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

In the Matter of	)	
	)	
K Z	)	OAH No. 18-0738-CSS
	)	Agency No. 001211466

DECISION AND ORDER

I. Introduction

C S appeals an order issued by the Child Support Services Division modifying the child support obligation of K Z. The modified order decreased Mr. Z's child support obligation from $515 a month to $388 a month.

A hearing was held on July 25, 2018. Mr. Z and Ms. S appeared in person; Child Support Specialist Brandi Estes represented the division telephonically. After the hearing, both parties submitted additional income information, the division submitted revised calculations, and Ms. S submitted a response to those calculations. The record closed on August 9, 2018.

Based on the evidence presented, the division's Modified Administrative Child and Medical Support Order should be adjusted to set child support in accordance with the division's latest shared custody calculations, set forth in its August 1, 2018 submission to record. Based on this, Mr. Z's monthly child support obligation is $226 a month effective March 1, 2018 and ongoing.

II. Facts

C S and K Z have two children, W and G. Mr. Z's monthly child support obligation was set following a hearing at $515 a month, effective April 1, 2016, based on a 50/50 shared custody arrangement.[1] Ms. S requested a modification review in January 2018. Mr. Z requested a modification review in February 2018.[2] The division issued a notice of petition for modification on February 7, 2018.[3] The division issued a modified order setting Mr. Z's child support obligation at $388 a month beginning March 1, 2018 and ongoing based on shared custody.[4] Ms.

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1 Div. Ex. 1 at 2, 4.
2 Div. Ex. 2, Ex. 6.
3 Div. Ex. 7.
4 Div. Ex. 10 at 3.

S appealed, disputing the division's calculation of income, deductions, and the effective date of the modification.[5]

Mr. Z works for Employer A as a power generation wireman/electrician. His current wage rate is $45.27 an hour.[6] Mr. Z also occasionally earns overtime pay. He estimated his total overtime in 2017 at 70 hours, and he expects to receive about the same amount of overtime this year. Mr. Z holds a position with his union that requires him to attend board meetings and conferences. Employer A does not pay him for time spent attending these meetings. Instead, his union compensates him for the wages lost while he is gone from his regular job in order to attend to union business, including attendance at union meetings and conferences.[7]

Ms. S's principal employer is Employer B. She earned $2,435 per pay period for this job through mid-June 2018.[8] Her pay rate increased to $2,527 per pay period beginning with the first check issued in July 2018.[9] She also works at Employer C for three hours each week. Her earnings from that job vary depending on the number of appointments. She receives commissions for services provided and tips.[10] Up until May 4, 2018, she had a third job, working for Employer D.[11] She earned $2,576 total from that employer in 2018.[12]

III. Discussion

Civil Rule 90.3 provides that an obligor's child support amount is to be calculated based on his or her "total income from all sources," minus allowable deductions specified in the rule.

Child support orders may be modified upon a showing of "good cause and material change in circumstances."[13] Civil Rule 90.3 permits modification of a child support amount if a party shows that a material change of circumstances has occurred.[14] A material change of circumstances will be presumed "whenever the change would result in an increase or decrease of support under the rule of at least 15%."[15] In child support appeals, the person who requests a hearing has the burden of proving that the division's order was incorrect.

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5 Div. Ex. 11.
6 Z Ex. 5.
7 Z Ex. 1; Testimony of Z.
8 S Ex. 2.
9 S Ex. 1.
10 S Ex. 3 and 4.
11 Testimony of S; S Ex. 5.
12 Div. Ex. 12 at 3.
13 AS 25.27.190(e).
14 Alaska Civil Rule 90.3(h)(1).
15 Alaska Civil Rule 90.3 Commentary X.

In this case, the 2016 order establishing Mr. Z's child support obligation was based on Mr. Z and Ms. S's income. Specifically, the child support amount was based in part on Ms. S's actual income in 2015 of approximately $30,342, which was lower than in other years due to unpaid leave from work.[16] In 2017, Ms. S's employers reported total earnings of $56,939 for Ms. S. Whereas Ms. S's income has increased, Mr. Z's has held relatively steady. Mr. Z's 2017 reported earnings of $99,377 are only slightly higher than his 2015 reported earnings of $98,169.[17]

In the calculations supporting the revised order issued July 11, 2018, and in the division's revised calculations, the division has estimated total income for 2018 for each parent based on 2018 year-to-date earnings.

