

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

In the Matter of)	
)	
K D)	OAH No. 16-1175-CSS
)	Agency No. 001162719

DECISION AND ORDER

I. Introduction

K D appeals a Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD) on September 26, 2016. The order increased his child support obligation for his daughter, A, from \$50 to \$328 per month, effective August 1, 2016. Mr. D asserted that he cannot afford the increased support amount, and he requested a reduction of the modified obligation because of financial hardship.

This decision concludes that the child support amount calculated under Civil Rule 90.3(a) would be \$278 per month. However, based on the evidence regarding Mr. D's financial circumstances, his request for a hardship variance is granted. Mr. D's child support obligation is adjusted to \$225 per month, effective August 1, 2016.

II. Facts

*A. Material Facts*¹

Mr. D and custodial parent G Z are the parents of one child, A, who is 7.² A is Mr. D's oldest child. She lives in Florida with Ms. Z, who has primary physical custody.

On February 29, 2016, following his release from an extended period of incarceration, Mr. D began working as a tire technician at No Name Enterprises.³ He is also training to learn certain mechanic's duties, such as alignments and front end work, with the plan of someday working as a mechanic. He is a part-time employee, but he is trying to obtain a full-time position.

In March 2016, Mr. D worked approximately 21 hours per week.⁴ Since April 2016, his work week has averaged roughly 35 hours, with some variations.⁵ He generally expects to

¹ Unless otherwise specified, material facts are based on the testimonies of K D and G Z.

² Exhibit 6, p. 1.

³ Exhibit 2, p. 2; Exhibit 8; D testimony.

⁴ Exhibit 2, p. 2.

⁵ Exhibit 2, pp. 1, 3-4; D testimony.

continue working 35 hours per week. He is paid every two weeks.⁶ He started at an hourly pay rate of \$12, but received a raise to \$13 per hour starting in June 2016.⁷

Mr. D has some nerve damage issues, which can restrict his job options and opportunities, since he cannot lift over 60 pounds of weight. However, he is presently capable of performing his current job duties, and he is physically capable of continuing to work his current schedule.⁸

Mr. D lives in an apartment with his girlfriend, who is pregnant and expects to deliver their child around April 30, 2017. His girlfriend works seasonally as a tour guide and dancer at the No Name, where she earned \$800 to \$900 per month last season. She is currently unemployed and looking for work.

Mr. D's monthly expenses are necessary and reasonable; they indicate that he is budgeting carefully and exercising significant financial restraint. He pays \$895 monthly in rent. Other monthly expenses include \$300 for food, and \$70 for his cell phone.⁹ He drives a 1999 Chevrolet Tahoe that is paid off. He spends approximately \$160 monthly on gas and \$100 per month on car insurance. Annual expenses for car maintenance are roughly \$557, or \$47 per month.¹⁰ He does not spend money to eat outside the home, for entertainment, for personal care or for any alcohol or tobacco. He does not use credit cards. These expenses total approximately \$1,572 per month.

Ms. Z and A live with Ms. Z's parents in Florida. Ms. Z has not earned income in recent years. She currently works in her mother's business, but she is not paid in cash. Rather, she works in the business in lieu of payment of rent. She receives Food Stamp assistance, and her parents provide for the rest of her and A's needs. She and her mother are in the process of launching a new business, which Ms. Z hopes will become a source of cash income and more financial independence.

A. Procedural Background

This case involves the modification of an existing child support order. Mr. D's support

⁶ Exhibit 2.

⁷ Exhibit 2.

⁸ D testimony.

⁹ He testified that he pays \$140 per month for both his cell phone and his girlfriend's phone. This decision relies only on the portion of the bill that is attributed to Mr. D's use.

¹⁰ Mr. D testified that he spends roughly \$200 per year on car maintenance, in addition to a recent repair that cost \$357.

obligation for A was set at \$50 per month in 2010.¹¹ On July 5, 2016, CSSD received a request for a modification review from the State of Florida, Office of Child Support Enforcement.¹² CSSD sent the parties a notice of the petition for modification on July 21, 2016.¹³ In response, Ms. Z submitted affidavits, indicating that she received no income in 2015 or to-date in 2016.¹⁴ She also submitted a written statement explaining that her parents provide her housing and pay other expenses, such as transportation, clothing, school supplies, and other items.¹⁵ CSSD received copies of seven of Mr. D's bi-weekly paystubs. Except for one missing check, the paystubs covered the period from February 29, 2016 to June 18, 2016.¹⁶

