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

In the Matter of	)	
	)	
S. X.	)	OAH No. 23-0244-CSS
	)	

DECISION AND ORDER

I. Introduction

This case involves the establishment of S. X.'s child support obligation for his son, T. X., the child he shares with T. C. Mr. X. appeals an administrative review hearing decision and Amended Administrative Child Support Order issued by the Child Support Services Division (Division) on December 27, 2022. Following the Division's internal administrative hearing, the amended order set his monthly support obligation for T. at $834, effective April 1, 2023, based on a primary custody calculation.[1] It also set his preorder arrears totaling $5,004 for the period of October 1, 2022, to March 31, 2023.[2]

Mr. X. raises several issues on appeal. He disputes the ongoing and pre-order arrears amounts calculated under the primary custody formula at Civil Rule 90.3(a), asserting that his income is not as calculated. He also claims he was not given appropriate deductions/credits for self-employment tax, voluntary retirement contributions, travel expenses, and extended visitation. Finally, he requests a variance due to financial hardship and unusual circumstances.

A telephonic hearing was held in this matter over several dates in April, May, June and August 2023. Mr. X. 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, and should be recalculated. Mr. X. did not show by 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. X.'s pre-order arrears obligation for T. should be adjusted to $591.32 per month for the months of October, November and December 2022, and $570.69 per month for the months of January, February and March 2023. Effective April 1, 2023, and ongoing his obligation should be $570.69 per month.

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[1] Ex. 6.

[2] *Id.*

II. Background and Procedural History

S. X. and T. C. are the parents of nine-year-old T.T. X., who just entered the 5th grade. After T. was born in 2012, they remained together as a family unit for several years. They separated in 2014, and then in 2017, when T. was five years old, Ms. D. relocated to Kentucky. Prior to her move she and Mr. X. drew up an informal custody agreement outlining an ongoing parenting plan. They contemplated that T. would live full time with his mother through elementary school (5th or 6th grade), then full time with his father thereafter. During the summers T. would live with the other parent for 2-3 months. Because the long-term plan as negotiated resulted in an equal division of custody, neither party would be liable for child support. For the next several years the agreement sufficed as a memorialization of their mutual acceptable parenting plan and was generally honored by the parties.

In 2022 a series of events forced the agreement to be revisited. In October Ms. D., who still resides in Kentucky, filed a request for the establishment and enforcement of a child support order.[3] Accordingly, the Alaska Child Support Services Division (Division) solicited income information from both parties, then calculated an ongoing monthly support obligation for Mr. X. of $828 based on primary custody.[4] Arrears were also calculated, dating back to Ms. D.'s initial request for services in October 2022.

In January 2023 Mr. X. requested an Administrative Review Hearing, asserting that his obligation was incorrectly calculated as the Division had not granted him appropriate deductions for travel expenses incurred accompanying T. back to Alaska in 2022. Nor had it provided him an extended visitation credit for the agreed upon summer vacations T. is expected to spend with him going forward.[5] Additionally, several years prior he married a partner with three children, and together they purchased a three-bedroom home in City A. to accommodate the family. He stated that he assumed this additional financial responsibility in consideration of his agreement with Ms. D. that neither parent would pay the other child support for T.[6]

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3 Ex. 1.
4 Ex. 4.
5 Ex. 5.
6 *Id.*

In February 2023 a telephonic internal Administrative Hearing was held with both parents participating. In March 2023 the Division issued an Amended Administrative Support Order increasing Mr. X.'s monthly support obligation for T. to $834 based on a primary custody calculation.[7] In April 2023 Mr. X., through counsel, requested a formal hearing before the Office of Administrative Hearings (OAH). The request was granted, and a formal hearing was initially held in April. It reconvened several times before a final hearing in August.

III. Facts

Mr. X. is an independent contractor and the joint owner of a construction company. He testified that he has experienced a fluctuation in profits over the last several years due to changes in market demand. Accordingly, his 2022 income was recalculated and resubmitted as $47,808, the average of his 2019, 2020, and 2021 earnings.[8] This was augmented by a Permanent Fund Dividend (PFD) in the amount of $3,284, bringing his 2022 gross annual income to $51,092. After significant testimony from tax qualified expert S. U.,[9] the parties agreed that Mr. X. was entitled a monthly self-employment tax deduction of $562.92.[10] Monthly deductions of $571.44 for federal income tax and $166.67 for retirement contributions were also included, resulting in an adjusted annual income of $35,479.64, and a monthly support obligation for T. of $591.32.[11]

The parties concurred that this was an accurate calculation of Mr. X.'s 2022 earnings and support obligation, insofar as it included agreed upon deductions and reflected an average of his last three years of earnings. Not included was the credit Mr. X. requested for

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7 Ex. 6.

