

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

In the Matter of)	
)	
X R. J)	OAH No. 16-0664-CSS
<hr style="width:40%; margin-left:0"/>)	Agency No. 001137097

DECISION AND ORDER

I. Introduction

X J appeals a Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD) on May 17, 2016. The modified order increased his child support obligation for his son, Z, from \$494 to \$720 per month, effective May 1, 2016. Mr. J asserted that he cannot afford the increased support amount and adequately provide for his other children, and he requested a reduction of the modified obligation because of financial hardship.

This decision concludes that Mr. J’s monthly child support payment was correctly calculated under Civil Rule 90.3(a). Although Mr. J requested a reduction due to financial hardship, there is not sufficient information in the record to show clear and convincing evidence that the modified amount will result in manifest injustice. Accordingly, the May 17, 2016, child support modification is affirmed.

II. Facts

*A. Material Facts*¹

Mr. J and custodial parent B H are the parents of one child, Z, who is 11.² Ms. H has primary physical custody of Z.

Mr. J does not live in Alaska. He works as a mechanic, and he is paid hourly.³ His regular pay rate is \$25.64 per hour.⁴ Mr. J’s work schedule varies from week to week. Based on his 2016 paychecks, dated through May 13, he often puts in a full 40 hour week, and he occasionally earns a small amount of overtime pay.⁵ In other weeks, he works 30 to 33 hours,⁶

¹ Unless otherwise specified, material facts are based on the testimonies of X J and B H.

² Exhibit 5, p. 1.

³ Exhibit 3.

⁴ Exhibit 3.

⁵ Exhibit 3, p. 2 (bi-weekly paycheck, 92.62 hrs), p. 3 (41.50 hrs), p. 7 (40.12 hrs), p. 8 (40.05 hrs), p. 9 (40.22 hrs). Starting in February 2016, his employer began paying employees weekly rather than bi-weekly.

⁶ Exhibit 3, p. 4 (30.12 hrs), p. 5 (32.56 hrs), p. 6 (32.28 hrs).

and still others he works closer to 39 hours.⁷ As of his May 13, 2016 paycheck, his gross 2016 earnings were \$20,819.76.⁸

Mr. J is married, but his wife does not earn wage income. In addition to himself and his wife, his household includes 4 dependents, who are all Mr. J's biological children. The oldest of these children is 19. According to Mr. J, that child is still in high school and will graduate in July 2017. The next child is 11; however, Z is approximately one month older than this child. Mr. J's youngest two children are 9 and 6 years old.

Mr. J's monthly household expenses include: mortgage payment, \$1502; electric heat and air conditioning, \$160; water, \$134; trash, \$75; internet, \$70; cable, \$80; and cell phones, \$100. His household has one car, a 2004 Nissan Frontier, which is paid off. His auto insurance costs \$70 per month; home insurance is \$60 per month; and health insurance is \$160 per month. His monthly gasoline cost averages \$140. The household spends about \$500 per month on food consumed at home, and \$200 per month to eat out. Personal care expenses are \$40 per month, and tobacco is \$20 per month. Mr. J did not indicate any spending for entertainment. His annual vehicle maintenance cost is roughly \$450. He does not have credit card or other debts. Based on this information, Mr. J's monthly expenses total approximately \$3348.50, without including his child support obligation for Z.

Ms. H's household includes Z and four younger children, ages 8, 7, 5, and 2. The father of the four younger children also lives in the home. He supports the household with monthly income of roughly \$2000. Ms. H has not worked in the past year. Her household's monthly expenses include: rent, \$900; food, \$600; cable, \$135; cell phones \$120; gas, \$100; car insurance, \$165.48; renter's insurance, \$10; personal care, \$100; and entertainment, \$120. The household has a 2009 Chevy Impala; Ms. H did not know the estimated cost for vehicle maintenance, though she recently spent \$150 for service. Based on this information, Ms. H's monthly household expenses total roughly \$2250.50, plus an undetermined amount to maintain the household car.

B. Procedural Background

This case involves a modification action. Mr. J's support obligation for Z was last adjusted in 2011. At that time, an administrative law judge (ALJ) modified his support obligation under Civil Rule 90.3(a) to \$494 per month, effective July 1, 2011.⁹ The ALJ based this calculation on Mr. J's expected 2011 income of \$49,558.85. However, in 2011, Mr. J's oldest

⁷ Exhibit 3, p. 1 (biweekly paycheck, 78.22 hrs), p. 10 (39.90 hrs).

⁸ Exhibit 3, p. 10.

