

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

In the Matter of: )  
 )  
 T B H ) OAH No. 14-1477-CSS  
 ) CSSD No. 001194838  
\_\_\_\_\_ )

**DECISION AND ORDER**

**I. Introduction**

T B H appeals an Amended Administrative Review Decision that the Child Support Services Division (CSSD) issued in his case on July 16, 2014. The obligee child is D, age six years. The custodial parent is B C.

A formal evidentiary hearing was held on September 6, 2014. Andrew Rawls, Child Support Specialist, represented CSSD. Mr. H participated in person and Ms. C participated by telephone. The record remained open for CSSD to provide child support calculations incorporating the evidence received through the administrative review process. Mr. H and Ms. C were provided an opportunity to comment on the revised calculations. The record closed without further participation by either parent.

Mr. H established by a preponderance of the evidence that CSSD's Administrative Review Decision dated July 16, 2014 should be modified. However, he failed to establish that his income should be averaged or that his child support obligation should be varied. Based on the record and after careful consideration, Mr. H owes support for D effective October 2013 in the amount of \$773 per month, and effective July 2014 and ongoing in the amount of \$459 per month. All other provisions of the Amended Administrative Child Support and Medical Support Order dated July 16, 2014 remain in full force and effect.

**II. Facts<sup>1</sup>**

**A. Relevant Procedural History**

Ms. C applied for child support services for D on October 3, 2013. Mr. H's paternity was established by genetic testing. CSSD issued an Order Establishing Paternity on March 28, 2014. On May 8, 2014 Mr. H's child support obligation for D was set at \$773 per month effective October 2013 and ongoing.<sup>2</sup> On May 22, 2014 Mr. H timely requested an Administrative Review.<sup>3</sup>

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<sup>1</sup> The facts stated herein are drawn from the testimony received at the hearing, and the exhibits admitted into evidence, unless another source is cited.

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

On July 16, 2014, CSSD issued its Administrative Review Decision and Amended Administrative Child Support and Medical Support Order. CSSD, using Mr. H's actual 2013 reported earnings, left Mr. H's monthly child support at \$773 per month from October 2013 through December 2013.<sup>4</sup> For January 2014 and ongoing, CSSD based its calculation on a combination of actual reported earnings for the first quarter of 2014, unemployment benefits, the permanent fund dividend, and anticipated future earnings of \$15.01 per hour for the remaining three quarters of 2014.<sup>5</sup> Based on those figures, CSSD determined Mr. H's child support obligation to be \$603 per month effective January 2014. Mr. H appealed, arguing that his monthly expenses are such that it would be manifestly unjust if his child support remained at \$603 per month. In the alternative, he asks that his income be averaged.

CSSD submitted a post hearing calculation. CSSD based its calculation on Mr. H's actual income, plus an estimate of the income Mr. H is expected to earn in the future. This resulted in CSSD revising its calculation upward to \$827 per month effective January 2014.<sup>6</sup>

***B. Material Facts***

Mr. H was employed by No Name Corporation at No Name until January 2014. He did not immediately return to work, opting instead to stay home and care for his young twins. Mr. H's reported earnings and unemployment benefits received in the first half of 2014 total \$54,806.22. Included in this amount is an unexplained second quarter payment from No Name in the amount of \$33,989.80. He returned to work in June 2014 earning \$15.01 per hour. His wife earns \$7.70 per hour and works 20 hours per week.

The Hs are purchasing a condominium. The mortgage, including association dues, is \$1,257 per month. Mr. H estimates his monthly utilities total \$445.37 (gas \$78.40, electric \$76.97, telephone \$150, internet and cable \$140); his monthly automobile expenses total \$642 (payment \$330, insurance \$150, gas \$150, maintenance \$12); monthly food and entertainment total \$315 per month; personal items (including diapers) total \$140 per month; and child care averages \$600 per month. He also paid some outstanding child support arrears using his credit card; he is currently paying \$50 per month on that credit card balance. Finally, Mr. H has \$60,000 in student loans that will soon be coming due.

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<sup>3</sup> Ex. 8.

