

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

IN THE MATTER OF)	OAH No. 08-0310-CSS
S. F. R.)	CSSD No. 001026736
)	
_____)	

CHILD SUPPORT DECISION AND ORDER

I. Introduction

On July 17, 2008, a formal hearing was held to consider the child support obligation of S. F. R. (Obligor) for the support of his children, B. and E., (Obligees).¹ Mr. R. participated. The custodial parent, L. K. G.- H., also participated. Andrew Rawls, Child Support Services Specialist, represented the Child Support Service Division (Division). The hearing was audio-recorded. The record closed on August 15, 2008.

This case is Mr. R.'s appeal of the Division's modification of his child support order for B. and E.. Having reviewed the record in this case and after due deliberation, I concluded that Mr. R.'s modified ongoing child support should be increased and set at \$610 per month effective June 1, 2008.

II. Facts

A. History

Mr. R.'s monthly child support obligation was \$266 per month set by a modification in 2001. The Division reviewed this child support order at Ms. G.-H.'s request. The Division issued a Notice of Petition for Modification on December 28, 2006.²

Ms. G.-H. and Mr. R. provided income information as ordered.³ The Division issued a

¹ The hearing was held under Alaska Statute 25.27.190.

² Division's Pre Hearing Brief & Ex. 2.

³ Division's Pre Hearing Brief.

Modification of Administrative Support Order on June 12, 2008.⁴

The Division determined that Mr. R.'s ongoing monthly child support should be increased to \$529 per month.⁵ The Division based its calculation of Mr. R.'s ongoing monthly child support on an estimate of his projected earnings.⁶ Mr. R. requested a formal hearing.⁷

After the hearing, as requested, the Division filed new calculations based on Mr. R.'s current income.⁸

B. Findings

Based on the evidence in the record, I conclude that it is more likely than not that the Division's latest calculations at Exhibit 16 are correct. I find that it is more likely than not that the income that the Division used in Exhibit 16, to calculate Mr. R.'s ongoing modified child support is the best estimate of his present earnings.⁹ I also find that there is good cause to move the effective date of modification forward to June 1, 2008.¹⁰

III. Discussion

In a child support hearing, the person who filed the appeal, in this case Mr. R., has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.¹¹ Mr. R. did not meet his burden in showing that he was entitled to lower child support than the Division originally calculated. Based on his current earnings, his child support should be modified further upward, but he did meet his burden to show that the effective date should be moved forward.

Mr. R. had been a truck driver when a disability required that he seek re-training. His current child support was set in 2001, while he was receiving training to become a substance

⁴ Division's Pre Hearing Brief & Ex 9.

⁵ Ex. 9.

⁶ Ex. 9, page 6.

⁷ Ex. 10.

⁸ Recording of Hearing, Ex. 14 - 17.

⁹ Recording of Hearing.

¹⁰ Recording of Hearing-Testimony of Mr. R..

¹¹ Alaska Regulation 15 AAC 05.030(h).

abuse counselor, and was working part-time. After his ongoing child support was set in 2001, Mr. R. obtained the necessary certification to work as a substance abuse counselor in 2004. He worked in this field until 2006, when he was earning \$18.00 per hour.

Mr. R. explained he was laid off from work in November of 2006. He collected unemployment for several months after the lay off, and he and his household began receiving public assistance in January 2007. In March of 2007, he moved his household, which includes his wife and their children, to Fairbanks because he was promised a job, but he was not hired. Starting in June 2007, he worked doing contract landscaping in Fairbanks and earned about \$10,000 that year. He was able to obtain substance abuse counselor work again in May of 2008. He currently works full-time for the Fairbanks Native Association where he is earning about \$15.00 per hour.¹² Mr. R. explained that he is still planning to finish his education, but only while he is working full-time.¹³ The Division's new calculations, based on Mr. R.'s current income, result in a monthly ongoing child support of \$610 per month.¹⁴

In its Post-hearing Brief the Division incorrectly characterizes the 2001 order, setting ongoing child support based on his actual earnings in 2001, as a variance of the child support guidelines. In the 2001 order, Mr. R's child support was set in accordance with Civil Rule 90.3(a) based on his actual income. Additional income was not imputed to Mr. R. because he was not unreasonably underemployed at that time. The 2001 order was not based on a downward variance of the presumptive monthly amount to prevent an injustice under Civil Rule 90.3(c).