⁹ Exhibit 1.

child was 14 years old, so the Civil Rule 90.3(a) calculation for Z included a \$913 monthly deduction for Mr. J's cost of supporting his older child in his home.¹⁰ At that time, as now, Mr. J argued that he could not afford the modification and also meet his current family's needs. The ALJ concluded that Mr. J's circumstances did not meet the high standard to qualify for a reduction based on financial hardship.¹¹

Prior to the 2011 modification, Mr. J's support obligation for Z was set at \$300 per month, effective January 1, 2006. An ALJ set that amount after determining that Mr. J's support obligation under Civil Rule 90.3(a) would have been \$339 per month; however, unusual circumstances justified a \$39 monthly reduction.¹² At that time, Mr. J earned \$30,000 per year, and he was the sole wage-earner supporting a household of six, with an additional child on the way, in addition to his support for Z.

In April 2016, Ms. H requested a modification review of Mr. J's support obligation for Z. CSSD sent the parties a notice of the petition for modification on April 16, 2016.¹³ Mr. J provided CSSD with a number of his 2016 paychecks.¹⁴ The most recent of these was issued on May 13, 2016.¹⁵

On May 17, 2016, CSSD issued a decision granting the petition for modification.¹⁶ The same day, it issued the Modified Administrative Child Support and Medical Support Order that is the subject of this appeal.¹⁷

To calculate Mr. J's expected 2016 income, CSSD relied on his \$20,819.76 gross year-to-date income, as of May 13, 2016. It averaged this wage over 20 weeks, resulting in average weekly income of \$1040.99.¹⁸ It then annualized this wage over 52 weeks. This totaled expected income of \$54,131.48.¹⁹ Because Mr. J's oldest child is now 19 and an adult, CSSD did not apply any deductions for child support for prior children. After mandatory deductions for matters such as taxes and social security, Mr. J's income resulted in an ongoing monthly support amount of \$720.²⁰

¹⁰ See Exhibit 1, p. 10.

¹¹ Exhibit 1.

¹² *In re J*, OAH No. 06-0297-CSS (Comm'r of Revenue AuH 18, 2006).

¹³ Exhibit 2.

¹⁴ Exhibit 3.

¹⁵ Exhibit 3, p. 10.

¹⁶ Exhibit 4.

¹⁷ Exhibit 5.

¹⁸ See Exhibit 3, p. 10. $\$20,819.76 / 20 = \1040.99 .

¹⁹ $\$1040.99 \times 52 = \$54,131.48$.

²⁰ Exhibit 5.

Mr. J appealed.²¹ The formal hearing took place on June 27, 2016. Mr. J and Ms. H appeared telephonically and represented themselves. Child Support Specialist Delinda Cain appeared in person and represented CSSD. A Spanish interpreter participated telephonically to assist Mr. J. The hearing was audio-recorded. The record closed at the end of the hearing.

III. Discussion

A parent is obligated both by statute and at common law to support his or her children.²² Civil Rule 90.3(a) provides the formula for calculating child support awards where one parent has primary physical custody. That calculation is based on the noncustodial parent's "total income from all sources," minus specified deductions.

In child support matters, the person who files an appeal bears the burden of proof.²³ Mr. J filed this appeal, so he must prove by a preponderance of the evidence that the May 17, 2016 Modified Administrative Child Support and Medical Support Order is incorrect.²⁴

A. Standard for Modification of Child Support

A child support order may be modified upon a showing of "good cause and material change in circumstances."²⁵ If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes that "material change in circumstances" has been established and the order may be modified.

Mr. J's child support was previously set at \$494 per month, so a revised calculation that is at least \$74.10 higher, or \$568.10 or more, would be sufficient to warrant modification in this case.²⁶

Modification of a child support amount becomes effective the month after the parties are served with the petition. The parties were served with notice of Ms. H's petition in April 2016, so the modification in this case is effective May 1, 2016.

B. Income Determination

Under Civil Rule 90.3, a parent's ongoing child support obligation should be based on the amount the parent can be expected to earn during the period for which the support is being paid.

²¹ Exhibit 6.

²² *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.

²³ 15 AAC 05.030(h).

²⁴ 2 AAC 64.290(e).

²⁵ AS 25.27.190(e).

²⁶ \$494 x 15% = \$74.10.

By its nature, this determination is a somewhat uncertain endeavor, since the relevant calculation is expected future income.²⁷

In this case, Mr. J's income appears to be relatively steady. In 2011, his expected income was \$49,558.85. Five years later, CSSD relied on his wages over a time period of more than four months to calculate his anticipated annual income of \$54,131.48. Mr. J asserted that CSSD's 2016 calculation overstates his income, because he often does not work a full 40 hour week. However, CSSD's calculation did not assume he will work 40 hours every week. By averaging Mr. J's gross income over a 20 week period, CSSD included the range of high and low hour work weeks in its determination. By doing so, it accounted for some weekly variations in Mr. J's work schedule and income.

Based on the evidence in the record, it is reasonable to conclude that Mr. J's schedule and income through his May 13th paycheck are predictive of his likely schedule and income through the rest of the year. Mr. J did not establish that he will be working notably fewer hours in the coming months, or that his recent work history is an unreliable indicator of his future schedule.

