

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

In the Matter of)	
)	
K M)	OAH No. 17-0203-CSS
<hr style="width:40%; margin-left:0"/>)	Agency No. 001123475

DECISION AND ORDER

I. Introduction

K M appeals a Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division on January 27, 2017, setting Mr. M’s child support obligation for his children A and U at \$1,920 a month beginning October 1, 2016. The division based this on income information from Department of Labor and Workforce Development records. During the course of the hearing, Mr. M testified that part of that income was from a temporary job he held in 2016. He also explained that he had been working as a self-employed contractor for two local airlines, but had given them notice effective April 1, 2017 because he did not have adequate cash flow to continue to run the business. Based on this, the division revised its calculations.

The division’s revised calculations for October 2016 through March 2017 are affirmed. However, the division’s conclusion that Mr. M is now voluntarily unemployed is rejected. Mr. M’s child support should be set at \$2,344 a month for October through December 2016, \$1,343 a month for January through March 2017, and, based on his actual income, at \$50 a month effective April 1, 2017 and ongoing.

II. Facts

K M and M N live in Town A, Alaska. The child support order in this case covers their children A and U, who live with Ms. N. Mr. M also has one older child and four younger children living with him.¹

The child support order at issue is a modified order. The division has not supplied a copy of the order that the modified order replaces, and there is no indication in the record of what Mr.

¹ CSSD Exhibit 4 at 1 - 2; Testimony of M.

M's ongoing child support obligation was before the modified order was issued.² It is assumed that the child support obligation for October 2016 set forth in this order represents at least a 15 percent change from the previous order.

Ms. N requested the modification. The division notified the parties and requested financial information on September 26, 2016.³ Neither party submitted income information. The division used income information from the state and federal departments of labor and workforce development to determine Mr. M's child support obligation. This data showed that Mr. M had \$115,951 in earnings in 2016, and \$75,750 in 2015.⁴ Using the 2016 figure plus a permanent fund dividend and an ANCSA corporation dividend, the division arrived at a taxable gross income figure of \$117,396 for 2016, and an adjusted gross income of \$85,318.⁵ The division issued a modified administrative child support and medical support order on January 27, 2017, setting Mr. M's child support obligation for two children at \$1,920 a month.

Mr. M appealed, arguing that he worked as an independent contractor for two airlines, and that the division's calculation failed to account for his business expenses.⁶ Before the hearing, Mr. M submitted a hearing expense worksheet, and details of his business income and expenses for March 2017.⁷ At the first hearing session, Mr. M explained that he was self-employed, handling bypass mail and freight, and coordinating passengers for two airlines, Aviation X and Air Y. Mr. M expressed concern that he did not have enough cash to make needed repairs to the snow machines, truck, and four-wheeler that he used in his business, and that the business could not function without these vehicles. He reported that after deduction of his child support and taxes from his business income, he did not have sufficient cash to continue to run the business. Mr. M stated that he had started selling his personal possessions to keep the business running, and that he had given his notice to both airlines, because he no longer felt he could meet his obligations to the airlines.

² The old order was not included as an exhibit to the division's pre-hearing brief, or submitted in response to the Administrative Law Judge's request at the April 28, 2017 hearing session.

³ CSSD Exhibit 1.

⁴ CSSD Exhibit 5. According to Ms. Sledgister, the Department of Labor and Workforce Development data was reported by Air Y and Construction Z, and did not include information from Aviation X.

⁵ CSSD Exhibit 3 at 6.

⁶ CSSD Exhibit 4 at 1 - 2.

⁷ M Exhibits 4 - 8, submitted March 22, 2017.

Mr. M worked for Construction Z on an airport project during the summer of 2016, earning \$77,620.⁸ He hired others to fulfill his obligations on the airline contracts while he was working in the temporary position for Construction Z. Mr. M described this job as a one-time opportunity, and did not anticipate that he would be employed by Construction Z again in 2017. Mr. M also holds a commercial fishing permit for Bristol Bay, but he did not fish the permit in 2016.⁹

