

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

In the Matter of)	
)	
S B. J)	OAH No. 18-0857-CSS
_____)	Agency No. 001118174

DECISION AND ORDER AFTER REMAND¹

I. Introduction

S J appeals a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on May 19, 2018. The modification increased his child support obligation for his daughter, S, to \$919 per month, effective February 1, 2018. Mr. J requested a reduction based on financial hardship, arguing that the new support amount will result in substantial hardship to his younger children.

The evidence produced in the hearing process showed that CSSD’s income calculation omitted Mr. J’s military specialty pay. When this income is included, his total income results in a support amount of \$1,000 per month under the Civil Rule 90.3(a) primary custody formula. Mr. J did not show clear and convincing evidence of manifest injustice or of substantial hardship to his subsequent children if this obligation is not reduced. His request for a hardship variance is therefore denied. Based on his actual income, Mr. J’s support obligation for S is adjusted to \$1,000 per month, effective February 1, 2018 and ongoing.

II. Facts

A. Material Facts

Mr. J and N T the parents of S, who is 17. She will turn 18 in May 2019. Mr. J lives in Virginia. Ms. T and S live in Alaska. Ms. T is the custodian of record. S plans to earn her general education diploma and begin college in the near future.

Mr. J is an E-5 with fourteen years of service in the military.² His household includes his wife, D, his 11-year-old stepson, and his infant daughter. He earns base pay of \$3,310.50 per month, resulting in expected 2018 gross wages of \$39,720.³ He also earns specialty pay in the

¹ A Proposed Decision, issued October 4, 2018, adjusted Mr. J’s support amount to \$1,000 per month and denied his request for a hardship reduction. CSSD and Mr. J filed Proposals for Action because the decision incorrectly stated that Mr. J’s rent expense is \$450, when it is actually \$1,250. The Commissioner of Revenue returned the case to the administrative law judge under AS 44.64.060(e)(2) to correct the error and revise the decision as appropriate based on the existing evidentiary record. This decision corrects the error and revises parts of the discussion regarding Mr. J’s request for a hardship variance. These revisions do not change the support amount calculated under Civil Rule 90.3(a) or the outcome of Mr. J’s request for a variance under Civil Rule 90.3(c).

² Exhibit 7 (January 2018 Military Leave and Earnings Statement).

³ *Id.*; Exhibit 3, p. 8.

form of career sea pay, \$406 per month, as well as military “non-income pay” benefits including a Basic Allowance for Subsistence (BAS), \$369.39 per month, and a Basic Allowance for Housing (BAH), \$1,428 per month.⁴

Due to the new baby’s age, D J is not presently working. She has work experience as a server in fast-food restaurants and as a baker at a Safeway store. Ms. J plans to remain a stay-home parent for the foreseeable future.

During the formal hearing, Mr. and Ms. J identified regular household expenses totaling approximately \$3,821 per month.⁵ This includes: \$1,250 for rent; \$300 for food at home; \$50 for food at restaurants or outside the home; \$200 per month for electricity, including heat; \$65 for water and sewer; \$35 for trash; and \$256 for three phone lines for members of Mr. J’s household. The family does not have other internet or cable service. The household owns two vehicles: a 2016 Chevrolet Cruze LT, on which Mr. J owes \$26,000 and pays \$500 per month; and a 2015 Kia Forte 5, on which he owes \$11,000 and pays \$388 per month. The household spends roughly \$90 per month for gas, \$20 per month for maintenance, and \$162 for home and auto insurance. Mr. J did not identify any entertainment expenses, expenses for alcohol or tobacco, or cost for his own personal care. At present, his largest personal care expenses are for diapers, \$100 per month, and formula for the baby, which Ms. J estimated will cost roughly \$312 per month.⁶ Ms. J has medical expenses totaling \$93 per month. Mr. J and Ms. J each have a credit card that is at its credit limit: \$3,000 for Mr. J, and \$2,000 for Ms. J. They are not currently making payments on either card.

Not included in the above regular household expense total are Mr. J’s child support amounts for S and for his seven-year-old son from a different relationship. Mr. J pays \$403 per month in child support for his seven-year-old child.⁷

Ms. T reported that she lives with S and her nine-year-old daughter from a different relationship. Ms. T’s fiancé also lives in the home. Ms. T works part-time in a pizza restaurant, where she earns roughly \$300 in gross pay each bi-weekly pay period. She recently started a second job cleaning and dishwashing at another restaurant, where she earns \$9.50 per hour and

⁴ Exhibit 7.

