

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

In the Matter of:	)	
	)	OAH No. 15-1507-CSS
S C. T	)	CSSD No. 001207711
_____	)	

**DECISION AND ORDER**

**I. Introduction**

The Department of Revenue child support services division issued an order establishing a child support obligation for S T of \$736 a month. Mr. T appeals.

A formal hearing was held on December 22, 2015. Mr. T did not participate in the hearing. N T, the custodial parent, participated telephonically. Child Support Specialist Joseph West represented the division. The hearing was recorded. The record closed on January 4, 2016.

Based on the evidence in the record and testimony at the hearing, the division's order establishing Mr. T's child support obligation at \$736 a month, with arrears totaling \$3,680, is upheld.

**II. Facts**

The division issued an Administrative Child and Medical Support Order on July 24, 2015, setting Mr. T's support obligation at \$736 a month for one child.<sup>1</sup> It also established arrears of \$3,680 for the period March 1, 2015 through July 31, 2015.

Mr. T did not answer his telephone at the time set for the hearing. An attempt was made to leave a message after the tone, but a recording interrupted, stating that the voicemail "memory is full." On the second try, a mechanical voice announced that "no one is available to take your call." Under 15 AAC 05.030(j), if a person requests a hearing and fails to appear at the hearing, the hearing officer may issue a decision without taking evidence from the person, unless the person, within 10 days after the date of the hearing, shows reasonable cause for failure to appear. The record was held open for ten days to give Mr. T time to show cause and request to reschedule the hearing, but Mr. T did not show reasonable cause or request to reschedule.

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<sup>1</sup> Division Exhibit 4.

### III. Discussion

A parent is obligated both by statute and at common law to support the parent's children.<sup>2</sup> Civil Rule 90.3(a)(1) provides that an obligor's child support amount is to be calculated based on the obligor's "total income from all sources." The person who filed the appeal, in this case Mr. T, has the burden of proving by a preponderance of the evidence that the division's support order is incorrect.<sup>3</sup>

#### A. Overtime

In his request for hearing, Mr. T disputes the monthly amount at which his child support obligation was established. He argues that the overtime he received in 2014 should not have been considered in calculating his obligation, because he does not anticipate having the opportunity to work overtime in the future.<sup>4</sup> The commentary to Civil Rule 90.3 specifies that "total income from all sources" includes overtime.<sup>5</sup> The commentary also provides an exception that applies in unusual circumstances to this rule: "In most cases income from overtime or a second job will be counted as adjusted annual income under Rule 90.3(a). However, the court has discretion not to include this income when, for example, the extra work is undertaken to pay off back child support."<sup>6</sup> Mr. T has not shown circumstances justifying an exception in this case to the rule that overtime counts as income.

Mr. T's request for hearing also refers to COLA, or cost of living allowance. To the extent he is arguing that COLA he may receive should not be counted as income, the argument is unavailing, as the Alaska Supreme Court has already determined that COLA should be included in annual income figures.<sup>7</sup>

Where a parent has experienced a wide variation in income from year to year, the agency may average income over more than one year to determine the parent's expected annual income.<sup>8</sup> The division calculated Mr. T's ongoing obligation using an annual figure of \$60,020 for wages based on his 2014 W-2.<sup>9</sup> Mr. T's actual reported wages for the first through third quarters of

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

<sup>3</sup> 15 AAC 05.030(h).

<sup>4</sup> Division Exhibit 8 at 2 - 3.

<sup>5</sup> Civil Rule 90.3 Commentary III.A.1. See also 15 AAC 125.030(a)(1).

<sup>6</sup> Civil Rule 90.3 Commentary VI.B.9.

<sup>7</sup> *Berkbigler v. Berkbigler*, 921 P.2d 628, 631 (Alaska 1996).

<sup>8</sup> 15 AAC 125.030(d).

<sup>9</sup> Division Exhibit 4 at 5, 8.

2015 totaled \$59,846. Mr. T earned \$48,718 for the second through fourth quarters of 2014.<sup>10</sup> These figures include some overtime for the later part of 2014 and the early part of 2015.<sup>11</sup> Mr. T's total reported earnings for the second quarter of 2014 through the third quarter of 2015 were \$108,564, or an average of \$18,094 each quarter, which corresponds to an annualized average of \$72,376. This is considerably higher than the amount used in calculating Mr. T's ongoing support obligation. Mr. T has not shown that the figure for wages used to calculate his ongoing child support obligation was incorrect.

Finally, Mr. T argues that the division should have also taken his expenses into account, particularly the increase in rent for the government-owned house he is required to live in for his job and the high cost of traveling from his community of residence to obtain medical care. The division is required to calculate Mr. T's child support based on his income, not his expenses.<sup>12</sup> The division may, at the request of a parent, vary a child support award calculated under 15 AAC 125.070 if the parent provides clear and convincing evidence to the agency that manifest injustice will result unless the support award is varied due to unusual circumstances.<sup>13</sup> Unusual circumstances may include "health or other extraordinary expenses."<sup>14</sup> However, the expenses cited by Mr. T, including health care related travel, are far from unusual or extraordinary. High costs for rent in limited housing markets and high expenses related to travel for medical reasons are common concerns in rural Alaska. Mr. T does not have other children to support. Mr. T has not shown unusual circumstances, or demonstrated that manifest injustice will result from a support award calculated according to Civil Rule 90.3(a).

