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

IN THE MATTER OF:	)	
	)	
M. T. U.	)	OAH No. 08-0658-CSS
_____	)	CSSD Case No. 001106273

DECISION AND ORDER

I. Introduction

This case concerns the obligation of M. T. U. for the support of K. T. U. and Z. T. T. U.[1] The custodian of record is K. L. (U.) T.

On November 14, 2008, the Child Support Services Division issued an amended administrative child support order establishing a support obligation in the amount of $963 per month for two children, effective December 1, 2008, with arrears in the amount of $68,099 for the period from June 1, 2001, through November 30, 2008.

Mr. U. filed an appeal and requested an administrative hearing. The assigned administrative law judge conducted a telephonic hearing on February 4, 2009. Both parties appeared and were represented by counsel. Andrew Rawls represented the division.

Because imposition of the presumptive support obligation for the entire period of arrears would be manifestly unjust, arrears are set at $702.10 per month from February, 2004, through December, 2007. Beginning in January, 2008, arrears and ongoing support are set at the presumptive amount, $880 per month.

II. Discussion

A. Case History

M. U. was born in 1971. He has been married twice and has four children, the eldest with his first wife, the two middle children with his second wife, and the youngest with his current partner.

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[1] Ex. 8, p. 1 (Application for Services, requesting "Support order establishment" for K. and Z., 1/9/2004); Ex. 10, p. 1 (Administrative Child Support and Medical Support Order, establishing support obligation for K. and Z., 6/24/2008); Ex. 23, p. 1 (Amended Administrative Child and Medical Support Order, establishing amended support obligation for K. and Z., 10/14/2008). The Pre-Hearing Brief states that "[t]he children in this case are K. T. U.…and C. C. U.…, and J. R. U.… . Mr. U.'s name appears on each child's birth certificate." There is no indication in the record as to who C. C. U. and J. R. U. might be. The reference to them in the Pre-Hearing Brief is in error. This case concerns K. and Z. *See* M. U. Post Hearing Brief at Note. 2.

Mr. U.'s first wife was T. S.; their son, C. D. U., was born in 1993.[2] The couple divorced, and the Child Support Services Division is administering a child support order for C. in CSSD No. 001103151.[3] That order was set at $845 per month by court order dated September 25, 2001, effective August 1, 2000.[4] It remains at that amount.[5]

On August 1, 1998, Mr. U. married his second wife, K. L. T. The couple had two children born during the marriage, K. and Z. The marriage was punctuated by periodic temporary separations, domestic violence on Mr. U.'s part, and drug abuse by both spouses.[6] The couple permanently separated in 2003 and Mr. U. had a fourth child, P. U. from another relationship.[7] Mr. U. and Ms. T. were finally divorced on November 21, 2008.[8] The court ordered shared custody, with a gradual increase in the amount of time spent physically in Mr. U.'s custody.

On February 24, 2001, as an adjunct to a domestic violence proceeding, the district court issued a temporary support order for one child (K.) in the amount of $702.10 per month; the order was effective November 11, 2000, and expired by its terms on May 11, 2001, "unless…a superior court or [the Child Support Services Division] enters a child support order concerning these parties."[9] The order provided for payments to be made through the Child Support Services Division "if one of the parties applies for the services of [the division]."[10] On April 12, 2001, just a month before the temporary order was scheduled to expire, Ms. T. filed an application for

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2 Ex. 14, p. 21; Ex. 15, p. 12. *See* note 1, *supra*.

3 Testimony of M. U. (52:45). *See* Exhibit E. It appears that the order may have been an out-of-state order, registered in Alaska in 2001. Ex. 14, p. 14 (State of Alaska and T. S. v. M. U., Superior Court No. 3KN-01-0000 CI).

