

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

IN THE MATTER OF:)
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OAH Case No: 08-0334-CSS
CSSD Case No: 001149980

DECISION AND ORDER

I. Introduction

J. J. C. and H. D. H. are the parents of T. H. C. (DOB 00/00/06). The genesis of this case is Ms. H.’s application for child support services filed with the Child Support Services Division (CSSD”) on July 26, 2007.¹ CSSD issued an Administrative Child Support and Medical Support Order on February 17, 2008, setting support at \$1067 per month.² Mr. C. requested relief from the order approximately ten weeks later.³

On or about June 2, 2008, Mr. C. supplied financial and other information pertaining to T.’s physical custody history.⁴ CSSD then issued an Amended Administrative Child Support and Medical Support Order on June 10, 2008, reducing the support amount to \$927 per month.⁵ With the amended order, CSSD issued an administrative review decision, which explained the June 10, 2008 support order.⁶ Mr. C. filed his appeal of this review decision on July 8, 2008.⁷

The formal hearing in this matter commenced on July 31, 2008 before Administrative Law Judge (“ALJ”) James T. Stanley. Mr. C. and Ms. H. appeared in person. David Peltier, Child Support Specialist, appeared in person for CSSD. In addition to his own testimony, Mr. C. called the following witnesses: A. W. (sister); L. C. (father); D. E. (friend and co-worker); A. C. (mother); J. G. (friend); C. L. (friend). In addition to her own testimony, Ms. H. called J. T. (aunt) as a witness. L. C. testified by telephone; all other witnesses testified in person. The

¹ Exhibit 1.

² Exhibit 2.

³ Mr. C.’s request for relief from the order is identified as Exhibit 3 in CSSD’s Pre-hearing brief, but Exhibit 3 is not part of the record in this case.

⁴ Exhibit 6 is comprised of thirty pages of information, but does not bear a date or an intake stamp by CSSD. Mr. C.’s cover letter is dated June 2, 2008, as are statements signed by others. Therefore, the information is believed to have been received by CSSD on or soon after June 2, 2008.

⁵ Exhibit 7, pp. 1-7.

⁶ Exhibit 7, pp. 8-9.

⁷ Exhibit 8, p. 1.

hearing was recorded. Exhibits 1-2 and 6-18 were admitted⁸. The record was closed July 31, 2008.

II. Facts

Mr. C. is the father of three children. T. is the youngest of his three children. C. J. C. was born 00/24/98 and A. R. C. was born 00/00/02. C. and A. reside outside of Alaska with their mother, C. L. C. On December 6, 2006, the court in Nueces County, Texas entered a child support order requiring Mr. C. to pay monthly child support for C. and A. in the amount of \$761 per month, plus additional cash medical support of \$150 per month, for a total of \$911 per month.⁹ At the hearing held July 31, 2008, Mr. C. testified that he is current with this Texas child support obligation.

Mr. C. earned \$86,056 in 2007 while working as a fitter-welder.¹⁰ Through the time of the hearing, Mr. C. continued his employment as a fitter-welder. CSSD projected Mr. C.'s income for 2008 to be \$87,710.39,¹¹ based upon his 2007 earnings as well as earnings reported by the Department of Labor for the second, third and fourth quarters of 2007, plus the first quarter of 2008. CSSD examined fourth quarter earning for 2006 and 2007 and concluded that Mr. C. typically receives significant overtime pay in the fourth quarter. CSSD postulated that Mr. C.'s income for 2008 will be the same as 2007, i.e. \$87,710.39.

Selected pay stubs submitted by Mr. C. show approximately \$5100 per month gross pay per month, before taxes, through June of 2008.¹² If Mr. C. did not work any overtime in 2008, his gross income would be approximately \$61,200. The pay stubs of May and June 2008 reflect that CSSD is garnishing his pay in the amount of \$685 per pay period, or \$1370 per month. After taxes, the Texas support obligation, and the CSSD support order (which appears to include an amount for application to arrearages), Mr. C.'s biweekly net take-home pay averages \$696, for an approximate monthly take-home amount of \$1392.¹³

⁸ Exhibits 3 (Mr. C.'s untimely, but accepted for filing, request for relief), 4 (CSSD's request for information), and 5 (notice of request for administrative review) were not moved into evidence, although exhibits 3, 4, and 5 are mentioned and identified in CSSD's pre-hearing brief. Exhibits 3, 4, and 5 are not in issue and do not appear necessary to render a decision in this matter.

⁹ Exhibit 6, pp. 7-22.

¹⁰ Exhibit 6, p. 3 (2007 federal tax return) and exhibit 6, p. 4 (2007 W-2).

¹¹ Exhibit 7, p. 7. The permanent fund dividend is included in total income.

¹² Exhibit 8, pp. 2-3.

¹³ Exhibit 10.

Mr. C. filed an undated expense checklist for hardship with CSSD.¹⁴ His total monthly expenses are in the range of \$3,999 to \$4,199, including his \$911 per month Texas child support obligation,¹⁵ but exclusive of the \$927 per month support obligation ordered by CSSD on June 10, 2008.