Mr. M submitted a summary of his 2016 federal tax return, showing adjusted gross income of \$151,111, and taxable income of \$113,461. He also submitted a W-2 from Construction Z for \$77,620, and 1099-MISC forms from Aviation X for \$60,977 and from Air Y for \$38,331. Finally, he submitted a small business owner information sheet for schedule C listing income of \$99,308, and expenses of \$3,396 for gas, \$13,550 for employees, \$5,711 for parts, \$4,500 for a Skandic 550 Fan Cool, and \$799 for sled freight. The last two items were bracketed with an arrow pointing to the word “Dep.” and amount of \$628.¹⁰ It may be that \$628 was a depreciation figure used on the tax return for a snowmachine and a freight sled, but this is not clear from the information sheet. Mr. M did not submit a copy of his complete 2016 tax return.¹¹

On March 30, 2017, based on the W-2 and 1099-MISC forms submitted by Mr. M, CSSD provided revised calculations. Counting his income from Air Y and Aviation X as reported on the 1099-MISC forms, his wages from Construction Z, and his permanent fund and ANCSA corporation dividends, the division concluded that he had \$178,372 in income in 2016. After deductions for federal income taxes, FICA, unemployment insurance, and one prior child in the home, the division calculated Mr. M’s child support obligation for 2016 at \$2,344 a month for two children.

At the hearing session on April 28, 2017, Mr. M reported that he was unemployed, that he had applied for a job as a tribal judge but had not gotten that position, and that he had no income. On May 4, 2017, the division submitted new calculations for April 2017 and ongoing based on its conclusion that Mr. M was voluntarily unemployed. The division imputed income of \$20,384 based on full-time employment at a minimum wage job. Adding the permanent fund and

⁸ M Exhibit 2.

⁹ Testimony of M.

¹⁰ M Exhibit 3.

¹¹ M Exhibits 1 - 3. The summary appeared to be from the Alaska Business Development Center, and referred to a form 1040 federal individual income tax return being enclosed.

ANCSA dividends, this yielded \$21,829 in income. After deductions for federal income taxes, FICA, unemployment insurance, but no deduction for a prior child in the home, the division calculated Mr. M's child support obligation for April 2017 forward at \$426 a month for two children.

A telephonic hearing was convened on March 23, 2017, and continued on March 31, 2017, and April 28, 2017. Mr. M represented himself at all three sessions. Ms. N participated in the first and second sessions, but did not participate in the third session. Kimberly Sledgister with the division's formal hearing section presented the division's case at the first two hearing sessions; Joe West presented the division's case at the third session. The record was held open for Mr. M to submit his complete tax return and for the division to submit revised calculations. The record closed on May 24, 2017.

III. Discussion

The Modified Administrative Child Support and Medical Support Order at issue in this case modified Mr. M's child support obligation effective October 1, 2016.¹²

This decision will evaluate Mr. M's obligation for three separate periods: October 2016 through December 2016, based on Mr. M's 2016 income from Construction Z and the airlines; January 2017 through March 2017 based only on income from the two airlines; and April 2017 and ongoing. As the person who filed the appeal, Mr. M has the burden of proving by a preponderance of the evidence that the division's calculations are incorrect.¹³

A. Child Support Obligation for October 2016 through March 2017

In 2016, Mr. M had a temporary job with Construction Z. Mr. M was also self-employed as a contractor by Aviation X and Air Y. The division's revised calculations used Mr. M's gross receipts from the airlines without deducting any expenses.¹⁴ Since Mr. M was not able to produce a copy of his complete 2016 tax return, reliable information about his business expenses is not available. In addition, estimating his business expenses based on the information sheet he

¹² A modification is effective beginning the month after the parties are served with notice that a modification has been requested. 15 AAC 321(d). In this case, the notice was issued on September 26, 2016, so the modification is effective as of October 2016.

¹³ 15 AAC 05.030(h).

¹⁴ The commentary to Civil Rule 90.3 at III.B. provides that self-employment income "includes the gross receipts minus the ordinary and necessary expenses required to produce the income." However, the division explained that it was unaware that Mr. M was self-employed when it issued the modified order, and indicated that it was unable to review his allowable deductions for purposes of the March 30, 2017 calculations without Mr. M's full tax return and corresponding schedules. Statement of Sledgister on 3/23/17; Submission to Record dated 3/30/17.

provided, subtracting those expenses from his gross receipts, and treating the result as self-employment income rather than wages would not result in a figure more favorable to Mr. M. Therefore, the division's calculations in the March 30, 2017 submission to record for the tax year 2016, setting Mr. M's child support obligation at \$2,344 for two children, should be adopted for the period October 2016 through December 2016.