*B. Arrears*

Mr. T disputes the division's finding that he owes \$3,680 in past-due child support for the period March 1 through July 31, 2015. Mr. T states that he paid his ex-wife directly for this period, so there are no past due payments and no interest owed.<sup>15</sup>

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<sup>10</sup> Division Exhibit 9.

<sup>11</sup> Division Exhibit 8 at 2 - 3.

<sup>12</sup> The commentary to Civil Rule 90.3 explains that the rule employs a percentage of income approach, and that only a very limited number of expenses may be deducted from income, including taxes, mandatory union dues, mandatory retirement contributions, and child and spousal support paid in other cases. Commentary at II and III.D. See 15 AAC 125.030.

<sup>13</sup> Civil Rule 90.3(c). See also 15 AAC 125.075(a).

<sup>14</sup> Commentary to Civil Rule 90.3 at VI.B. See also 15 AAC 125.075(a)(2)(D).

<sup>15</sup> Division Exhibit 8 at 2.

Mr. T's monthly obligation was not established until the division issued its order on July 24, 2015.<sup>16</sup> The total amount of arrears was calculated using Mr. T's monthly obligation of \$736 per month. Arrears were calculated beginning in March 2015, because the state of Maryland's request was received on March 31, 2015. Total arrears for the five months, March through July 2015, were \$3,680.

Mr. T makes a number of points in his appeal relating to his financial relationship with Ms. T, including that he paid the purchase price of a vehicle she is using and put money into the house in which Ms. T currently resides. He argues that insurance money he received after his mother's death was used largely for Ms. T's benefit. The life insurance money was received in 2006.<sup>17</sup> When the agency calculates arrears under 15 AAC 125.105, "total income from all sources is the actual annual income that the parent earned or received in each calendar year." That total includes one-time and lump sum payments such as inheritances.<sup>18</sup> However, the division is not seeking arrears from 2006, the year in which the life insurance money was received. So, receipt of that income is irrelevant to the calculation of arrears for March through July of 2015. How that money was spent, whether on cars and housing during or after the marriage, is irrelevant in the absence of a written agreement between the parties to allow credit against the 2015 arrears for in-kind payments made using the insurance money.

In calculating arrears, the division will give credit for "direct payments made by or on behalf of the obligor directly to the custodial parent in the form of cash, a money order, a check made payable to the custodial parent, or a deposit or electronic funds transfer to a bank or equivalent account held by the custodial parent."<sup>19</sup> By regulation, the division will also give credit against arrears for in-kind contributions, but only if "the parents agree in writing to allow credit for the in-kind contribution and the parents agree in writing to the dollar value of the in-kind contribution."<sup>20</sup> There is no evidence in the record of a written agreement between the parties that would allow an in-kind credit or establish the amount of the credit.

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<sup>16</sup> Division Exhibit 4 at 1 - 2.

<sup>17</sup> Division Exhibit 8 at 4.

<sup>18</sup> 15 AAC 125.030(e).

<sup>19</sup> 15 AAC 125.105(b).

<sup>20</sup> 15 AAC 125.105(c).

There is, however, evidence in the record that Mr. T raised the issue of credit for in-kind contributions, including the use of the car, at the administrative review hearing of his case.<sup>21</sup> Regulations 15 AAC 125.465(d) and 15 AAC 125.470(e) provide procedures to claim credit for direct payments of child support that are outside the jurisdiction of the formal hearing process through the Office of Administrative Hearings. Under those regulations, an administrative appeal is not available from an administrative review decision denying a request for credit for direct payments or in-kind contributions, however, the administrative review decision is final for the purpose of appeal to the superior court.

Mr. T has not demonstrated that the division's finding that Mr. T owes \$3,680 in past due child support for the period March 1, 2015 through July 31, 2015 is incorrect. This decision does not address any credits for claimed direct payments or in-kind contributions that are under review or in dispute. Mr. T may wish to seek clarification from the division about the status of his various claims for credit for direct payments and in-kind contributions, or pursue direct payment and in-kind contribution claims already decided in superior court.

#### **IV. Conclusion**

Mr. T has not met his burden of proving that the division's support order was incorrect, either in establishing his ongoing monthly child support obligation, or in establishing the arrears. The division's child support order is affirmed. These child support amounts were calculated using the primary custody formula in Civil Rule 90.3(a).

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

The division's Administrative Child Support and Medical Support Order of July 24, 2015 is affirmed.

DATED January 7, 2016.

*Signed* \_\_\_\_\_  
Kathryn L. Kurtz  
Administrative Law Judge

<sup>21</sup>

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Division Exhibit 7.

**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, 2016.

By: Signed  
Signature  
Kathryn Kurtz  
Name  
Administrative Law Judge  
Title

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