A. Calculation of child support

The division's modified administrative child support and medical support order, issued July 11, 2018, set Mr. Z's child support obligation at $388 a month. The division based this figure on 2018 year-to-date compensation as reported on February 2018 paystubs. The division treated Mr. Z's union paychecks as secondary employment, rather than recovery of lost wages. Also, the division extrapolated annual income for Ms. S from all three of her jobs, even though Ms. S's employment at Employer D has ended.[18] At the hearing, both parents argued that the division's calculations overstated their income.

Following the hearing, the division provided revised calculations. The division's revised calculations use an annual wage figure of $98,914.60 for Mr. Z.[19] This figure is based on Mr. Z's current hourly rate and an anticipated 70 hours of overtime.[20] Mr. Z testified persuasively that his paychecks from the union compensate him for time spent at mandatory union board meetings and conferences, replacing wages he would otherwise earn at Employer A for that time. Furthermore, the annual wage figure in the division's revised calculations is in line with Mr. Z's earnings over the past three years as reported to the Department of Labor and Workforce Development.[21] Mr. Z's employer-reported wages totaled $98,169 in 2015, $109,124 in 2016,

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16 Div. Ex. 1 at 2, 6; Div. Ex. 12 at 4.
17 Div. Ex. 12 at 1 - 2.
18 Div. Ex. 10 at 8.
19 Div. Ex. 14 at 3.
20 Div. Submission to Record; Testimony of Z. Mr. Z testified that he received about 70 hours of overtime last year, and expects about the same number of hours of overtime in 2018. *See also* Z Ex. 2, 6, 7.
21 Div. Ex. 12.

and $99,377 in 2017. Mr. Z testified that the higher wages in 2016 were due to a one-time special project undertaken by his employer in the third quarter of that year, and he did not anticipate this happening again in the future. The evidence supports the division's revised calculations estimating Mr. Z's annual income at $98,194.60.

The division's original calculations used an annual wage figure of $58,440 for Ms. S for her primary job with the state, and $11,183 for her secondary employment with the salon and Employer D, for total expected gross wages of $69,623. The division's revised calculations lowered the secondary employment figure to $10,525 to account for the end of Ms. S's employment with Employer D. Rather than extrapolating her income from Employer D forward through 2018, as the original calculation did, the revised calculation includes only Ms. S's actual wages at Employer D through the end of her employment on May 4, 2018. This resulted in total expected 2018 gross wages of $68,964.84. The division noted that Ms. S received a pay increase from her primary employer in June 2018, but this increase is not reflected in its shared custody calculation.[22]

The division's shared custody calculations accurately summarize each parent's expected 2018 wage income. Including permanent fund dividends for each parent and after all appropriate deductions, Ms. S and Mr. Z's respective incomes result in a monthly obligation of $226 a month for two children based on equal shared custody, owed by Mr. Z.[23]

Ms. S challenged the division's revised calculations in her post-hearing submission, noting that her income from Employer D had not been removed, and arguing that it is unjust to allow Mr. Z "double the deductions that I am allowed."[24] Ms. S did not, however, show that the division's revised calculations were incorrect. The division accounted for Ms. S's concern about the end of her employment with Employer D by including only actual wages for 2018, and not extrapolating future income from that source as it did in its original calculation. The division allowed both parties deductions in accordance with Civil Rule 90.3, including deductions for retirement contributions up to 7.5 percent of income, as discussed below. Ms. S did not argue

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22 Division Submission to Record; Div. Ex. 14.
23 Div. Ex. 14.
24 S email response to revised calculations.

that the division erred by not including her pay increase in the adjusted wage figure it used in the revised shared custody calculation.[25]

According to the commentary to Civil Rule 90.3, "child support is calculated as a certain percentage of the income which will be earned when the support is to be paid. This determination will necessarily be somewhat speculative because the relevant income figure is expected future income."[26] Ms. S's income from her principal job may be slightly higher than shown in the division's revised calculations over the coming year due to the increase in her salary, and her income from her other employment may be slightly lower due to the end of her employment at Employer D. However, the division's revised calculations are based on Ms. S's actual earnings January through mid-June 2018. As such, the division's revised calculations are a reasonable estimate of Ms. S's income over the period during which the support is to be paid and should be adopted.