Ms. H. was employed in a dentist's office at the time of the hearing. She was paid at the rate of \$19 per hour. Based upon a single pay stub covering a two-week period,¹⁶ Ms. H.'s gross monthly income is \$2100, or approximately \$25,000 per year. The hours worked during any given month fluctuate because of the employing dentist's closure of the office when he is on vacation(s). Ms. H. estimated her annual income at \$26,000 when she completed her hardship expense checklist.¹⁷ Ms. H. estimated her monthly expenses to be at least \$2300 per month.¹⁸

III. Discussion

The purpose of the hearing was threefold: first, to inquire of Mr. C. and obtain a current picture of his financial situation; second, to determine when Mr. C. provided a home and living expenses for T. and Ms. H.; third, to determine if Mr. C. has sufficient income to support his three children and service his other financial obligations without placing an unfair burden upon himself and his children. Stated differently, if child support for T. is set at \$927 per month, effective July 1, 2008, as CSSD presently advocates, will Mr. C. be saddled with total financial obligations that constitute a hardship?

A parent is obligated both by statute and at common law to support his or her children.¹⁹ By regulation, CSSD collects support from the date the custodial parent requested child support services, or the date that public assistance or foster care was initiated on behalf of the child(ren).²⁰ In this case, Ms. H. applied for and began receiving child support services in July of 2007.

¹⁴ Exhibit 9. The hardship checklist is undated, but presumably, it was filed with his other financial information on or about July 8, 2008.

¹⁵ The \$200 difference is due to varying food, electricity, entertainment, and personal care expenses.

¹⁶ Exhibit 15.

¹⁷ Exhibit 12.

¹⁸ Based upon Ms. H.'s hardship checklist, childcare appears to vary by as much as \$400 per month; she estimates childcare to be between \$291 and \$700 per month; the lower estimate was used to estimate her total monthly expenses. Not considered was her car payment of \$250 per month. As of the date of the hearing, it appeared that Ms. H. had three remaining car payments of \$250 each.

¹⁹ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.

²⁰ 15 AAC 125.105(a)(1)-(2).

Child support amounts calculated under Civil Rule 90.3 from Mr. C.'s actual income figures are presumed to be correct. Civil Rule 90.3(a) (1) provides that Mr. C.'s child support amount is to be calculated based on his "total income from all sources." An Obligor has the burden of proving his or her earning capacity.²¹ Mr. C. may obtain modification or termination of future periodic support payments upon a showing of good cause and material change in circumstances.²² To establish good cause, the parent must prove by clear and convincing evidence²³ that "manifest injustice would result if the support award were not varied."²⁴ Depending upon the facts of a particular case, "good cause" might be established by showing "unusual circumstances".²⁵

A. *Mr. C.'s Hardship Claim*

Mr. C. argues that his annual gross income for child support purposes should be approximately \$62,151²⁶ based upon biweekly income of \$2,390.44.²⁷ His argument is based upon the proposition that he will not receive significant overtime in 2008 as he did in the fourth quarters of 2006 and 2007. In the event that Mr. C.'s income for 2008 is significantly lower than his 2007 income, the law provides that he can apply to have his child support obligation for T. modified.²⁸ In the absence of evidence from Mr. C., that his income in 2008 will be less than his income for 2007, a reasonable indicator of Mr. C.'s income for 2008 is his income for 2007. Mr. C. has not met his burden of establishing that his income for 2008 will be less than his actual income for 2007 of \$87,710.39.²⁹

Mr. C. had monthly household expenses at the time of the hearing of approximately \$3,999 to \$4,199 per month, and take-home, spendable income of approximately \$4635 per month based upon an adjusted annual income of \$55,620.59.³⁰ If \$927 (child support for T.) is

²¹ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

²² AS 25.27.190(e).

²³ The clear and convincing standard of proof is more difficult to meet than the preponderance of the evidence standard.

²⁴ Civil Rule 90.3(c).

²⁵ Civil Rule 90.3(c) (1).

²⁶ Twenty-six pay periods per year at an average of \$2390.44 per pay period.

²⁷ The average of \$2390.44 is derived from May and June, 2008, biweekly gross pay of \$2337, \$2322.75, \$2429.63, and \$2472.38, before taxes and deductions. Exhibit 10, pp. 1-2.

²⁸ If an Obligor's income changes, and a new child support calculation based on the changed income level is more or less than 15% different from the child support amount set in a previous child support order, Civil Rule 90.3(h) assumes that a material change in circumstances has occurred and the child support amount may be modified.

²⁹ Exhibit 8, p. 5.

³⁰ Exhibit 7, p. 7. Adjusted annual income is derived from total gross income minus total monthly deductions.

added to Mr. C.'s other expenses, his monthly expenses become \$4926 to \$5126 per month. In other words, he is "short" \$300 to \$500 per month to meet his obligations.

