

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

IN THE MATTER OF:)

K. M. M.)

) OAH No. 08-0459-CSS

) CSSD No. 001121420

DECISION AND ORDER

I. Introduction

The Obligor, K. M. M., appealed a Notice of Denial of Modification Review that the Child Support Services Division (“CSSD”) issued in his case on August 14, 2008. The Obligee child is G., DOB 00/00/95.

The hearing was held on September 23, 2008 and October 22, 2008. Mr. M. appeared by telephone in the second proceeding; the custodian, J. L. H., did not participate in either hearing.¹ Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded and the record closed on October 16, 2008.

Rebecca L. Pauli, Administrative Law Judge, conducted the hearing. The appeal was subsequently reassigned to Kay L. Howard, Administrative Law Judge, who had presided over the hearing regarding Mr. M.’s support obligation for his older child. ALJ Howard reviewed the documentary record and listened to the digital recordings of each hearing in this matter. Based on the record and after careful consideration, CSSD’s Notice of Denial of Modification Review is vacated and Mr. M.’s child support is modified to \$684 per month for one child.

II. Facts

A. Background

Mr. M.’s child support obligation for G. was set at \$854 per month in April 2006.² Mr. M. requested a modification on April 22, 2008.³ On April 30, 2008, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.⁴ Mr. M. provided current

¹ Mr. M. was not at home for the first hearing and a message was left with the person who answered the telephone; there was no answer at Ms. H.’s telephone number prior to either hearing.

² Exh. 1.

³ Exh. 3.

⁴ Exh. 4.

financial information.⁵ On August 14, 2008, CSSD issued a Notice of Denial of Modification Review that left his child support at \$854 per month, as set in April 2006, for the reason that a new calculation based on his current income did not result in a 15% change from the existing order.⁶ Mr. M. appealed on August 27, 2008, asserting primarily that CSSD used an incorrect gross income figure and did not include his 401(k) deduction in the calculation.⁷

Mr. M. pays support for another child, K., DOB 00/00/93, in the amount of \$997 per month. He initiated a modification review of his support order for K. at about the same time he requested a modification in this case for G. CSSD denied his petition, as it did here, and Mr. M. appealed. During the formal hearing he provided a year-to-date paystub for the pay period ending September 21, 2008, which is much more recent information than is present in the record in this case.⁸ Also, Mr. M. presented significantly more factual testimony at the hearing in K.'s case, primarily because the bulk of the hearing time in this matter was taken up with discussing reassignment of the appeal to the undersigned administrative law judge. Therefore, given these circumstances, the administrative law judge hereby incorporates into the record of this appeal Mr. M.'s hearing testimony from his other case, plus the September 21, 2008, paystub, renumbered here as Exhibit 14 and attached to this decision.

B. Material Facts

Mr. M. began working for Peak Oilfield Services on March 15, 2008 and earns \$32.50 per hour. If he did not work overtime, he would earn about \$67,600 in one year.⁹ But the year-to-date paystub he provided shows that in the approximate six months he had worked for Peak Oilfield Services, Mr. M. did receive overtime work.¹⁰ The paystub shows that as of September 21, 2008, he had received \$5,971.89 in overtime pay in addition to his straight time earnings of \$33,702.50.¹¹ Mr. M.'s annual income can be estimated from these figures by dividing his year-to-date wages of \$39,674.39 by 27 weeks, then multiplying the resulting average weekly salary

⁵ Exh. 5.

⁶ Exhs. 6 & 7.

⁷ Exh. 8.

⁸ *In the Matter of K. M. M.*, OAH No. 08-0484-CSS, Exh. 9 at pg. 2.

⁹ \$32.50 per hour x 2080, the number of hours a full-time employee typically works in one year, which is derived by multiplying 40 hours per week x 52 weeks.

¹⁰ Mr. M. worked 27 weeks from March 15, 2008 through September 21, 2008. *See* Exh. 14.

¹¹ *Id.*

of \$1,469.42 times 52 weeks, which yields a total annual income figure of \$76,409.84.¹² Since it is based on the most current information, this figure is more accurate than the estimate that Mr. M. will earn \$67,991.85, which reportedly was taken from his earnings as reported to the Alaska Department of Labor and Workforce Development (“DOL”) for the third quarter of 2007 through the second quarter of 2008.¹³

On July 1, 2008, Mr. M. qualified for monthly 401(k) deductions, which totaled \$1,587.70 for the 11 weeks from July 1, 2008, through September 21, 2008.¹⁴ Dividing the total 401(k) deduction of \$1,587.70 by 11 weeks equals an average of \$144.34 per week, which, when multiplied times 52 weeks, equals approximately \$7,505.68 per year. This amount is 10.12% of Mr. M.’s estimated annual income.