B. Other Arguments regarding Mr. Z's income and deductions

At the hearing, Ms. S argued that Employer A's contributions to the Alaska Electrical Trust Fund Pension Plan on behalf of Mr. Z should be considered a perquisite and counted as income to Mr. Z in the child support calculation. This argument was considered and rejected in a previous decision involving the same parties.[27] The relevant facts have not changed. Mr. Z cannot access the funds contributed to that pension plan now, but will have the right to a pension benefit when he turns 58.[28]

As Administrative Law Judge Handley wrote in the parties' prior appeal:

> The law and evidence, however, do not support Ms. [S]'s arguments concerning Mr. Z's retirement contributions and employer-funded pension. The provision of Rule 90.3 that includes pensions within the definition of "income" is intended to cover situations where an obligor is drawing down their pension, i.e., receiving payments from it, rather than money being paid into a pension fund on the obligor's behalf. And the provision regarding "perquisites" requires their inclusion within the definition of income "to the extent that they ... reduce living expenses, including but not limited to employer provided housing ... and transportation benefits." There was no showing at the hearing of this matter that Mr. Z's employer-funded pension has the effect of reducing his living expenses in a manner comparable to these types of employer-provided benefits. The pension,

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[25] The topic of Ms. S's pay increase was not addressed at the hearing. However, both parties were given the opportunity to respond to the division's revised calculations. Ms. S responded, Mr. Z did not.

[26] Civil Rule 90.3 Commentary III.E.

[27] Div. Ex. 1 at 4 - 6.

[28] Testimony of Z.

> therefore, does not constitute a "perquisite" that should be included in Mr. Z's income.[29]

In this proceeding, no evidence was presented showing that the contribution of Mr. Z's employer towards Mr. Z's pension has the effect of reducing Mr. Z's living expenses as anticipated in the commentary to Civil Rule 90.3. Therefore, the employer contribution toward Mr. Z's pension is not a "perquisite" for purposes of Civil Rule 90.3 and the division was correct not to include it as income in its calculations.

Ms. S takes issue with the division's application of the 7.5 percent cap on retirement deductions. Civil Rule 90.3 defines adjusted annual income as the parent's total income minus specified deductions. The specified deductions include "mandatory contributions to a retirement or pension plan" as well as "voluntary contributions to a retirement or pension plan or account in which the earnings are tax-free or tax-deferred, except that the total amount of these voluntary contributions plus any mandatory contributions ... may not exceed 7.5% of the parent's gross wages and self-employment income."[30]

Mr. Z voluntarily contributes 7.5 percent of his income to the union pension plan.[31] According to Ms. S, it is unfair to allow Mr. Z a 7.5 percent deduction from his income for voluntary retirement contributions. In her view, this is unfair because Mr. Z's employer is also contributing to the plan, but the employer contribution does not count towards the 7.5 percent cap. Ms. S argued that this is unfair because her PERS contributions, which are mandatory deductions from her paycheck as a state employee, count toward the 7.5 percent cap on the deduction. Ms. S reasons that, if the contributions her employer requires her to make to her retirement plan count towards the 7.5 percent cap, then mandatory contributions made by Mr. Z's employer to Mr. Z's pension plan also should count against the 7.5 percent cap. To the extent Civil Rule 90.3 does not permit this, Civil Rule 90.3 has a loophole and is therefore flawed, in Ms. S's view. While Ms. S may wish to see changes to Civil Rule 90.3, the division is obliged to apply Civil Rule 90.3 as it stands.

