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

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| In the Matter of | ) | |
| | ) | |
| B P. D | ) | OAH No. 17-0553-CSS |
| | ) | Agency No. 001161893 |

# DECISION

## I. Introduction

The issue in this appeal is whether the Child Support Services Division (CSSD) should re-open and revise the terms of an administrative child support order it issued in 2010. B D appeals CSSD's decision denying his request for relief from the 2010 child support order. He requested relief based on fraud, misrepresentation, or other misconduct of an adverse party. Mr. D also sought to vacate the order due to mistake, inadvertence, or excusable neglect.

Based on the evidence in the record and after careful consideration, CSSD's decision is affirmed. As a party to the 2010 child support order and many subsequent efforts to modify it, Mr. D was aware that he paid ongoing child support pursuant to a primary custody calculation. He also was aware of his children's actual residence and any time periods in which the children's mother, F C, lived in his home. Seven years after issuance of the 2010 order, CSSD may not retroactively modify it based on Mr. D's vague and conclusory assertions of fraud, or of mistake, inadvertence, or excusable neglect. Mr. D has not shown he is entitled to the relief he requests.

## II. Facts and Proceedings

### *A. Background*

Mr. D and F C are the parents of five children.[1] This case involves Mr. D's child support obligations for four of those children: K (born in August 1991), E (born in July 1997), and twins X and Y (born in November 1999).[2] K turned 18 and emancipated in August 2009. E emancipated in July 2015. X and Y are currently 17, but they will turn 18 in November 2017.

On March 30, 2010, CSSD issued an Administrative Child Support and Medical Support Order that established Mr. D's support obligation for the children under the primary custody

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[1] *See* Exhibit 2; Exhibit 17, pp. 6-7 (letter from the oldest child, Z D. D). Z D. D was an adult throughout the time period at issue relevant to this case. CSSD hearing representative statement.

[2] Exhibit 2.

formula at Alaska Civil Rule 90.3(a).[3] CSSD initiated the child support action, because Ms. C had received Alaska Temporary Assistance Program benefits beginning in February 2008.[4]

The 2010 child support order identified Ms. C as the custodian of record. Based on Mr. D's actual income information, the order set an ongoing support obligation of $1,523 per month for the three children who were still minors as of May 1, 2010. It also assessed arrears totaling $25,472 for the period from February 2008 through April 2010.[5]

Mr. D was personally served with the child support order on April 4, 2010.[6] He did not appeal it. Starting in 2010, he was aware that he made child support payments pursuant to the order via income withholding from his paycheck.[7]

In March 2012, CSSD served Mr. D with a Notice of Petition for Modification of Administrative Support Order.[8] The notice again identified Ms. C as the custodian of record. Mr. D did not respond or provide income information.[9] Based on his employer's wage information, CSSD issued a Modified Administrative Child Support and Medical Support Order on June 8, 2012. The modified order increased Mr. D's monthly support obligation for three children to $1,752, effective April 1, 2012.[10] Mr. D did not appeal.

In May or June 2012, Mr. D moved from Alaska to New Mexico. In November 2012, through legal counsel, Mr. D requested a modification review.[11] The one-page written request asserted that Mr. D's income had dropped dramatically, and he was earning only 33% of his former Alaska wages. It did not raise custody issues or assert that the family had been living as an intact unit. The request asked that Mr. D's case "be reviewed and modified to accurately reflect the substantial change in income."[12] According to CSSD, it denied the request on November 23, 2012, because Mr. D did not submit any supporting evidence to document his changed

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3 *Id.*

4 Exhibit 2, p. 9; CSSD hearing representative statement. For this reason, the child support order set pre-order arrears beginning in February 2008. *See* 15 AAC 105(a)(1).

5 Exhibit 2. The order assessed support for four children from February 2008 through August 2009. After K emancipated in August 2009, it became a three-child order.

