

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

In the Matter of)
)
M S III) OAH No. 20-0573-CSS
) Agency No. 001159166

CORRECTED¹ DECISION AND ORDER

I. Introduction

M S III appealed a Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division (Division) on May 29, 2020. The modified order increased the monthly support obligation for his child, K-B, from \$336.00 to \$650.00.

A telephonic hearing took place August 11, 2020. Mr. S could not be reached for the hearing despite repeated attempts to do so, and messages were left for him. Testimony was presented by Child Support Specialist Brandi Estes on behalf of the Division. The Office of Administrative Hearings (OAH) held the record open for 10 days pursuant to 15 AAC 05.030(j). Mr. S did not contact the OAH during that period, and the case proceeded to decision on the existing record August 26, 2020.

There has been a material change in circumstances since the prior administrative order, and modification of child support is appropriate under Rule 90.3(b). Because Mr. S did not appear at the hearing, it is impossible to determine whether the resulting increase should be waived or reduced to prevent hardship to a subsequent family as suggested in one of his communications with the Division.

Accordingly, the Division is affirmed, but Mr. S may respond with additional information and request a reduction either through a Proposal for Action to the proposed decision or a request for modification to the Division.

II. Facts

M S III and D N are the parents of one child, K-B. Mr. S’ monthly child support obligation for K-B was administratively established as \$336.00 on February 19, 2010.²

¹ Issued to include correct typographical error and accurately reflect support amount in final order.
² Ex. 1.

The child support amount remained the same for an almost a decade until January 31, 2020 when Ms. N requested a modification review.³ During the modification review, the Division determined Mr. S had been employed with a single primary employer from 2010 to 2016. Mr. S remained employed with that primary employer after 2016, but he also took regular secondary employment through 2019.⁴ His primary and secondary employers changed in 2020.⁵ As a result, Mr. S' adjusted income basis materially increased from that used as the calculation basis in 2010.⁶

The Division issued a Modified Administrative Child Support and Medical Support Order on May 29, 2020 setting support for K-B at \$650.00 effective March 1, 2020.⁷ This is an increase of over 15% from the previously established amount of \$335.00.⁸

On June 22, 2020, the Division received a letter, treated as an appeal, from Mr. S' objecting to the modification because the increase would cause a hardship to his new family.⁹ The letter appears to indicate that Mr. S has been taking second jobs to ensure he is adequately providing for a subsequent family in addition to K-B, but no details about his current financial or family situation were included.¹⁰

Ms. N informed the Division that she did not desire the modification to occur.¹¹ She also declined to provide any information on her existing financial or family circumstances.¹²

The formal hearing took place on August 11, 2020. Mr. S was called at the number he provided to the Office of Administrative Hearings (OAH). He was requested to immediately return the call and told the hearing would be delayed fifteen minutes for him to do so.¹³ Another call was made after the fifteen minutes, but again there was no answer at the number. A message was left advising Mr. S of his right to show good cause for a new

³ Testimony of B. Estes.

⁴ Id.

⁵ Id.

⁶ For example, records from the Alaska Department of Labor indicate an income of over \$17,000.00 for the first quarter of 2020 alone in comparison to other years where his total income was the equivalent of that sum. Ex.7.

⁷ Ex. 5.

⁸ See Rule 90.3(h). Testimony of B. Estes.

⁹ Ex. 6.

¹⁰ Id.

¹¹ Ex. 4.

¹² Testimony of B. Estes.

¹³ The custodial parent, D N, was also non-responsive to a telephone call to her number of records on the date and time for the hearing. Her telephone did not have an active message system. Ms. N had previously informed the Division that she did not wish to participate.

hearing within ten days. The OAH kept the record open for ten days to hear from Mr. S pursuant to 15 AAC 05.030(j). Mr. S did not contact the OAH during the 10-day regulatory period, and the case proceeded to decision on the existing record August 26, 2020.

Child Support Specialist Brandi Estes appeared on behalf of the Division. She was the only witness at the August 11, 2020 hearing. Division exhibits were admitted. The Division's position on the support order had not changed. The modification was appropriate under Rule 90.3 and should be upheld.¹⁴

Recognizing that a support award almost doubling the prior amount was a material change and would have a significant impact on Mr. S' finances, the Division would not necessarily have objected to reducing it to avoid a hardship to him. However, because Mr. S had not appeared or submitted any details to the Division, insufficient information existed on which to grant a hardship variance or reduction. The Division remained open to a hardship finding if Mr. S or Ms. N appeared to present evidence.¹⁵

III. Discussion

A. Standards of Review

As the person who filed the appeal, Mr. S bears the burden of proof.¹⁶ His burden is to show by a preponderance of the evidence that the Division incorrectly calculated the support amount per Rule 90.3.¹⁷ If the support calculation is correct, it can be still be reduced, but the individual seeking a reduction from a properly calculated determination must prove a hardship exists. This requires clear and convincing evidence that a manifest injustice would result if the support award were not reduced.¹⁸

B. S's Adjusted Income

A parent is obligated both by statute and at common law to support his or her children.¹⁹ Alaska Civil Rule 90.3(a) provides the formula used to calculate child support awards in cases, like this, where one parent has primary physical custody. The Commentary to Civil Rule 90.3 explains that the rule is designed to approximate the amount a non-custodial parent would have spent on the children if the family was intact. It operates on the principal that, as the

¹⁴ Testimony of B. Estes.