Furthermore, Ms. S's argument conflates mandatory employer contributions to retirement plans and mandatory employee contributions to retirement plans. The difference between Ms. S's situation and Mr. Z's situation is not the employer contribution to a retirement plan, which is

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29 Div. Ex. 1 at 5 (citations omitted) (*See* Civil Rule 90.3 Commentary III.A(19)).
30 Civil Rule 90.3(a)(1)(A) and (B).
31 Div. Ex. 9 at 11; Z Ex. 2 and 5.

required of the employer in both cases. The state's PERS defined contribution plan requires the state to contribute an amount equal to five percent of an employee's gross eligible compensation towards the employee's retirement account in the plan. The plan also requires Ms. S to contribute eight percent of her gross compensation to the account.[32] According to Ms. S, Employer A is required to contribute to the Alaska Electrical pension plan on behalf of Mr. Z.[33] In addition, Mr. Z elects to contribute 7.5 percent of his compensation to a retirement plan.

So, both Ms. S's employer and Mr. Z's employer make mandatory contributions towards their employees' retirement. Ms. S and Mr. Z also both make contributions towards their own retirement plans. The difference between the two is that Ms. S is a participant in a "mandatory plan" for purposes of Civil Rule 90.3, meaning her contributions to her PERS retirement account are required. Mr. Z is not a participant in a mandatory plan; his contributions to his retirement are voluntary.[34]

The same 7.5 percent cap applies to an employee's contributions to a retirement plan for purposes of the child support calculation, whether those contributions are voluntary contributions, mandatory contributions, or a combination of voluntary and mandatory contributions.[35] The division properly capped monthly allowable deductions for each parent's retirement contributions at 7.5 percent of each parent's gross wages. Ms. S has not shown any error in the application of the 7.5 percent cap.

Finally, in her response to the division's revised calculations, Ms. S argued that "the mere fact that, Mr. Z is allowed double the deductions that I am allowed is a glaring injustice." Deductions are limited under Civil Rule 90.3(a)(1). The dollar amount of many of those deductions -- including federal income tax, social security, and Medicare -- will vary depending on income. Also, as discussed above, the maximum deduction for combined mandatory and voluntary retirement contributions is 7.5 percent of gross wages and self-employment income. Because the amount of allowable deductions varies according to income, and Mr. Z's income is

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[32] Administrative notice is taken of the plan information at http://doa.alaska.gov/drb/dcrp/dcr_plan/general_info.html, accessed July 26, 2018. Furthermore, administrative notice is taken that the abbreviation "PERS DC MAND" on Ms. S's paystub, Ex. 8 at 1, refers to a mandatory employee contribution to the PERS defined contribution plan. If a party objects to the taking of administrative notice of these facts, the party may file a written statement as provided in the Notice of Proposed Decision.

[33] Testimony of S.

[34] *See* Civil Rule 90.3 Commentary III. D.1.

[35] Civil Rule 90.3(a)(1)(A)(v) and (a)(1)(B); Civil Rule 90.3 Commentary III.D.1.

higher than Ms. S's, Mr. Z's allowable deductions are higher than Ms. S's. The division calculated monthly allowable deductions in accordance with Civil Rule 90.3.

IV. Conclusion

Mr. Z's monthly child support obligation should be modified based on a material change in circumstances. In accordance with the division's revised calculations, Mr. Z's child support amount should be set at $226 a month for two children.

According to the division's regulations, a modification is effective beginning the first day of the next month after the division issues a notice to the parties that a modification has been requested.[36] The regulation setting the effective date the month after the division issues notice applies regardless whether a party requests a hearing on the modification. The notice in this case was issued on February 7, 2018. Therefore, under the regulation, the modification takes effect March 1, 2018.

The child support amounts in this order were calculated based on the shared custody formula in Civil Rule 90.3(b) and the parties' 50/50 shared custody arrangement.

V. Child Support Order

1. Mr. Z's child support for W and G is set at $226 per month effective March 1, 2018 and ongoing.

2. All other provisions of the Modified Administrative Child and Medical Support Order dated July 11, 2018 remain in effect.

Dated: August 28, 2018.

By: *Signed*
Signature
Kathryn L. Kurtz
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

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.

[36] 15 AAC 125.321(d).

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 __13th__ day of ____September_____, 2018.

By: *Signed*
Signature
Hanna Sebold
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]