8 *Id.* The Division originally calculated his 2022 gross annual income as $61,080.50 based on the average of his 2021 and 2022 income from self-employment and augmented by the PFD. This figure was carried forward to 2023. The parties agreed that as allowed under Civil Rule 90.3, Court Commentary, III Defining Income, E. Time Period for Calculating Income, Mr. X.'s income would be calculated by averaging his past income over 2019, 2022 and 2023, resulting in an average gross annual income of $47,808.

9 Ms. U. is Mr. X.'s mother. Her testimony was permitted without objection based on her academic qualifications, as well as more than 20 years of experience as an auditor, State of Alaska Tax Division Director, and Corporate Tax Manager.

10 Based on Ms. U.'s testimony and federal tax table guidelines, a self-employment tax rate of 12.4% plus 2.9% (for a total of 15.3%) was applied to 92.35% of Mr. X.'s net earnings. Therefore, applying these rates results in the following: $47,808 x .9235 = $44,150.68 (net earnings from self-employment) x .153 (self-employment tax rate) = $6,755.05 annual self-employment tax/12 = $562.92 monthly. *See* Internal Revenue Service, Topic No. 554, Self-Employment Tax, *available at* https://www.irs.gov/taxtopics/tc554.

11 Based on a primary custody calculation, under Civil Rule 90.3(a)(1)(F)(2) a noncustodial parent's support obligation for one child is calculated by multiplying the individual's adjusted annual income ($35,479.64) by 20% = $7,095.92 annually, or a monthly support obligation of $591.32.

extended visitation and travel expenses associated with having T. live with him every summer beginning in 2022.

Mr. X.'s 2023 income was calculated by carrying forward his averaged 2022 income of $47,808 and adding in a PFD of $1,300, resulting in a gross annual income of $49,108. After subtracting monthly deductions of $509.27 for federal income tax, $562.92 for federal self-employment tax (calculated by applying the formula explained below) and $166.67 for retirement contributions, his annual adjusted income totaled $34,241.68, or $2,853.47 monthly, and a monthly support obligation for T. of $570.69.[12] Again, notwithstanding Mr. X.'s request for travel and visitation credit, all parties agreed that this was an acceptable calculation of Mr. X.'s projected 2023 earnings and corresponding support obligation.

Through July 2023 Mr. X.'s wife E. was a server in a restaurant. Her submitted paystubs indicate she worked at minimum full-time hours earning an average of $3,820.88 monthly, or $955.22 weekly, after appropriate deductions.[13]

During the final hearing date at the end of August 2023, Mr. X. testified that his wife had left her server position approximately a month earlier and begun working part time hours at their church. She planned to maintain a reduced work schedule to be more available to homeschool the children. Therefore, her earning capacity for the remainder of the year was calculated by multiplying $10.85 (minimum wage) x 30 hours a week x 52 (the number of weeks in a year), resulting in estimated year earnings of $15,228.84 after applicable deductions, or $1,268.07 monthly, and $317.01 weekly.[14]

In addressing Mr. X.'s request for a variance due to financial hardship, both parties testified at length about their household budgets. Beginning with Mr. X.'s home, combining his and his wife's average monthly adjusted incomes of $2,853.47 and $2,544.03 respectively results in $5,397.50 in monthly wages.[15] Their mortgage payment is $1,332 (which will increase by $300 on October 1), food averages $1100, gas, approximately $144,

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12 *See* FN 11. Support is calculated by taking Mr. X.'s 2023 adjusted annual income of $34, 241.68 x 20% = $6,848.33 annually, or a monthly support obligation of $570.69.

13 Ex. F shows total YTD earnings of $13,377.28 after appropriate deductions, resulting in average YTD weekly earnings of $955.52.

14 As per the Division calculator, *available at* https://webapp.state.ak.us/cssd/guidelinecalc, requisite monthly deductions for annual wages of $16,926 ($10.85 x 30 x 52) include federal income tax, FICA and unemployment insurance totaling $141.43 and resulting in an adjusted annual income of $15,228.84.