While Mr. C. cannot spend lavishly or unwisely because his expenses exceed his present income, he has a reasonably good employment history, marketable technical skill, and he has the ability to reorganize his expenditures. To meet his obligations to all of his children, he may need additional or different employment, but Mr. C.'s financial situation does not support a finding of "unusual circumstances" as that term is contemplated by Civil Rule 90.3(c).

B. Ms. H.'s Hardship Claim

Ms. H. is the custodial parent of T. and is not under court or administrative order to pay child support. She has not requested that the amount of child support for T. be reduced or varied. The hardship checklist information³¹ that Ms. H. filed has been considered in deciding Mr. C.'s appeal.³²

C. When Was The Family Intact?

The bulk of the evidence that Mr. C. has presented through testimony, documents, and photos is calculated to show that beginning in July of 2007, and through March of 2008, Mr. Curier provided a home and support for Ms. H. and T. For the months that Mr. C. provided a home and support for T., he would not be obligated to pay child support. The parties do not dispute that T. was with Ms. H. at all pertinent times.

Ms. G., Mr. J., Mr. E., Mr. L., Ms. C., Ms. W., and Mr. J. each provided a typed, signed statement that stated, in pertinent part, that "I, (name), am witness to H. H. and T. C. living and residing with J. C. at 000 L. C. #B, Anchorage, AK 99508 before July 2007 and until March 2008."³³ Each of the matching letters was witnessed (but not sworn) before a notary public. The body of the matching letters appears to have been prepared by Mr. C. for the convenience of the signers. At the hearing, testimony of several witnesses tended to erode their signed statement. This is not to imply that any witness was fabricating a story. Rather, a few of the witness did not have personal knowledge of each month in question, such that they could swear under oath that Mr. C., Ms. H., and T. were at the L. address each and every month, July 2007 through March 2008.

³¹ Exhibit 12.

³² Commentary to Rule 90.3, sect. VI.B requires consideration of the custodial parent's income when determining whether unusual circumstances are present,

³³ Exhibit 6, pp. 24-30.

Ms. H. provided a letter from Ms. T. stating that Ms. H. was residing in the T. home from June 27, 2007 through August 26, 2007, and again for a period of unspecified duration beginning in September 2007 and ending shortly before Christmas.³⁴ Ms. T. further indicates that Ms. H. was back in her (T.) home early in 2008 and remaining through Easter. Ms. T.'s letter is unsigned; however, Ms. T.'s live testimony generally tracks her written statement.

Considering the entire record compiled in this matter, the demeanor and candor of the witnesses and the parties, the weight of the evidence shows that:

- July 2007 - Ms. H. and T. were in Mr. C.'s home during the first two weeks of the month when Mr. C. provided a home and support.
- August 2007 - Ms. H. and T. were not in Mr. C.'s home.
- September and October 2007 - Ms. H. and T. were in Mr. C.'s home.
- November 2007 - Ms. H. and T. were not in Mr. C.'s home.
- December 2007 - and January and February 2008, Ms. H. and T. were in Mr. C.'s home.
- March 2008 - Ms. H. and T. were in Mr. C.'s home for the majority of the month.

CSSD incorrectly concluded in the June 10, 2008 amended administrative child support and medical support order that Mr. C. owed child support in arrears in the amount of \$8,343 for the period July 1, 2007 through June 30, 2008.³⁵ For the time that T. was not in his home, but was with his mother, Mr. C. owes child support. Based upon the evidence adduced through the time of the hearing in this matter, arrearages for the period July 1, 2007 through June 30, 2008 should be \$5,098.50 because Mr. C. did not provide a home and support for T. for only half of July, all of August and November, 2007, and all of April, May, and June, 2008.

IV. Conclusion

Based on all of the evidence presented, and considering the circumstances of Mr. C., Ms. H., and their child, to the extent that their circumstances are described in the record, Mr. C.'s case does not present unusual circumstances as contemplated by Civil Rule 90.3(c). Mr. C. has not proven by clear and convincing evidence that manifest injustice will result if the child support amount calculated for T. under Civil Rule 90.3 is not reduced. For the months when Mr. C. provided a home and support for T. (one-half of July, September, October, and December, 2007, January, February, and March, 2008), Mr. C. is not liable for child support. The amount of

³⁴ Exhibit 11.

³⁵ Nine months of support at \$927 per month. Prior to the hearing, CSSD believed that Mr. C. did not provide a home or support for T. for this nine month period.

child support included in the arrearage calculation is reduced by seven and one-half months, the period when the family was intact after child support services commenced in July of 2007.

The amended administrative child and medical support order issued by CSSD on June 10, 2008 is MODIFIED to reflect that through June 30, 2008, Mr. C. owed \$5,098.50 in arrears. All other terms and conditions of the June 10, 2008 amended administrative child and medical support order remain unchanged.³⁶

DATED this 22nd day of December, 2008.

By: Signed
James T. Stanley
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 9th day of January, 2009.

By: Signed
Signature
James T. Stanley
Name
Administrative Law Judge
Title

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

³⁶ The administrative review decision recites arrearages of \$8343; it should be \$5,098.50.