

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

IN THE MATTER OF:)
)
 M. W. H.) OAH No. 09-0109-CSS
) CSSD No. 001153557
_____)

DECISION AND ORDER

I. Introduction

The obligor, M. W. H., appeals an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on January 29, 2009. The obligee child in this case is K., DOB 00/00/92.

The formal hearing was held on March 26, 2009. Both Mr. H. and the custodian, T. S. B., appeared in person. Erinn Brian and Andrew Rawls, Child Support Specialists, represented CSSD. The hearing was recorded. The record closed on April 16, 2009.

Based on the record and after careful consideration, Mr. H.'s child support is set at \$588 per month, effective May 2008, and ongoing.

II. Facts

A. Procedural Background

Ms. B. applied for child support services on May 9, 2008.¹ On October 7, 2008, CSSD served an Administrative Child Support and Medical Support Order on Mr. H.² He requested an administrative review and genetic testing, and provided additional information.³ On October 31, 2008, CSSD denied Mr. H.'s request for paternity testing because K. was born in California.⁴ On January 29, 2009, CSSD issued an Amended Administrative Child and Medical Support Order that set Mr. H.'s ongoing child support at \$913 per month, with arrears of \$8,217 for the period from May 2008 through January 2009.⁵ Mr. H. filed an appeal on February 9, 2009,

¹ Exh. 1.
² Exh. 2.
³ Exhs. 3-4, 7-8.
⁴ Exh. 5.
⁵ Exh. 9.

asserting he is self-employed and CSSD did not allow all of the deductions on his federal tax return.⁶

B. Material Facts

Mr. H. and Ms. B. are the parents of K., DOB 00/00/92. K. currently lives with Ms. B.

Mr. H. is self-employed. Since 1998, he has been a salesperson for L. P., a manufacturer and supplier of industrial products. Mr. H.'s income is derived completely from commission sales, for which he receives a Form 1099 from L. He has fixed costs that he must pay every month, including warehouse storage, truck and office expenses, supplies, and postage and freight. In addition, he spends a sizable amount every year on advertising, which includes sponsoring snow machine racers and traveling to competitions with his motor home.

In 2007, Mr. H. had gross receipts of \$96,227.⁷ He claimed expenses of \$74,499, plus a deduction of \$5,293 for the business use of his home, for net profit of \$16,435.⁸ In 2008, Mr. H. had gross receipts of \$72,470, from which he claimed expenses of \$64,604 plus a deduction of \$5,416 for the business use of his home, all of which result in net income of \$2,450.⁹

Mr. H. lives with a woman named B. L. and her two sons from a previous relationship. Ms. L. is employed in Anchorage and to assist Mr. H. in this appeal, acknowledged that she earns approximately \$45,000 per year. Ms. L. and Mr. H. share living expenses that consist of two mortgages totaling \$1,940, household utilities and insurance, all of which total \$2,477 per month.¹⁰ Other than the expenses he has for his fixed costs such as warehouse storage, Mr. H. has expenses that total \$3,931 per month.¹¹ Most of these expenses go toward a significant consumer debt for Mr. H.'s 2006 Mini Cooper, 2007 Ford motor home, three snow machines, vehicle and snow machine insurance, health insurance, and his payments on five credit cards totaling \$1,365 per month.¹² Mr. H. is current on all of these bills.

Ms. B. is employed by the State of Alaska as a nurse supervisor. She owns her own home and pays \$1,312 per month for two mortgages, plus the usual expenses for food, utilities,

⁶ Exh. 10.

⁷ Exh. 8 at pg. 1.

⁸ *Id.*

⁹ Mr. H. filed his final documents on March 18, 2009, but the exhibits were not identified or numbered by page. Consequently, this set of documents will be labeled as Exhibit A; the obligor's Schedule C is at page 11.

¹⁰ Exh. 11.

¹¹ *Id.*

¹² *Id.*

telephone and Internet service. She pays \$406 per month for a 2004 Ford F-150, \$292 for a 24 foot 2002 motor home, plus gasoline, vehicle maintenance, insurance, and health expenses. She has two Visa credit cards with a total balance of \$5,000.

III. Discussion

Mr. H. is challenging the calculation of his child support amount, specifically, CSSD's failure to allow him all of the deductions he reported on his tax return. In addition he is requesting a variance in the child support order due to financial hardship. He claims the amount calculated will cause manifest injustice because he will not be able to pay all of his bills and his child support at the same time.

A. Mr. H.'s Income

A parent is obligated both by statute and at common law to support his or her children.¹³ 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).¹⁴ In this case, Ms. B. requested child support services in May 2008, so that is the first month Mr. H. is obligated to pay support in this administrative child support action.