15 The first half of the year Ms. X. was earning approximately $3,820.88 monthly; this dropped to an estimated $1,268.07 monthly the remainder of the year. Therefore, for the purposes of calculating the household budget the average of both figures was used, which is $2,554.03.

trash is $37, cell phone bills total $200, cable is $51, electricity is $133, payments on their two vehicles total $693, gas averages $450 (for both cars, and his work requires him to travel as far as City B.), vehicle maintenance, $50, combined monthly insurance costs for vehicles and health equal $210, and personal care/entertainment is approximately $150.[16] Without including monthly payments of $995 towards personal debt, the higher mortgage, or costs associated with birthdays, school supplies, recreation, gifts, etc., the monthly household expenses are approximately $4,550.00. Subtracting this sum from their combined monthly incomes of $5,397.50 results in a monthly balance of approximately $847.50 for the X. household.

Ms. D. testified that her household consists of just her and T., and that she currently works at a gas station/convenience store. Submitted paystubs indicate that up until recently she was earning $39,520 in gross wages, and an adjusted annual income of approximately $30,333 after deductions, or $2,332 monthly.[17] In August she received a raise, increasing her gross annual income to $43,680, and her adjusted annual income to approximately $33,196.80, or $2,766.40 monthly.[18]

Ms. D. testified to monthly household expenses of $775 for rent, $580 for food, utilities and cell phone costs averaging $322, $90 for gasoline, combined health and vehicle insurance of $203, average gasoline costs of $90, $13 allotted for twice annual oil changes, and $325 in personal/entertainment expenses, including bowling and T.'s karate costs. Without including $232 of monthly payments towards consumer debt or expenses associated with haircuts, school pictures, clothing, birthdays, etc., her monthly expenses average $2,308. Subtracting this sum from her estimated monthly income of $2,549.20 results in a balance of about $241.20 for the D. household.[19]

At the conclusion of the final hearing on August 21, 2023, the parties were given until September 5 to submit an informally negotiated, mutually acceptable agreement

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16 *See* Ex. 3. It appears costs associated with Mr. X.'s vehicle are also claimed as a "business expense" as per his taxes and Profit and Loss statements. However, this was not examined further, as the respective household budget calculations submitted by the parties are meant to offer a "general snapshot" of the financial health of the homes, not precise calculations.

17 Ex. 1, pp. 11-13. Submitted 2022 paystubs indicate average net earnings of $583 weekly, $2,332 monthly, or $30,333 annually.

18 *Id.* D. test.

19 Her monthly income was calculated by taking an average of her pre and post-raise monthly income ($2,332 + $2,776.40 = $5,098.40/2 = $2,549.20).

regarding Mr. X.'s monthly support obligation for T. The parties concurred that Mr. X. was entitled to deductions for voluntary retirement contributions and self-employment tax but did not reach a consensus regarding his request for credit for extended visitation or travel expenses, or his solicitation of a variance. Prior to deadline both parties notified OAH that their communications were unsuccessful. Accordingly, the record closed on September 5, 2023.

IV. Discussion

A. 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.[20] It is a duty that cannot be discharged, even if the parents reach an informal agreement otherwise. 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 applicable deductions. Income includes any benefits that would have been available to the family unit should it have remained intact.[21]

The parties agreed that Mr. X.'s 2022 adjusted annual income was accurately calculated as $35,479.64, resulting in a monthly support obligation for T. of $591.32.[22] They also concurred that his 2023 annual adjusted income was correctly calculated as $34,241.68, with a corresponding monthly support obligation of $570.69.[23] The parties did not reach a consensus regarding Mr. X.'s request for a variance based on hardship, or travel and visitation credit.

B. Travel expenses

An issue raised in Mr. X.'s appeal was a request for credit for ongoing travel expenses he expected to incur accompanying T. from Kentucky to Alaska for summer visitation. The issue was seemingly abandoned at hearing, presumably because the parties reached an informal understanding.

In July 2023 the parties were required to submit into the record an updated, more detailed informal coparenting agreement than the one from 2017. The updated version was not adjudicated by the Superior court, and therefore is not legally enforceable. However, to the extent it is signed by both parties and notarized, it represents their mutual understanding

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20 *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.
21 *See* Civil Rule 90.3 Commentary, III. Defining Income.
22 *See* FN 11.
23 *See* FN 12.

that "the parent receiving physical custody of T. before or after visitation will be responsible for travel costs relating to his visit."[24] In light of this agreement – and the fact the topic was not raised again during the hearing - the issue of travel expenses will not be addressed in this order.