The Division also incorrectly characterizes moving the effective date of a modification forward as a "variance." The word "variance" in the context of an Alaska child support order is a term of art. Moving the effective date of a modification forward from the first of the month following the service of the petition for modification is not a variance of the child support guidelines, requiring clear and convincing evidence that moving the date forward is needed to prevent an injustice under Civil Rule 90.3(c). The effective date of a modification cannot predate

¹² Recording of Hearing-Testimony of Mr. R..

¹³ Recording of Hearing-Testimony of Mr. R..

¹⁴ Ex. 8.

the service of the petition for modification even when it would clearly prevent an injustice.¹⁵
The effective date of a modification can, however, be moved forward upon a mere showing that there is good cause to do so.¹⁶

Mr. R. was going to school full-time and working part-time, training in a new field to recover some of his lost earning ability when his current support amount was set in 2001. Since then he has become a certified health care provider with increased earning capacity. The Division argues that it would be manifestly unjust to move the effective date forward because Mr. R. did not seek to modify his child support upward when his income temporarily increased between 2004 and 2006 when he was laid off and had to go on public assistance. Civil Rule 90.3(c) imposes no duty on either party to a child support order to seek a modification of the order when there has been a change of circumstances.

The Division also argues that the failure to find that Mr. R. was unreasonably underemployed in 2001 and Mr. R.'s failure to seek an increase in his ongoing support in 2004 resulted in Ms. G.- H. receiving "reduced child support" since 2001. The Division argues that moving the effective date of this modification forward would be unfair to the children covered by this order, because they will not receive an adequate benefit from Mr. R.'s increased earning capacity before they become adults.

In addition to the apparent confusion implicit in its misapplications of the use of the term "variance" noted above, the Division fails to recognize the importance of the forward looking nature of a modification action in its analysis of this case. The focus in setting ongoing child support in a modification action is on the obligor's ability to pay and the children's needs in the months following the service of the petition rather than on redressing past inequities between the interested parties.

Giving significant weight to a disparity between the obligor's income and his monthly child support obligation during periods of time that precede the service of the modification petition would run counter to the prohibition on retroactive modifications. If, for example, the fact that a custodial parent failed to request a downward modification during a period, prior to the petition date, during which the obligor would have been entitled to a downward modification

¹⁵ See *State, Dept. of Revenue, Child Support Enforcement Div. v. Schofield*, 993 P2d 405, (Alaska 1999).

¹⁶ *Alaska Dept. of Revenue, CSED v. Kevin Lyn Dillon* 977 P 2d 118, (Alaska 1999).

had the custodial parent requested one, would not mitigate toward a reduction in the obligor's ongoing child support in a modification, nor should it be a consideration in the determination of whether there was good cause to delay the effective date of an upward modification for that obligor.

Child support should be set based on the obligor's ability to pay during the period when that support will be paid.¹⁷ In the case of ongoing child support being set in a modification order, that time period is the period that begins after the service of the petition.¹⁸ In this case, that period began on December 28, 2006. On that date, Mr. R. was unemployed. He would spend the next sixteen months trying to pay child support and support himself, his wife and his younger children living in his household on unemployment benefits, public assistance grants, below poverty level earnings and by spending down his assets. If the modification had been processed at that time with the knowledge of his 2007 financial circumstances and income that we now have, with the benefit of hindsight, his ongoing child support might well have been reduced.

Ongoing child support should be based on the best estimate of the obligor's projected future earning.¹⁹ This is why the Division's modification order needs to be adjusted. The Division's modification order sets ongoing child support too low because it is based on Mr. R. prior earnings. We now have better income information. He has a new job. He is earning more than the income that the Division used, and there is not reason to believe that his income is likely to change significantly in the foreseeable future. He has not, however, been making this level of income for all of the unusually extended period that has elapsed since the petition was filed.

Civil Rule 90.3 allows a child support amount to be modified if the party requesting the change shows that a material change of circumstances has occurred.²⁰ The rule states that a material change of circumstances "will be presumed" if the modified support amount would alter the outstanding support order by 15 percent.²¹ Monthly child support of \$610 is more than a 15 percent increase from the current order of \$266 per month.

¹⁷ Alaska Civil Rule 90.3, Commentary III.E.

¹⁸ Alaska Civil Rule 90.3(h)(2).

¹⁹ Alaska Civil Rule 90.3, Commentary III.E.

²⁰ Alaska Civil Rule 90.3(h)(1).