Civil Rule 90.3(a)(1) provides that an Obligor's child support amount is to be calculated from his or her "total income from all sources," minus mandatory deductions. Civil Rule 90.3 does not have a specific formula for determining the income of a self-employed Obligor, but the Commentary to the Rule does provide this guidance:

Self Employment Income. Income from self-employment, rent, royalties, or joint ownership of a partnership or closely held corporation includes the gross receipts minus the ordinary and necessary expenses required to produce the income. Ordinary and necessary expenses do not include amounts allowable by the IRS for the accelerated component of depreciation expenses, investment tax credits, or other business expenses determined by the court to be inappropriate. Expense reimbursements and in-kind payments such as use of a company car, free housing or reimbursed meals should be included as income if the amount is significant and reduces living expenses.^[15]

¹³ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁴ 15 AAC 125.105(a)(1)-(2).

¹⁵ Civil Rule 90.3, Commentary III.B.

CSSD initially calculated Mr. H.'s child support at \$913 per month for one child.¹⁶ CSSD's calculation does not specifically explain the income figure it used, \$69,205.17,¹⁷ but that calculation is no longer being considered in this appeal. After the hearing, CSSD submitted a post hearing brief in which the agency implies, basically, that Mr. H. has not accurately represented his financial circumstances and that his child support for 2008 and 2009 should be based on his potential income, as reflected in three possible draft calculations submitted for the tribunal.

Mr. H. argues that he is entitled to the deductions that appear on his tax return. There is no support for this argument in Alaska child support law. To the extent that his deductions are "ordinary and necessary expenses required to produce the income" of his business, they may be allowed. But a deduction allowed by the IRS for the purpose of filing his federal tax return is not necessarily one that may be deducted for child support purposes.

CSSD suggests there is little likelihood that Mr. H.'s evidence about his financial circumstances is accurate. CSSD did not accept Mr. H.'s testimony that his girlfriend, B. L., pays the bulk of their household expenses and in effect supports him. At \$45,000, her income is not sufficient for that. But even if she does cover most of their household costs, Mr. H. has not adequately explained how he pays all of his other bills that total nearly \$4,000 per month. Taken to its logical conclusion, CSSD's argument suggests that Mr. H. does have the money to pay his bills because he commingles his personal and business expenses and pays personal bills from his business receipts. CSSD's argument is persuasive.

The person who files the appeal, in this case, Mr. H., has the burden of proving that CSSD has calculated his child support incorrectly.¹⁸ Mr. H. has not met that burden. It is clear that Mr. H. cannot pay all of his personal bills on net income of \$2,450. In addition, the figures that appear on his 2008 Schedule C are not credible when viewed as a whole. For example, Mr. H. testified he uses his Ford Excursion almost exclusively for work, yet his tax return shows a total of 34,536 business miles claimed for 2008. This is the equivalent of driving from Anchorage to Wasilla – 100 miles – *almost every day of the year*. This total amount of miles is not believable and it is underscored by Ms. B.'s testimony that Mr. H. often drives the Ford for

¹⁶ Exh. 9 at pg. 6.

¹⁷ See Exh. 9 at pg. 4.

¹⁸ 15 AAC 05.030(h).

personal use because she has been on some of the snow machine trips he's used it for. Similarly, Mr. H. did not adequately explain his fuel receipts. He included motor home fuel in his business expenses because several of the receipts attached to Exhibit A show nearly 40 gallons pumped at one time. Although Mr. H. testified he uses the motor home extensively for his business, he did not prove that it is an "ordinary and necessary" business expense. Also, at least one of the receipts is for gasoline purchased by Ms. L. because her card was used for the purchase. There may be other receipts that reflect fuel purchased for Ms. L.'s use. That also is not an allowable expense for Mr. H.'s business.

Another expense that is not allowable is Mr. H.'s expense of \$5,416 for the business use of his home. At the hearing he testified that Ms. L. pays all of the household bills. If she is paying all of those expenses, Mr. H. may not use them as a deduction on his tax return.

After the hearing, CSSD prepared calculations for 2008 and 2009 that were taken not from Mr. H.'s net income on his Schedule C, but from the total of his expenses. CSSD concluded, based on his testimony that he is not delinquent on any of his bills, that Mr. H. has the income to pay those bills and so it attributed the total of those expenses to him as income for the child support calculation. Mr. H. reported having regular monthly bills of \$3,931, so the division added that figure to one-half of the household expenses he shares with Ms. L. (\$1,238.50), to estimate his total expenses at \$5,169.50 per month.¹⁹ CSSD then multiplied that monthly figure times 12 months to estimate his annual income at \$62,028.²⁰ Inserting that figure into the CSSD online child support calculator results in a child support amount of \$833 per month for 2008.²¹ CSSD used the same income figure for the 2009 calculation and reached a child support amount of \$822 per month for 2009.²²

CSSD's method of using Mr. H.'s expenses to substitute for and represent his income is not a typical method of calculating child support, but the expenses he reported are suspect.²³ The Schedule C in his 2008 tax return indicates Mr. H. had net income after expenses of \$2,450.²⁴

¹⁹ Exh. 11.

