the first of the month following the service of the petition for modification is not a variance of the child support guidelines, requiring clear and convincing evidence that moving the date forward is needed to prevent an injustice under Civil Rule 90.3(c).

There is not good cause to move the effective date forward to the month U returned to her mother's home as requested by Mr. N. As noted above, there is a court custody order in effect granting primary physical custody to Ms. D. Child support generally follows the custody order even when actual custody is not exercised consistently with that order.<sup>26</sup> Mr. N is currently working with his Division caseworker to ensure that his payments are directed to the proper party. Whether that party is the child's mother or a third party does not change the amount of monthly child support that Mr. N is obligated to pay, because he does not have any other biological children.<sup>27</sup>

#### **IV. Conclusion**

Mr. N's ongoing child support should be modified based on the Division's calculations. Modified ongoing child support should be set at \$899 per month for one child effective June 1, 2013, based on the Division's estimate of Mr. N's current income in accordance with the Division's order. The child support amount in this order was calculated using the primary custody formula in Civil Rule 90.3(a).

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

The Division's Modified Administrative Child and Medical Support Order issued August 2, 2013 is affirmed.

DATED this 9th day of October 2013.

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

---

<sup>24</sup> See *State, Dept. of Revenue, Child Support Enforcement Div. v. Schofield*, 993 P2d 405, (Alaska 1999).

<sup>25</sup> *Alaska Dept. of Revenue, CSED v. Kevin Lyn Dillon* 977 P 2d 118, (Alaska 1999).

<sup>26</sup> See *Turinsky v. Long*, 910 P2d 590, (Alaska 1996), which states: "Child support awards should be based on a custody and visitation order."

<sup>27</sup> Alaska Civil Rule 90.3(i).

**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 28<sup>th</sup> day of October, 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.]