On September 26, 2016, CSSD issued the Modified Administrative Child Support and Medical Support Order that is the subject of this appeal.¹⁷ To calculate Mr. D's expected 2016 income, CSSD relied on a \$12 hourly wage, over an average 35-hour work week, for 52 weeks of the year.¹⁸ This resulted in expected annual income of \$21,840. CSSD added the 2016 Alaska PFD of \$1,022, for total expected income of \$22,862. After mandatory deductions for matters such as taxes and social security, this income resulted in an ongoing monthly support amount of \$328.¹⁹

Mr. D appealed.²⁰ The formal hearing took place on October 31, 2016. Mr. D appeared in person, represented himself and testified on his own behalf. Ms. Z appeared telephonically, represented herself and testified on her behalf. Child Support Specialist Kimberly Sledgister appeared in person and represented CSSD. The hearing was audio-recorded. The record remained open after the hearing until November 16, 2016, so that Mr. D could submit documents explaining his medical condition and any limitations on his ability to work. However, no submissions were received by this deadline.

After one extension of time for post-hearing document submission, Mr. D submitted an email that did not directly request a further extension. However, the message was not clear, and

¹¹ Exhibit 1.

¹² Exhibit 3.

¹³ Exhibit 4.

¹⁴ Exhibit 5, pp. 1-2.

¹⁵ Exhibit 5, p. 5.

¹⁶ Exhibit 2, pp. 1-4. The missing paystub presumably would have covered the period from May 23, 2016 to June 4, 2016.

¹⁷ Exhibit 5.

¹⁸ Exhibit 6, pp. 5-6.

¹⁹ Exhibit 6, p. 6.

²⁰ Exhibit 7.

it could be interpreted as a second request for an extension. Mr. D indicated that he was having difficulty getting an appointment with a new primary care provider. However, the opportunity to submit post-hearing documents was premised on an expectation that Mr. D would submit existing medical records that explain his injury and any physical limitations on his ability to do his job. It did not contemplate time for Mr. D to seek out new medical care and document his nerve damage for the first time.

Because Mr. D testified that he can perform his current job duties, and there is no assertion that he is voluntarily or unreasonably underemployed, Mr. D's medical records are not needed for this decision. If, in the future, Mr. D's medical provider orders work restrictions that significantly reduce his expected income (as calculated in this decision), Mr. D may request another modification review, so the new information can be considered.

III. Discussion

A parent is obligated both by statute and at common law to support his or her children.²¹ 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.²² Mr. D 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.²³

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."²⁴ 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. D's child support was previously set at \$50 per month, so a revised calculation that is at least \$7.50 higher, or \$57.50 or more, would be sufficient to warrant modification in this case.²⁵

²¹ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.

²² 15 AAC 05.030(h).

²³ 2 AAC 64.290(e).

²⁴ AS 25.27.190(e).

²⁵ $\$50 + (\$50 \times 15\%) = \$57.50$.

Modification of a child support amount becomes effective the month after the parties are served with the petition.²⁶ In this case, the parties were served with notice of the petition in July 2016, so the modification is effective August 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. By its nature, this determination is a somewhat uncertain endeavor, since the relevant calculation is expected future income.²⁷

Mr. D's income from past years is unhelpful in establishing his likely 2016 income, because he was previously incarcerated for extended periods of time.²⁸ An Alaska Department of Labor database shows that he earned wage income of only \$400.31 in 2015.²⁹ For the first three quarters of 2016, the Department of Labor database shows Mr. D's income, as reported by his employer, as follows: first quarter, \$511.60; second quarter, \$5,648.48; third quarter, \$6,350.18.³⁰ This totals \$12,510.26.

For the fourth quarter of 2016, assuming twelve weeks of work at \$13 per hour and 35 hours per week, Mr. D's gross wages are expected to be roughly \$5,460.³¹ In total, therefore, Mr. D is likely to earn approximately \$17,970.26 in 2016, plus his 2016 PFD, for total income of \$18,992.26. Under Civil Rule 90.3(a), after appropriate deductions such as taxes and Social Security, this expected 2016 income results in an ongoing monthly child support amount of \$278.³²

Mr. D argued that he should not be required to pay increased child support, because he was concerned that Ms. Z would spend the money inappropriately. Ms. Z's testimony did not suggest this to be the case. Regardless, however, the focus here is on the noncustodial parent's financial obligation to support his child. For purposes of this discussion, the law presumes the custodial parent is meeting her financial and other obligations to the child.

²⁶ 15 AAC 125.321(d).

²⁷ Civil Rule 90.3, Commentary III.E.

²⁸ D testimony; Z testimony.