¹⁵ Id.

¹⁶ 15 AAC 05.030.

¹⁷ 15 AAC 05.030(h).

¹⁸ Civil Rule 90.3(c), Commentary VI.B.2.

¹⁹ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.

income available to both parents increases or decreases, the amount available to support the children will change.²⁰

The Commentary²¹ to Alaska Civil Rule 90.3. Section III.E titled “Time Period for Calculating Income,” provides that child support calculations should generally be based on the best possible approximation of the parent's *current* income.²² The best indicator of future earning capacity should be selected from the evidence available.²³ Records from the Alaska Department of Labor are considered reliable indicators of current and past income.

Ms. N is the primary custodial parent for purposes of Rule 90.3 in this case because the child resides with her 100% of the time. Therefore, Mr. S’ support payment is set at 20% of his adjusted income from his anticipated 2020 employment by Rule 90.3(a). The Division calculated his anticipated 2020 adjusted income based on current records from the Alaska Department of Labor which were the best evidence available.

That calculation set his adjusted income at \$39,007.32. Applying the 20% primary custody formula results in \$7,801.46 in annual income available for child support which yields a monthly support obligation of \$650.00 per month for one child.²⁴ The Division correctly calculated Mr. S’s child support under Rule 90.3(a). No error occurred.

This amount is more than 15% greater than the support obligation established in February 2010. If an updated support amount calculated under the rule is 15% more or less than the outstanding support order, a material change in circumstances has occurred and modification is appropriate.²⁵

Because Mr. S’s child support was correctly calculated, it is from that figure that his request to lower the support amount based on financial hardship should be considered. Deciding whether to do so is a difficult question in these circumstances. Child support determinations calculated

²⁰ Civil Rule 90.3, Commentary, II.

²¹ “The commentary to Civil Rule 90.3 has not been officially adopted, but it can provide useful guidance in applying the rule. *Miller v. Clough*, 165 P.3d 594, 599 (Alaska 2007) (citing *Caldwell v. State, Dep’t of Revenue, Child Support Enf’t Div.*, 105 P.3d 570, 573 n. 6 (Alaska 2005)).

²² The Commentary provides:

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. The court must examine all available evidence to make the best possible calculation.

²³ *McDonald v. Trihub*, 173 P.3d. 416, 417 (Alaska 2007).

²⁴ Ex. 5., p. 8.

²⁵ Rule 90.3(h).

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."²⁶ This is a high standard, and reductions based on hardship are reserved for cases involving unusual circumstances.

In making this determination, it is appropriate to consider all relevant evidence, including the circumstances of the custodial parent and the child. As the Division acknowledged, this is an unusual situation. The original support amount has remained unchanged for a decade. Mr. S reliably pays his support every two weeks. Neither he nor Ms. N have had much contact with the Division suggesting the child has been adequately supported during the time the Division has administered child support. The new amount is essentially double the prior support amount. There can be no dispute such a change would have a drastic impact on any household. Both Mr. S and Ms. N support a reduction to avoid a hardship to him.²⁷

However, neither Mr. S nor Ms. N appeared at the hearing or submitted any description of their finances or family circumstances. It is impossible to tell how much of a reduction, if any, should occur. In the absence of some concrete information from Mr. S, any decision to depart from the modified amount would be complete speculation.

This decision declines to engage in that speculation, but Mr. S should be aware he can submit information on his current situation and how the increase impacts him through the Proposal for Action process or his own request for modification to the Division.

IV. Conclusion

The decision by the Division is Affirmed.

Mr. S is encouraged to use the Proposal for Action process to provide more information on his financial and family circumstances or to request a supplemental hearing. In the alternative, he may file his own request to modify with the Division.

²⁶ Rule 90.3(c).

²⁷ Testimony of B. Estes.

V. Child Support Order

- 1. M S III is liable for child support in the amount of \$650.00 per month for his child K-B effective March 1, 2020 and ongoing.**
- 2. All other terms of the Modified Administrative Child Support and Medical Support Order dated May 29, 2020 remain in full force and effect.**

Dated: August 31, 2020

Signed _____
Carmen E. Clark
Administrative Law Judge

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 within 30 days after the date of this decision.

DATED this 16th day of September, 2020.

By: *Signed* _____
Signature
Carmen Clark _____
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.]