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

IN THE MATTER OF	)	
	)	
R. W.	)	Case No. OAH-09-0295-CSS
	)	CSSD Case No. 001063067

DECISION & ORDER

I. Introduction

The custodian, N. D., appeals a Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD) on April 20, 2009. Ms. D. appeared by telephone at a hearing held on June 16, 2009. The obligor, R. W., appeared with counsel Karen Godnick. Mr. W.'s wife, B. W., attended by telephone and testified. Andrew Rawls represented CSSD. The child is S. W.-D. (DOB 00/00/96).

The modified order is vacated in favor of an existing order.

II. Facts

The previous order was issued in a case that began in 2006. Hearings in that case were held on January 17, 2007, March 15, 2007, June 28, 2007, July 9, 2007, July 26, 2007, and August 28, 2007. A subpoena was issued for Mr. W.'s wife, B. W., to appear and testify about her business, and the extent to which Mr. W. participated in the business. Mrs. W. hired her own attorney to challenge the subpoena. Mr. W. eventually retained separate counsel. Mrs. W. never did testify. After a proposed decision was issued, Mr. W. filed a proposal for action. At Mr. W.'s request, the commissioner remanded the case with instructions "that the case be returned to the administrative law judge to take additional evidence about B. W.'s business income and the extent of R. W.'s involvement with J.'s C. P." A further hearing was held on March 17, 2008, and an opportunity to provide further documentary evidence was provided. On August 6, 2008, the commissioner's office adopted a Corrected Amended Decision & Order setting Mr. W.'s support obligation at $549 per month for one child.

Less than three months later, Mr. W. filed the request for modification from which this case arises. Mr. W. submitted a Child Support Guidelines Affidavit stating that his gross income for 2007 was $3,633.63, and for 2008 was $5,885.53, plus permanent fund dividends.[1] In support of the 2008 income level, Mr. W. submitted W-2 forms showing he earned exactly two

[1] Exhibit 1, page 4.

thousand dollars in wages from Mrs. W.'s company, and $3,885.53 in wages from D.'s P. Mr. W. also submitted pay stubs from D.'s showing that he earned $7.15 per hour.

CSSD calculated Mr. W.'s gross annual income to be $22,826.53. CSSD calculated this figure by taking Mr. W.'s hourly wage of $7.15 at D.'s and multiplying it by 2,080, the number of work hours in a year (40 hours per week x 52 weeks). This results in annual wages of $14,872. CSSD then added to this amount Mr. W. could have made if he worked full-time at D.'s the amount he actually did make working at D.'s, $3,633.63, the $2,000 he reported earning from Mrs. W.'s business, and PFD income of $2,069. This calculation results in a monthly child support obligation of $334 per month for one child. In spite of the fact that CSSD added a full year's worth of wages to the amount Mr. W. actually made working for D.'s, it was the custodian, not Mr. W., who appealed the decision.

Mrs. W. runs a school photography business on contract for a large company called J.'s. Mrs. W. has been running this business since before she married Mr. W., but after they married Mr. W. has been involved in the business to some degree. The extent of Mr. W.'s participation, and whether income should be attributed to him for the work he does for the company, was a principal issue in the previous case. In testimony for the previous case, Mr. W. repeatedly asserted that he had not worked for his wife's business or had any meaningful participation in it. The administrative law judge found that "the contradictions in the evidence show that Mr. W. was not truthful in his testimony. It is more likely than not that he is earning income that he is not reporting to CSSD. It is also more likely than not that Mr. W. has engaged in a scheme of concealing his earnings and assets from CSSD and this tribunal."

In the hearing for this case, the W.s admit that Mr. W. has in fact been working for his wife's business all along. The work is seasonal and not full-time. During the busy part of the year, Mr. W. works about 30 to 35 hours per week for the business. The W.s testified that after the previous order was issued, the business started paying him $1,000 per month. Mrs. W. testified that the reason she began paying her husband was

> …due to the fact that after the last child support hearing, that he wasn't getting paid because he was mostly staying home with our daughter, that they were awarding due to what they considered he probably should have been getting paid…. I understood that they were saying that Ray was working for me, so they were saying that, you know, here's the income, and so if I'm going to pay him, then I, if he's going to be getting calculated off of that then I ought to be paying him actually.

Mrs. W.'s business now pays Mr. W. $1,000 per month. Mrs. W. testified that, since she was now paying Mr. W., she "slightly" increased his hours in the business. On further

questioning, Mrs. W. could not provide an estimate of how many more hours Mr. W. is working now for the business than he was in the past. Mrs. W. explained that in fact she cannot be certain how many hours Mr. W. works for the business at all, because the business requires her to travel frequently, and a great deal of Mr. W.'s work is managing the office in her absence.

At the same time he is tending the office in Mrs. W.'s absence, Mr. W. cares for the couple's very young child. While the business pays Mr. W. $1,000 per month, Mrs. W. testified that some of that money could be considered payment for daycare for their two-year-old daughter. The fact that Mr. W. cares for the child while Mrs. W. is traveling makes daycare unnecessary, a monetary benefit to the family as a whole.

