

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

IN THE MATTER OF:)
) OAH No. 09-0182-CSS
N. C. B.) CSSD No. 001151428
_____)

DECISION AND ORDER

I. Introduction

This case involves the Obligor N. C. B.'s appeal of an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on February 26, 2009. The Obligee child in this case is O., DOB 00/00/05.

The formal hearing was held on April 20 & 29, 2009. Mr. B. appeared through counsel, Herbert A. Viergutz; the custodian, V. V. N., participated by telephone. Erinn Brian and Andrew Rawls, Child Support Specialists, represented CSSD. The hearing was recorded. The record closed on April 29, 2009.

Based on the record and after careful consideration, Mr. B.'s child support is set at \$700 per month, effective July 1, 2006, and ongoing, pursuant to Civil Rule 90.3(c).

II. Facts

A. Procedural Background

Ms. N. filed an application for child support services in her state of residence on July 17, 2006.¹ On January 9, 2008, CSSD received a Uniform Interstate Family Support Act (UIFSA) petition from the other state.² CSSD proceeded with paternity establishment and on July 30, 2008, the Superior Court issued an order adjudicating Mr. B. as O.'s father based on his admission of paternity.³ CSSD subsequently requested financial and medical information from Mr. B., which he provided.⁴ On December 19, 2008, CSSD served an Administrative Child Support and Medical Support Order on Mr. B.⁵ He requested an administrative review.⁶ On February 26, 2009, CSSD issued an Amended Administrative Child and Medical Support Order

¹ Exh. 2.
² Exh. 1.
³ Exh. 5.
⁴ Exhs. 6-7.
⁵ Exh. 8.

that set Mr. B.'s ongoing child support at \$1,168 per month, with arrears of \$22,412 for the period from July 2006 through February 2009.⁷ Mr. B. filed an appeal on March 20, 2009, asserting CSSD's calculations were improper because of the income information used.⁸

B. Material Facts

Mr. B. is in the military – he is an E-6 with nearly seven years of service and is currently deployed in Afghanistan. He and his wife, D., have a son named I., DOB 00/00/07. D. is not currently unemployed although she has worked in the past as a certified nurse assistant and in retail sales.

Mr. B.'s support obligation in this case begins in July 2006. That year, he received \$55,448.03 in both taxable earnings and non-taxable entitlements.⁹ A child support obligation calculated from those earnings equals \$849 per month for one child.¹⁰ In 2007, Mr. B. received \$79,004.75 in earnings and benefits, which included a one-time signing bonus of over \$12,000.¹¹ A child support obligation calculated from those earnings equals \$1,177 per month for one child.¹² In 2008, Mr. B. received \$63,694.39 in earnings and benefits.¹³ A child support obligation calculated from those earnings equals \$1,014 per month for one child.¹⁴

For 2009, CSSD used Mr. B.'s rank and years of service to estimate that his earnings and benefits for the year would total \$68,106.59.¹⁵ A child support amount calculated from those earnings equals \$1,068 per month.¹⁶ Mr. B.'s attorney indicated the obligor may be returning to Alaska in July 2009 for a break so CSSD requested a delay in record closure in order to obtain Mr. B.'s current Leave and Earnings Statement (LES). CSSD asserted that since Mr. B. is overseas he should be receiving additional duty pay that is currently not reflected on the most

6 Exh. 9.
7 Exh. 10.
8 Exh. 11.
9 Exh. 14 at pg. 3.
10 *Id.* at pg. 1.
11 *Id.* at pg. 6.
12 *Id.* at pg. 4.
13 *Id.* at pg. 10.
14 *Id.* at pg. 8.
15 *Id.* at pg. 14.

16 *Id.* at pg. 12. In 2008 and 2009, CSSD would still charge Mr. B. with the 2007 support amount of \$1,177; both later figures are less than a 15% change. See *Duffus v. Duffus*, 72 P.3d 313, 321-322 (Alaska 2003). Because this case has been resolved through the application of Civil Rule 90.3(c) based on good cause and unusual circumstances, the question whether *Duffus* controls is moot.

recent LES he submitted for November 2008.¹⁷ CSSD's request was denied because the exact date of his return was not known at the time of the hearing and pursuant to AS 44.64.060(d), a proposed decision must be issued in this matter no later than July 18, 2009. Of course, any party is entitled to request a modification in the future.

