

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

In the Matter of)	
)	
S O. N)	OAH No. 20-0574-CSS
<hr style="width: 80%; margin-left: 0;"/>)	Agency No. 001200758

DECISION AND ORDER

I. Introduction

This case involves the establishment of S N’s child support obligation for his daughter, Z. Mr. N appeals an administrative review hearing decision and Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (Division) issued on May 15, 2020. The order set his monthly support obligation for Z at \$747.¹ It also set preorder arrears at \$41,613 for the period of July 1, 2014 to May 31, 2020.² The custodian of record is E G.

Mr. N raises two issues on appeal. First, he disputes the ongoing and pre-order arrears amounts calculated under the primary custody formula at Civil Rule 90.3(a), asserting that they do not accurately reflect his changes in rank in the Army, and some periods incorrectly include a Basic Allowance for Housing (BAH). Secondly, he requests a variance due to financial hardship and unusual circumstances.

A telephonic hearing was held in this matter over several dates in August, October and November, 2020. Mr. N demonstrated by a preponderance of the evidence that the Division’s calculations of his child support arrears and his ongoing obligation were based on incomplete information. Additionally, Mr. N showed by show clear and convincing evidence that manifest injustice would result if his obligation was not further reduced by way of a hardship variance.

Based on the evidence and after careful consideration, Mr. N’s pre-order arrears obligation for Z should be adjusted to \$100 per month, effective April 2014 through December 2016, and \$200 per month, effective January 2017 through December 2019. Effective January 2020 and ongoing his obligation should be \$175 per month.

¹ Ex. 10.
² *Id.*

II. Facts

In July 2014 the Division received an application from Ms. G for the collection of child support from Mr. N for Z.³ Mr. N was not named as the father on the birth certificate, but paternity was verified through genetic testing and legally confirmed in an order issued by the City A Superior Court on June 2016.⁴ The Division solicited financial information from both parties and Mr. N provided two leave and earnings statements (LES).⁵

In October 2016 the Division issued an order setting Mr. N's ongoing support obligation at \$323 per month for one child.⁶ This order remained unserved on Mr. N until 2019.⁷ In May 2020 the Division issued an updated recalculation of his ongoing support obligation, setting it at \$747 for one child.⁸ The calculation included both taxable base pay and nontaxable basic allowance for subsistence (BAS) and basic allowance for housing (BAH).⁹ Mr. N was given the requisite deductions for state and federal taxes, prior child support obligations, and Social Security and Medicare, resulting in an adjusted annual income of \$45,812.40.¹⁰

The May 2020 order also updated his monthly arrears based on the same criteria, as well as Mr. N's presumed changes in rank during his years in the military.¹¹ This resulted in a support obligation of \$475 from July 2014 through December 2017, and \$747 from January 2018 and ongoing. His arrears from July 2014 through May 2020 totaled \$41,613.¹²

In June 2020 Mr. N submitted an appeal of the May 2020 Administrative Review Hearing Decision and Amended Administrative Child and Medical Support Order and the case was referred to this tribunal.¹³ He argued that the Division's calculations of his support obligations over the years did not accurately reflect his changes in rank in the Army, including a demotion, which resulted in a lower rate of pay. Also, he asserted that the

³ Ex. 1.

⁴ Ex. 4.

⁵ Ex. 2.

⁶ Ex. 7.

⁷ It is unclear from the record why order was not served sooner, although Mr. N noted that he was deployed overseas so receiving mail was more difficult.

⁸ Ex. 10.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Ex. 11.

calculations for some months incorrectly included a BAH that he did not receive, as he was not living on base. Finally, he argued he simply cannot afford to pay the monthly obligation and mandatory withholding for accrued arrears.

A telephonic hearing was held in this matter over several dates: August 13, October 14, and November 3, 2020. Mr. N and Ms. G represented themselves. The Division was represented by Child Support Specialist Brandi Estes. At the close of the hearing the parties indicated they had no additional materials to submit into the record. The hearing ended and the record closed on November 3, 2020.

III. Discussion

A. Child support modification under Civil Rule 90.3(a)

As the person who filed the appeal in this case, Mr. N bears the burden of proof. As to the support amount calculated under the Civil Rule 90.3(a) primary custody formula and applied in the Amended Administrative Child Support and Medical Support Order, his burden is to show by a preponderance of the evidence that the calculation is incorrect.¹⁴ Regarding his request for a variance based on financial hardship, Mr. N must show clear and convincing evidence that manifest injustice would result if the support award were not varied.¹⁵

B. Child support calculation under Civil Rule 90.3(a)

A parent is obligated both by statute and at common law to support his or her children.¹⁶ Civil Rule 90.3(a)(1) provides that an obligor's child support amount is to be calculated based on his or her "total income from all sources" minus mandatory deductions. Income includes any benefits that would have been available to the family unit should it have remained intact.¹⁷

The order issued by the City A Superior court imposed on Mr. N a duty of support for Z from the date of her birth, which was April 2014. Therefore, that is the month that Mr. N's obligation to support the child through the Division should begin.¹⁸

Over the dates of the hearing Mr. N provided the Division significant additional information about his demotion in rank, the times he was not receiving a BAH, W2 Wage

¹⁴ 15 AAC 05.030(h).