Part of the difficulty of this case is that while the W.s insist that the business is owned and operated by Mrs. W. and that Mr. W. is a mere employee, the evidence continues to show that the business is run, at least to some degree, as a family enterprise. Mr. W. might not be an equal partner, but neither is he a mere employee taking orders from his boss and clocking his hours. The fact that Mr. W. had been working for Mrs. W. or the business without collecting any salary at all, and that part of his current salary is related to providing care for the couple's child, shows that the finances of this married couple are such that it is impossible to arrive at a fair estimation of Mr. W.'s income without considering the couple's and the business's income as a whole, and then calculating a proportion that is fairly attributable to Mr. W.. This is by no means an uncommon or inappropriate situation when couples work together to support each other's enterprises and care for their children. However, the extent of Mr. W.'s participation in the business is difficult to ascertain; the only two witnesses have a mutual interest in minimizing the true level of Mr. W.'s participation and attributing as much income as possible to Mrs. W. This situation is compounded by a history of recalcitrance and deceptiveness.

III. Discussion

Civil Rule 90.3(h) provides that modification of a support award is appropriate if there has been a material change of circumstances. A material change of circumstances is presumed to have occurred if support calculated under the rule would change by fifteen percent or more.

Mr. W. argues that the modified support order, in which support decreases by more than fifteen percent, is based on a material change of circumstances. Mr. W. argues that in the previous case, a complete and accurate accounting of Mr. W.'s income or earning capacity was not available. Now that Mr. W. has presented additional information, including the testimony of his wife, he argues that the additional available evidence constitutes a material change. There

has been no significant change, however, in Mr. W.'s actual employment or income. The W.s admitted that changes made since the last hearing were for the most part accounting changes made in response to the last decision. Each month, a thousand dollars that the couple had been counting as his wife's income is now labeled as Mr. W.'s. But Mrs. W. described the increase in Mr. W.'s participation in the business as "slight." She stated that the business began paying wages to Mr. W. only because it had been found that, for the purposes of calculating child support, income was being imputed to Mr. W. for his participation in the business.

The essence of Mr. W.'s case is that he was dissatisfied with the result of the last case. Rather than appealing that decision to the Superior Court, Mr. and Mrs. W. simply adjusted their family's finances and accounting, altered Mr. W.'s participation in the business to some degree, and then requested another modification. At any time, the couple could decide that Mr. W. should work more or less for the business, and the W.s could shift income attribution from one to the other without affecting their family finances at all, regardless of which one is doing more work.

In *Byers v. Ovitt*, the Supreme Court held that when considering a material change of circumstances, "the change must be a factual event that affects a party's ability to pay, not just a proposal to change the method of calculation."[2] Mr. W.'s argument that the availability of additional evidence about the obligor's earning capacity constitutes a material change of circumstances is incorrect. Even if the lack of credible information in the prior case had not been the result of the obligor's false and incomplete testimony, there has been no significant factual event that has changed Mr. W.'s ability to pay support. Mr. W. may currently be a little more involved in the business, but he and Mrs. W. have the ability to change his involvement as they wish. The likelihood is that in the future Mr. W.'s participation in the business will continue to reflect what is most reasonable for the family as a whole, not a pure arm's-length employee/employer relationship with his wife. But Mr. W.'s ability to earn has not changed, nor is it likely to in the immediate future.

Mr. W.'s argument is more in the nature of a motion under Civil Rule 60(b) than under Civil Rule 90.3(h). Under Rule 60(b), new information may be the basis for altering a previous judgment when the absence of information was the result of mistake or excusable neglect, which is not the situation in this case. Until something actually changes in the obligor's ability to pay, a child support decision is entitled to some degree of finality. As the Supreme Court has stated,

> The requirement of a change in circumstances places greater emphasis on the need for finality in the tension which necessarily arises between modification and the policies underlying *res judicata*. It also reflects the need to achieve some reduction in the level of divorce litigation which now raises serious problems of judicial administration in nearly all states.[3]

The extraordinary level of resources expended on this case and the previous decision illustrates the basis for the court's concern. If obligors could continually adjust their hours and request modifications until they achieved a result they liked, the administrative appeal process would quickly become too congested to function. Mr. W. enjoys flexibility both in the amount of his participation in the family business and in the number of hours he works for D.'s. Depending on the amount of time he decides to spend with S. or caring for his younger daughter at any given time, Mr. W.'s hours and income will probably continue to vary. But until something significant and external happens, his ability to earn will not. Mr. W. is not entitled to a "re-do" of the previous hearing, and he has not demonstrated a material change in circumstances warranting modification of the existing order.

A great deal of testimony and argument at the most recent hearing was directed to medical coverage for S. S. is entitled to Native health benefits. Because the custodian lives in No Name City, most of the time taking advantage of this entitlement requires an inconvenient drive to the L. I. Reservation. The custodian therefore seeks partial reimbursement for the health insurance she purchases for S. through her employer.

Evidence available in this case is insufficient for a meaningful comparison of the relative benefits of the two programs. CSSD has an efficient procedure in place for evaluating claims for credit or debit for health care coverage. The custodian's claim for health care coverage reimbursement should be addressed under the procedures of 15 AAC 125.432. Appeals of decisions under that regulation may not be addressed administratively, but must be taken to Superior Court.

IV. Conclusion

Because there has been no material change in circumstances, modification of the existing order is not warranted at this time. CSSD should handle reimbursement for medical expenses administratively.

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2 *Byers v. Ovitt*, 133 P.3d 676 (Alaska 2006).
3 *Bunn v. House*, 934 P.2d 753, 757-758 (Alaska 1997).

V. Order

IT IS HEREBY ORDERED that the Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division on April 20, 2009 is VACATED. Support shall remain as set by the commissioner's order of August 6, 2008. CSSD shall evaluate claims for health care costs in accordance with 15 AAC 125.432.

DATED this 224th day of August, 2009.

By: *Signed*
DALE WHITNEY
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 notices, 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 17th day of September, 2009.

By: *Signed*
Signature
Dale Whitney
Name
Administrative Law Judge
Title

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