<sup>4</sup> Ex. 10.

<sup>5</sup> Ex. 10.

<sup>6</sup> September 17, 2014 Submission to Record.

Ms. C works full-time in retail earning \$7.50 per hour. She lives with her boyfriend. He earns \$16 per hour. Their rent is \$1,150 per month including utilities. Ms. C estimates that her monthly food and entertainment expenses average \$650 – \$750 per month, and that her monthly telephone expense is \$200 per month. Her gas and other automobile-related expenses average close to \$300 per month.

### III. Discussion

#### A. *Applicable Legal Principles*

A parent is obligated both by statute and at common law to support his or her children.<sup>7</sup> A parent's duty of support begins on the child's date of birth.<sup>8</sup> In cases where child support is determined by CSSD, the agency collects support from the date a parent requests child support services, or the date public assistance or Medicaid benefits are initiated on behalf of the child.<sup>9</sup>

In Alaska, the rules for calculating child support are contained primarily in Rule 90.3 of the Alaska Rules of Civil Procedure (Civil Rules). How support is calculated depends on the type of custody exercised by the parents of the children.<sup>10</sup> Under Civil Rule 90.3(a)(1), where (as here) the custodial parent has primary physical custody of the child, the first step in calculating child support is to determine the non-custodial parent's total income from all sources. The second step is to subtract any applicable deductions from the non-custodial parent's gross income; the resulting number is referred to as adjusted income. The third step is to multiply the non-custodial parent's adjusted income by the percentage specified in Civil Rule 90.3 applicable to the number of children for whom support must be paid.<sup>11</sup> In this case there is one child for whom support must be paid. In order to calculate a child support award for one child, the non-custodial parent's adjusted annual income is multiplied by 20%.<sup>12</sup> The annual child support obligation is then divided by twelve to obtain the monthly child support payment.

Under Civil Rule 90.3, a parent's current / ongoing child support obligation should be based on the amount the parent can be expected to earn during the period the support is being paid.<sup>13</sup> This determination is necessarily somewhat speculative because the relevant income figure is expected

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<sup>7</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); A.S. 25.20.030.

<sup>8</sup> *State of Alaska, Department of Revenue, Child Support Enforcement Division ex rel. Hawthorne v. Rios*, 938 P.2d 1013, 1015 (Alaska 1997).

<sup>9</sup> 15 AAC 125.105(a)(1)-(2).

<sup>10</sup> Civil Rule 90.3(a), (b) (recognizing four types of custody [primary, shared, divided, and hybrid] and identifying a calculation for each type). *See also* Civil Rule 90.3(f) (defining types of custody).

<sup>11</sup> Civil Rule 90.3(a)(2).

<sup>12</sup> Civil Rule 90.3(a)(2)(A).

<sup>13</sup> Civil Rule 90.3, Commentary, Section III(E).

future income.<sup>14</sup> In cases where the obligor parent's income is relatively steady, this calculation can be based on the obligor's parent's income from the previous year. If a person has erratic income from year to year, Civil Rule 90.3 allows child support to be based on an average of several years' income.<sup>15</sup> The facts of the particular case generally determine the approach to be used.<sup>16</sup>

When a child support order is established, the division first determines the amount of pre-order arrears, that is, the amount owed from the date the proceeding was initiated until a final administrative order is issued. Because arrears are calculated with the benefit of hindsight, the regulations provide that “total income from all sources is the *actual annual income* that the parent earned or received each calendar year for which arrears are sought to be established . . .”<sup>17</sup>

Once the initial period of support has been calculated, CSSD determines the amount of ongoing support, that is, the amount owed each month after a final administrative order is issued. It must be determined whether a material change in circumstances occurred, justifying a modification of support for each subsequent year.<sup>18</sup> A material change in circumstances is presumed if there is a 15% or more increase or decrease in the amount of support owing. If there is a material change, then the monthly support amount will be modified (increased or decreased) as appropriate.<sup>19</sup>

### ***B. Income Averaging***

As noted above, if a person has erratic income from year to year, Civil Rule 90.3 allows child support to be based on an average of several years' income.<sup>20</sup> In this case, Mr. H's income has not truly been erratic; rather, Mr. H encountered a short period of unemployment, and then became re-employed at a lower rate than before. The Alaska Supreme Court has held that parents going through *temporary* periods of unemployment can be expected to maintain their support obligations.<sup>21</sup> Accordingly, Mr. H's request to employ income averaging in this case is denied.<sup>22</sup>

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<sup>14</sup> Civil Rule 90.3, Commentary, Section III(E).

