

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

IN THE MATTER OF: )  
 )  
 J. E. C. ) OAH No. 09-0084-CSS  
 ) CSSD No. 001149713  
\_\_\_\_\_ )

**DECISION AND ORDER**

**I. Introduction**

The obligor, J. E. C., appealed an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on January 27, 2009. The Obligee child is J., DOB 00/00/2000.

The hearing was held on March 9, 2009. Both Mr. C. and the child's mother, J. G.,<sup>1</sup> appeared by telephone. Erinn Brian and Andrew Rawls, Child Support Specialists, represented CSSD. The hearing was recorded. The record closed on March 31, 2009.

Based on the record as a whole and after careful consideration, Mr. C.'s child support arrears are set at \$100 per month for the period from June 2007 through September 3, 2008. Mr. C. is liable for support even though Ms. G. hid J. from him and the child was not always in Ms. G.'s direct care. However, Mr. C. is not obligated to pay the full amount calculated by CSSD; his total arrears should be reduced to reflect the fact that he has had custody of J. since September 3, 2008 and it would be manifestly unjust to charge him with the full monthly amount from June 2007 until the date he was awarded custody.

**II. Facts**

**A. History**

Ms. G. received public assistance benefits for J. from June 2007 through September 2008.<sup>2</sup> On October 24, 2008, CSSD served an Administrative Child and Medical Support Order on Mr. C.<sup>3</sup> He requested an administrative review and provided a copy of a court order awarding him custody of J. on September 3, 2008.<sup>4</sup> Following the administrative review, CSSD issued an

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<sup>1</sup> Formerly known as J. G.-C.

<sup>2</sup> Pre-hearing brief at pg. 1; *see also* Exh. 4 at pg. 7.

<sup>3</sup> Exh. 1.

<sup>4</sup> Exhs. 2-3.

Amended Administrative Child Support and Medical Support Order on January 27, 2009, that set Mr. C.'s child support arrears at \$717 per month for the period from June 2007 through September 2008, all of which totals \$11,472.<sup>5</sup> Mr. C. filed an appeal and requested a formal hearing on February 17, 2009. He asserted primarily that Ms. G. had kept J. from him and that the child was not always in Ms. G.'s direct care.<sup>6</sup>

## **B. Material Facts**

Mr. C. and Ms. G. are the parents of J., DOB 00/00/2000. Ms. G. also has an older daughter named K. who is currently 15 years of age.<sup>7</sup> Mr. C. has had court-ordered custody of J. since September 3, 2008.

The parties previously lived in Washington State and separated in 2003.<sup>8</sup> At that time, Ms. G., an Alaska Native, returned to her childhood home with J. and K., in part to obtain medical care for K. Mr. C. and Ms. G. remained in contact after their separation. In May 2004 Mr. C. began providing Ms. G. with \$400-\$500 per month. She did not have a bank account so he deposited it into her mother's account. During the summer of 2004, K. spent two months in Washington with Mr. C. and he brought her back to Alaska at the end of her stay. Also, he briefly visited Alaska during the winter of 2004-2005. The parties attempted to work out custody of J., but they were unsuccessful.

In July 2005, Ms. G. went into hiding with J. and K. and Mr. C. stopped making voluntary child support payments. They had no contact after that, so in 2007 Mr. C. retained the services of an attorney and private investigator to find Ms. G. and J. He filed a divorce action in January 2008.

Soon after terminating contact with Mr. C., Ms. G. contracted cancer and was very ill for a significant period of time. Due to the gravity of her illness, Ms. G. petitioned the K. Indian Tribe ("KIT") to place the children in the temporary guardianship of her parents, L. and B. B., in March 2008. The tribal court held a hearing on her petition on April 9, 2008 and granted her petition on April 14, 2008.<sup>9</sup> Ms. G. eventually moved into her parent's home in early 2008 and

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<sup>5</sup> Exh. 4 at pg. 2.

<sup>6</sup> Exh. 5.

<sup>7</sup> Exh. 8 at pg. 1.

<sup>8</sup> Unless otherwise noted, the facts are taken from the hearing testimony of Mr. C. and Ms. G.

