

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

IN THE MATTER OF:)
)
L D. S) OAH No. 06-0360-CSS
) CSSD Case No. 001018457
_____)

DECISION AND ORDER

I. Introduction

This case concerns the obligation of L D. S for the support of D M (DOB 00/00/89). The custodian of record is L (B) A.

On April 17, 2006, the Child Support Services Division issued an amended administrative child support order establishing a support obligation in the amount of \$272 per month effective May 1, 2006, with arrears in the amount of \$11,935 for the period from February 1, 2001, through April 30, 2006.

Mr. S filed an appeal and requested an administrative hearing. The case was referred to the Office of Administrative Hearings and the assigned administrative law judge conducted a telephonic hearing on June 1, 2006. Mr. S and Ms. A participated, and Andrew Rawls represented the division.

Based on the evidence and the testimony at the hearing, ongoing support is set at \$206.

II. Discussion

L S and L A met in 1988 while they were living in Alaska. Neither was married at the time: Ms. A was childless; Mr. S had a young daughter, born in 1986 from a prior marriage. The couple had a brief relationship that resulted in the birth of their child, D, in 1989. Before either of them realized that Ms. A was pregnant, they mutually agreed to terminate the relationship. Mr. S left Alaska and neither of the two had any further contact or knowledge of the other's whereabouts or circumstances.

Mr. S and his former wife remarried, and the remarried couple had another child in 1990. The couple divorced in 1998, and Mr. S was ordered to pay child support in the amount of \$605 per month for his two children.¹

¹ Ex. 7,p. 2.

Ms. A was a single parent until 2000, when she married. In 2001 she and her husband had a child. With the birth of her second child, and the attendant responsibility for child care, Ms. A was unable to make ends meet. For most of the time from February, 2001, through June, 2004, Ms. A received public assistance benefits on behalf of D and her other child. Ms. A has been able to support her children without public assistance since June, 2004. She is presently single.

As a condition of Ms. A's receipt of public assistance, the division instituted a proceeding to establish a child support obligation for D. In October, 2005, the division served Mr. S with a notice of paternity, and he learned for the first time of his daughter's birth. Mr. S was established as D's father by an order issued on February 1, 2006.² On February 6, 2006, the division issued an administrative support order including arrears from the date Ms. A began receiving public assistance in 2001.³ Following review, an amended order was issued on April 17, 2006.

Mr. S's total income was \$10,860 in 2001, \$5,193 in 2002, \$25,079 in 2003, \$9,385 in 2004, and \$20,033 in 2005.⁴ For the last five years, Mr. S has been employed as a mortgage broker on a commission basis. He can reasonably be expected to have total income for child support purposes in 2006 of \$20,033, or about \$1,669 per month.

Mr. S currently lives alone. His monthly rent is \$1,000. He pays about \$500 per month for food, including about \$250 per month while traveling in his employment. His utilities cost about \$160 per month, and he pays about \$300 per month for telephone and cell phone. He has a monthly car payment of \$250; insurance and gas are another \$250 per month.⁵ His total monthly expenses are about \$2,460, in addition to his monthly child support obligation.⁶

L A works two jobs, including one as a personal care attendant for her mother, who lives with her; she takes home about \$3,600 per month. She lives with D and her younger daughter, age 4, in her brother's house. She pays her brother \$600 per month as

² Ex. 1.

³ Ex. 2, p. 1.

⁴ Ex. 9, pp. 1-5.

⁵ Mr. S testified that he recently acquired health insurance from his employer, not realizing that it would cost \$600 per month. Because of the cost, he testified he will not continue the insurance. Accordingly, that expense is not included in this calculation. See Ex. 10, p. 2; Ex. 12.

rent, including all utilities, and spends about \$350 per month on food for herself and her daughter.⁷ She pays \$100 a month for cell phone service. Her car is fully paid for and she pays about \$90 per month for gas. Her personal care expenses run to about \$50 per month. She is paying \$200 a month to the Internal Revenue Service for back taxes, \$150 a month on credit card debt, and \$200 a month on health care debts for her children. Her total monthly expenses are about \$1,190, plus debt payments. A reduction in child support from the amounts set in the amended order would not adversely impact D or her other child.

III. Discussion

Mr. S did not dispute the income information used to calculate the presumptive support obligation reflected in the amended support order.⁸ He contends, however, that given his household expenses and his pre-existing child support obligations, the presumptive support obligation should be reduced.