Mr. B.'s regular expenses total approximately \$4,587 per month, which includes \$1,745 for rent; \$400 for food; \$290 for gas; \$25 for trash pickup; \$190 for electricity; \$163 for cable and internet; \$166 for telephone and cell phone services; \$472 for the payment on a 2007 Ford F-150 truck that was purchased in January 2008; \$510 for the payment on a 2007 Suzuki XL7 that was purchased in April 2008; \$140 for vehicle maintenance; \$200 for gasoline; \$356 for vehicle insurance; and \$130 for renter's insurance.¹⁸ Mrs. B., who testified in her husband's absence, stated that she also has expenses such as clothing and shoes and other miscellaneous costs for their son I.

Mr. B. paid child support of \$300 directly to Ms. N. in July 2006 and \$425 per month from August 2006 through January 2009.¹⁹ This equals a total amount of direct pay credits of \$13,050. He cancelled the automatic allotment effective February 2009 after CSSD began garnishing his check.²⁰

Ms. N. is also in the military and works as a diet technician at the hospital on E.A.F.B. Her net income is approximately \$3,200 per month. Her regular monthly expenses total about \$3,698, which includes \$659 for rent; \$300 for food; \$165 for utilities; \$276 for cable and cell phone services; \$336 for the payment on a Chevrolet Equinox that was purchased in October 2008; \$160 for gasoline and maintenance; \$98 for car insurance; \$100 for entertainment; \$250 for personal care items; \$12.08 for dental insurance for O.; \$800 for childcare; and \$542 for the payments on credit card debt and loans.²¹ Ms. N.'s BAH is larger than her actual rent payment, so she uses the extra to cover part of her childcare bill.²² Also, since Ms. N. was not asked to submit a recent LES, it is not known whether any of her loan obligations are paid via allotments from her check. If so, those debts would not be listed as needing to be paid from her net income because they would already have been accounted for.

¹⁷ See Exh. 7 at pg. 29.

¹⁸ Exh. 15 at pg. 1.

¹⁹ Exh. 13 at pg. 6; *see also* Exh. 9 at pg. 7.

²⁰ See Exh. 14 at pg. 21.

²¹ Exh. 16 at pg. 2.

III. Discussion

A. Mr. B.'s Income

A parent is obligated both by statute and at common law to support his or her children.²³ 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).²⁴ In this case, Ms. N. requested child support services in July 2006, so that is the first month Mr. B. 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 states specifically that a military parent's total income from all sources includes "Armed Service Members base pay plus the obligor's allowances for quarters, rations, COLA and specialty pay."²⁵ The reason for including the non-pay benefits, especially the BAH, in the child support calculation is because they reduce the parent's living expenses and allow a military member to use the remainder of his or her cash pay to cover other expenses.

The parties stipulated in the second hearing session that CSSD had accurately calculated Mr. B.'s child support obligation for each year at issue. Those support amounts, found in Exhibit 14 and set forth in the facts section above, are correct because they are based on Mr. B.'s actual income figures and they were calculated pursuant to Civil Rule 90.3. Thus, as calculated by CSSD for the period from July 2006 through April 2009, Mr. B.'s arrears total \$38,050, minus credits for direct payments made by way of an allotment in the total amount of \$13,050, for a balance due of \$25,000.²⁶

B. Financial Hardship

The primary issue in this appeal is whether Mr. B. is entitled to a reduction in his child support obligation based on a financial hardship, pursuant to Civil Rule 90.3(c). 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

²² Testimony of V. N.

²³ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

²⁴ 15 AAC 125.105(a)(1)-(2).

²⁵ Civil Rule 90.3, Commentary III.A.29.

²⁶ *See* Exh. 14 at pg. 21.

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^[27]

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).²⁸

Technically, there is no automatic recognition of Mr. B.’s younger child, I., that would result in the reduction of his child support obligation for O. In general, Civil Rule 90.3 states that a parent’s child support obligation should not be reduced because that parent has younger children.²⁹ This is because a parent has the choice not to start a second family if he or she cannot support the children from his or her first family. However, the commentary to the rule also states that the court or administrative tribunal “should reduce child support if the failure to do so would cause substantial hardship to the ‘subsequent’ children.”³⁰ Consideration should be given to Mr. B.’s subsequent child for the purposes of calculating his child support obligation for O.

Mr. B. does not have sufficient income with which to pay all of his bills and his child support obligation as calculated. Plus, he is currently deployed overseas and does not have the ability to make the necessary adjustments to his financial circumstances in person. Moreover, Mrs. B. is not working currently because their son I. is just over two years of age, so she is not able at this time to contribute toward the family financially.³¹ However, she should prepare to return to the work force as soon as I. is of suitable age. Child support obligors who request a variance in their child support amount because of financial hardship, are expected to marshal all of their resources, including spouses who can work, to meet their obligations.

²⁷ Civil Rule 90.3(c)(1).

