

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

IN THE MATTER OF:)
)
M. D. B.)
)
) OAH No. 08-0675-CSS
) CSSD Case No. 001103863
_____)

DECISION AND ORDER

I. Introduction

This case concerns the obligation of M. D. B. for the support of O. E. H. (DOB 00/00/95). The custodian of record is C. M. H.

The Child Support Services Division (Division) issued an amended administrative child support order dated November 7, 2001, in the amount of \$484 per month.¹ Ms. H. filed a request for modification, and on November 6, 2008, the Division declined to proceed with review of the order.²

Mr. B. appealed and requested a formal hearing. The case was referred to the Office of Administrative Hearings, and the assigned administrative law judge conducted a telephonic hearing on January 26, 2009. Mr. B. and Ms. H. testified. Andrew Rawls represented the Division.

Because neither party showed a material change in circumstances or has shown by clear and convincing evidence that the existing order is unjust, the request for modification is denied.

II. Facts

M. B. is a resident of Anchorage. For the past twenty years, he has worked on road construction projects. In 2001 Mr. B. earned \$34,529 and received unemployment compensation of \$1,170. Including his Alaska Permanent Fund dividend, his total income for 2002 was \$37,662.86.³ In the years 2005-2007, Mr. B.'s average annual total income, including wages, unemployment compensation, and his Alaska Permanent Fund dividend, has been \$38,469.58.⁴

¹ Exhibit 1
² Exhibit 5.
³ Exhibit 7.
⁴ Exhibit 7.

In the years 2005-2007, Mr. B. earned average monthly wages of about \$4,522 during the third quarter of the year, from July through September.⁵ Excepting the first quarter of 2007, when he was unemployed, in 2005-2007 Mr. B. earned average monthly wages of about \$2,857 in the first quarter, \$2,873 in the second quarter, and \$2,303 in the fourth quarter.⁶

Mr. B. was employed by W. L. of Alaska from 2004 until the end of the 2006 construction season, when he went to work as a road construction supervisor for C. U. C. U., unlike W. L., generally does not have any jobs during the first quarter of the year, and in 2007 and 2008 Mr. B. was unemployed and receiving unemployment compensation during the first quarter. In 2008, his unemployment continued through the second quarter. In order to maintain his income, during the third quarter of 2008 Mr. B. worked on some Fairbanks projects for A. R. S. as well as in Anchorage for C. U. His total income for the year was \$32,504.37, including wages (\$24,675.37), unemployment compensation (\$5,760), and his Alaska Permanent Fund dividend (\$2,069), for monthly gross income of \$2,630.34. His monthly net pay was about \$2,280. Mr. B. anticipates that he will not have winter work in 2009, as in the prior two years.

Mr. B. is married and his wife takes home about \$1,200 per month. They have two children, ages 7 and 12. The estimated monthly household expenses include a mortgage (\$1,700), food (\$700), utilities (\$335),⁷ trash collection (\$50), telephone (\$315-320),⁸ personal care (\$40-50), and entertainment (\$20). The family has three vehicles: a 1989 Dodge pickup that is paid for, and a 2002 Chevrolet flatbed and a 2003 Suburban that are being paid for. The total monthly cost of these vehicles is \$1,525-1,575.⁹ Altogether, his monthly household expenses are about \$4,485-4,750. In addition, Mr. B. has substantial credit card debt, with monthly minimum payments of more than \$600.

C. H. is a single parent; the household consists of herself and her son O. They live in No Name City, a small town in East Texas. Ms. H. is scheduled for full time work, but often takes time off to provide care for her son, who has been diagnosed as

⁵ Exhibit 7.

⁶ Exhibit 7.

⁷ Mr. B. testified that the monthly utilities include natural gas (\$150), electricity (\$120), and water (\$65).

⁸ Mr. B. testified that his monthly expenses include telephone (\$65-70) and cell phone (\$250).

bipolar and is receiving mental health treatment. Her total monthly income is about \$1,175, and her net monthly income is about \$876.¹⁰ She receives Social Security payments of \$334 per month on her son's behalf. Ms. H.'s total monthly household expenses include rent (\$300), food (\$400-500), utilities (\$260), Internet and telephone (\$75), personal care (\$50), school lunches (\$40), and entertainment (\$25-30). She has a 2002 Ford Escort that is paid for; the monthly cost of the vehicle is \$95-106.¹¹ Altogether, her monthly household expenses are about \$1,245-1,361.

II. Discussion

The annual child support payment for one child is 20% of the adjusted annual income.¹² The Division will modify the child support order when the child support obligation changes by an amount greater than 15% of the existing order.¹³ The support obligation is determined based on "the expected actual annual income that the parent will earn or receive when the child support award is to be paid."¹⁴ The support obligation may be reduced if it would result in a manifest injustice due to unusual circumstances.¹⁵ The obligor must provide clear and convincing evidence of manifest injustice.¹⁶ In determining whether manifest injustice exists, all of the relevant circumstances should be considered.¹⁷

A. Presumptive Support Obligation

In this case, Mr. B.'s income was relatively consistent through 2007. However, beginning in 2008 Mr. B. earned somewhat less due to a reduction in winter work with his new employer, C. U. Based on his income in 2008, his anticipated income for 2009

⁹ Mr. B. testified that his monthly vehicle expenses include two vehicle loans (\$500 each), insurance (\$350), maintenance (\$25), and gasoline (\$150-200).

