

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

IN THE MATTER OF:)
)
T. R. B.)
)
_____)

OAH No. 08-0116-CSS
CSSD Case No. 001096278

DECISION AND ORDER

I. Introduction

This case concerns the obligation of T. R. B. for the support of M. H. (DOB 00/00/99). The custodian of record is S. T.

A support order was issued on June 2, 2005, setting support in the amount of \$482 per month. Ms. T. filed a request for review and modification. On February 6, 2008, the Child Support Services Division issued a modified support order in the amount of \$624 per month. Mr. B. appealed.

The assigned administrative law judge conducted a telephonic hearing on March 27 and May 1, 2008. Mr. B. participated in the first hearing and Ms. T. in the second. Andrew Rawls represented the division at both.

Because Mr. B. has not shown manifest injustice by clear and convincing evidence, modified ongoing support is set at \$573 per month.

II. Facts

T. R. B. is employed as a loan officer by Bank of America.¹ On June 2, 2005, the Child Support Services Division issued a support order in the amount of \$482 per month, based on 2004 income of \$58,417.44.² Mr. B.'s income over the next three years was

¹ Ex. 5, p. 6.
² Ex. 1, Ex. 2.

\$47,973 (2005);³ \$61,655 (2006);⁴ and \$68,544.96 (2007).⁵ His current gross monthly income is about \$5,712.09; his current monthly take home pay (after pre- and post-tax deductions including retirement contributions and health care coverage, excluding deductions for child support) is approximately \$3,300.21.⁶

Mr. B. is married. His household consists of himself, his wife, and one child of Mr. B.'s who was born prior to M. Ms. B. is presently employed; she takes home about \$1,600 per month. The total monthly household take home income is around \$4,900.21.

The B.'s live in a house they are purchasing, with a monthly mortgage payment of \$1,575. The monthly household expenses include: groceries (\$140-150); utilities (\$547);⁷ water, sewer and trash (\$130);⁸ and telephone and electronics (\$376).⁹ The household owns two vehicles, a 2002 Ford Explorer and a 2005 Jeep Liberty, with payments of \$525 per month on both cars for total monthly car payments of \$1,050. Gas for the vehicles costs around \$200 per week.¹⁰ With maintenance, repairs and insurance, the total operating cost for the vehicles is around \$1,000 per month.¹¹ Mr. B. pays \$496.26 per month for health care coverage,¹² and he contributes in excess of 7.5% of his

³ Ex. 5, p. 3. The total income for both Mr. B. and his wife was \$66,098, including wages (\$47,973), income from a pension or annuity (\$11,956), and unemployment compensation (\$6,264). The pension income and unemployment compensation are not included as income to Mr. B. for purposes of calculating his child support. Generally, lump sum pension withdrawals are not included in calculating child support. *See* Civil Rule 90.3 Commentary at III(A). The unemployment compensation is excluded because there is no evidence that Mr. B. was unemployed in 2005.

⁴ Ex. 5, p. 5. This amount is the total income for both Mr. B. and his wife. It includes wages (\$66,386) and a business loss (-\$5,002). The couple's income tax return states that his wife was a student; therefore, none of the 2006 income is attributed to her. Ex. 5, p. 6.

⁵ Ex. 7. This total is based on Mr. B.'s year to date gross income through November 30, 2007, as shown on Exhibit 5, p. 11. Mr. B.'s taxable income was substantially less; it does not include \$12,327.78 in contributions to a 401K plan (\$6,072.86) or the pre-tax deductions from income for insurance coverage (\$6,254.92). *See* Ex. 5, p. 11 (\$62,832.98 [YTD gross income] - \$12,327.78 [\$6,072.86 + \$6,254.92] = \$50,505.20 [YTD taxable earnings]).

⁶ *See* Ex. 5, p. 11. Mr. B.'s monthly total income is $\$62,832.98 \div 11 = \$5,712.09$. His monthly net pay available for child support purposes (\$3,300.21) is his monthly indicated net pay (\$2,871.21 [$\$31,594.30 \div 11$]) plus the amount deducted each month for his current child support obligation (\$428 [$\$4,708 \div 11$]).

⁷ Mr. B. testified his monthly payments are around \$300 for natural gas, \$247 for electricity, \$85 for

⁸ Mr. B. testified he pays \$45 monthly for water and \$85 monthly for sewer and trash.

⁹ Mr. B. testified his monthly payments are for Internet (\$53), cable television (\$125), cell phone (\$99), and telephone (\$99).

¹⁰ Mr. B. commutes 45 miles to work each way every day.

¹¹ At \$200 per week, gas is around \$867 per month. Mr. B. testified his automobile insurance costs \$131 per month, and maintenance costs around \$53 every three months (\$17.66 per month).

¹² Ex. 5, p. 11 (bimonthly wage statement showing contributions of \$204 for medical coverage, \$38 for dental coverage, and \$6.13 for vision coverage).

total income to a retirement plan.¹³ Total monthly household expenses, excluding health care coverage and a 7.5% retirement contribution, are approximately \$4,818.

II. Discussion

A. Mr. B.'s 2007 Income for Child Support Purposes Was \$68,544.96

The division calculated Mr. B.'s support on the basis of his actual reported wages for 2007 through November 30, 2007. Mr. B. objected that his commission income fluctuates and is not guaranteed, and that his total income for tax purposes was only \$52,476, as shown on his 2007 W-2 form.¹⁴

Mr. B.'s objection that his commissions fluctuate overlooks the fact that his 2007 income was based on actual income over an 11 month period. Certainly, the amount of his commissions fluctuated from month to month, but his child support obligation is based on annual income.