4 Ex. 34, p. 7.

5 *Id.*

6 *See generally*, *See* Ex. 14, p. 12 (referencing a December 2, 2003, *ex parte* protective order); Ex. 14, p. 9 (State v. U., No. 3KN-05-0000 CR (petition to revoke probation for failure to attend batterers' intervention program); Ex. 14, pp. 4-4 (protective order, 11/28/07); Ex. 15, pp. 2-5 (Report to the Court in No. 3KN-07-000 [*sic*] CI by Alaska Department of Health and Social Services, Division of Family and Youth Services) ("M. and K.'s relationship, when they were together, was full of domestic violence and substance abuse (cocaine, meth).").

7 Mr. U. has been in a relationship with D. B. since 2006, and according to evidence in the record is no longer abusing drugs or engaging in domestic violence. Ex. 15, pp. 3, 12.

8 U. v. U., Superior Court No. 3KN-07-000 CI, Findings and Fact and Conclusions of Law, Findings Nos. 1-3 (January 16, 2009, *nunc pro tunc* to November 21, 2008); Decree of Divorce (January 16, 2009, *nunc pro tunc* to November 21, 2008).

9 Ex. 4, p. 7; U. v. U., District Court No. 3KN-00-000 CI. This was the court's third try. The initial order, issued December 2, 2000, was set at $593.13 per month; it included a credit for health insurance in the amount of $12.01 per month, for a net support obligation of $581.17 per month. Ex. 2, p. 2. That order was effective November 9, 2000, and terminated May 9, 2001. Ex. 2, p. 7. On reconsideration, on January 13, 2001, the court had set the amount of the order at $779.85. Ex. 3, p. 1. The court's February 24 order expressly supersedes November 9 order. Ex. 4, p. 7, ¶12.

services (specifically, "[e]nforcement of [the] existing support order") on April 12, 2001, and in response the division set up this case, CSSD No. 001106273.[11]

The Child Support Services Division did not establish a permanent administrative support order to replace the expiring temporary judicial support order for K. However, after the temporary order had expired on May 11, from August 2 through November 13, 2001, the division collected $3,406.90 from Mr. U. that it distributed directly to Ms. T. and credited to arrears that had accrued on the expired judicial order.[12] On November 25, 2001, Ms. T. notified the division that the couple had "got back together in July 2001,"[13] and the division stopped collecting on K.'s expired temporary support order.[14]

Mr. U. and Ms. T. permanently separated on October 5, 2003.[15] On December 2, 2003, again in connection with a domestic violence case, the district court issued a second temporary support order, this one for no specified amount and effective for 20 days only.[16] On January 8, 2004, Ms. T. filed an application for services asking the Child Support Services Division to establish a child support order for K. and Z.[17] In response, rather than initiating a proceeding to establish a support order, on February 3, 2004, the division issued a notice of withholding on the expired temporary support order for K.,[18] and initiated an administrative modification review.[19]

By early 2004, and continuing into 2008, the children lived with their mother in the home of her parents, G. and L. J.T.[20] On June 2, 2004, the division filed a motion in the domestic violence case that had resulted in the temporary support order for K., asking the court to modify the order by adding Z. to it, and to increase the amount of support to $818 per month.[21] The court called the division and informed it that the order it was seeking to modify was a temporary

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10 Ex. 4, p. 5.

11 Ex. 5.

12 Ex. 28, p. 1; Ex. 29, p. 5; Ex. 33, p. 1; Ex. 30, p. 2 (CSSD's Supplement to Post-Hearing Brief, Affidavit of Andrew Rawls).

13 Ex. 6.

14 *See* Ex. 33, p. 3; Exhibit 20, p. 2.

15 U. v. U., Superior Court No. 3KN-07-000 CI, Findings and Fact and Conclusions of Law, Findings Nos. 1-3 (January 16, 2009, *nunc pro tunc* to November 21, 2008); Decree of Divorce (January 16, 2009, *nunc pro tunc* to November 21, 2008). The separation followed an assault by Mr. U. on Ms. T. *See* State v. U., No. 3KN-03-0000 CR (T.'s Post Hearing Brief, Attachment A).