²⁹ See Exhibit 8.

³⁰ Exhibit 8.

³¹ \$13 x 35 hours/week x 12 weeks = \$5,460.

³² See Attachment A, calculation from CSSD online child support calculator at: <https://webapp.state.ak.us/cssd/guidelinecalc/form>.

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. 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."³³ 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. D requested a hardship reduction, arguing that he is unable to pay for necessary expenses in addition to the child support amount calculated under Rule 90.3(a). Because of a prior drug offense, Mr. D testified that he is not eligible for public assistance, such as Food Stamps, which otherwise might help him get by.

Based on the evidence in the record, Mr. D's 2016 average gross monthly wage income is approximately \$1,497.52, before deductions for taxes and Social Security.³⁴ Because Mr. D was not working in January and most of February 2016, however, this figure does not paint an entirely accurate picture of his current income. However, even if one annualizes only Mr. D's income over the last three quarters of 2016, when he was working, Mr. D's adjusted monthly income would not cover his household expenses, plus a \$278 monthly child support obligation.

After annualizing Mr. D's income from the second through fourth quarters of 2016, and then allowing for deduction of taxes and Social Security, his adjusted monthly income would be \$1,738.87.³⁵ As discussed previously, Mr. D's current monthly household expenses total roughly \$1,572, without including his modified child support obligation for A. After necessary expenses, Mr. D's available funds total \$166.97 per month.³⁶

Based on the evidence, Mr. D has shown clear and convincing evidence that manifest injustice would result if he is required to pay the full modified child support amount in his

³³ Civil Rule 90.3(c); *see also* 15 AAC 12.075.

³⁴ $\$17,970.26 / 12 = \$1,497.52$.

³⁵ Mr. D's income over the last three quarters of 2016 totals \$17,548.66. Over 9 months, this results in gross monthly income of \$1,949.85. Annualized over 12 months ($\$1,949.85 \times 12$), his gross income would be \$23,398.20, plus \$1,022 for the PFD, for taxable gross income of \$24,420.20. After deductions for taxes and Social Security, this results in adjusted annual income of \$20,866.52. (Calculation done on CSSD online child support calculator.) $\$20,866.52 / 12 \text{ months} = \$1,738.87$ adjusted monthly income.

³⁶ $\$1738.97 - \$1,572 = \$166.97$.

current circumstances. Mr. D's expenses are reasonable for a household of one. That is, they do not reflect significant expenditures to support his girlfriend. However, because Mr. D's girlfriend could be expected to pay a small portion of the rent, Mr. D's support obligation for A is more appropriately adjusted to \$225 per month, rather than \$167.

This decision takes into consideration Ms. Z and A's circumstances. Like Mr. D, Ms. Z appears to be making a fresh start financially. It is not clear why she has not earned cash income in recent years; however, she expects to start doing so with her new business venture. Nonetheless, Ms. Z and A's circumstances are stable and their basic needs are being met, because of the significant financial and other support offered by Ms. Z's parents. For this reason, Ms. Z and A are not at substantial risk of financial hardship if Mr. D's obligation is adjusted to \$225 per month.

Mr. D is working hard to earn income and to keep up with his financial obligations as he re-establishes himself after an extended period of incarceration. He does not appear to be spending money unnecessarily. Based on the totality of the evidence, his monthly support amount should be set at \$225 per month, based on financial hardship. This amount requires him to allocate all of his income, after taxes and necessary personal expenses, to supporting his daughter. At the same time, it avoids imposing on him an unsustainable financial burden. If Mr. D's financial situation improves, any party may request a modification review to address his changed circumstances.

IV. Conclusion

Mr. D met his burden to show that the Modified Administrative Child Support and Medical Support Order dated September 26, 2016, was based on an incorrect income figure. Based on his 2016 expected gross wages and a 2016 Alaska PFD, his support obligation under the primary custody formula in Civil Rule 90.3(a) would be \$278. However, Mr. D requested a variance under Civil Rule 90.3(c), and that request was granted. Based on the evidence brought forward during the hearing process, Mr. D's support obligation should be adjusted to \$225 per month, effective August 1, 2016.

V. Child Support Order

- Mr. D is liable for child support for A in the amount of \$225.00 per month, effective August 1, 2016 and ongoing;

- All other provisions of the Administrative Child Support and Medical Support Order dated September 26, 2016, remain in full force and effect.

DATED: November 23, 2016.

By: Signed
Kathryn Swiderski
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 7th day of December, 2016.

By: Signed
Signature
Kathryn A. Swiderski
Name
Administrative Law Judge
Title

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