Mr. B.'s objection that his W-2 form should be used as the basis for determining his total income for child support purposes mistakenly presumes that taxable income is the proper measure of income for child support purposes: it is not. Total income for child support purposes is determined according to 15 AAC 125.070(a), which provides that the appropriate percentage is applied to "adjusted annual income determined under 15 AAC 125.065." Adjusted income under 15 AAC 125.065(a) is "the parent's total income from all sources determined under 15 AAC 125.030 minus the deductions specified in Alaska Rule of Civil Procedure 90.3(a)(1)."

Total income under 15 AAC 125.030 includes cash payments, such as wages, salaries and commissions,¹⁵ and in-kind compensation.¹⁶ However, it does not include the value of employer provided health insurance benefits.¹⁷ Whether the value of health care insurance is considered income for child support purposes depends on the source of payments for that insurance. If an employer provides health care insurance at no cost to an employee, the value of the insurance is a fringe benefit that is not considered income to the employee for child support purposes. On the other hand, if an employee pays for

¹³ Ex. 5, p. 11 (showing contributions of \$6,072.86 on income of \$62,832.98 through November 30, 2007).

¹⁴ Ex. 8, p. 2. See B. Ex. A.

¹⁵ 15 AAC 125.030(a)(1), (2).

¹⁶ 15 AAC 125.030(a)(19).

¹⁷ See Civil Rule 90.3, Commentary at III(A)(19).

health care insurance with deductions from wages, the wages are considered income for child support purposes: the insurance has not been “provided” by the employer; it has been purchased by the employee with his wages.

Mr. B.’s wage stub shows that his total income through November 30, 2007, was \$63,832.98, but that his taxable income was only \$50,505.20. For purposes of determining his taxable income, Mr. B.’s contributions to his 401K plan and his payments for health care insurance are not included as taxable income.¹⁸ But for purposes of determining total income for child support purposes, both his contributions to the 401K plan and his payments for health care insurance are included. Mr. B.’s payments for health insurance coverage are not employer provided health insurance benefits: Mr. B. pays for those benefits out of his own pre-tax wages. For these reasons, Mr. B.’s W-2 form does not reflect his total annual income for child support purposes. The division’s modified support order was based on the correct amount of total income: \$68,832.98.

In determining Mr. B.’s adjusted annual income for child support purposes, Alaska Civil Rule 90.3(a)(1)(B) requires that his contributions to his 401K plan (up to 7.5% of total income) must be deducted. However, the rule does not contain any language authorizing the deduction of his payments for health care insurance. Thus, the division’s calculation of adjusted annual income accompanying the modified order correctly deducted a portion of Mr. B.’s contributions to his 401K from his total income, and correctly did not deduct any of his payments for health insurance coverage. However, the division incorrectly failed to provide a deduction for Mr. B.’s Virginia income tax obligation. The division corrected that error in a post-hearing submission, as shown on Exhibit 11. With that correction, Mr. B.’s adjusted annual income is \$34,384.56, and his presumptive support obligation is \$573 per month.

B. Mr. B. Has Not Shown Manifest Injustice

Although he disputed the division’s calculation of his income, Mr. B.’s primary argument as stated in his appeal and at the hearing was that he could not afford an increase in his current \$482 per month child support obligation.

¹⁸ According to a note on page 14 of the instructions to IRS form W-2, an employer may report health insurance premiums deducted from an employee’s wages in box 14 of form W-2, but is not required to do so. The form and instructions may be accessed at irs.gov.

Mr. B.'s testimony indicates that his current net monthly household income available for child support payments is approximately equal to his current household expenses. To the extent that Mr. B.'s ability to pay child support is limited by his current expenses, he would be unable to pay any child support at all. But Mr. B. has been making payments of \$482 per month for the past three years, and in any event under Alaska law, an obligor's ability to pay is measured by income, not by expenses.¹⁹

Nonetheless, expenses can be taken into account and the support obligation may be reduced if the child support obligation as measured by income would result in a manifest injustice.²⁰ The obligor must provide clear and convincing evidence of manifest injustice.²¹ In determining whether there is manifest injustice, all of the relevant circumstances should be considered.²²

In this case, the presumptive increase in support from the prior order is \$91 per month, or \$1,116 per year. Since the prior order went into effect, Mr. B.'s income has increased by approximately \$10,000 per year. Mr. B. has failed to show that his current household expenses cannot reasonably be reduced to accommodate a modest increase in his child support obligation.²³ In the absence of such a showing, he has failed to demonstrate by clear and convincing evidence that the presumptive support obligation of \$573 per month is manifestly unjust.

IV. Conclusion

Because Mr. B.'s presumptive support obligation of \$573 is more than 15% greater than his existing order, a material change of circumstances is presumed and modification of the support order is appropriate. The support order should be set at the presumptive amount because Mr. B. has not shown manifest injustice by clear and convincing evidence.

¹⁹ Civil Rule 90.3, Commentary at II.

²⁰ 15 AAC 125.075(a)(2).

²¹ 15 AAC 125.075(a).

²² *See*, 15 AAC 125.080.

²³ In particular, Mr. B. did not show that the household expense for vehicles, which is in excess of \$2,000 per month, cannot reasonably be reduced through refinancing his car loans or by replacing his current vehicles with less expensive and more fuel-efficient vehicles.

CHILD SUPPORT ORDER

The Modified Administrative Child Support and Medical Support Order dated February 6, 2008, is **AMENDED** as follows; in all other respects, the Amended Administrative Child Support and Medical Support Order dated February 6, 2008, is **AFFIRMED**:

Mr. B.'s modified ongoing child support is set at \$573 per month, effective December 1, 2007.

DATED: June 17, 2008.

Signed _____
Andrew M. Hemenway
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 and Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 11th day of July, 2008.

By: *Signed* _____
Andrew M. Hemenway
Administrative Law Judge

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