

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

IN THE MATTER OF	)	OAH No. 07-0352-CSS
R. C. M.	)	CSSD No. 001111187
	)	
_____	)	

**DECISION AND ORDER**

**I. Introduction**

A formal hearing was held to consider the child support obligation of R. C. M. (Obligor) for the support of his child, J., (Obligee).<sup>1</sup> Mr. M. appeared by telephone. A friend, S. S., assisted Mr. M.. The custodial parent, N. G., did not participate. Ms. G.'s case is administered by Barbara Milville in the Division of Child Support in the state where Ms. G. lives. Andrew Rawls, Child Support Services Specialist, represented the Child Support Service Division (Division). The hearing was audio-recorded. The record closed on July 28, 2007.

This case is Mr. M.'s appeal of the Division's decision to deny his request for a reduction of his ongoing child support order for J.. Having reviewed the record in this case and after due deliberation, I concluded that it is necessary to reduce Mr. M.'s ongoing child support obligation to \$72 per month, in order to prevent injustice.

**II. Facts**

This case is a modification action.<sup>2</sup> Mr. M.'s existing child support for J. was previously set in 2001 at \$270 per month.

The Division issued notice of the petition for modification on March 21, 2007 at Mr. M.'s request. Mr. M. timely provided all the income information he was ordered to file with the Division.<sup>3</sup> The Division issued a Denial of Modification Review on May 24, 2007. Mr. M.'s

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<sup>1</sup> The hearing was held under Alaska Statute 25.27.170.

<sup>2</sup> Alaska Civil Rule 90.3(h) governs child support modification actions.

<sup>3</sup> Division's Pre Hearing Brief.

modified ongoing child support remained at \$270 per month.<sup>4</sup> Mr. M. requested a formal hearing. Prior to the hearing, Mr. M. provided updated household financial information.

Based on the evidence in the record, I find that it is more likely than not that Mr. M. is not voluntarily underemployed. Furthermore, Mr. M. has shown by clear and convincing evidence that manifest injustice will result if ongoing child support is not reduced to \$72 per month.<sup>5</sup> Mr. M.'s ability to provide for the children living in his household will be seriously impaired if his child support is not reduced to \$72 per month. Mr. M. and the children's mother are doing the best that they can to support their children and live within their very limited means. They own a used 14 foot wide by 70 foot long trailer that they live in on land they are purchasing for \$200 per month. They live in a rural area because their housing there is so inexpensive, Mr. M. does have a regular seasonal job there, and he can lower the family's expenses by getting in firewood to heat with.<sup>6</sup>

### **III. Discussion**

Although Mr. M.'s paternity of J. is in dispute, his paternity of J. was legally established. I cannot order the Division to conduct genetic testing in an appeal of a modification action.<sup>7</sup> As I explained at the hearing, in order for Mr. M. to disestablish his paternity of J., Mr. M. must file a disestablishment action in court. Furthermore, any delay in filing such an action could limit the relief Mr. M. might receive from having to pay child support arrears.<sup>8</sup>

In a child support hearing, the person who filed the appeal, in this case, Mr. M., had the burden of proving by a preponderance of the evidence that the Division's order is incorrect.<sup>9</sup> After the formal hearing, the Division requested that its order be affirmed, arguing that income should be imputed to Mr. M. and that his request for modification was correctly denied.<sup>10</sup> Mr.

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<sup>4</sup> Ex. 4.

<sup>5</sup> Recording of Hearing.

<sup>6</sup> Recording of Hearing.

<sup>7</sup> Alaska Statute 25.27.166(a)(2).

<sup>8</sup> Recording of Hearing.

<sup>9</sup> Alaska Regulation 15 AAC 05.030(h).

<sup>10</sup> Recording of Hearing.

M., however, met his burden of proof to show that the Division's order was incorrect.<sup>11</sup>

At the hearing, Mr. M. explained his employment history. Mr. M. has held several jobs, but all of them have paid close to the minimum wage. He has never worked year-round since he moved to Alaska in 1995. He has only a ninth grade education. He works seasonally doing park maintenance during the summer. He has tried to obtain minimum wage type employment during winter, but he has not found any due to his educational limitations and the expense of transportation to potential employment in the area. His seasonal job is a fairly good source of income for Mr. M. given these limitations. His girlfriend's employment opportunities are also very limited. During the winter Mr. M. collects unemployment, works on his property and gets in firewood for heat.

Income can be imputed to an obligor in cases of unreasonable voluntary underemployment.<sup>12</sup> The Alaska Supreme Court has recognized that an obligor parent should not be locked into a particular job or field, nor prevented from seeking personal or professional advancement.<sup>13</sup> On the other hand, a noncustodial parent who voluntarily reduces his or her income should not automatically receive a corresponding reduction in his or her child support obligation.<sup>14</sup>

Obligor parents should not always have to pay support based on their maximum earning capacity when they choose to earn less than they could.<sup>15</sup> The custodial parent should not, however, be forced to finance the noncustodial parent's lifestyle choice if that choice is unreasonable given the duty to provide child support.<sup>16</sup> The Alaska Supreme Court has indicated that the circumstances surrounding an obligor's failure to maximize earnings should be carefully considered, and then a determination made about whether, under all the circumstances

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<sup>11</sup> Recording of Hearing.