⁵ After the Proposed Decision was issued, Mr. J submitted a budget summary that conflicts with evidence he presented during the hearing in terms of his income (BAH) and certain expenses and debts. Because this information was not timely submitted, it is not part of the evidentiary record.

⁶ Ms. J testified that each can of formula is \$26. She estimates that the baby will require 10-12 cans per month. $12 \text{ cans/month} \times \$26/\text{can} = \$312/\text{month}$.

⁷ Exhibit 4.

works roughly 20 hours per week. Ms. T's fiancé works in the transportation department at the federal courthouse, for which he earns approximately \$4,000 per month in gross pay.⁸

Ms. T summarized her household's regular living expenses. Based on the evidence she provided, her household income is sufficient to cover the household's reasonable living needs. Ms. T also pays ongoing and past-due child support for a child from a different relationship. The ongoing amount was recently reduced through a modification review, which has eased some of her financial pressures.

The parents disagreed during the hearing whether S actually lives with Ms. T. Ms. T testified that S lives in her home, but she regularly visits with her grandparents. However, S has told Mr. J that she lives with her grandparents.⁹ During the hearing, she told him by text message that she was planning to move to a shelter for homeless youth.¹⁰ This dispute does not affect the calculation of Mr. J's modified child support amount, and it cannot be resolved in this case. The CSSD hearing representative agreed to forward Mr. J's allegations and the text messages he submitted to his CSSD caseworker, who can initiate the separate process for determining whether Mr. J's support obligation should be suspended for any months in which S lived away from her mother's home.

B. Background

In 2013, CSSD set Mr. J's child support obligation for S at \$785 per month.¹¹ Ms. T requested a modification review, and CSSD served each parent with notice of the petition for modification on January 24, 2018.¹² It sent Mr. J's notice by first class mail to his address of record in Washington state.¹³ Mr. J last lived at that address in 2016.¹⁴ After moving away, he did not inform CSSD of his new address. As a result, he did not actually receive the notice.¹⁵ Consequently, he did not submit income information, as the notice of petition for modification had requested.

On May 19, 2018, CSSD issued a decision granting the modification. It also issued the Modified Administrative Child Support and Medical Support Order that is the subject of this

⁸ T testimony.

⁹ J testimony; J 8/18/18 submission to record (text messages).

¹⁰ J testimony; J 8/18/18 submission to record.

¹¹ Exhibit 1.

¹² Exhibit 2.

¹³ Estes testimony.

¹⁴ J testimony.

¹⁵ J testimony; Estes testimony. He updated his address with the agency on March 16, 2018.

appeal.¹⁶ The modified order set Mr. J's support for S at \$919 per month, effective February 1, 2018, based on military pay information available to CSSD.¹⁷ CSSD's calculation included Mr. J's wages, subsistence allotment, and housing allotment, but not his career sea pay.¹⁸

Mr. J requested a formal hearing.¹⁹ He argued that, under his present financial circumstances, he cannot afford the increased child support amount without jeopardizing his ability to support his seven-year old son and his subsequent family.

The formal hearing took place by telephone on September 18, 2018. Mr. J represented himself with assistance from D J. Both Mr. and Ms. J testified. Ms. T represented herself and testified on her own behalf. Child Support Specialist Brandi Estes represented CSSD. The hearing was audio-recorded. All submitted documents were admitted to the record, which closed on September 20, 2018.

III. Discussion

As the person who filed the appeal in this case, Mr. J bears the burden of proof. As to the support amount calculated under the primary custody formula and applied in the modified child support order, his burden is to show by a preponderance of the evidence that the calculation is incorrect.²⁰ Regarding his request for a variance based on financial hardship, Mr. J must show clear and convincing evidence that manifest injustice would result if the support award were not varied.²¹

A parent is obligated both by statute and at common law to support his or her children.²² Child support orders may be modified upon a showing of "good cause and material change in circumstances."²³ If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes a "material change in circumstances" has been established. Mr. J's child support was previously set at \$785 per month, so a support calculation that changes his obligation by \$117.75 or more would be sufficient to modify his child support

¹⁶ Exhibit 3.

¹⁷ Estes testimony; Exhibit 3, p. 8.