C. Extended visitation credit

The 2023 agreement also specifies that T. will spend no less than 60 days with his father every summer. Additionally, for any periods of time T. visits for more than 27 consecutive days, the parties concurred that pursuant to Civil Rule 90.3(a)(3) Mr. X.'s support obligation for that month should be reduced by 75%. Mr. X. requests this credit for the months of June and July 2023, when T. was in his care, and solicits an extended visitation credit for those two months every year going forward.

This tribunal does not have jurisdiction to issue a visitation and custody order, and to date the parties have declined to seek an enforceable order from the Superior court.[25] Currently, their visitation and custody agreement regarding T. is restricted to their informal parent agreement. It is not appropriate or efficient to grant an ongoing support credit based on an agreement which cannot be legally enforced, as there is no mechanism to ensure that the visitation actually takes place. Therefore, Mr. X.'s request for an ongoing reduction of his support obligation for specific months is denied. However, he may still receive the 75% extended credit any months that he is due a support reduction by petitioning the Division after the visitation has occurred.[26] This includes the months of June and July 2023, when T. spent the summer in his care.

D. Variance under Civil Rule 90.3(c)(1)

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[24] July 2023 informal parenting agreement.

[25] The parties explained that they have elected not to seek an order from the Superior court as they felt that the process would be "overly cumbersome and costly." The parents were advised that this would not necessarily be the case. Based on the current custody plan being exercised by the parties it appears that the state of Kentucky would have jurisdiction over this matter. The Kentucky Court of Justice, Family Court website offers a drop-down menu with resources for legal help and links to legal forms on its website, *available at* https://kycourts.gov/. One of the posted forms is a Motion for Waiver of Costs and Fees, *available at* https://kycourts.gov/Legal-Forms/Legal%20Forms/026.pdf.

[26] Instructions on how to solicit extended visitation credit can be found on the State of Alaska Child Support Enforcement Division website under Visitation Credit FAQ, *available at* https://childsupport.alaska.gov/child-support-services/information/faqs/visitation-credit-faq.

Mr. X.'s argument on appeal is that he is unable to pay the $570.69 ongoing support obligation for T. in addition to the current living expenses of his family. He asserts that he relied on his initial agreement with Ms. D. that neither parent would pay the other support when he decided to take on the additional expenses of a home and family. He requests a variance of his ongoing obligations.

An obligor-parent may obtain a reduction in the ongoing support amount, but only if he or she shows that "good cause" exists for the reduction.[27] To establish good cause, the parent must show clear and convincing evidence that manifest injustice would result if the support award were not varied.[28] 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.

Ms. D. clearly operates on a very limited budget. She is working full time hours at gas station/convenience storeand bears the full financial responsibility for all the living expenses for her and T. A review of her budget indicates conservative spending, and no obvious extravagances. At the end of every month, before deducting for payments of $232 towards personal debt or including routine expenses for clothing and haircuts for T., she is left with a balance of $241.20.

Mr. X. also operates within a very restricted budget. He testified that his wife recently left her job as a server at a local restaurant due a "toxic work environment" and was not planning to return to the industry. Since then her wages have dropped considerably, as she is currently working part time at the local church. The household expenses include a mortgage, utilities, food, and costs associated with maintaining three children ages 16, 15 and 11 years old. Nothing on Mr. X.'s list of monthly expenses indicates that he and his wife have frivolous expenses that could be eliminated. They currently end each month with an approximate surplus of $847 before subtracting payments of $995 towards personal credit card debt or routine expenses for the children. Mr. X. asserts that he cannot pay the ordered support for his biological child as well as adequately provide for his household.

Despite his precarious financial situation, Mr. X. has not shown by clear and convincing evidence there is good cause to reduce his ongoing support obligation of $570.69 as calculated

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27 *See Willis v. State, Dep't of Revenue, Child Support Enforcement Div.*, 992 P.2d 581 (Alaska 1999).
28 Civil Rule 90.3(c)(1).

under Civil Rule 90.3(a), or that failing to do so would result in manifest injustice. As Ms. D.'s monthly budget is equally restricted, she is not in a financial position to accept a lowered support payment for T. It is not credible that Mr. X. was sufficiently naïve to believe it was appropriate to craft an informal agreement with Ms. D. in 2017 that allowed him to avoid making child support payments for the first 10-12 years of T.'s life. Nor is it believable or particularly relevant that had he known that he might eventually owe a monthly support obligation of $570.69 for his biological son, he might have opted not to marry.[29]

