

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

IN THE MATTER OF)
)
 J. M.) Case No. OAH-07-0725-CSS
)
 _____) CSSD Case No. 001062738

DECISION & ORDER

I. Introduction

The obligor, J. M., appeals a Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD) on December 4, 2007. Administrative Law Judge Dale Whitney of the Office of Administrative Hearings heard the appeal on January 22, 2008. Mr. M. appeared by telephone. The custodian of record, M. C., did not appear. Andrew Rawls represented CSSD. The child is K. C. (DOB 00/00/93). Because the circumstances of this case have not changed significantly since the original order was issued in September of 1997, this modified order is vacated in favor of the previous existing order.

II. Facts

The events initiating the modification in this case are somewhat unclear. The previous support amount had been set at \$50 per month in an order issued in 1997 by Revenue Hearing Examiner Pamela Kelley, based on unusual circumstances that required variation from the Civil Rule 90.3(a) formula in order to avoid manifest injustice. It appears from Exhibit 2 that Mr. M. requested the modification in this case. Mr. M. testified that he did not request modification, he only appealed after CSSD raised the amount of his support obligation. Mr. Rawls stated that CSSD had not sent out computer-generated modification forms in this case. The request for modification form, however, does have pre-printed information for the parties and the case number. On this request form, Mr. M. added a hand-written note stating, "I also have 3 kids @ home I am supporting. Probably go on welfare after fishing is done."

Mr. M. lives in No Name City with his wife and three children, ages 13, 4 and 2. All of these children are younger than K. Mr. M.'s wife is not employed, except occasionally as a substitute bingo caller. Mr. M.'s income varies substantially both in source and amount each year. Mr. M. sometimes earns wages from construction work, he earns fishing income, he sometimes receives unemployment insurance benefits, and he receives a permanent fund dividend. Mr. M. owns salmon and herring permits, although he testified that he seldom fishes for herring anymore, as it is no longer a profitable fishery.

Mr. M. earned no wages in 2005. In 2006 he earned \$8,559 and in 2007 he earned \$14,580 in wages. Mr. M. testified that he did very well in 2007 because of jobs available due to a village water construction project. That project is now complete, and such jobs are unlikely to be readily available in the future. Mr. M. also testified that he has been treated recently for back injuries, and he is unsure when and to what extent he will be able to return to work.

Mr. M. fishes from an 18-foot Lund with a Honda 45 horsepower outboard. Mr. M.'s 2005 and 2006 tax returns show fishing income of \$6,646 and \$6,446, respectively. CSSD calculated Mr. M.'s fishing income for 2007 by subtracting Mr. M.'s list of expenses and crew share payments from his fish ticket and processor bonus payments, noting that other credits or deductions might be allowable by the Internal Revenue Service. CSSD estimated Mr. M.'s 2007 fishing income to have been \$13,040. Mr. M. testified that 2007 was an unusually profitable year for fishing.

Mr. M. testified that there are about one thousand residents in No Name City, a village on the lower Kuskokwim. Employment opportunities are limited, and expenses are high. Heating oil and gasoline both cost more than \$5.00 per gallon.

Ms. C. elected not to appear at the hearing, and therefore information about her household expenses and income are limited. In 2006 Ms. C. earned \$23,253. She filed her 2006 federal tax return as a single head of household with K. listed as the only dependant.

III. Discussion

Generally, support for one child in primary custody should be set at 20 percent of the obligor's adjusted income.¹ This amount may be varied upon proof by clear and convincing evidence that, because of unusual circumstances, manifest injustice would result if the support award were not varied.² In this case it is first necessary to establish an estimate of Mr. M.'s income for 2008 and future years, and then to determine whether the amount of support should be based on that figure or varied from the standard formula.

A common method of estimating income for people such as fishermen who have varying incomes is to average the last three years' income. CSSD has calculated Mr. M.'s average income over the last three years to be \$20,245.28. The income supporting this calculation includes \$3,944 in unemployment compensation and \$3,606.72 in PFD income that Mr. M.

¹ Civil Rule 90.3(a).

² Civil Rule 90.3(c).

earned over the three-year period. It also includes \$3,913.50 that is one half of the earned income tax credit that Mr. M. and his wife received in 2005 and 2006.

Mr. M.'s income is likely to be less what would be reflected in a three-year average. Mr. M.'s wage income is likely to be reduced substantially or eliminated, considering the employment situation in the village and Mr. M.'s medical problems with his back. For construction wages, the year 2005, in which Mr. M. earned no income, is likely to be representative of 2008. Eliminating construction wage income from the average results in annual gross income of \$12,532.28, and a child support obligation for one child of \$211 per month.

Having determined an income estimate, the next step is to consider Mr. M.'s request for variation under Civil Rule 90.3(c). Several factors should be considered. First, it should be noted that the above figure for gross annual income includes an average of \$1,304.50 in earned income tax credit, which may be attributable more to Mr. M.'s wife. But it is likely that Mr. M. would not qualify for this credit if he were not supporting three younger children. Although this credit is not listed as a specifically allowable deduction, it is not money that would normally be available to support K. had the original family remained intact. Deducting this amount from Mr. M.'s income would result in a support obligation of \$193 per month for one child.

Civil Rule 90.3(c) requires consideration of the custodian's circumstances as well as the obligor's. Ms. C. appears to support only herself and K., while Mr. M. supports a family of five in addition to K., with the assistance of whatever his wife earns as a substitute bingo caller. Supporting only one child, Ms. C. earns a higher level of income than Mr. M. At lower levels of income in rural communities, these differences in income and responsibility may be magnified. Considering all of these factors, a variation of support under Civil Rule 90.3(c) is appropriate in this case. Increasing Mr. M.'s support obligation would result in manifest injustice to Mr. M.'s subsequent three children who, along with Mr. M.'s wife, depend on Mr. M.'s varying income.

The original order was set at \$50 based on a finding that Mr. M.'s income in 1997, at less than \$7,000, was below federal poverty guidelines. While Mr. M.'s income has increased some since 1997, consideration of the totality of the circumstances shows that there has not been any significant change in circumstances since Revenue Hearing Examiner Kelley set support at \$50.00 per month for one child. The amount should remain unchanged.

IV. Conclusion

Under the unusual circumstances of this case, manifest injustice would result if support were not varied from the Civil Rule 90.3(a) formula. The circumstances of this case have not

changed significantly from the time when the existing order set support at \$50 per month based on unusual circumstances in 1997. The support amount should not be changed at this time.

V. Order

IT IS HEREBY ORDERED that the Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division on December 4, 2007, be VACATED. Support will remain at \$50 per month for one child in accordance with the existing order issued on September 22, 1997.

DATED this 28th day of March, 2008.

By: Signed
DALE WHITNEY
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 notices, 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 15th day of April, 2008.

By: Signed (Terry L. Thurbon) for
Signature
Dale A. Whitney
Name
Administrative Law Judge
Title

[This document has been modified to conform to technical standards for publication.]