<sup>15</sup> Civil Rule 90.3, Commentary, Section III(E); *see also Pugil v. Cogar*, 811 P.2d 1062 (Alaska 1991); *Zimin v. Zimin*, 837 P.2d 118 (Alaska 1992); *Hill v. Bloom*, 235 P.3d 215 (Alaska 2010).

<sup>16</sup> *See Byers v. Ovitt*, 133 P.3d 676, 683 (Alaska 2006) (noting that a court may determine a party's income by various means).

<sup>17</sup> 15 AAC 125.030(e) (emphasis added).

<sup>18</sup> 15 AAC 125.105(e).

<sup>19</sup> 15 AAC 125.105(e); 15 AAC 125.321.

<sup>20</sup> Civil Rule 90.3, Commentary, Section III(E); *see also Pugil v. Cogar*, 811 P.2d 1062 (Alaska 1991); *Zimin v. Zimin*, 837 P.2d 118 (Alaska 1992); *Hill v. Bloom*, 235 P.3d 215 (Alaska 2010).

<sup>21</sup> *Patch v. Patch*, 760 P.2d 526, 529–30 (Alaska 1988).

<sup>22</sup> As the person who filed the administrative appeal, Mr. H has the burden of proving that the order CSSD issued is incorrect.

**C. Child Support Calculated Pursuant to Civil Rule 90.3(a)**

Civil Rule 90.3(a)(1) provides that an obligor's child support amount is to be calculated based on his or her "total income from all sources," minus mandatory deductions such as taxes and Social Security. Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct.

Mr. H has not challenged the amount of income attributed to him for the periods covered by the Amended Administrative Child Support and Medical Support Order. Rather, he contends that the amount of support ordered is manifestly unjust and therefore must be varied. Manifest justice will be found if a reasonable person would be convinced that the award is either unjustly large or unjustly small after careful evaluation.<sup>23</sup> However, before the issue of a reduction based on manifest injustice can be addressed, the amount of unvaried support must be determined.

It is undisputed that CSSD based its 2013 support calculation on Mr. H's actual income reported on his W-2 form. The amount of support ordered for the period from October 2013 through December 2013, \$773, is presumed to be correct.<sup>24</sup>

In the first half of 2014 Mr. H has reported earnings (including unemployment insurance and the permanent fund dividend) in the amount of \$56,690.22. Using this income, less allowable deductions, Mr. H's monthly support obligation for D should be \$749 per month.<sup>25</sup> Because this amount is based on Mr. H's actual income for this six-month period, it is presumed to be correct. Further, since the percentage difference between \$773 per month and \$749 per month is less than 15%, the "material change" requirement, necessary for modification, is not satisfied.<sup>26</sup> Accordingly, Mr. H's support obligation for the first half of 2014 should remain at \$773 per month. However, effective July 1, 2014, Mr. H began earning \$15.01 per hour. Working full time, Mr. H should earn \$31,220 in one year.<sup>27</sup> Based on this amount, Mr. H's monthly child support obligation for D is \$459 per month.<sup>28</sup> Because the percentage difference between \$773 per month and \$459 per month is greater than 15%, it is appropriate to modify Mr. H's support obligation to \$459 per month effective July 1, 2014 and ongoing.

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<sup>23</sup> 15 AAC 125.080.

<sup>24</sup> See CSSD's Post Hearing Submission to the Record; Ex. 17.

<sup>25</sup> Attachment A.

<sup>26</sup> AAC 125.105(e); 15 AAC 125.321.  $\$773 \times 15\% = \$115.95$ .