16 Ex. 7 (U. v. U., No. 3KN-03-0000 CI).

17 Ex. 8.

18 Ex. 14, p. 11. The withholding order was in the amount of $826.74, which presumably included arrears, since the temporary support order was for $702.10. *See* note 9, *supra*.

19 Ex. 26, pp. 11-14.

20 Ex. 14, p. 3.

21 Ex. 26, pp. 3, 16.

order that was no longer in effect; the division withdrew the request to modify that order on July 23, 2004, stating that it "will re-file the motion once it obtains a copy of the correct order to be modified."[22]

Despite having been notified by the court that no support order was in effect, the division still did not initiate a proceeding to establish an administrative support order. Instead, the division issued a second withholding order in this case on July 25, 2005.[23] Over the course of the next year and a half, until the end of 2006, the division continued to collect on that withholding order, paying out all the amounts collected on it directly to Ms. T. From February 3, 2004, through December 28, 2006, the division collected from Mr. U. and disbursed to Ms. T. $21,695.84, in the absence of an effective judicial or administrative support order for K. or Z.[24] Throughout that time, neither Mr. U. nor Ms. T. asked for a change in the amount of the support due or paid, and neither questioned the division's authority to collect the money that Mr. U. was paying under the withholding order issued in this case.

In January, 2007, when Mr. U. went to work for S., the withholding order did not follow him, and the division stopped collecting support in both this case and C.'s case.[25] By April, 2007, the division had served withholding orders in both cases on Mr. U.'s new employer, and the division again began collecting child support on both.[26] However, about this time the division apparently realized that it had never established an administrative support order in this case, and it began to sequester the amounts it was collecting on the withholding order in this case.

In October, 2007, Mr. U. contacted the division and requested modification of his support order for C.[27] On November 6, 2007, the division conducted an audit in this case.[28] Based on the audit, the division credited the sequestered amount of $7,242.33 it had collected on the withholding order in this case to Mr. U.'s account for C. and disbursed the proceeds to C.'s

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22 Ex. 27.

23 Ex. 14, p. 13. The withholding order was in the amount of $983.27 per month. *See* notes 9, 18, *supra*.

24 Ex. 30; Ex. 33.

25 Ex. 33, 99. 3-4; Ex. 34, p. 4.

26 Ex. 34, p. 4.

27 Mr. U. testified that he contacted the division to request modification of the order for C., and that the division reduced the support order for C. by about $100 per month. (56:00). However, the division's post-hearing submission states that C.'s order was initially set at $845 per month and has never been modified.

28 *See* Ex. 28.

custodian on December 10, 2007.[29] Thereafter, Mr. U. contacted the division and, apparently for the first time, asked for modification of the support order in this case; the division advised him that the case was under review.[30]

Finally, on June 24, 2008, the division issued an administrative order establishing Mr. U.'s support obligation for K. and Z.[31] Mr. U. requested administrative review,[32] and the division issued an amended administrative order on November 14, 2008.[33] The amended order established an ongoing child support obligation of $963 per month for two children effective December 1, 2008, and arrears for one child of $674 in June, 2001, for two children at the rate of $796 per month from October, 2003, through December, 2004, $1,389 per month from January 1, 2005, through December 31, 2006, and $963 per month thereafter.