6 Exhibit 2, p. 14. Mr. D's signature appears on the certified mail return receipt, which is marked "restricted delivery" to the addressee.

7 D testimony.

8 Exhibit 4. Ms. C initiated the modification review by signing and submitting a CSSD request form. Exhibit 3.

9 *See* Exhibit 5, p. 4.

10 Exhibit 4, p. 5.

11 Exhibit 6.

12 *Id.*

circumstances.[13]

In April 2013, E moved to New Mexico to live with his father. Both parents agreed on the timing of the move, and CSSD suspended Mr. D's ongoing support obligation for E, effective April 24, 2013.[14]

In July 2013, Mr. D again requested a modification review, and CSSD served the parties with notice of his request.[15] Based on wage information reported by Mr. D's employer, CSSD issued a Modified Administrative Child Support and Medical Support Order on October 30, 2013.[16] Again applying the Civil Rule 90.3(a) primary custody formula, the modified order reduced Mr. D's support obligation for two children to $1,035 per month ($1,265 per month for three children), effective August 1, 2013.[17]

In May 2014, X moved to New Mexico to live with Mr. D.[18] In October 2014, Mr. D requested another modification review, and CSSD served the parties with notice of the petition the same month.[19] Mr. D did not submit any documentation showing his income or other changed circumstances, so CSSD denied his modification request.[20]

The next year, in August 2015, Mr. D submitted a CSSD form, again requesting a modification review.[21] CSSD served the parties with notice of the petition on October 13, 2015.[22] During the modification review process, Mr. D provided documentation showing that he began exercising custody of X on May 30, 2014, the date X left Alaska and traveled to New Mexico. In response, in November 2015, CSSD issued an Administrative Review Decision that suspended Mr. D's support obligation for X, effective May 30, 2014 and ongoing.[23]

Recognizing that the parties had switched to a divided custody arrangement, CSSD granted

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13 CSSD pre-hearing brief, pp. 1-2. The record does not include a formally-issued decision on Mr. D's November 2012 modification request.

14 Exhibit 7.

15 Exhibit 8.

16 Exhibit 9.

17 *Id.* The order set his monthly obligation for three children at $1,265. However, Mr. D's support for E had been suspended before the effective date of the modification. That obligation remained suspended until E emancipated in July 2015. CSSD hearing representative statement.

18 Exhibit 14.

19 Exhibit 10.

20 Exhibit 11.

21 Exhibit 12.

22 Exhibit 13.

23 Exhibit 14. *See also* Exhibit 17, pp. 9-10 (X's plane ticket, leaving Anchorage May 30, 2014, and 2014 school enrollment information).

Mr. D's modification request and issued a modified child support order on January 6, 2016.[24] After adjusting for each parent's reciprocal child support obligations, the Modified Administrative Child Support and Medical Support Order set Mr. D's ongoing support obligation at $8.74 per month, effective November 1, 2015.[25] At that time, only X and Y remained as minor children.

*B. 2017 Request for Relief from 2010 Child Support Order*

On January 19, 2017, through counsel, Mr. D filed a document entitled "Request for Relief from Agency Administrative Order Pursuant to 15 AAC 125.125."[26] The submission requested relief from the 2010 Administrative Child Support and Medical Support Order, arguing that Ms. C had perpetrated a fraud by falsely claiming she exercised primary custody of the children. It also suggested she may have defrauded public assistance programs by receiving assistance based on custody she did not in fact exercise.