Mr. M.’s health insurance coverage at Peak Oilfield Services became effective on July 1, 2008, after he had worked 90 days. He is an insulin-dependent Type I diabetic and before he had insurance he had to pay for insulin and diabetic supplies on his own. Now that he has insurance, Mr. M. incurs only the copay costs for his insulin and syringes, as well as the lancets and test strips for his blood glucose monitor. In addition, Mr. M. has hypertension – high blood pressure – and now must take up to three different medications. He estimated his total out of pocket expenses for his diabetic supplies and medications is now about \$225 per month.¹⁵

Mr. M. has a mortgage payment of \$884 per month; plus he pays \$800 for food in addition to other unremarkable household expenses. His vehicle is paid for and he has a \$325 per month payment on a 2004 Harley Davidson motorcycle. He spends approximately \$320 per month on gasoline and \$225 per month for medications and diabetic supplies.¹⁶ Finally, Mr. M.’s girlfriend lives in his home and works three days per week, earning \$7.15 per hour.

Ms. H. did not participate in the hearing, so G.’s financial situation is unknown. There is no evidence in the record whether G. receives public benefits such as cash assistance, food stamps or Medicaid.

¹² *Id.*

¹³ See Exhs. 10 & 13. As discussed in the hearing, there are at least three instances of multiple listings of the same earnings in Mr. M.’s DOL report, so that report is not reliable proof of his income. Moreover, Mr. M. now has different employment, so even if the DOL report was correct, it would not be an accurate predictor of Mr. M.’s current annual income. See Exh. 11 at pg. 1.

¹⁴ Exh. 14.

¹⁵ Mr. M. testimony.

¹⁶ Mr. M. testimony.

III. Discussion

A. Income

Modification of child support orders may be made upon a showing of “good cause and material change in circumstances.”¹⁷ If the newly calculated child support amount is more than 15% different than the previous order, the Rule assumes a material change in circumstances has occurred and the support amount may be modified.¹⁸

Mr. M.’s child support was set at \$854 per month in April 2006. CSSD denied this modification request because the agency estimated his child support would not go down the requisite 15% from that order.¹⁹

Mr. M. argues that CSSD significantly overestimated his annual income. He claimed that he is guaranteed only 40 hours per week, so his hourly wage of \$32.50 per hour should result in annual income of \$62,400, not the much higher figure CSSD used. Mr. M. argues overtime should not be included in his total income figure because even though he occasionally gets overtime work it is not guaranteed and cannot be counted upon.

Civil Rule 90.3(a)(1) provides that an obligor's child support is to be calculated from his or her "total income from all sources." The commentary to the Rule specifically defines income to include overtime pay.²⁰ Thus, his overtime pay should be used in the calculation. Mr. M. correctly points out that overtime work is not necessarily consistent or guaranteed, but in the absence of evidence to the contrary, since Mr. M. has occasionally worked overtime for this employer in the past, the evidence indicates overtime work will continue to be available to him in an amount consistent with the average number of hours he has already worked overtime.

Mr. M. has not yet been working for his current employer for one year, so his “total income from all sources” must be estimated from the information he provided. Based on the most recent paystub, which shows his earnings from 27 weeks of employment, Mr. M.’s annual income, as discussed in the previous section, is estimated at \$76,409.84. This is the best evidence of his income and this figure should be used in his child support calculation. Also, for

¹⁷ AS 25.27.190(e).

¹⁸ Civil Rule 90.3(h).

¹⁹ Exhs. 6 & 7.

²⁰ Civil Rule 90.3, Commentary A.III.1.

practical purposes and to maintain consistency in the determination of his two separate child support obligations, the same income figure should be used in both of Mr. M.'s cases.

Mr. M. has been making contributions to his 401(k) plan since July 1, 2008, a period of 11 weeks from the date of his most recent year-to-date paystub. Mr. M. testified that he is having 10% taken out of his check for the deduction, which appears to be consistent with the amount estimated from his year-to-date paystub, as discussed above. However, Civil Rule 90.3(a)(1)(B) caps the maximum allowable retirement deduction at 7.5%, so although Mr. M. may be contributing 10% of his total income to the 401(k), he is allowed to deduct only 7.5% of his income in the child support calculation. Determining the 7.5% figure is done by multiplying Mr. M.'s estimated annual income of \$76,409.84 times 7.5%, which equals \$5,730.74, or \$477.56 per month. This amount should be inserted into Mr. M.'s child support calculation.