B. Income

In 2001 through 2004, Mr. U. worked full time for N. C. W. S. as a roughneck and all his earnings were in Alaska. His total income was $54,691 in 2001, including wages ($52,841)[34] and his Alaska Permanent Fund dividend ($1,850), $52,297 in 2003, including wages ($51,189) and his dividend ($1,108),[35] and $66,331 in 2004, including wages ($65,411) and his dividend ($920).[36] Beginning in 2005, Mr. U. took a second job with C. T., a subsidiary of N. C.;[37] his total income was $98,949, consisting of wages from both N. C. ($59,290) and C. T. ($39,659),

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[29] Ex. 28; CSSD's Supplement to Post-Hearing Brief. Mr. Rawls stated at the hearing that the division had credited amounts to C.'s case for the benefit of the State of Alaska, under an assignment of rights. (20:40). However Mr. Rawls' post-hearing submission states that all amounts collected under both orders were paid directly to the custodial parents, and that no public assistance was involved in this case. CSSD Submission to Record (July 14, 2009). The division's post-hearing audit shows credits in the amount of $13,282.67 to Mr. U.'s account for C. from July 1 through December 10, 2007. Ex. 34, pp. 4-5. These credits, presumably, include the $7,242.33 in receipts mentioned in Mr. Rawls' affidavit. In addition, it appears that additional amounts collected under the withholding order in this case from December, 2007, through February, 4, 2008, were credited to C.'s case. *See* Ex. 34, p. 6 (showing credits to C.'s account in excess of the number of paychecks being issued to Mr. U., through February 4, 2008).

[30] Both Mr. U. and the division state that he was in contact with the division about this time. Mr. U. asserts that he "requested that child support be reviewed and adjusted as a result of his lower income." M. U. Post-Hearing Brief at 2. The division states that Mr. U. spoke to his caseworker on December 22, 2007, January 25, 2008, and March 20, 2008, asking that excess funds collected be refunded to him or applied to C.'s case. CSSD's Supplement.

[31] Ex. 23.

[32] Ex. 12.

[33] Ex. 23.

[34] Ex. 16, pp. 1-3.

[35] Ex. 18, p. 4.

[36] Ex. 18, pp. 10-11.

[37] M. U. testimony (42:20).

some of the latter out-of-state.[38] Despite the increase in income, Mr. U. lost his home to foreclosure.[39] In 2006, Mr. U. worked out-of-state full time for C. T.; his total income was $58,032, including wages of $57,170 from N. C. ($862)[40] and C. T. ($56,308).[41] Mr. U. also had a taxable distribution from a retirement account ($33,182).[42] Mr. U. used the bulk of the proceeds from that distribution to pay off loans taken out jointly with his wife, and the remainder, about $13,000, to pay federal income taxes.[43] In January, 2007, Mr. U. went to work for S.[44] Mr. U.'s total 2007 income was $68,460.19, consisting of wages and interest;[45] all of the income was earned in Alaska.[46] Mr. U. has remained in the same job since 2007, and his income in 2008 and 2009 is not more than 15% greater or lesser than it was in 2007.[47]

III. Discussion

A. The Division Did Not Retroactively Modify a Child Support Order

Mr. U. argues that the withholding order issued in 2004 is a *de facto* child support order, and that therefore rather than an administrative proceeding to establish a child support order, this is a prohibited retroactive modification.[48]

This argument is mistaken. With respect to Z., there never was a support order in effect until the division established the order that is the subject of this appeal: at the time the initial temporary support order was issued, Z. had not yet been born. Even if the withholding order was

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[38] Ex. 19, pp. 2, 4. It appears that Mr. U. worked substantially full time for his first employer, and that the second job was in addition to that, since Mr. U.'s 2005 earnings from his first job were are substantially the same as in 2001 ($51,727), 2002 ($59,338), 2003 ($51,189), and 2004 ($65,410) (employer ID no. 0000680000). *See* Ex. 16, p. 2; Ex. 17, p. 2; Ex. 18, pp. 2, 9; Ex. 19, p. 2. Mr. U. denies that he received an Alaska Permanent Fund dividend in 2005, and there is no evidence that he did. It appears that Mr. U. was ineligible for a dividend in 2005 due to absence from the state. *See* Ex. 14, p. 1; M. U. Post-Hearing Brief at 8.

[39] Ex. 19, p. 3.

[40] Ex. 20, p. 5.