²⁰ *Id.*

²¹ Exh. 12.

²² Exh. 13.

²³ See 15 AAC 125.050(a).

²⁴ Exh. A at pg. 11. The tax return also reports wages of \$40,984, but those were earned by the obligor's ex-wife, M. See Exh. A at pg. 8.

On a monthly basis, this net profit equals \$204.16 per month.²⁵ This figure is simply not consistent with Mr. H.'s testimony, specifically the statement that he is not delinquent on his personal bills which total nearly \$4,000 per month. As CSSD stated in its Post-Hearing Brief:

There is little likelihood that Ms. L. carries the household. It is not reasonable to believe that Ms. L. can clearly support herself, her two children and Mr. H. on \$45,000 with over \$6,000 worth of expenses, not including her own personal expenses not reported.^[26]

Because of the many inconsistencies and unanswered questions arising from Mr. H.'s evidence, his tax returns and testimony are not credible. It is more likely than not that the obligor commingles business and personal expenses and as a result it is not possible to calculate his child support obligation from the information contained in his tax returns and testimony. His estimate of his net income is too low. In the same vein, however, CSSD's estimate that Mr. H.'s income for child support purposes is \$62,068 is too high; it does not take into consideration that Mr. H.'s gross receipts in 2008 totaled only \$72,470, a mere \$10,000 difference.²⁷

Since the record does not contain a reliable and credible determination of Mr. H.'s income for child support purposes, income should be imputed to him based on the provisions of Civil Rule 90.3(a)(4) regarding potential income. Typically the use of potential income requires a finding of voluntary and unreasonable unemployment or underemployment,²⁸ but that is not the case with Mr. H. The total amount of his gross receipts is known, but Mr. H. did not provide evidence sufficient to establish the actual net income from his business. Thus, his income should be estimated based on an hourly wage, but one that is also cognizant of and should not exceed Mr. H.'s total gross receipts. Mr. H. is a skilled individual in his area of expertise, so he could reasonably expect to earn \$20 per hour in the workplace. On an annual basis (2,080 hours), this hourly wage equals income of \$41,600 per year. Inserting this income figure into CSSD's online child support calculator yields a child support amount of \$588 per month.²⁹ This is a reasonable estimate of Mr. H.'s ability to pay child support for K.

²⁵ \$2,450 ÷ 12 months = \$204.16.

²⁶ Post-Hearing Brief at pg. 1.

²⁷ Exh. A.

²⁸ See Civil Rule 90.3(a)(4).

²⁹ See Attachment A.

B. Financial Hardship

The second issue in this appeal is whether Mr. H. is entitled to a reduction in the child support amount calculated based on a financial hardship, pursuant to Civil Rule 90.3(c). Mr. H.'s child support is now correctly calculated at \$588 per month, based on his estimated income for 2008. It is from this calculation that Mr. H.'s request for a variance based on financial hardship should be considered.

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). 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^[30]

It is appropriate to consider all relevant evidence, including the circumstances of the custodian and obligee child, to determine if the support amount should be set at a different level than provided for under the schedule in Civil Rule 90.3(a).³¹

Based on the evidence presented, Mr. H.'s situation does not present "unusual circumstances" of the type contemplated by Civil Rule 90.3. Mr. H. commingles his business and personal lives and expenses to the extent that it is not possible to determine his actual net income from the business. Thus, Mr. H. did not prove by clear and convincing evidence that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 were not reduced.

IV. Conclusion

Mr. H. did not meet his burden of proof, as required by 15 AAC 05.030(h). His child support obligation is correctly calculated at \$588 per month. Neither did Mr. H. prove by clear and convincing evidence that manifest injustice would result in the absence of a variation of the

³⁰ Civil Rule 90.3(c)(1).

³¹ See Civil Rule 90.3, Commentary VI.E.1.

child support amount. Based on the evidence as a whole, the calculation of \$588 per month should be adopted.

V. Child Support Order

- Mr. H. is liable for child support for K. in the amount of \$588 per month, effective May 2008, and ongoing;
- All other provisions of CSSD's January 29, 2009, Amended Administrative Child and Medical Support Order remain in full force and effect.

DATED this 8th day of June, 2009.

By: Signed
Kay L. Howard
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 30th day of June, 2009.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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