Mr. D agreed that the children lived with Ms. C for three or four months in 2008, when she took them to a homeless shelter. Apart from that limited period, however, he asserted that he had lived with and financially supported all four of the children from birth through May or June 2012, when he moved to New Mexico. He asserted that Ms. C also lived in his home for various periods of time, and he had provided her with cash and other financial support. Claiming that manifest injustice had occurred, Mr. D asked CSSD for relief from the 2010 support order under 15 AAC 125.125(1) (mistake, inadvertence or excusable neglect) and 15 AAC 125.125(3) (fraud, misrepresentation, or other misconduct of an adverse party).[27]

In support of his request, Mr. D submitted a timeline of events, unsworn letters from a property manager and from several family members, proof of X's 2014 travel to New Mexico, and assorted school records for E, X and Y.[28] Without specifying dates, the property manager asserted that she had managed "several rentals" to Mr. D between 2006 and 2012, and Mr. D had his children living with him during those times.[29] The letters from Mr. D's family members generally assert that Mr. D provided housing, care and financial support for the children. They also indicate that Ms. C sometimes lived in Mr. D's home when she had nowhere else to go.[30] Because Mr. D

24 Exhibit 15.
25 *Id.*
26 Exhibit 17.
27 *Id.*
28 Exhibits 17, 19, 20.
29 Exhibit 17, p. 5.
30 Exhibits 17, 20.

worked on the North Slope, his mother, brother, and sister wrote that they came to Alaska for specific periods of time between 2008 and 2010, to help Mr. D by providing care for the children when he was away at work.[31]

The letters are not clear that the children at all times lived in Mr. D's home, and they do not clearly define the timeframes at issue. One letter, written by C U, asserts that Mr. D financially provided for the children, but his son Z was their guardian after November 2008, because Ms. C was incarcerated.[32]

On April 12, 2017, CSSD denied Mr. D's request for relief from the 2010 child support order.[33] Its Decision on Request for Relief from Agency Administrative Order states that the 2010 support order was correctly issued, and CSSD saw no evidence demonstrating a mistake, inadvertence, or excusable neglect. CSSD also concluded that the Division of Public Assistance must investigate allegations of fraudulent receipt of public benefits.[34]

Mr. D appealed.[35] The formal hearing took place on June 8, 2017. Mr. D appeared telephonically and was represented by F W. Ms. C did not appear, and she could not be reached at her telephone number of record. Child Support Specialist Kimberly Sledgister appeared telephonically and represented CSSD.

The record remained open for 60 days after the hearing, to accommodate Mr. D's request for time to submit additional evidence showing the months in which the children lived in his home, any time periods in which Ms. C also lived in his home, and any direct child support payments he had made to Ms. C. However, Mr. D did not take advantage of this opportunity.[36] The record closed on August 7, 2017. All documents submitted prior to August 7th were

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31 Exhibit 20. Mr. D worked a two-week-on, two-week-off schedule. D testimony.

32 Exhibit 17, p. 8. Ms. U also generally asserts that she and Z assisted Mr. D in the care of the children, but she does not explain the circumstances of that assistance in any detail.

33 Exhibit 21. CSSD had notified Ms. C of the request for relief, *see* Exhibit 21, p. 8, but she did not respond.

34 In a letter explaining it decision to deny the requested relief, CSSD advised Mr. D that he might resolve many of his concerns through a different process, in which CSSD could suspend, defer or terminate support under the existing support orders, based on custody changes or times in which the family lived as an intact unit. *See* Exhibit 21, p. 4. CSSD requested submission of school records, notarized statements from non-family members, and other evidence that supported Mr. D's claims on those issues. *See* Exhibit 21, p. 4.

35 Exhibit 22.

36 The record remained open so Mr. D could submit this evidence, and CSSD could evaluate whether his support obligation should be suspended for particular months, as well as whether he should receive any credits for direct support payments, under the existing child support orders. These issues are distinct from the question in this appeal, which addresses Mr. D's request to re-open and revise the 2010 child support order under 15 AAC 125.125. This decision does not foreclose any relief to which Mr. D may be entitled on other grounds.

admitted.

## III. Discussion

As the party who filed the appeal, Mr. D has the burden of proving by a preponderance of the evidence that CSSD's April 12, 2017 Decision on Request for Relief from Agency Administrative Order is incorrect.[37] He did not meet this burden.