<sup>9</sup> Exh. 8. Ironically, Ms. G. was served with the divorce complaint on the same day. Exh. 7 at pg. 1.

has remained there ever since. The tumor in her left sinus is inoperable but she testified that at least it appears to have stopped growing.

The parties' divorce action went to hearing on July 22, 2008, but Ms. G. did not file an answer to the complaint or appear at the hearing.<sup>10</sup> The court's findings of fact, conclusions of law, divorce decree and custody order were all issued on September 3, 2008.<sup>11</sup> The court awarded custody of J. to Mr. C.<sup>12</sup>

### III. Discussion

Mr. C.'s primary argument is that he should not be charged for child support arrears in this case because Ms. G. withheld custody of J. from him for three years. Ms. G.'s response is that she left Washington with the children and returned to Alaska in 2003 because they did not have medical insurance and K. had medical problems that had to be treated. As to why she went into hiding in 2005, Ms. G. claims she was afraid of the possibility of domestic violence because of Mr. C.'s temper. The custodian said that she attempted to put the children into protective custody with the KIT because she developed an inoperable sinus tumor and she was not sure how long she was going to live.

The person who filed the appeal, in this case, Mr. C., has the burden of proving by a preponderance of the evidence that the agency's child support determination is incorrect.<sup>13</sup>

A parent is obligated both by statute and at common law to support his or her children.<sup>14</sup> This obligation begins when the child is born.<sup>15</sup> By regulation, CSSD collects support from the date the custodial parent requested child support services, or the date public assistance or foster care was initiated on behalf of the child(ren), up to six years prior to service on the obligor of notice of his or her support obligation.<sup>16</sup> Ms. G. began receiving public assistance benefits on J.'s behalf in June 2007,<sup>17</sup> so pursuant to 15 AAC 125.105(a)(1)-(2) that is the first month for which CSSD may charge Mr. C. with child support.

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<sup>10</sup> Exh. 7 at pg. 1.

<sup>11</sup> Exhs. 3, 7.

<sup>12</sup> The KIT relinquished its jurisdiction over J. to the Superior Court. Exh. 3 at pg. 1.

<sup>13</sup> 15 AAC 05.030(h).

<sup>14</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

<sup>15</sup> *CSSD v. Kovac*, 984 P.2d 1109 (Alaska 1999).

<sup>16</sup> 15 AAC 125.105(a)(1)-(2).

<sup>17</sup> Exh. 6.

Mr. C.'s claim that he should not have to pay arrears because Ms. G. went into hiding with J. is incorrect. A parent is obligated to support his or her child regardless of whether the custodian interferes with visitation.<sup>18</sup> The obligation to pay child support and the obligation to provide the child for visitation are separate and distinct responsibilities. Just because Ms. G. did not hold up her end of the bargain does not mean that Mr. C. may correspondingly withhold his support for J.

Mr. C. also claimed that he was paying support for J. in the amount of \$400-\$500 per month prior to Ms. G. going into hiding. The obligor did not clearly state whether he is requesting a credit against his child support arrears for the support he paid for J. It may be that he simply wants the tribunal to know that he was supporting the child. In any event, Mr. C. is not entitled to a credit against his child support obligation in this case for supporting J. before Ms. G. took her into hiding. CSSD may only give the obligor credit for direct payments made "before the time the obligor is ordered to make payments through the agency," so long as the direct payment was not made *before* the first date support is due in the administrative child support action.<sup>19</sup> There is no dispute on this issue – Ms. G. testified she did not receive any funds from Mr. C. from June 2007 through September 2008 and he acknowledged he did not send any money to her mother's account after Ms. G. disappeared with J.

Alaska law makes clear that Mr. C. is obligated to support J. even though Ms. G. secreted the child away. Thus, the essential issue in this case is not whether Mr. C. is obligated to pay support, but whether that support should be adjusted now that he has custody of J.

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." Civil Rule 90.3(c). A finding that "unusual circumstances" exist 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

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<sup>18</sup> AS 25.27.080(c).