[41] Ex. 20, pp. 2, 5.

[42] Ex. 20, pp. 4, 6. Mr. U. denies that he received an Alaska Permanent Fund dividend in 2006, and there is no evidence that he did. It appears that Mr. U. was ineligible for a dividend in 2006 due to absence from the state. *See* Ex. 14, p. 1; M. U. Post-Hearing Brief at 8.

[43] M. U. testimony (44:10-40).

[44] M. U. testimony (50:30).

[45] Ex. 21, pp. 2, 5. This amount includes wages contributed to a retirement account. Mr. U. carried forward a capital loss of $29,864, of which $1,500 was deducted from his income from wages and interest. Ex. 21, p. 7. The capital loss is disregarded for purposes of child support. The division included a 2007 Alaska Permanent Fund dividend in its income calculation for 2007. Ex. 23, p. 10. However, Mr. U. was ineligible for an Alaska Permanent Fund dividend in 2007 due to incarceration during the prior year. *See* Exhibit E.

[46] *See* Ex. 21, p. 2 (showing no out of state income tax).

[47] Ex. 22, p. 1 (2008 monthly wages of $5,654.26 = annual wages of $67,851.12); Ex. 23, pp. 14, 16.

[48] U. Post Hearing Brief at 3-6.

a *de facto* child support order, it was so only with respect to K.[49] More fundamentally, the rule against retroactive modification applies to final child support orders, and a withholding order is neither a final order nor a child support order. A "support order" is an order "for the support and maintenance of a child."[50] A withholding order neither establishes a child support obligation nor sets the amount of support owed. It simply sets the amount to be withheld from an employer to cover the support obligation established in a child support order, including interest and arrears. Even after a final child support order has been issued, a withholding order is subject to modification even if there is no change in the underlying support order. That a withholding order was in effect for a lengthy period of time is a circumstance that may be considered in establishing the appropriate amount of pre-order arrears, but a withholding order is not a final child support order for purposes of the prohibition against retroactive modification.

B. Presumptive Support Obligation

The division establishes a presumptive child support obligation for arrears based on the parent's income for each year in which the arrears accrued, beginning with the first year and adjusting the amount on an annual basis to reflect any material change of circumstances.[51] For two children, the presumptive support obligation is 27% of that parent's adjusted annual income,[52] that is, total income after allowable deductions.[53]

1. Income

Mr. U. has raised three issues regarding income. Two are easily disposed of. First, Mr. U. asserts that the division wrongly included an Alaska Permanent Fund dividend in his income for 2005 and 2006.[54] However, that is not so. The division did not include a dividend in either year's income.[55] Second, Mr. U. asserts that his income calculation should reflect the foreclosure on his house.[56] However, the house was a capital asset; Mr. U. has not shown that the loss of the house affected his income for purposes of child support in 2005 or any other year.

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[49] *See* Spott v. Spott, 17 P.3d 52, 55 (Alaska 2001) (interim support order for first child; order of support for second child "could have been expressed in a separate order" and "does not violate the prohibition on retroactivity.").

[50] 15 AAC 125.900(13).

[51] 15 AAC 125.105(e).

[52] 15 AAC 125.070(a); Civil Rule 90.3(a)(2)(A).

[53] 15 AAC 125.070(a); -.065; Civil Rule 90.3(a)(1).

[54] U. Post Hearing Brief at 8.

[55] Ex. 23, p. 4 ("The Alaska Permanent Fund dividend was included in…the 2001 through 2004 and 2007 calculations."). *See* Ex. 23, p. 9.

[56] U. Post Hearing Brief at 8.

The third issue is more problematic. It concerns the treatment of a lump sum withdrawal from Mr. U.'s retirement account in 2006. The division included the withdrawal, in the amount of $33,182, in its calculation of income.[57] At the hearing in this case, Mr. U. objected that his lump sum withdrawal from his retirement account should not be included as part of his total income for child support purposes, but he did not specify any grounds for excluding it, and he did not address that issue in his post hearing brief.