*A. General Rule Prohibiting Retroactive Modification*

During the hearing, Mr. D clarified that, except for the brief period in 2008 when Ms. C and the children lived in the shelter, he sought to vacate all other obligations under the 2010 child support order, including any modifications of the order through May or June 2012.

However, once a child support order becomes final, as Mr. D's first support order did in 2010, it is a judgment that becomes vested when each periodic support payment becomes due and remains unpaid.[38] In general, both Alaska and federal law prohibit retroactive modification of child support orders.[39] Child support orders are modified beginning with the first day of the month *after* the month in which a notice of petition for modification was served on the non-requesting parent.[40] Applying this rule, Mr. D's support obligation was modified several times after 2010.

The rule against retroactive modification is subject to very limited exceptions. The Alaska Supreme Court has stated: "Retroactive modification is statutorily permitted only when paternity is disestablished and the modification can be implemented without violating federal law, or on the motion of the obligor when there is a clerical mistake or the support order is based on a default amount."[41]

None of these exceptions apply in this case. Paternity is not at issue. The 2010 support order was based on Mr. D's actual income, not a default amount.[42] The closest basis for action would be the "clerical error" exception. However, Mr. D's claim is that the 2010 child support order incorrectly identified Ms. C as the custodial parent after mid-2008, and it incorrectly ordered

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37 15 AAC 05.030(h).

38 AS 25.27.225.

39 *See* Alaska Civil Rule 90.3(h)(2) and Commentary at X.B; 42 U.S.C. § 666(a)(9) (2010); *Teseniar v. Spicer*, 74 P.3d 910, 915 (Alaska 2003).

40 Alaska Civil Rule 90.3(h)(2); 15 AAC 125.321(d).

41 *Teseniar*, 74 P.3d at 915 (quoting *Hendren v. State, Dep't of Revenue,* 957 P.2d 1350, 1352 (Alaska 1998)) (internal quotation marks omitted).

42 *See* Exhibit 2. A child support order is based on a "default amount" or "default income figure" when it has no relation to the obligor-parent's actual ability to pay. *See* AS 25.27.195(b); 15 AAC 125.121(a), (j).

him to pay monthly child support, when the children were already living in his home. This argument raises substantive factual and legal questions that are beyond the scope of mere "clerical error."

*B. CSSD Regulation Authorizing Late-Filed Appeals*

Mr. D argued that CSSD should grant his request to reopen the 2010 child support order pursuant to a regulation, 15 AAC 125.125. Under that regulation, a party to an administrative child support order may request relief from the order even after the deadline for appeal has passed. To do so, the requesting party must specify the regulatory grounds for relief, and it must explain "to the director's satisfaction" why relief is justified.[43] For purposes of this case, the relevant grounds for late-filed relief include: mistake, inadvertence, or excusable neglect; and fraud, misrepresentation, or other misconduct of an adverse party.[44]

Mr. D has not cited any authority suggesting that 15 AAC 125.125 was intended to address situations like the one he presents in this appeal. Nor has he adequately explained why he failed to act on his claims for seven years. As discussed below, 15 AAC 125.125 does not offer an alternate path to retroactively modifying the 2010 order or any subsequent child support orders in Mr. D's case.

1. Fraud, Misrepresentation, or Other Misconduct of an Adverse Party

Mr. D asserts that the 2010 child support order should be vacated because Ms. C perpetrated a fraud by falsely claiming that she exercised custody of the children. First, on the record presented, it is not clear what assertions Ms. C may have made about her custody of the children. The record merely shows that the 2010 child support order and several subsequent modifications were based on primary custody with her.[45] Mr. D agrees Ms. C exercised primary custody for three or four months in 2008, presumably beginning with February 2008, when she received public assistance and lived in a shelter with the children.

Second, even assuming Ms. C misrepresented the parties' custody arrangement, there is no basis for concluding that Mr. D was an unwitting victim of fraud, misrepresentation or other misconduct. Mr. D does not explain how he could have been defrauded or misled, given that he was a party to each child support order, and he was fully aware of the parties' actual custody and living arrangements at all relevant times. His failure to actively participate in the child support

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43 15 AAC 125.125(a), (b). The "director" refers to the director of the Child Support Services Division.