A. Presumptive Obligation

For one child, a parent's presumptive support obligation is 20% of that parent's adjusted annual income,⁹ that is, total income after allowable deductions.¹⁰ Total income is "the expected actual annual income that the parent will earn or receive when the child support award is to be paid."¹¹ One of the allowable deductions from total income is a for child support paid under court orders "arising from prior relationships."¹² When adequate information is available, arrears may be based on the actual income received during the period for which arrears are due.¹³

In this case, Mr. S had a pre-existing marriage and one child of that marriage at the time of his relationship with Ms. A. At the time his support obligation for D was established, he had a previously-established support obligation for two children from his

⁶ Mr. S testified that his child support obligation has been adjusted several times. He testified that it was at \$850 until recently, when it was reduced to \$650. However, the only evidence submitted to regarding the amount of his obligation is the initial court order, for \$605.

⁷ Ms. A testified that she spends \$400-\$500 per month on food, including her mother.

⁸ Ex. 9, pp. 1-5. The division used the same income information to calculate a presumptive support obligation in its post-hearing brief. Ex. 15, pp. 1-5.

⁹ 15 AAC 125.070(a); Civil Rule 90.3(a)(2)(A).

¹⁰ 15 AAC 125.070(a); -.065; Civil Rule 90.3(a)(1).

¹¹ 15 AAC 125.030(a).

¹² Civil Rule 90.3(a)(1)(B). See 15 AAC 125.065(a).

¹³ Duffus v. Duffus, 72 P.3rd 313, 321 (Alaska 2003); Spott v. Spott, 17 P.3rd 52, 56 (Alaska 2001).

pre-existing marriage. Under these circumstances, Civil Rule 90.3(a)(1)(B) provides for a deduction from Mr. S's total income for his payments under the pre-existing court order for the support of his older child of the pre-existing marriage. Whether Civil Rule 90.3(a)(1)(B) also provides a deduction the amount paid under the same order for his younger child of the marriage, born after D, is a question that has not been decided by the Alaska courts.

The circumstances that bear on the award of child support are myriad, and not all are directly addressed by Civil Rule 90.3. The commentary to Civil Rule 90.3 suggests that the architects of the rule contemplated sequential completed relationships, and did not intend in Civil Rule 90.3(a)(1)(B) to address the situation that exists in this case, where a married person has a child outside of the marriage and subsequently has another child within the marriage, before a child support obligation has been established for the intervening child.¹⁴ Accordingly, such a situation should be treated as an unusual circumstance, within the meaning of Civil Rule 90.3(c)(1)(A). Mr. S's presumptive obligation, therefore, should include a deduction for only the older of his two children of his pre-existing marriage.

The division's post-hearing brief provides a deduction of \$392 per month, based on Mr. S's child support order of \$605 per month for two children, reduced to the amount that would have been owed for one child under Colorado's child support guideline, and capped at his actual payments. This approach yields a presumptive support obligation of \$80 in 2001, \$50 in 2002, \$270 in 2003, \$64 in 2004, \$206 in January-March, 2005, and \$284 beginning in April, 2005, and ongoing.¹⁵ The division's post-hearing calculations are consistent with Civil Rule 90.3(a)(1)(B) and are therefore adopted as Mr. S's presumptive support obligation.

B. Manifest Injustice

The presumptive support obligation may be reduced if the amount as calculated under 15 AAC 125.070 would result in a manifest injustice due to unusual circumstances.¹⁶ The obligor must provide clear and convincing evidence of manifest

¹⁴ "A child support order for children of a second marriage should take into account an order to pay support to children of a first marriage, but not vice-versa." Civil Rule 90.3, Commentary at III(D).

¹⁵ Ex. 15, pp. 1-7.

¹⁶ 15 AAC 125.075(a)(2).

injustice.¹⁷ In determining whether manifest injustice exists, all of the relevant circumstances should be considered.¹⁸

Mr. S argues that it is unfair to charge him arrears for periods when he did not know that he had a child, in light of his pre-existing obligation for the support of the children of his marriage. He adds that the both the arrears and the ongoing support obligation are in excess of his ability to pay, given his expenses.