B. Prior Child Deduction

Civil Rule 90.3(a)(1)(B) provides that a parent who pays support for a prior child is entitled to a deduction in that amount from the parent's income, so long as the payment has been ordered by a court or administrative agency such as CSSD, and the amount is being paid. Mr. M. has been and remains liable for a child support payment of \$997 per month on behalf of his prior child, K.. This obligation is being enforced by CSSD, so it is an allowable deduction from Mr. M.'s income for the purpose of calculating his support obligation for G.

Mr. M.'s child support is calculated using CSSD's online child support calculator, found at <http://www.childsupport.alaska.gov>.²¹ Inserting the figures discussed in this decision, including the income figure of \$76,409.84, the retirement deduction of \$477.56 per month, and the deduction for supporting a prior child of \$997 per month, results in a modified child support amount of \$684 per month.²² This is the most accurate determination of Mr. M.'s support obligation for G., based on the evidence in the record, and it is from this figure that an analysis is conducted as to whether it should be varied based on a financial hardship.²³

²¹ Federal income taxes, social security and unemployment insurance are calculated by the computer program automatically, and the current year's PFD is automatically included in the obligor's income.

²² See Attachment A.

²³ Mr. M. also argued that his PFD and federal tax refund should not be garnished in their entirety, but those issues cannot be resolved here. The administrative law judge does not have the authority to direct CSSD's enforcement actions. See AS 25.27.180(a).

C. Financial hardship

Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. The parent may obtain a reduction in the amount calculated, but only if he or she shows that "good cause" exists for the reduction. In order to establish good cause, the parent must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."²⁴ The presence of "unusual circumstances" in a particular case may be sufficient to establish "good cause" for a variation in the support award:

Good cause may include a finding . . . that unusual circumstances exist which require variation of the award in order to award an amount of support which is just and proper for the parties to contribute toward the nurture and education of their children^[25]

All the relevant evidence should be considered, including the circumstances of the obligee child, to determine if the support amount should be set at a different level than calculated under Civil Rule 90.3(a).²⁶ There is no evidence in the record of G.'s circumstances.

Based on the evidence presented, this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. M. did not prove by clear and convincing evidence that manifest injustice will result if the child support amount calculated under Civil Rule 90.3 is not varied. Mr. M.'s financial situation is strained at the time, but his bills and expenses are not out of the ordinary or unusual. He is now eligible for health insurance from his employer, and will have assistance in obtaining insulin and diabetic supplies. He has to take additional hypertension medications, but these are also covered by his health insurance and as a result, his total copay expenses should roughly equal the \$225 per month he was already spending on medical supplies. Since his overall financial obligations are not excessive or unusual, his situation does not constitute "unusual circumstances."

Mr. M. may have to make some difficult financial adjustments, but simply having monthly living expenses or debts that exceed one's net income does not automatically entitle a parent to a reduction in the child support calculation.²⁷ Mr. M. has a duty to support G. in an

²⁴ Civil Rule 90.3(c).

²⁵ Civil Rule 90.3(c)(1).

²⁶ See Civil Rule 90.3, Commentary VI.E.1.

²⁷ Civil Rule 90.3, Commentary VI.B.4.

amount based on his total annual income and subject to mandatory deductions, and this duty to his child takes priority over other debts and obligations.²⁸

Nor is Mr. M.'s requirement to pay child support in two cases unusual. As discussed above, Civil Rule 90.3 has been designed to factor into the younger child's support obligation the amount an obligor pays for an older child.²⁹ That deduction has been included, so Mr. M.'s modified support obligation has been correctly calculated.

IV. Conclusion

Mr. M. met his burden of proving by a preponderance of the evidence that CSSD's Notice of Denial of Modification Review was issued in error. Mr. M.'s current annual income has been correctly estimated, subject to his deductions for retirement and his support obligation for an older child. These adjustments are sufficient to warrant a modification to \$684 per month, which should be adopted. CSSD may make the necessary adjustments to the child support amount based on Mr. M.'s medical insurance premiums.

V. Child Support Order

- Mr. M. is liable for modified ongoing child support in the amount of \$684 per month, effective June 1, 2008;
- All other provisions of CSSD's most recent child support order in this matter remain in full force and effect.

DATED this 28th day of November, 2008.

By: Signed
Kay L. Howard
Administrative Law Judge

²⁸ See *Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

²⁹ See Civil Rule 90.3(a)(1)(C).

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 22nd day of December, 2008.

By: Signed
Signature
Rebecca L. Pauli for Kay L. Howard
Name
Administrative Law Judge
Title

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