Several items in this decision were also calculated in a way that strongly favors Mr. X.[30] For example, due to "fluctuations in the industry" Mr. X.'s 2022 and 2023 income was based on an average of his earnings in 2019, 2022 and 2023, resulting in a gross annual income of $47,808. This is a significant difference from how the Division calculated his income by averaging his 2022 and 2023 earnings, resulting in a gross annual income of $61,080.50.[31] While averaging three prior years of income instead of two is permitted under Civil Rule 90.3, doing so is appropriate for obligors who have "very erratic incomes," such as those working in the fishing industry.[32] In contrast, Mr. X.'s business was just becoming established in 2019, so it is unsurprising that his profits were lower, and not necessarily because of industry fluctuations. As Mr. X. gains experience as an independent contractor and business owner it can be presumed that going forward his company profits will rise. Nothing in the record suggests that the construction market is predicted to cool or be vulnerable to significant uncertainties in the immediate future.[33]

Secondly, while under Civil Rule 90.3(a)(3) a parent may solicit an extended visitation credit of *up to* 75%, the parties agreed Mr. X. would be granted the full 75%. This was in the absence of any testimony as to what additional expenses Mr. X. will assume beyond food during T.'s summer visits. There was nothing in the record regarding haircuts, shoes, clothing, or any

[29] It was not clarified at the hearing if Mr. X. has formally adopted Ms. X.'s three children. If not, another potential source of income in the X. household is child support collected from the biological father of the children.

[30] As the calculations were presented as "mutually agreed upon" they were not revisited by this tribunal, but it bears mentioning that Mr. X. was vigorously represented by counsel, while Ms. D. represented herself.

[31] Ex. 6.

[32] Civil Rule 90.3, Court Commentary, III. Defining Income, E. Time Period for Calculating Income.

[33] The parties are advised that a modification review may be solicited from the Division at any time, but it may be especially appropriate to revisit Mr. X.'s support obligation when his profits from 2024 are available. *See* Civil Rule 90.3(h)(1), Material Change of Circumstances. Support will also be reexamined by any Superior court that issues a formal custody order in this matter.

other costs he would be committing to covering associated with T.'s care and maintenance which would justify such a significant reduction in his monthly support obligation.

Finally, based on Mr. X.'s testimony, in July his wife abruptly quit her job and decided not to return to waiting tables. While a desire to transition into a new career is wholly understandable, it is a personal choice that has had a significant financial impact on the household. Mr. X. represented that she is looking for a part time position, so she has the flexibility to homeschool the children. Again, this is seemingly an admirable plan made in the best interest of the children in their home, but one that necessarily restricts Ms. Wilson's choices of jobs, and ability to earn full time wages. While Mr. X. and his wife are free to make choices that promote the health and happiness of their family, their resulting increased financial difficulties do not constitute good cause to reduce the support obligation for T., Mr. X.'s biological son.

V. Conclusion

Weighing the situations of both parents and considering the wellbeing of T., Mr. X.'s request for a variance based on hardship is denied. He did not show by clear and convincing evidence that failing to reduce his ongoing support obligation as calculated under Civil Rule 90.3(a) would result in manifest injustice. Accordingly, Mr. X.'s ongoing monthly obligation is set at $570.69, effective April 1, 2023, and ongoing. His monthly preorder arrears are set at $591.32 per month for the months of October, November, and December 2022, and $570.69 per month for the months of January, February and March 2023. For any month that Mr. X.'s visitation with T. exceeds 27 consecutive days, pursuant Civil Rule 90.3(a)(3) he may solicit from the Division a 75% reduction of his monthly obligation.[34]

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VI. Child Support Order

1. S. X. is liable for a monthly child support obligation for one child based on a

[34] This was agreed upon in writing by the parties.

primary custody calculation of $570.69 effective April 1, 2023, and ongoing.

2. S. X. is liable for preorder arrears for one child based on a primary custody calculation in the amount of $591.32 per month for the months of October, November and December 2022, and $570.69 per month for the months of January, February and March 2023.
3. For any month that S. X.'s visitation with T. exceeds 27 consecutive days he may solicit from the Division a 75% reduction of his monthly obligation.
4. All other terms of the Amended Administrative Child Support Order issued by the Child Support Services Division (Division) on December 27, 2022, remain in full force and effect.

Dated: September 21, 2023

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 10/17/2023

By: *Signed*

Adam Crum

Commissioner of Revenue

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