I. Arrears

It is not unfair to impose an obligation for arrears for periods when a parent has no knowledge of the existence of a child: a parent's duty to "maintain the parent's children" is the legal consequence of parenthood, without regard to knowledge.¹⁹ But this case involves not only establishing a legal support obligation, but also determining the amount of that obligation. The fundamental premise of Civil Rule 90.3 is that child support payments should be based on available income.²⁰ Payments made under a pre-existing court order are not available for purposes of a subsequently-established support obligation, regardless of the birth dates involved. Therefore, in determining the amount to be paid as arrears on D's behalf, it would be unfair to ignore payments that were made by Mr. S under his pre-existing support order during the period those arrears accumulated, particularly since the other order cannot be retroactively modified to account for his obligation to D. Under the facts of this case, it would be manifestly unjust not to provide a deduction from Mr. S's income during the period of arrears that is equal to the amount he actually paid on a pre-existing child support order during that time. Mr. S actually paid \$398 per month during the period of arrears,²¹ as compared with the deduction of \$392 per month in the division's calculation.

In addition, Mr. S argues, and the evidence indicates, that the amounts shown in the amended order are beyond his ability to pay. Furthermore, a portion of the arrearage accumulated during periods when Ms. A was on public assistance. Payment of those

¹⁷ 15 AAC 125.075(a); *see* Civil Rule 90.3(c)(1).

¹⁸ *See* 15 AAC 125.080.

¹⁹ AS 25.20.030.

²⁰ Civil Rule 90.3, Commentary at III(A) (income for child support purposes includes "benefits which would have been available for support if the family had remained intact.")

²¹ Mr. S's total payments in 2001-2005 were \$26,240.35. Ex. 14, pp. 1-2. There is no evidence of any additional payments since the end of 2005. Averaged over the 66 months of arrears, his average monthly payment was \$397.58.

accumulated arrears will be applied to repay public assistance benefits, and will not benefit D.²² Finally, Mr. S was completely unaware that D had been born until October, 2005, and thus he had no opportunity, during the time the arrears accumulated, to manage his affairs in a manner that would accommodate his child support obligation to her. For these reasons, it would be manifestly unjust at this time to impose an obligation for more than the minimum amount during the entire period of arrears before he was aware of his parental support duty.²³ Accordingly, arrears will be reduced from the presumptive amount to the minimum amount from February, 2001, through October, 2005. Since that time, arrears will be reduced by increasing the deduction under Civil Rule 90.3(a)(1)(B) to \$398 per month.

2. *Ongoing Support*

Mr. S's presumptive ongoing support obligation is \$284, as shown in the division's post-hearing brief. The presumptive ongoing support obligation does not include any deduction for prior child support, because he is no longer paying child support for his older child from the pre-existing marriage.²⁴

Mr. S's monthly expenses exceed his monthly income, without regard to his child support obligations, but he has not shown by clear and convincing evidence that he cannot substantially reduce his monthly expenses. Nonetheless, there is clear and convincing evidence that the presumptive support obligation is not reasonably necessary for D's support: Ms. A testified that she does not need support at the presumptive support level, and she testified to income and expenses yielding a positive cash flow well in excess of Mr. S's presumptive support obligation. Furthermore, Mr. S's pre-existing support obligations cannot reasonably be ignored in determining the appropriate level of ongoing support.

On balance, under these facts, it is manifestly unjust that Mr. S's ongoing support obligation should be set at the presumptive level. Rather, he should be provided a deduction from his income to the extent of the Colorado guideline for one child, or \$392 per month.

²² The same cannot be said for repayment of arrears that accrued during times when Ms. A was not on public assistance. Those amounts would be paid directly to Ms. A, and could be used for D's benefit.

²³ See Civil Rule 90.3, Commentary at VI(E)(2), VI(B)(2).

²⁴ Ex. 15, p. 6.

IV. Conclusion

Based on the testimony at the hearing and the evidence in the record, Mr. S's child support obligation for arrears should be set at the minimum amount during the time prior to service of the paternity petition, and he should be provided a deduction of \$398 per month from his income in other months of arrears, and of \$392 per month for ongoing support.

ORDER

1. L D. S is liable for any arrears accrued from February 1 through October 31, 2005, at the rate of \$50 per month; from November 1, 2005, through December 31, 2005, at the rate of \$205 per month; and from April 1, 2006, through July 31, 2006, at the rate of \$206 per month.
2. The ongoing child support obligation of L D. S is \$206 per month effective August 1, 2006.

DATED: July 20, 2006

Signed

Andrew M. Hemenway
Administrative Law Judge

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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 notices, 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 8th day of August, 2006.

By: Signed _____
Signature
Andrew M. Hemenway _____
Name
Administrative Law Judge _____
Title

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