44 15 AAC 125.125(b)(1), (3).

45 It also shows she submitted one request for a modification review in 2012 by signing a CSSD form. Exhibit 3.

determination process for many years, and his failure to challenge Ms. C's assertion of primary custody, do not justify re-opening the 2010 child support order at this late date based on a finding of fraud.

Mr. D also suggested that Ms. C may have defrauded the State of Alaska by fraudulently receiving public assistance benefits premised on her custody of the children. As presented, this claim is purely speculative, and it provides no basis for relief. CSSD is not the state agency charged with investigating such allegations. If, after investigation, another governmental entity concludes that Ms. C did not exercise custody as she claimed, Mr. D can present that information to CSSD for appropriate action.

2. Mistake, Inadvertence, or Excusable Neglect

Mr. D contends that CSSD should revise the 2010 child support order based on mistake, inadvertence, or excusable neglect. Here again, however, he has not pointed to evidence justifying the relief he requests. As an initial matter, although Mr. D presented some general evidence indicating that he exercised primary custody of the children for extended periods of time, he did not clearly establish the dates or other circumstances involved. The record is unclear whether the children at all times lived in Mr. D's home, or whether Mr. D provided financial assistance while they lived in other homes.

More importantly, even if Mr. D did exercise primary custody as he alleges, he clearly knew his children lived with him. He also knew when Ms. C lived in his home. He does not adequately explain why he failed to act on this information, either by appealing his child support orders in a timely way, or by correcting them through the modification review process. He asserts that he was busy working and earning income to provide for his family, and he did not understand child support issues. He characterizes his failure to act as a mistake, inadvertence, or excusable neglect.

These explanations are unpersuasive. Mr. D asked CSSD to modify the child support order several times after 2010, but he often failed to provide the information CSSD requested, so his requests were denied. When he did provide appropriate evidence that a child was living in his home, as he did in 2013 and 2015, CSSD suspended his support obligation for that child, effective as of the date the child moved to his home.

In light of the straightforward factual claims at the heart of Mr. D's argument, Mr. D's failure to timely challenge the 2010 child support order and its subsequent modifications, and his

failure to follow through and complete the modification review process over many years, is not the kind of "mistake, inadvertence, or excusable neglect" contemplated by 15 AAC 125.125.[46] His untimely request is effectively a motion to retroactively modify a prior child support order, and CSSD appropriately denied it.[47]

## IV. Conclusion

Mr. D failed to show that CSSD erred when it denied his request for relief from the Administrative Child Support and Medical Support Order issued on March 30, 2010. Mr. D's case does not satisfy the narrow statutory grounds for retroactively modifying the 2010 order. Further, Mr. D has not shown fraud, misrepresentation, or other misconduct, nor has he shown mistake, inadvertence, or excusable neglect, that justify the relief he seeks pursuant to 15 AAC 125.125.

CSSD's April 12, 2017 Decision on Request for Relief from Agency Administrative Order is affirmed.

DATED: August 25, 2017.

By: *Signed*
Kathryn Swiderski
Administrative Law Judge

[46] *See, e.g., Dickerson v. Williams*, 956 P.2d 458, 465 (Alaska 1998) (to get relief for excusable neglect under Alaska Civil Rule 60(b)(1), a party not only must show "neglect," but also a valid "excuse"); *Wright v. Wright*, 22 P.3d 875 (Alaska 2001).

[47] *See Aldrich v. Aldrich*, 286 P.3d 504, 508 n. 19 (Alaska 2012) (to the extent a parent's request for relief under Civil Rule 60(b) is interpreted solely as a motion to modify a prior child support order, Civil Rule 90.3(h) bars retroactive modification).

# 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 8th day of September, 2017.

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

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