<sup>19</sup> AS 25.27.020(b).

amount of support which is just and proper for the parties to contribute toward the nurture and education of their children . . .  
[20]

Civil Rule 90.3 also states that when establishing support arrears, the court or tribunal should consider all the relevant factors in the case. The Commentary provides:

It will sometimes be necessary for the court to establish support for a time when no complaint or petition for support had yet been served, and there was no other court or administrative order in effect. The court has determined that Civil Rule 90.3 applies to such calculations. Vachon v. Pugliese, 931 P.2d 371, 381-382 (Alaska 1996). However, in some circumstances unfairness may result from rigid application of the rule. The court should consider all relevant factors in such a situation, including whether the obligor was aware of the support obligation, especially if the obligor had children subsequent to that child. See also Commentary VI.B.2.<sup>[21]</sup>

In applying the above language to Mr. C.'s arrears, several factors must be taken into consideration. First, J. is now living with Mr. C., so if he has to pay the total arrears of \$11,000, she would be deprived of the support she should have as a member of his household. This essentially makes J. bear the burden of those arrears. Second, in light of Ms. G.'s health problems, it is unlikely that Mr. C. will receive any substantial child support from her and he will have to provide the bulk of J.'s support during the remaining years of her minority.<sup>22</sup> Third, Mr. C. had to incur legal expenses of roughly \$20,000 to locate Ms. G. and litigate their divorce and custody action. This has also increased the financial burden on the family.

The Alaska Supreme Court holds that factors such as these, which relate to the well being of an obligee, are especially important in determining whether there is good cause to vary the child support amount. The court has stated:

The meaning of the term "good cause," however, is to "be determined by the context in which it is used."<sup>23</sup> That context, for Civil Rule 90.3 purposes, must focus first and foremost on the

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<sup>20</sup> Civil Rule 90.3(c)(1).

<sup>21</sup> Civil Rule 90.3, Commentary VI.E.1.

<sup>22</sup> The custody order did not set Ms. G.'s child support amount, but directed her to file a child support affidavit within 10 days of September 3, 2008. Exh. 3 at pg. 2.

<sup>23</sup> Citing *Coats v. Finn*, 779 P.2d 775, 777 (Alaska 1989).

needs of the children. See Civil Rule 90.3, commentary at sec. I(B).<sup>[24]</sup>

Based on all the evidence, this case presents unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. C. proved by clear and convincing evidence that manifest injustice would result if he were to pay the full arrears in this case. It makes little sense and it would be unjust to burden Mr. C.'s household by adding more child support debt to his current obligation to support J. in the home. Setting Mr. C.'s child support at \$100 per month constitutes a reasonable measure of his ability to pay support under Civil Rule 90.3(c). This should reduce his monthly arrears to \$1,600, plus applicable fees and interest, and CSSD's regulations indicate the total amount will be collected at \$90-\$100 per month.<sup>25</sup> There is no ongoing support due because Mr. C. has custody of J.

#### **IV. Conclusion**

Mr. C. met his burden of proving that the Amended Administrative Child Support and Medical Support Order was incorrect. Mr. C. proved by clear and convincing evidence that there is good cause in this case to set his child support arrears at \$100 per month for the period from June 2007 through September 3, 2008. Support for the month of September 2008 should be prorated to reflect the fact that Mr. C. was awarded custody on September 3, 2008.

#### **V. Child Support Order**

- Mr. C. is liable for support arrears in the amount of \$100 per month for the period from June 2007 through September 3, 2008;
- CSSD is directed to prorate Mr. C.'s support amount for the month of September 2008 to reflect him being awarded custody on September 3, 2008;
- Ongoing support is suspended because Mr. C. has custody of the child;
- All other provisions of CSSD's January 27, 2009, Amended Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 1<sup>st</sup> day of June, 2009.

By: Signed  
Kay L. Howard  
Administrative Law Judge

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<sup>24</sup> *Doyle v. Doyle*, 815 P.2d 366 (Alaska 1991).

<sup>25</sup> 15 AAC 125.545(a).

**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 19<sup>th</sup> day of June, 2009.

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

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