²⁸ See Civil Rule 90.3, Commentary VI.E.1.

²⁹ Civil Rule 90.3, Commentary VI.B.2.

³⁰ *Id.*

³¹ Ms. N. insisted during the hearing that Mr. B. told her in November 2008 that Mrs. B. was working. Ms. N. requested an investigation and was informed she could make that request of CSSD because the OAH is not authorized by statute to perform investigations.

Although Ms. N. is fully employed, her situation is also financially stressful, particularly because she is a single parent who incurs \$800 in day care costs every month. Fortunately, her BAH helps cover that expense.

Based on the evidence, Mr. B. has proven by clear and convincing evidence that manifest injustice would result if his child support were not varied from the amounts calculated pursuant to Civil Rule 90.3. Mr. B.'s child support obligation should be reduced, but in a manner that leaves the ongoing child support amount as intact as possible, with the primary reduction coming from the arrears. CSSD set Mr. B.'s ongoing support amount at \$1,177 per month, which means that with an arrears balance of \$25,000, CSSD would be seeking an additional \$415 per month,³² or a total amount to be garnished of about \$1,592 per month. Mrs. B. testified that they just barely got by when they were paying \$425 per month, so Mr. B. cannot pay an increase of over \$1,000 per month from the amount he paid directly to Ms. N.

Another relevant factor is that prior to the commencement of wage garnishment, Mr. B. was making a sincere and responsible effort to keep up with his child support obligation through a voluntary allotment of \$425 per month deducted from his military paycheck. Unfortunately, Mr. B. underestimated the monthly child support amount that would be calculated from his total annual income, so, depending on the year, he was paying up to \$750 per month less than CSSD eventually calculated. As a result, even though Mr. B. consistently paid child support, he still owes \$25,000 after the direct payment credits are subtracted.

Therefore, in the presence of unusual circumstances, clear and convincing evidence of manifest injustice, and careful consideration, Mr. B.'s child support should be set at \$700 per month for all of the months at issue in this appeal, from July 2006 through June 2009, all of which totals roughly \$21,600 in arrears. Applying the direct pay credits of \$13,050 leaves a balance of approximately \$8,550, which would add about \$245 per month to the ongoing support amount of \$700 per month.³³ CSSD would thus be collecting about \$945 per month in arrears and ongoing support.

The above child support amounts take into consideration the need for Mr. B. to provide a meaningful level of child support for O. in the present. The ongoing child support amount of \$700 per month substantially meets that goal and is in fact \$275 per month more than what the

³² See 15 AAC 125.545(a).

³³ See 15 AAC 125.545(a).

obligor has been paying for nearly three years. In addition, setting the arrears at \$700 per month acknowledges Mr. B.'s past efforts to meet his support obligation in great measure through a monthly allotment from his pay. Of course, reducing the arrears has lowered the back support due to Ms. N., an amount she probably has been counting on. But it is more important to keep the ongoing monthly child support amount intact to the extent possible.

Finally, the parties should understand it is not the intent of this decision that Mr. B.'s ongoing child support remain at \$700 per month indefinitely. One of the primary reasons his support has been dealt with this way is because he is currently deployed and it would be manifestly unjust to set his child support at a level that would make it extremely difficult, if not impossible, for Mrs. B. to maintain the family without losing their housing and vehicles. This is at best a stop-gap measure that anticipates Mr. B. will return home and tackle the problem of extending himself too deeply into consumer debt, especially from purchasing two late-model vehicles with very high payments in the last year. Mr. B. must be prepared for the inevitable petition for modification and subsequent increase in his support obligation. They may even need to move into more affordable housing.

Therefore, based on the evidence presented, Mr. B.'s situation presents "unusual circumstances" of the type contemplated by Civil Rule 90.3. Mr. B. has proven 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. B. met his burden of proving by clear and convincing evidence that manifest injustice would result in the absence of a variation of the child support amount. Based on the evidence as a whole, his child support should be set at \$700 per month from July 2006 forward. Also, his arrears should be adjusted by the \$13,050 in direct pay credits to which he is entitled as a result of paying Ms. N. through an allotment from July 2006 through January 2009.

V. Child Support Order

- Mr. B. is liable for child support in the amount of \$700 per month for the period from July 2006 through June 2009, and ongoing;
- Mr. B. is entitled to a credit for direct payments he made to Ms. N. in the amount of \$300 in July 2006, and \$425 per month from August 2006 through January 2009, all of which total \$13,050;

- All other provisions of the February 26, 2009, Amended Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 19th 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 31st day of August, 2009.

By: Signed
Signature
Christopher Kennedy
Name
Deputy Chief Administrative Law Judge
Title

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