¹⁸ Exhibit 3, p. 8.

¹⁹ Exhibit 4.

²⁰ 15 AAC 05.030(h).

²¹ Civil Rule 90.3(c).

²² AS 25.20.030; *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987).

²³ AS 25.27.190(e).

obligation.²⁴ When the newly calculated amount is less than a 15% change, CSSD still may grant the modification if three or more years have elapsed since the prior support order was issued.²⁵

A modification is effective beginning the month after the parties are served with notice of the request for a modification review.²⁶ Here, CSSD provided proper notice on January 24, 2018, when it sent notice of the request for a modification to each parent's address of record by first-class mail.²⁷ Mr. J did not actually receive the notice because he did not keep his address current with CSSD, as he is obligated to do. Because CSSD provided proper notice, the modification in this case is effective as of February 1, 2018.²⁸

A. *Child Support Calculation*

Civil Rule 90.3 specifically provides that, when determining a military parent's total income from all sources, the calculation includes "Armed Service Members base pay plus the Obligor's allowances for quarters, rations, COLA and specialty pay."²⁹ The base pay and specialty pay amounts are included as taxable income.³⁰ Other benefits are non-taxable income.³¹ If the service member lives off base, the income determination includes the BAH amount reflected in the Military Leave and Earnings Statement (LES). If the service member lives rent-free in base housing, the housing allowance is an in-kind contribution. For child support purposes, its value is the same amount the service member would receive for BAH while living off base.³² Non-pay benefits are included in the calculation because they reduce living expenses and allow the military member to use the remainder of his or her cash pay to cover other expenses.

Mr. J did not challenge CSSD's calculation of his support amount under the primary custody formula. However, the evidence at hearing showed that CSSD omitted his career sea pay when it calculated his total income from all sources. After the hearing, CSSD supplemented the record with Mr. J's June 2018 LES, which shows Mr. J's wages, specialty pay, and non-income pay.³³ When his career sea pay is included in the calculation and after all other applicable

²⁴ \$785 x 15% = \$117.75.

²⁵ 15 AAC 125.321(b)(2)(C).

²⁶ 15 AAC 125.321(d).

²⁷ 15 AAC 125.316(c); Estes testimony.

²⁸ Mr. J was advised that he could present income information through the formal hearing process, and any adjustments to the child support calculation would relate back to February 1, 2018. This provided him a full opportunity to provide information and express his views on the appropriate calculation of his child support amount.

²⁹ Civil Rule 90.3, Commentary III.A.28 (emphasis added).

³⁰ See Exhibit 3, p. 8; Attachment A.

³¹ Exhibit 3, p. 8; Attachment A.

³² See Civil Rule 90.3, Commentary III.A.19.

³³ Exhibit 7.

deductions, Mr. J's actual income results in a support amount of \$1,000 per month for S under the primary custody formula.³⁴

Since S is Mr. J's oldest minor child, Civil Rule 90.3(a) sets his support amount for her at 20% of his adjusted annual income.³⁵ The primary custody formula does not provide a deduction from income for the child support Mr. J pays for his younger child from a different relationship. It also does not allow a deduction for the cost of supporting his subsequent family. Civil Rule 90.3 prioritizes an obligor-parent's financial responsibility to his or her oldest children. Therefore, the support obligation for an older child may not be reduced simply because the parent has subsequent children.³⁶ However, if the failure to reduce the older child's support obligation would cause "substantial hardship" to the subsequent children, a reduction may be allowed under the hardship provision at Civil Rule 90.3(c).³⁷ This issue is discussed below.

B. Financial Hardship

Mr. J's primary argument is that he is unable to pay the modified support amount while also paying support for his seven-year old son from a different relationship and while supporting his wife, stepson, and new baby. This raises the issue of a financial hardship variance under Civil Rule 90.3(c).

Child support determinations calculated under Civil Rule 90.3 from an obligor'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."³⁸ It is appropriate to consider all relevant evidence, including the circumstances of the custodial parent and child, to determine if the support amount should be set at a different amount than the one determined under Civil Rule 90.3(a).³⁹

Including all sources of military pay, child support rules identify Mr. J's 2018 adjusted annual income as \$59,986.08.⁴⁰ This is his income after deductions for federal income taxes and matters such as Social Security/Medicare. It translates to \$4,998.84 in available income each month.⁴¹ Based on the information Mr. J provided in the hearing, his household living expenses

³⁴ Attachment A.