¹⁵ Civil Rule 90.3(c).

¹⁶ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁷ See Civil Rule 90.3 Commentary, III. Defining Income.

¹⁸ Ex. 4.

and Tax Statements, LES forms, and support obligations for other children. The Division used this information to recalculate Mr. N's monthly support obligation as follows.¹⁹

For 2014 Mr. N's wages as listed on his W2 were added to his BAS to establish his gross income, then deductions were taken for Federal income tax, social security, unemployment insurance and support obligations for children born prior to Z. This resulted in an adjusted annual income of \$12,972.88, or an annual monthly support obligation of \$216 for one child.

For 2015 Mr. N's income was similarly calculated, and his adjusted annual income was \$13,506.24 or \$225 per month for one child. However, this \$9 increase in his support obligation did not meet the requisite 15% change set forth in 15 AAC 125.316(e), so his obligation remained as set at \$216 for one child.

For 2016 Mr. N's income was calculated in the same manner, resulting in an adjusted annual income of \$16,659.28 or \$278 per month. This increase in support of \$62 did meet the 15% change of circumstances threshold, so his support obligation for one child was set at \$278 per month.

For 2017 Mr. N's income was again calculated based on his wages and his BAS with requisite deductions, resulting in an adjusted annual income of \$31,167.12 or \$519 per month for one child. The change in the support obligation again exceeded the mandatory 15% change under 15 AAC 125.315(e).

For 2018 Mr. N's income was calculated in the same way, resulting in an adjusted annual income of \$24,560.77 or \$409 per month for one child. Again, as this change in the support obligation met the statutory requirements it remained as set.

For 2019 Mr. N's income was again calculated based on his wages and his BAS and mandatory deductions, resulting in an annual income of \$25,475.64 or \$425 per month for one child. This did not meet the required 15% change that would constitute a change of circumstances, so the support obligation remained as previously set at \$409.

For 2020 Mr. N's income was calculated using his 2019 base pay, his BAS, and in-kind housing beginning September 1, 2020 at \$450 per month for a studio apartment. Standard deductions were subtracted, resulting in an adjusted annual income of \$27,295.20

¹⁹ See Ex. 14.

or \$455 per month. As this does not meet the necessary 15% change, his support obligation remained as set in 2019 at \$409 per month.

Mr. N met his obligation of showing by a preponderance of the evidence that the monthly support obligations as originally calculated by the Division were incorrect under Civil Rule 90.3 as they were based on incomplete information. The updated calculations corrected the discrepancies.

C. Variance under Civil Rule 90.3(c) as applied to ongoing support

Mr. N's second argument on appeal is that he is simply unable to pay the ongoing support obligation for Z even as recalculated in addition to the mandatory withholding for the arrears he owes. An obligor-parent may obtain a reduction in the pre-order arrears support amount, but only if he or she shows that "good cause" exists for the reduction.²⁰ To establish good cause, the parent must show clear and convincing evidence that manifest injustice would result if the support award were not varied.²¹ 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.

Here, Mr. N has shown that he lives on an exceptionally tight budget. He owns two vehicles outright - a 2002 Chevy and a 2008 Nissan Xterra - and is responsible for all the related expenses, including insurance, gasoline, and maintenance, which average \$550 a month. He spends nothing on personal care or entertainment but has monthly expenses for food and a cell phone which come to about \$450. He also has the additional burden of credit card debt, payments on a school loan, and child support for five other children. While his monthly income is \$2275, his debts, expenses and child obligations total an average of \$3,352, leaving him with a monthly deficit of over \$1000.

Ms. G and her household members also live frugally. She testified about previously working for her church in the children's ministry between 20 and 25 hours a week at \$15 an hour, but getting laid off in June due to the Covid pandemic. Her husband was self-employed in the construction industry and was making approximately \$25,000 a year, but after injuring his foot at the beginning of the summer has not been able to return to work. There are three

²⁰ See *Willis v. State, Dep't of Revenue, Child Support Enforcement Div.*, 992 P.2d 581 (Alaska 1999).

²¹ Civil Rule 90.3(c).

additional children in the home besides Z. Their household expenses include a mortgage payment of \$500, as well as utilities, food, gas and a monthly car loan for a 2004 Town and Country Chrysler, totaling an average of \$1800. Augmented by the cost of cell phones and household entertainment expenses, their monthly household obligations average \$2300. They rely on monthly food stamps and Ms. G receives \$358 per month in unemployment. Based on Ms. G's testimony, her household is accruing a monthly deficit that currently averages \$860.

Clearly both households are under financial strain, with very few expenses that can be eliminated. However, the household of Ms. G has experienced financial strain relatively recently, as she and her husband both lost their jobs at the beginning of the summer. Additionally, while Ms. G's husband is currently recuperating from a foot injury and may not be able to return to the construction industry until he has completely healed, other, less physically demanding employment options may be available to him in the interim. Additionally, Ms. G's position at her church may resume within the next year, depending on the trajectory of the Covid-19 pandemic. Until then, she too could seek employment in any of the surrounding communities.