Mr. J's income has increased modestly since the 2011 proceedings that set his ongoing support for Z at \$494 per month. His 2016 modified support obligation has increased significantly, because Mr. J's oldest child is now 19 and an adult. As a result, the 2016 support calculation for Z no longer includes a \$913 monthly deduction for that prior child. Z is currently the oldest child for whom Mr. J owes a duty of support. Absent unusual circumstances, he is entitled to receive 20% of Mr. J's adjusted annual income, without any reduction for Mr. J's younger children from different relationships.²⁸

Under Civil Rule 90.3(a), after appropriate deductions for matters such as taxes and social security Mr. J's expected 2016 income results in an ongoing monthly child support amount of \$720, effective May 1, 2016.

C. Hardship variance under Civil Rule 90.3(c)

Child support determinations calculated under Civil Rule 90.3 from a non-custodial parent's actual income figures are presumed to be correct. The parent may obtain a reduction in the amount calculated, 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

²⁷ Civil Rule 90.3, Commentary III.E.

²⁸ Civil Rule 90.3(a)(2); Civil Rule 90.3, Commentary VI.B.2.

“manifest injustice would result if the support award were not varied.”²⁹ This is a high standard, and reductions based on hardship are reserved for cases involving unusual circumstances. In making this determination, it is appropriate to consider all relevant evidence, including the circumstances of the custodial parent and the child.

Mr. J contends that, no matter how his income is calculated, he is unable to financially provide for his family, even at the \$494 support amount. Based on the evidence at the hearing, Mr. J’s current monthly household expenses total roughly \$3348.50. They will be \$4068.50 once his modified support obligation for Z is included. Since Mr. J’s gross monthly income is expected to be \$4510.95, it is clear that the increased child support obligation will be financially challenging for him.³⁰

Under Alaska law, however, Mr. J’s duty to pay the correct percentage of his income toward the ongoing support for Z takes precedence over other debts and financial obligations. Therefore, his obligation to support his younger children does not justify lowering his monthly support for Z, unless a reduction is required to prevent a substantial hardship to the younger children.³¹ This is because parents have a paramount duty to support their children, and new obligations to subsequent children do not diminish that duty.³²

Based on the totality of the evidence in the record, Mr. J has not met his burden to clearly and convincingly establish that manifest injustice would result if his support amount is not reduced. He is justifiably concerned about the increase in his ongoing support obligation. His desire to continue supporting his oldest child, and to maintain a certain lifestyle for his current family, is also understandable. However, the oldest child is legally an adult, and there is no evidence that his or her needs justify special accommodation in the child support calculation at issue here. Further, there is no evidence that Mr. J’s younger children are likely to experience substantial hardship if his obligation to Z is not reduced. Therefore, this case does not present unusual circumstances as contemplated by Civil Rule 90.3(c).

Mr. J has shown that he has some difficult budget adjustments and decisions to make, and he may need to consider additional sources of income. For instance, income he earns from a

²⁹ Civil Rule 90.3(c); *see also* 15 AAC 12.075.

³⁰ Expected 2016 gross income of \$54,131.48 / 12 months = \$4510.95 per month.

³¹ Civil Rule 90.3 Commentary VI.B.2; 15 AAC 125.075(a)(2)(F).

³² *Kestner v. Clark*, 182 P.3d 1117, 1123 (Alaska 2008) (a parent should not be relieved of the obligation to support his or her children except under the most extreme circumstances.).

second job might be accounted for differently, if it is to better provide for his subsequent family's needs.³³ His wife also could consider opportunities to earn income to meet those needs.

This determination takes into consideration Z's and Ms. H's circumstances. Like Mr. J, Ms. H lives on a tight budget. Even excluding non-necessities such as entertainment expenses, her monthly expenses exceed her household's monthly income. She, too, has an obligation to support Z, as well as her younger children. The evidence regarding her household income and expenses strongly suggests that Z is not in a position to forego the support due under Civil Rule 90.3(a), in order to help subsidize Mr. J's household.

IV. Conclusion

Mr. J did not meet his burden to show that the Modified Administrative Child Support and Medical Support Order dated May 17, 2016, was incorrect. CSSD properly calculated Mr. J's support obligation under the primary custody formula in Civil Rule 90.3(a), based on his expected 2016 income and the fact that he no longer receives a credit for the cost of supporting his oldest child in his home. This calculation resulted in an ongoing support amount of \$720 per month for Z, effective May 1, 2016.

There is not clear and convincing evidence that manifest injustice will result if the support award is not reduced. Therefore, the request for a variance under Civil Rule 90.3(c) is denied.

V. Child Support Order

- The Modified Administrative Child and Medical Support Order dated May 17, 2016, is affirmed and remains in full force and effect.

DATED: July 5, 2016.

By: Signed
Kathryn Swiderski
Administrative Law Judge

³³ See 15 AAC 125.075(a)(2)(H).

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 19th day of July, 2016.

By: Signed
Signature
Lawrence A. Pederson
Name
Administrative Law Judge
Title

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