15 AAC 125.030(b)(1)-(5) provides a list of five specific forms of income that are excluded from total income for purposes of child support. 15 AAC 125.030(b)(1) expressly excludes lump sum withdrawals from a pension plan or profit sharing plan, "to the extent the proceeds have already been treated as a portion of total income for the purpose of calculating a child support award under Alaska Rule of Civil Procedure 90.3."[58] In this particular case, as in most cases involving the establishment of a child support order under current law, 15 AAC 125.030(b)(1) does not apply, because there was no prior child support order, and thus no prior occasion to treat contributions as income (or not) "for the purpose of calculating a child support award." Thus, Mr. U.'s lump sum payout will be treated as income.

2. Deductions

Mr. U. raised only one issue regarding deductions, asserting that the division erred by not provided a deduction for contributions to a retirement account in 2005 ($1,026.68) and 2007 ($3,702.53).[59] Ms. T. did not dispute the 2007 deduction, but argues that the division's calculation of wages for 2005 ($98,949.46) had already incorporated the contributions to a retirement account, based on the amount shown as Mr. U.'s Social Security Wages in 2005 ($99,975.14).[60]

As Ms. T. points out, Mr. U.'s 2005 retirement contribution was incorporated into the division's calculation. However, the 2007 contribution was not, and Mr. U. should be provided a deduction for that 2007 contribution.

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[57] The record does not include the division's worksheet for 2006. However, given the support obligation calculated for that year, it is apparent that the division included the lump sum distribution.

[58] This exclusion applies to arrears. *See* 15 AAC 125.030(e)(2).

[59] U. Post Hearing Brief at 8.

[60] Tullos Post Hearing Brief at 7.

3. Effective Dates

When the case is "initiated by the custodial parent, the agency will establish arrears beginning as of the date the custodial parent most recently applied for the agency's services."[61] In this case, Ms. T. most recently applied for services in January, 2004. To the extent that the division's amended order established arrears for a period of time prior to February, 2004, it was issued in error.[62] The division will establish arrears in this case beginning in February, 2004.

4. Calculation of Presumptive Support

Neither party has challenged the division's calculation of Mr. U.'s presumptive support obligation for 2001 or 2004, and the division's calculations for those years are therefore adopted.

Mr. U. has not shown that the division incorrectly determined his support obligation for 2005 or 2006. However, he has shown that the division's calculation of the presumptive support obligation for 2007 was erroneous, because it did not include a deduction for contributions to a retirement account. The correct presumptive amount for 2007, based on the income and deductions used by the division and adjusted to provide the retirement deduction is $880, as shown in Appendix A.[63] Because the support obligation for 2008 and 2009 is based on the 2007 calculation, the obligation for those years is also $880 per month.

5. Credit for Health Insurance

Mr. U. contends that he should be given a credit for the health insurance coverage that he provided for the children.[64] Ms. T. asserts that she was not informed that health care coverage had been provided, and that therefore no credit should be given.[65]

Credits for health insurance coverage are governed by 15 AAC 125.432. 15 AAC 125.432(e) states:

> The agency will grant a credit or debit [for the cost of health care coverage] prospectively from the date the parent purchases the health care coverage, the date the coverage was actually made available to the children, or the effective date of the order requiring the parent to provide health care coverage and allowing a credit or debit for the cost of the coverage, whichever date is later.

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61 15 AAC 125.105(a)(2).

62 The division's amended order includes arrears for June, 2001 ($674) and October through December, 2003 ($796 per month). Ex. 23.

63 The division included an Alaska Permanent Fund dividend in the calculation of the 2007 support obligation, but Mr. U. did not receive a dividend that year. *See* note 45, *supra*. Any error in including the dividend is harmless, however, because the presumptive amount will not be imposed for 2007, and in subsequent years Mr. U. will receive a dividend.

