

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

IN THE MATTER OF:)

S D. T)

) OAH No. 14-1611-CSS
) CSSD No. 001064581

DECISION AND ORDER

I. Introduction

The obligor, S D. T, questions why his child support doubled in five months from \$450 for two children (E and N) to \$992 per month for three children (E, N and L).

On August 6, 2014, the Child Support Services Division (CSSD) issued a Modified Administrative Child Support and Medical Support Order that added a child, L, to the existing \$450 consent order, and calculated the amount of ongoing support to be \$992 per month for three children. The ongoing support was calculated under Alaska Rule Civil Procedure 90.3(a). Mr. T believes this is incorrect because other than adding L, his financial situation has not changed since the March 2014 Consent Order.

Two hearings were held, on October 7, 2014 and November 19, 2014. Mr. T participated in the October hearing by telephone. He did not appear or otherwise participate in the November hearing. The custodian, Ms. R, did not participate in either hearing. The record closed on November 29, 2014 without further input from Ms. R or Mr. T.

Mr. T established by a preponderance of the evidence that CSSD's August 25, 2014 order was incorrect. This order purported to add N, not L, to the existing order for N and E. This is a clerical error that should be corrected.

Mr. T established by a preponderance of the evidence that his actual income is slightly different than that used by CSSD, resulting in a slightly lower monthly child support obligation for three children, \$978.

Finally, Mr. T failed to establish by clear and convincing evidence that unless varied, the child support amount would be manifestly unjust.

Using actual income and Alaska Rule Civil Procedure 90.3(a) Mr. T is liable for arrears for L from November 2013 through December 2013 in the amount of \$194 per month, and from January 2014 through July 2014 in the amount of \$177 per month. Mr. T's monthly child support obligation for E, N, and L is \$978 per month, effective August 2014 and ongoing.

II. Facts

In March 2014, a \$450 support order was entered by consent of the parties.¹ This order set ongoing monthly child support for E and N. The \$450 consent order was adopted after Mr. T established the existence of unusual circumstances supporting a variance from the \$1,206 per month for two children ordered in December 2013.²

On July 3, 2014, CSSD issued an order establishing Mr. T's paternity of a third child with Ms. R, L, and support proceedings ensued.³ When an additional child is added to an existing support order, the proceedings are referred to as "add-a-kid." An add-a-kid proceeding combines an establishment proceeding with a modification proceeding.

CSSD received information from Mr. T's employer that he earns \$22 per hour and works 40 hours per week.⁴ Using this information, on August 6, 2014, CSSD issued its Modified Administrative Child Support and Medical Support Order, adding L to the existing support order and ordering ongoing support in the amount of \$992 per month, effective August 1, 2014.⁵ Ms. R then withdrew from CSSD's services effective August 13, 2014.⁶

While CSSD does not collect support at this time, if it were to start, then the amount of support ordered in the August 6, 2014 order would be the amount of support owed for three children.

When he received the \$992 per month order, Mr. T appealed, arguing that he is a flat-rate employee paid per job, not hourly.⁷ This is the same argument he raised in March 2014. At the time of the March 2014 consent order, Mr. T had started a new job and his annual earning capacity had changed. Using the best available information at the time, the parties agreed that \$450 was an appropriate amount at the time.

At the first hearing in October, Mr. T provided current information regarding his income and expenses. He provided wage information from January 1, 2014 through October 1, 2014. During this period he earned \$32,991.20 and was paid twice a month. His individual pay checks

¹ *In re S T*, OAH No. 14-0167-CSS (March 10, 2014).

² Exh. 2.

³ Exh. 4; Exh. 6.

⁴ Exh. 5.

⁵ Exh. 9. The August 6, 2014 order states that added child is N. This is incorrect. L is the added child.

⁶ Exh. 8.

⁷ Exh. 10.

ranged from a high of \$2,734.60 to a low of \$462.⁸ He earned an average of \$3,472 per month or \$41,671.81 per year.⁹ When the PFD is included, Mr. T's 2014 annual gross income is expected to be \$43,556. Using CSSD's online calculator reveals that his expected monthly adjusted gross income is \$2,964.98.¹⁰ Mr. T's monthly expenses average \$1,870.¹¹ Therefore, Mr. T's monthly adjusted income exceeds his monthly expenses (exclusive of child support) by \$1,094.

III. Discussion

Child support orders may be modified upon a showing of "good cause and material change in circumstances."¹² Adding other children to a child support order is a material change in circumstance.¹³ In this case, CSSD has modified Mr. T's child support for the purpose of adding L to the previous order for E and N. The modification ordered monthly support for three children effective August 2014 in the amount of \$992. At the same time, CSSD established support for L from November 2013. The establishment action resulted in arrears in the amount of \$254 per month from November 2013 through December 2013, and \$180 per month from January 2014 through July 2014.

Mr. T's argument is appealing. How can CSSD issue an order doubling his child support payment when he has had no change in his financial situation? Mr. T's support for two children was set at \$450 per month effective December 1, 2013. CSSD based its calculation of \$1,206 monthly child support for two children on gross income for 2013 totaling \$70,093.08. This was an overstatement of income to be earned when support was to be paid. Mr. T's work situation had recently changed and he was no longer earning income at his prior level.¹⁴ With his new earnings and expenses, the parties agreed that \$450 per month would be an appropriate amount of child support, based on Mr. T's ability to pay. Actual income information is now available and should be used. When actual income is used to calculate child support, Mr. T has not established by clear and convincing evidence that it would be manifestly unjust if the amount of

⁸ Exh. 13.