<sup>27</sup>  $\$15.01 \times 2080 \text{ hours} = \$31,220$ .

<sup>28</sup> Attachment B.

***D. Should the Support Obligation be Reduced due to Financial Hardship?***

CSSD initially calculated Mr. H's child support, both arrears and ongoing, at \$773 per month, based on his actual and anticipated earnings.<sup>29</sup> Mr. H asserts, however, that CSSD's order is incorrect, both because his income should have been averaged (discussed above), and because the amount of support ordered will cause financial hardship to Mr. H's current family.

A parent may obtain a reduction in the amount calculated based on financial hardship, but 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>30</sup>

Mr. H's monthly expenses total \$3,399.37, not including child support. Once child support is included, his monthly expenses total \$4,172.37.

In 2013 Mr. H's monthly adjusted income was \$3,864.83. For the first six months of 2014 Mr. H's adjusted monthly income was \$3,747. In both instances, once child support is added, Mr. H's monthly expenses exceed his monthly income by several hundred dollars. In both instances, Ms. H's income is not considered. Once it is included, a reasonable person would not find the amount of support ordered during this period to be manifestly unjust.

The difference between income and expenses becomes much greater, however, when Mr. H's current circumstances are considered. Since July 1, 2014, Mr. H now earns just over one-half of what he earned before, yet his expenses have not changed. His monthly adjusted gross income is now \$2,294 per month. His monthly expenses now exceed his monthly income by \$1,564. His wife's part-time income is not likely to make up the difference.

Mr. H's expenses are not excessive. However, Mr. H has other options available to provide for D as well as his current family. Mr. H could make up the difference by his wife working more hours. Or, Mr. H could get a second, part-time job. When an obligor obtains a second job for purposes of supporting his subsequent family, the income of the second job is not included for purposes of child support calculations.<sup>31</sup>

Ms. C works full time, earning about half as much as Mr. H. Her adjusted monthly gross income is \$1,268 per month. Her monthly expenses are \$2000 per month. It is recognized that Ms.

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<sup>29</sup> Ex. 7.

<sup>30</sup> Civil Rule 90.3(c).

<sup>31</sup> Income from a second job, if it is specifically to care for a subsequent family, may be a defense to an upward modification. Civil Rule 90.3, Commentary VI.B.2.

C shares her home with someone whose earnings are similar to those of Mr. H. However, that individual does not have a legal obligation to support D.

In summary, adding a monthly child support obligation to Mr. H's other monthly expenses will clearly strain his budget, and he and/or his wife may need to work longer hours. However, based on the evidence in its entirety, Mr. H did not prove by clear and convincing evidence that manifest injustice will result if his child support obligation, as calculated under Civil Rule 90.3, is not reduced. Accordingly, Mr. H's request for a variance under Civil Rule 90.3(c), based on financial hardship, is denied.

#### **IV. Conclusion**

Mr. H failed to prove that his income over the period in question should be averaged, or that his case presents unusual circumstances such that manifest injustice would result if his monthly child support obligation is not reduced pursuant to Civil Rule 90.3(c). Likewise, Mr. H failed to prove that CSSD's calculation of his monthly child support obligation for the period from October 2013 through June 2014 was incorrect. However, Mr. H did establish, by a preponderance of the evidence, that CSSD's calculation of child support, beginning in July 2014 and ongoing, was incorrect. Accordingly, CSSD's calculation establishing support for D in the amount of \$773 per month, effective October 2013, is affirmed. However, Mr. H's child support obligation, effective July 2014 and ongoing, is reduced to \$459 per month.

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

1. Mr. H is liable for support for D in the amount of \$773 per month effective October 2013.
2. Mr. H is liable for support for D in the amount of \$459 per month effective July 2014 and ongoing.
3. All other provisions of the Amended Administrative Child Support and Medical Support Order dated July 16, 2014 remain in full force and effect.

DATED this 31st day of March, 2015.

*Signed* \_\_\_\_\_  
Jay Durych  
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 17th day of April, 2015.

By: Signed\_\_\_\_\_

Name: Jay D. Durych

Title: Administrative Law Judge, DOA/OAH

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