During the first quarter of 2017, Mr. M was still working on contract for the two airlines, but did not anticipate being re-hired by Construction Z. Therefore, the division's calculations in the March 30, 2017 submission to record for the tax year 2017, setting Mr. M's child support at \$1,343 for two children based on Mr. M's 2016 income from the two airlines, should be adopted for the period January 2017 through March 2017.

B. Mr. M's ongoing child support obligation

Mr. M is no longer working on contract for Aviation X and Air Y, effective April 1, 2017. The division argues that Mr. M is voluntarily unemployed, because he gave notice.¹⁵ However, Mr. M testified persuasively that he could not continue to provide the services required by the airlines given the state of his vehicles and his inability to repair them given his cash flow problems. Mr. M's current unemployment is therefore not voluntary, and income based on full-time employment at minimum wage should not be imputed.

Furthermore, employment prospects in Town A are limited. As the division noted, Town A qualifies as a distressed community.¹⁶ Although Mr. M built a business serving the two airlines, once he determined that he was unable to continue to fulfill those contracts, his business failed. The airlines have now contracted with someone else to provide the services Mr. M had been providing.¹⁷ Mr. M applied for another job, but was not hired. Mr. M stated that he was continuing to look for work.

Given this, Mr. M's ongoing child support obligation should be based on his other sources of income, a permanent fund dividend and an ANCSA corporation dividend, which total \$1,445 annually. This results in a child support obligation of \$50 a month for two children.

¹⁵ Division's Post Submission to Record, dated May 4, 2017. The division's submission also cites a case diary note, which records a telephone conversation on March 22, 2017 between Mr. M and a division enforcement case worker in which Mr. M told the case worker that if the division would not work with him, he would stop working. However, this does not change the conclusion above that Mr. M gave notice because he could no longer meet his obligations to the airlines given his cash flow situation.

¹⁶ Statement of Sledgister.

¹⁷ Testimony of M.

C. Financial Hardship

Mr. M also submitted a hearing expense worksheet, to support consideration of a variance of his child support obligation under Civil Rule 90.3(c). That subsection permits an exception to the formula in Civil Rule 90.3(a) based on a finding that “manifest injustice would result if the support award were not varied.”

However, in addition to the business concerns discussed above, Mr. M’s argument for a hardship variance rests on the fact that he has four younger children in the home.¹⁸ The commentary to Civil Rule 90.3 states that “the existence of such ‘subsequent’ children, even if the obligor has a legal obligation to support these children, will not generally constitute good cause to vary the guidelines.”¹⁹ Therefore, a hardship variance for the period October 2016 through March 2017 is not warranted in this case.

A hardship variance for April 2017 and ongoing is not available because the minimum order of \$50 is itself an exception to the formula in Civil Rule 90.3(a).²⁰

IV. Conclusion

This order establishes Mr. M’s child support obligation for A and U for the periods October through December 2016, January through March 2017, and April 2017 and ongoing.

If there is a material change in circumstances, such as a new job for Mr. M, either party may request a modification of the ongoing support obligation specified in this order.

The child support amounts in this order were calculated using the primary custody formula in Civil Rule 90.3(a).

V. Child Support Order

1. Mr. M’s child support obligation for the two children is \$2,344 a month, effective October 2016 through December 2016.

2. Mr. M’s child support obligation for the two children is \$1,343 a month, effective January 2017 through March 2017.

3. Mr. M’s child support obligation for the two children is \$50 a month, effective April 2017 and ongoing.

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¹⁸ M Exhibit 4.

¹⁹ Civil Rule 90.3 Commentary at VI.B.2.

²⁰ Civil Rule 90.3(c)(3).

4. All other provisions of the division's Modified Child Support and Medical Support Order issued on January 27, 2017 remain in effect.

Dated: June 13, 2017.

Signed

Kathryn L. Kurtz
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 within 30 days after the date of this decision.

DATED this 28th day of June, 2017.

By: Signed

Signature
Kathryn L. Kurtz

Name
Administrative Law Judge

Title

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