⁹ $(\$32,991.20/19) \times 2 = \$3,472$ per month.

¹⁰ Attachment A.

¹¹ Mr. T testified that he has the following monthly expenses: \$1,000 (rent, cell phone, and cable) + \$500 (food) + \$50 (utilities) + \$240 (gas) + \$80 (laundry) = \$1,870 per month

¹² AS 25.27.190(e).

¹³ See 15 AAC 125.321(b)(2)(B).

¹⁴ Whether Mr. T was voluntarily or unreasonably under employed was not an issue.

support ordered in August 2014 was not varied.¹⁵ However, before the request for variance can be discussed, Mr. T's unvaried child support must be calculated.

A. *Income*

The amount of child support received by a child is based on the parent's ability to pay.¹⁶ Mr. T has the burden of proving his earning capacity.¹⁷ Child support determinations calculated under Civil Rule 90.3(a) from a parent's actual income are presumed to be correct. "Child support is calculated as a certain percentage of the income which will be earned when the support is to be paid. This determination will necessarily be somewhat speculative because the relevant income figure is expected future income."¹⁸

Mr. T's most current income information reveals that he is expected to earn \$41,672.81 in 2014.¹⁹ This amount, plus the PFD less allowable deductions, results in a monthly child support obligation for three children in the amount of \$978.00, effective August 1, 2014.²⁰ It is from this amount that Mr. T's request for a variance will be considered.

B. *Hardship Variance*

An obligor may obtain a reduction in the amount, 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."²¹ The existence of "unusual circumstances" may also provide a sufficient basis for a finding of good cause to vary the calculated child support amount.²² It is appropriate to consider all relevant evidence to determine if the support amount should be set at a different level than provided for under the schedule in Civil Rule 90.3(a).²³

Mr. T's monthly adjusted gross income is \$2,964.98.²⁴ He testified that his monthly expenses average \$1,870.²⁵ Therefore, Mr. T's monthly adjusted income exceeds his monthly

15 15 AAC 05.030(h).

16 Commentary Civil Rule 90.3 I B.

17 *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

18 Commentary Civil Rule 90.3 III E.

19 Exh. 13.

20 Attachment A.

21 Civil Rule 90.3(c).

22 Civil Rule 90.3(c)(1).

23 See Civil Rule 90.3, Commentary VI.E.1.

24 Attachment A.

expenses by \$1,094. Unless varied, after subtracting the \$978 for child support from his net income, Mr. T will have net income in the amount of \$116. Because his income exceeds his expenses inclusive of child support, Mr. T has *not* established by clear and convincing evidence that manifest injustice would result if the support award were not varied.

C. *Arrears*

Addressing the arrears for L from November 2013 through July 2014, CSSD identified two periods of arrears: November 2013 through December 2013 and January 2014 through August 2014. Because we know the exact amount of income earned when the support is owed, that is the amount of income used to calculate child support.

First, his income must be annualized for purposes of child support. In the fourth quarter of 2013 he earned \$11,866.36.²⁶ His 2013 annual income for purposes of child support was \$47,465.44. After allowable deductions, Mr. T's monthly child support for three children is \$1,071.²⁷ For the reasons set forth above, this amount is not manifestly unjust.

Arrears in an "add-a-kid" situation are calculated by taking the difference between support without the added child and the support owing with the added child. As calculated, Mr. T's unvaried child support obligation for two children would have been \$877 per month. The difference between this amount (\$877) and the child support obligation for three children per month (\$1,071), is the monthly arrears owing. Therefore, the amount of support owing for L from November 2013 through December 2013 is \$194 per month.

Using the same formula, Mr. T's arrears for L from January 2014 through July 2014 is \$177 per month.²⁸

IV. **Conclusion**

Mr. T established by a preponderance of the evidence that CSSD's August 25, 2014 order was incorrect. This order purported to add N, not L, to the existing order for N and E. This is a clerical error that should be corrected.

Mr. T established by a preponderance of the evidence that his actual income is slightly different than that used by CSSD resulting in a slightly lower child support obligation.

²⁵ \$1,000 (rent, cell phone, and cable) + \$500 (food) + \$50 (utilities) + \$240 (gas) + \$80 (laundry) = \$1,870 per month.

²⁶ Exh. 11.

²⁷ Attachment B. $\$1,071 - \$877 = \$194$.

²⁸ Attachment A. $\$978 - \$801 = \$177$.

Finally, Mr. T failed to establish by clear and convincing evidence that unless varied, the child support amount would be manifestly unjust. Using actual income and Alaska Rule Civil Procedure 90.3(a) Mr. T is liable for arrears for L from November 2013 through December 2013 in the amount of \$194 per month and from January 2014 through July 2014 in the amount of \$177 per month. Mr. T's monthly child support obligation for E, N, and L is \$978 per month, effective August 2014 and ongoing.

V. Child Support Order

- CSSD will takes steps to ensure the child added to the August 25, 2014 order is L, not N;
- Mr. T is liable for child support arrears for L in the amount of \$194 per month effective November 1, 2013 through December 31, 2013, and in the amount of \$177 per month effective January 1, 2014 through July 31, 2014;
- Mr. T's child support obligation for E, N, and L is set at \$978 per month effective August 2014 and ongoing;
- All other provisions of the Modified Administrative Child Support and Medical Support Order dated August 25, 2014 remain in full force and effect.

DATED this 8th day of January 2014.

By: Signed
Rebecca L. Pauli
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 26th day of January, 2015.

By: Signed
Signature
Rebecca L. Pauli
Name
Administrative Law Judge
Title

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