For Mr. N, on the other hand, there is little possibility for a significant increase in his household income in the near future as he already holds a full-time position in the military. His monthly budget shows he has few expenses that could be eliminated, but for possibly selling one of his vehicles. Even with extraordinary budgeting he still would not be able to avoid ending each month deeper in debt. Further complicating his financial situation, under army regulations if a soldier fails to provide adequate financial support to family members and comply with all court orders his commander can opt to record the failure in his permanent record, pursue criminal charges in the Uniform Code of Military Justice, seek punitive action, deny his reenlistment, or even discharge him from the military.²² Any of those outcomes, especially discharge, could make it very difficult for Mr. N to secure employment in the private sector. His ability to support his six children, including Z, could be considerably diminished.

Mr. N, therefore, showed by clear and convincing evidence that his support obligation as calculated is manifestly unjust. There is little room in his budget for a reduction in expenses, and allowing him to fall further into debt and put his military career at risk jeopardizes his ability to pay child support at all. While Ms. G is also in an undeniably difficult financial situation, in the

²² Army Regulation 608-99, Army Publishing Directorate, *Army Regulations*, available at https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=4407.

coming months she and her husband will presumably return to work, easing their current financial strain. Therefore, weighing the situations of both parents and considering the wellbeing of Z, Mr. N's ongoing monthly obligation should be reduced to \$175.

D. Variance under Civil Rule 90.3(c) as applied to preorder arrears

A totality of the circumstances can be also considered when deciding whether a variance of the pre-order arrears amount is warranted under Civil Rule 90.3(c).²³ The same contributing factors that make Mr. N's ongoing support obligation untenable may be weighed when evaluating his ability to pay pre-order arrears.

There is no indication that Mr. N has made payments towards his support obligation for Z in previous years, which is concerning. However, the record indicates that while Z was born in 2014, paternity wasn't established until 2016. Also, presumably because he was deployed, the support order was not served on Mr. N until 2019. By then he had fathered two additional children. Upon learning of his ongoing support obligation and his past arrears totaling over \$40,000 Mr. N appropriately engaged in the appeals process after seeking guidance from the military with creating a sustainable budget. He is seemingly sincere in his attempt to find a way to provide for his children and remain financially solvent.

For the same reasons Mr. N's ongoing support obligation should be reduced, his financial circumstances make application of the Civil Rule 90.3(a) formula unjust for purposes of determining pre-order arrears, as well. Besides his monthly support obligation, an additional monthly withholding amount is deducted based on the amount of arrears as listed in the amortization chart established under 15 AAC 125.545.²⁴ The Division's recalculation of Mr. N's arrears results in arrears of over \$25,000 which implicates an additional required monthly withholding of \$415.²⁵ Mr. N does not have the resources – even with the best of budgeting – to make meaningful payments towards both his ongoing obligation as well as his pre-order arrears. Further, Mr. N's financial circumstances are such that he does not accumulate savings quickly, and he likely will be unable to pay off accrued arrears and accumulating interest for an extended time period. The ordered arrears therefore pose an unmanageable and unjust burden for him going forward.

²³ *Id.*

²⁴ 15 AAC 125.545.

²⁵ Ex. 14.

To mitigate this burden and provide Mr. N an opportunity to stay current with his support obligation, his pre-order arrears obligation for Z should be adjusted to \$100 per month, effective April 2014 through December 2016, and \$200 per month, effective January 2017 through December 2019. This, too, will be financially difficult for him while he also pays his ongoing obligation. However, it seeks to balance his financial difficulty in paying pre-order child support with Ms. G's financial circumstances, which also are clearly strained. The reduction is balanced by emphasizing Mr. N's ongoing financial responsibility to support Z.

IV. Conclusion

The evidence at hearing showed that the Division incorrectly calculated Mr. N's child support obligation under the primary custody formula under Civil Rule 90.3(a) as insufficient information was provided regarding Mr. N's fluctuation in pay and rank. After the obligation was recalculated based on updated information, Mr. N met his high burden of proving that his monthly support amount was still manifestly unjust as set, and his request for a variance of that obligation is granted. Beginning January 1, 2020 and ongoing, Mr. N's support amount for Z is set at \$175 per month. Mr. N similarly demonstrated there existed good cause to reduce his arrears, as well. His pre-order arrears are \$100 per month for July 2014 – December 2016, \$200 per month for January 2017 – December 2019, and \$175 per month for January 2020 and ongoing.

V. Child Support Order

1. S O. N is liable for child support in the amount of \$175 per month for one child effective January 1, 2020 and ongoing.
2. S O. N is liable for pre-order arrears in the amount of \$100 per month for July 2014 – December 2016, and \$200 per month for January 2017 – December 2019.
3. All other terms of the Modified Administrative Child Support and Medical Support Order dated May 15, 2020 in full force and effect.

Dated: November 18, 2020

Signed

Danika B. Swanson
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 1st day of December, 2020.

By: Signed _____
Signature
Lawrence A. Pederson _____
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.]