¹⁰ Ms. H. testified that she earns \$273.26 per week gross, \$203.76 net.

¹¹ Ms. H. testified that her monthly vehicle expenses include insurance (\$34), maintenance (\$10-11), and gasoline (\$50-60).

¹² 15 AAC 125.010, -.070(a); Civil Rule 90.3(a)(2)(A).

¹³ 15 AAC 125.321(b)(1).

¹⁴ 15 AAC 125.030(a).

¹⁵ 15 AAC 125.075(a)(2).

¹⁶ 15 AAC 125.075(a); *see* Civil Rule 90.3(c)(1).

¹⁷ *See* 15 AAC 125.080.

will be the same as his total income in 2008: \$32,504.37.¹⁸ At that income level, his presumptive support obligation is \$457 per month, as shown in Appendix A.

B. Manifest Injustice

Mr. B. argues that the support obligation should be reduced for two reasons: first, because he took on a second job in order to support his subsequent family, and second because the presumptive support obligation will cause a hardship to the subsequent family.

1. *Second Job*

In a modification proceeding, income from a second job taken to better provide for, or avoid hardship to, a subsequent family may be disregarded.¹⁹ Mr. B. argues that he took a second job with A. R. S. during the construction season.

That a person has more than one employer during a given period of time does not necessarily mean that the person had a “second job” for child support purposes. Both jobs could be half-time positions, for example, or they may be sequential. In this case, Mr. B. did not work at all for more than half of 2008 and it does not appear that he was simultaneously employed by C. U. and by A. R. S.: C. U.’s work was in Anchorage, and A. R. S.’s was in Fairbanks. In any event, Mr. B. took on additional hours for a portion of the summer construction season in order to compensate for lost income, not to generate additional income over and above the income he had been earning when the prior child support order was entered, to better support his subsequent family. For these reasons, Mr. B.’s income from A. R. S. is included in determining his support obligation.

2. *Hardship*

The evidence shows that Mr. B.’s current household income is insufficient to meet his current financial obligations, without regard to his child support obligation. His current net household income is about \$3,280 per month, as compared with total household expenses of \$4,485-4,750, indicating a monthly net cash outflow in excess of \$1,000 per month. Mr. B. has accumulated a substantial credit card debt, which presumably reflects the negative monthly cash flow, but which has left him with an

¹⁸ Mr. B. argued that his unreimbursed travel expenses should be deducted from his income. There is no specific provision for the deduction of such expenses. See 15 AAC 125.065(a); Civil Rule 90.3(a)(1). More importantly, Mr. B. did not establish that he will incur such expenses in 2009.

¹⁹ 15 AAC 125.075(a)(2)(F), (H). See Civil Rule 90.3, Commentary at VI(B)(2).

additional \$600 in monthly credit card payments. Including child support and credit card payments, the record indicates that the household has a monthly negative cash flow in excess of \$2,000.

Despite this significant negative current cash flow, the evidence suggests that Mr. B. has the ability to accommodate the existing child support obligation without undue hardship to his subsequent family, by increasing income and decreasing expenses. In particular, the record reflects that Mr. B. is presently paying \$1,525-1,575 per month for motor vehicles. In addition, Mr. B. has relied on unemployment compensation rather than any form of employment during periods when he is laid off from his primary occupation. Notably, this case was initiated by Ms. H. in an effort to increase the support obligation due to her own increased expenses; Mr. B. did not himself initiate a request to modify the obligation by reducing the amount to reflect a reduction in income. In short, although it is clear that Mr. B. will have to make significant financial adjustments and find regular winter employment in order to meet his child support obligation, he has not shown by clear and convincing evidence that the presumptive support obligation is manifestly unjust.

C. Variable Payments

Mr. B. asked that the support order be adjusted to provide for variable payments during the year: higher during the summer months when he earns more than at other times. The support obligation may be adjusted to reflect seasonal income if the burden of budgeting for periods of unequal income should be placed on the custodian rather than the obligor and the custodian does not reasonably object.²⁰ In this case, neither condition applies: Mr. B. has a greater ability to budget for variations in income, since he must do so for his own family regardless of the child support obligation, and Ms. H. objected at the hearing to variable payments. In light of her limited income, the objection was reasonable.

IV. Conclusion

The amount of the presumptive support obligation has not changed by more than 15%, and there has been no showing of a material change of circumstances. The petition for modification should be denied.

²⁰ See Civil Rule 90.3(c)(5), commentary at VI(F).

CHILD SUPPORT ORDER

1. The Division's decision to deny the petition for modification is AFFIRMED.
2. Mr. B.'s child support obligation remains at \$484 per month.

DATED: February 17, 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 10th day of March, 2009.

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

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