64 U. Post Hearing Brief at 6-7.

65 T. Post Hearing Brief at 6.

The division will provide the parties a notice of the credit or debit allowed, and its decision; a parent may contest the notice, but the division's decision is not subject to an administrative appeal.[66]

C. Adjustment of Presumptive Support Obligation

The presumptive support obligation may be reduced if the amount would result in manifest injustice due to unusual circumstances.[67] The obligor must provide clear and convincing evidence of manifest injustice.[68] In determining whether manifest injustice exists, all of the relevant circumstances should be considered.[69] In establishing pre-order arrears, "unfairness may result from rigid application of [Civil Rule 90.3]."[70]

The facts of this particular case, as established by clear and convincing evidence, present unusual circumstances. First, Mr. U. has four children by three mothers, with two support orders. Second, the division is establishing arrears for a lengthy period of time, extending over more than five years. Third, the division for more than five years failed to establish a support order, but continued to collect on a withholding order.

Under these circumstances, in light of the facts of this particular case, imposition of the presumptive support obligation would be manifestly unjust, primarily because although establishing arrears in this case is not a retroactive modification of a child support order, to establish arrears in an amount that differs from the expired support order would have substantially the same effect as a retroactive modification.

Following Ms. T.' January 8, 2004, request to establish a support order, the division issued a withholding order and began collecting on the expired temporary support order.[71] Over the course of the next four years, until February, 2008, the division continued to collect child support under a withholding order issued in this case, purportedly under the expired judicial support order. Throughout this time, all of the parties, including the division, acted as if the expired prior temporary support order was still in effect and Mr. U. was paying the amount he owed under that order, plus arrears, and neither Mr. U. nor Ms. T. asked for any change in the *status quo*. These circumstances, in light of the facts of this particular case, make it manifestly

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66 15 AAC 125.432(g).
67 15 AAC 125.075(a)(2).
68 15 AAC 125.075(a); *see* Civil Rule 90.3(c)(1).
69 *See* 15 AAC 125.080.
70 Civil Rule 90.3, Commentary at VI(E).

unjust at this late date to change the support obligation from amount stated in the expired temporary support order. Neither Ms. T. nor Mr. U. at any time asked for modification, or questioned the amount of the withholding order or the division's authority to collect under it. To order a greater or lesser amount of support than the amount due under the expired temporary support order would, under the unusual circumstances of this case, be equivalent to a retroactive modification.[72]

Limiting arrears to the amount of the prior support order is appropriate in light of other circumstances as well. First, this is not a case in which the amount actually paid was unjustly low, or in which Mr. U. evaded payment of his full support obligation. To the contrary, until mid-December, 2007, in addition to making regular payments on the withholding order issued in this case, Mr. U. was also paying child support under a withholding order in C.'s case.[73] From January 2, 2004 through July, 2009, which is essentially the entire period of arrears, Mr. U. paid a total of $103,825.18 under those two withholding orders, about 35% of his adjustable annual income during that time, which is more than the presumptive support obligation for three children in an intact family.[74] Mr. U.'s average monthly payment during that time was $1,573.11, which is almost exactly the amount ($845 + $702.10 = $1,547.10) of the amount due under the support order for C. ($845) and the expired support order for K. ($702.10).[75]

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[71] As previously noted, the division issued a withholding order higher than that, apparently to account for accrued arrears.

[72] In the absence of a prior withholding order, in a case involving a lengthy period of arrears for an obligor subject to multiple orders who has a subsequent family, it may be appropriate to set arrears based on the "whole family" approach. *See, e.g.*, In Re M.G., OAH No. 06-0288-CSS (Department of Revenue, October 19, 2006) (determining support as if all children were in a single family, and dividing support equally, adopting method set out in Civil Rule 90.3(i) for cases of third party custody). That approach, under the facts of this case, would yield a monthly obligation for arrears of $758.50 in 2004, $1,078.50 in 2005, $549 in 2006, $768.50 in 2007, and $896.50 in 2008. The average of these amounts is $810.20 per month, which is not grossly disproportionate to $702.10 per month.