<sup>12</sup> Alaska Civil Rule 90.3(a)(4).

<sup>13</sup> See *Pattee v. Pattee*, 744 P.2d 659 (Alaska 1987).

<sup>14</sup> *Pattee v. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

<sup>15</sup> See *Pattee v. Pattee*, 744 P.2d 659 (Alaska 1987).

<sup>16</sup> *Olmstead v. Ziegler*, 42 P3d 1102 (Alaska 1987).

in the case, income should be imputed.<sup>17</sup>

In this case it is not appropriate to impute income. Mr. M. is not unreasonably voluntarily underemployed.<sup>18</sup> As a couple, Mr. M. and his girlfriend are currently not capable of earning an income sufficient to support their household above the poverty level.<sup>19</sup> Mr. M. has obtained probably the best job that he can find in the area in which he and his family live. His girlfriend cannot work currently due to her pregnancy. Her earning capacity is also very limited. The family receives food stamps. They could not afford to move, and it is unlikely that a move would significantly improve their financial situation.<sup>20</sup>

Alaska Civil Rule 90.3 provides that an obligor's child support is to be calculated based on his or her "total income from all sources."<sup>21</sup> A child support award may be varied only "for good cause upon proof by clear and convincing evidence that manifest injustice would result if the support award were not varied."<sup>22</sup> Good cause includes a finding of unusual circumstances.<sup>23</sup>

The circumstances of this case are unusual. Mr. M.'s household's financial circumstances are fairly desperate. His household income is far below the poverty level for a family of five, and his household will soon become a family of six. Mr. M.'s household includes two of his biological children, who are younger than J., plus a step child. Another biological child is due in October.<sup>24</sup>

Mr. M. already has significant arrears due in part because he does not receive enough pay to garnish the full amount of child support during the winter. It would be unjust to further impoverish the children living with Mr. M. by piling on more debt in the form of child support

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<sup>17</sup> See *Pattee v. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

<sup>18</sup> Recording of Hearing.

<sup>19</sup> Recording of Hearing.

<sup>20</sup> Recording of Hearing.

<sup>21</sup> Alaska Civil Rule 90.3(a)(1).

<sup>22</sup> Alaska Civil Rule 90.3(c).

<sup>23</sup> Civil Rule 90.3(c)(1)(A).

<sup>24</sup> Recording of Hearing.

arrears. Manifest injustice would result if the support award is not reduced in this case. The burden of paying more child support will fall disproportionately on the children living with Mr. M. Those children will be completely dependent on Mr. M.'s limited means until his girlfriend is able to work again. Not reducing the ongoing child support for J. would cause additional hardship for the three children, soon to be four children, in Mr. M.'s household. At the hearing, Ms. G. did not appear, therefore I will assume that this reduction in Mr. M.'s support obligation would not make her unable to support J.

To avoid injustice, Mr. M.'s ongoing child support should be calculated as if all the children dependent on him for support, including J., his stepchild, and the child on the way, were one family, the way that Civil Rule 90.3(i) instructs for setting child support in third-party custody situations. If all five children were part of one family, with one custodial parent and one support order, Mr. M.'s obligation would be set at 39% of his adjusted 2006 income of \$11,072.52.<sup>25</sup> I believe that is the correct approach in this case, with that 39% obligation then divided by five to establish the amount that should be awarded to J.. This results in a monthly child support obligation of \$72.<sup>26</sup>

A support order cannot be modified retroactively.<sup>27</sup> Generally, the new monthly child support amount in a modification action should be effective the month after the parties are served with the petition.<sup>28</sup> The effective date of this modification should be effective April 1, 2007 because the petition for modification was issued in March 2007.

#### **IV. Conclusion**

Mr. M.'s modified ongoing child support should be reduced to \$72 per month effective April 1, 2007.

#### **V. Child Support Order**

1. The Division's Denial of Modification Review issued on May 24, 2007 is overturned.
2. The Petition for Modification on March 21, 2007 is granted.
3. Mr. M.'s modified ongoing child support for J. is set in the monthly amount of \$72, effective

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<sup>25</sup> Ex. 9.

<sup>26</sup> Annual AGI of \$11,072.52 x 0.39 ÷ 5 children ÷ 12 months = \$72

<sup>27</sup> Alaska Civil Rule 90.3(h)(2).

<sup>28</sup> Alaska regulation 15 AAC 125.321

April 1, 2007.

4. The Division should give the parties the appropriate debit or credit for their out-of-pocket expenses for providing health insurance coverage for J.

DATED this 23<sup>rd</sup> day of August, 2007.

By: Signed \_\_\_\_\_

Mark T. Handley

Administrative Law Judge