³⁵ See Civil Rule 90.3(a)(2)(A).

³⁶ See *In re V.S.*, OAH No. 11-0271-CSS (Comm'r of Revenue 2011), pg. 4.

³⁷ Civil Rule 90.3, Commentary VI.B.2.

³⁸ Civil Rule 90.3(c).

³⁹ Civil Rule 90.3(c)(1); Civil Rule 90.3, Commentary VI.B.

⁴⁰ Attachment A.

⁴¹ \$59,986.08 / 12 months = \$4,998.84.

are roughly \$3,821 each month. His support amount for S raises his monthly expenses to \$4,821; they are \$5,224 when Mr. J's child support obligation for his seven-year old son is also included.

The evidence in the record is that Mr. J's monthly net income falls \$200 to \$300 short of covering all his regular living expenses as well as his two ongoing child support obligations.⁴² In his Proposal for Action, Mr. J argued that the evidence at hearing results in an actual monthly shortfall of \$357 to \$427.⁴³ While a shortfall of any magnitude undoubtedly causes financial stress, none of these sums show unusual circumstances or clear and convincing evidence of substantial hardship to Mr. J's subsequent children. Therefore, even accepting Mr. J's post-hearing calculations as accurate, they do not change the analysis or outcome of the hardship discussion.

Mr. J does not have a legal obligation to financially support his stepson. Though his desire to do so is understandable, it is not a basis for a hardship reduction. Further, the household's consumer and credit card debts do not justify a reduction of child support for S. This is because the obligation to support one's children is deemed more important than most other obligations, including prior or subsequent debts.⁴⁴ Similarly, expenses for lifestyle choices do not necessarily warrant a reduced child support amount.

The evidence shows that Mr. J's budget is clearly strained. If his support obligation for S is suspended for any months in which she did not live with her mother, that adjustment would significantly ease his budgetary pressures. If it is not suspended, Mr. J likely will need to make other adjustments. These could include reducing household expenses or finding additional sources of income, such as from part-time work (by Mr. J or his wife) to help defray existing expenses.

During the hearing, the parties discussed whether they might agree on a child support amount that acknowledges Mr. J's financial situation while also considering S's and Ms. T's circumstances. Ms. T signaled a willingness to leave the support amount at the former figure. Mr. J disagreed and requested a significantly lower amount. There being no agreement between the parties on financial hardship, the undersigned is obligated to apply the law to the facts in the record.

⁴² \$4,998.84 (income) - \$5,224 (expenses) = -\$225.16.

⁴³ The \$427 figure includes a \$70 monthly fee for internet service that was not discussed during the hearing. Mr. J's calculations also appear to be based on a different net income determination than is applied in this decision. J Proposal for Action, received 10/9/18.

⁴⁴ See Civil Rule 90.3, Commentary VI.B.4.

The requesting party bears a high burden of proof to obtain a variance based on financial hardship. Here, Mr. J did not show that manifest injustice will result if his support amount is not reduced, and the record does not demonstrate clear and convincing evidence that his subsequent children are likely to experience substantial hardship if he must pay the amount calculated under the regular child support formula. This obligation will undoubtedly require adjustments to Mr. J's budget. It will not be easy, especially given that his wife is not working and there is a new baby in his home. However, Mr. J likely has options available that do not require S to bear the burden of supporting his subsequent household. Fortunately, this budgetary challenge will be relatively short-lived since S will soon emancipate.

IV. Conclusion

Mr. J's support obligation for S should be modified to \$1,000 per month, effective February 1, 2018, pursuant to Civil Rule 90.3(a). Mr. J's request for a variance under Civil Rule 90.3(c) is denied, as he did not show clear and convincing evidence that manifest injustice would result if his child support is not reduced from the usual calculation.

V. Child Support Order

- Mr. J's child support obligation for S is modified to \$1,000 per month for one child, effective February 1, 2018, and ongoing;
- All other provisions of the Modified Administrative Child Support and Medical Support Order dated May 19, 2018, remain in full force and effect.

DATED: November 27, 2018.

By: Signed
Signature
Kathryn A. Swiderski
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.

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 3rd day of December, 2018.

By: *Signed*

Signature

Sheldon Fisher

Name

Commissioner

Title

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