[73] It appears that Mr. U. was subject to withholding orders in both cases until February, 2008, except for January through March, 2007, when neither withholding order was in effect, presumably as a result of Mr. U.'s change of employment.

[74] The presumptive support obligation for three children in an intact family is 33% of adjusted annual income. Civil Rule 90.3(a)(2)(C).

[75] The division has credited payments to C.'s account in an average amount of $1,073.84 per month, and to this case in an average amount of $499.27 per month. *See* Ex. 33, 34. By regulation, the division is required to credit payments first to the ongoing support obligation. 15 AAC 125.571(a). The amount credited to C.'s account is higher than to K. and Z.'s account because no order was in effect in this case until June 24, 2008. Thus, from January, 2007, until June 24, 2008, the division credited all payments made to C.'s account. The $200 difference is largely derived from the $7,242.53 in sequestered funds collected during that time under the withholding order in this case that was credited to C.'s account.

Second, although under 15 AAC 125.030(b)(1), a lump sum withdrawal from a pension plan is treated as income for purposes of the calculation of arrears, including such a withdrawal in the calculation of arrears may in some cases be unjust. The general rule is that Civil Rule 90.3 "should be interpreted broadly to include benefits which would have been available for support if the family had remained intact."[76] In this particular case, Mr. U. was fully employed and earned his usual income in 2006; the lump sum withdrawal was not a replacement for the loss of his usual and regular source of income. Furthermore, the lump sum withdrawal was not used for current consumption; rather, Mr. U. testified, except for $13,000 used to pay taxes, the lump sum withdrawal was used in its entirety to pay marital debts. Taxes are generally deductible from income, and by paying marital debt Mr. U. provided a benefit to his estranged spouse and himself, not to their children. Under these circumstances, the withdrawal would not have been available for support had the family remained intact.

Mr. U. contacted the division and, he says, requested modification of the order in this case in about December, 2007. From that point forward, it is no longer manifestly unjust to set arrears based on his actual income, because the division's actions were no longer retroactive in effect: any increase or reduction in the support obligation that took effect after that date was not a *de facto* retroactive modification of the prior order, but rather a forward-looking modification just as in the usual case of a request for modification review. Arrears and ongoing support from the first day of the month following Mr. U.'s request, *i.e.*, from January 1, 2008, therefore, should be based upon actual income.

IV. Conclusion

Imposition of a support order for arrears in the presumptive amount is manifestly unjust. Arrears should be set at the amount provided in the expired temporary support order, through the first day of the month after the date Mr. U. requested a change. From that time forward, arrears and ongoing support should be set at the presumptive amount.

[76] Civil Rule 90.3, Commentary at III(A). For example, depending on the circumstances, a lump sum distribution from a pension or profit sharing plan might not be considered as income for child support purposes, to the extent that the proceeds are capital gains that are not a regular source of income. *See* 15 AAC 125.030(a)(16). Similarly, a withdrawal from a savings account, or from a taxable brokerage account, might not be considered income, to the extent the proceeds represented a return of capital rather than taxable income.

CHILD SUPPORT ORDER

The Amended Administrative Child Support and Medical Support Order dated November 14, 2008, is **AMENDED** as follows; in all other respects, the Amended Administrative Child Support and Medical Support Order dated November 14, 2008, is AFFIRMED:

1. Mr. U.'s arrears are set at $702.10 per month, for the months from January 1, 2004-December 31, 2007, and at $880 per month, for the months from January 1, 2008, through September 30, 2009.

2. Amended ongoing child support is set at $880 per month, effective October 1, 2009.

DATED: September 30, 2009.

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 4th day of November 2009.

By: *Signed*
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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