

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

IN THE MATTER OF: )  
 ) OAH No. 09-0329-CSS  
S. D. K. ) CSSD No. 001056724  
\_\_\_\_\_ )

**DECISION AND ORDER**

**I. Introduction**

The obligor, S. D. K., appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (“CSSD”) issued in his case on April 23, 2009. The obligee child is Z., DOB 00/00/02.

The hearing was held on July 1, 2009. Both Mr. K. and the custodian, B. L. S., participated by telephone. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded and the record closed on July 2, 2009.

Based on the record and after due deliberation, Mr. K.’s child support is modified to \$440 per month for one child, effective December 1, 2008, and ongoing, based on the good cause provisions of Civil Rule 90.3(c).

**II. Facts**

**A. Background**

Mr. K.’s child support obligation for Z. was set at \$290 per month in August 2003.<sup>1</sup> Ms. S. requested a modification on October 30, 2008.<sup>2</sup> On November 10, 2008, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.<sup>3</sup> CSSD did not receive financial information from Mr. K. On April 23, 2009, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified Mr. K.’s ongoing child support to \$599 per month, effective December 1, 2008.<sup>4</sup> Mr. K. appealed on May 25, 2009, asserting primarily that he and his wife are expecting twins in September 2009 and she has been required to stop working for the duration of the pregnancy. Mr. K. also asserted that when the

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<sup>1</sup> Exh. 1.  
<sup>2</sup> Exh. 2.  
<sup>3</sup> Exh. 3.  
<sup>4</sup> Exh. 5.

twins are born he will be supporting four children on only one income, whereas in the past they have had two incomes in their home.<sup>5</sup>

**B. Material Facts**

Mr. K. and the custodian are the parents of Z., date of birth 00/00/93. Z. lives with his mother in Louisiana.

Mr. K. is employed by A. P. and T. Company as a service technician. In 2008, he earned \$43,581.75. He anticipates earning less in 2009 because the long-term project he has been working on is coming to a close this year and he will not be getting as much over time as in the past. Mr. K. earns \$22 per hour for straight time and \$33.16 per hour for overtime work.<sup>6</sup> In addition, he contributes 3% of his earnings to a retirement account, which on a monthly basis is \$108.95.

Mr. K. and his wife, D. currently have two children in the home: T., date of birth 00/00/97, D.'s child from a prior relationship; and their biological child, X., date of birth 00/00/03. Also, Mr. K. and his wife are expecting twins sometime in September 2009. This will bring their household to six occupants. D., ordinarily a sales manager who earns in excess of \$40,000 per year,<sup>7</sup> has had to quit working because of her pregnancy. Mr. K. testified that D. would have to wait at least six to eight months to return to work after the twins are born and that it would cost \$1,800 per month for child care.

Mr. K. has regular monthly expenses of \$1,697 for a mortgage payment; \$500-\$600 for food; \$150 for heating oil; \$50 for water service; \$150 for electricity; \$20 for telephone; \$60 for cable service; \$70 for Internet; \$100 for a cell phone; \$250 for the payment on a 1996 GMC Yukon; \$245 for the payment on a 2004 Nissan; \$250 for gasoline; \$83 for vehicle maintenance; \$170 for vehicle insurance; \$95 for health insurance; \$610 per month for the payments on two personal loans and a line of credit; and several thousand dollars owed for medical expenses.<sup>8</sup> Mr. K. acknowledged that the bulk of his medical bills are covered by health insurance and he is required to pay only the deductible and co-pay amounts. At the hearing, the obligor estimated

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

<sup>6</sup> Even if he worked only straight time, it is estimated that Mr. K. would earn in the neighborhood of \$45,760 per year. \$22 per hour x 2,080 hours per year = \$45,760.

<sup>7</sup> See Obligor's Exh. A, unnumbered exhibits filed on July 1, 2009.

<sup>8</sup> Mr. K. testified that in the last six months he has had two surgeries for kidney stones and a broken back.

they have expenses for personal care items of several hundred dollars per month, although they did not specify a total figure.

Ms. S. is also employed. She works 35 hours per week and receives \$10.75 per hour. In 2008, she earned \$21,308.50.<sup>9</sup> Her gross income is approximately \$1,630 per month and she estimates she will earn about \$19,565 in 2009.<sup>10</sup> Ms. S. was recently divorced, having been married for four years. The obligee, Z., broke his arm and required two surgeries to repair it adequately. The co-pay and deductible amounts the custodian was responsible for totaled between \$2,500 and \$3,000. Ms. S. testified she left messages for Mr. K. to obtain his help with these bills but he did not respond.

### **III. Discussion**

#### **A. Mr. K.'s income**

A parent is obligated both by statute and at common law to support his or her children.<sup>11</sup> Civil Rule 90.3(a)(1) provides that an obligor's child support amount is to be calculated based on his or her "total income from all sources." Child support orders may be modified upon a showing of "good cause and material change in circumstances."<sup>12</sup> If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes "material change in circumstances" has been established and the order may be modified. If the 15% change has not been met, CSSD is not required to modify the child support obligation.

A modification is effective beginning the month after the parties are served with notice that a modification has been requested.<sup>13</sup> The person who filed the appeal, in this case, Mr. K., has the burden of proving by a preponderance of the evidence that the agency's child support determination is incorrect.<sup>14</sup>

Mr. K.'s child support was set at \$290 per month in 2003. In response to the petition for modification, CSSD used the obligor's 2008 income information as reported to the Alaska Department of Labor and Workforce Development to calculate his modified child support amount. The income figure reported was \$42,192.82, which resulted in a support amount of

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<sup>9</sup> Exh. 4 at pg. 1.

<sup>10</sup> \$10.75 per hour x 35 hours x 52 weeks = \$19,565.

<sup>11</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

<sup>12</sup> AS 25.27.190(e).

<sup>13</sup> 15 AAC 125.321(d). In this case, the notice was issued on November 6, 2008. Exh. 3.

<sup>14</sup> 15 AAC 05.030(h).

\$599 per month.<sup>15</sup> After the hearing, CSSD revised the calculation at the request of the administrative law judge based on the income figure reported on Mr. K.'s 2008 tax return and which also incorporated an additional deduction for his 3% retirement contribution. This calculation, utilizing the income figure of \$43,581.75 that appears on his tax return, results in a child support amount of \$589 per month.<sup>16</sup> This figure is more than twice the amount of Mr. K.'s prior child support order and thus meets the necessary 15% difference that supports a modification of a child support order.

**B. Financial hardship**

Mr. K.'s primary issue on appeal is that he cannot afford the child support amount calculated by CSSD from his actual income. Mr. K. testified that his wife, who formerly provided half of the financial support for the family, is no longer working because of her pregnancy and will be unable to work for at least a year or longer. As a result, Mr. K. claims that he is on the verge of bankruptcy. CSSD opposes any reduction in Mr. K.'s modified child support on the basis that the reduction in income for the family is a temporary situation and will be relieved when D. returns to work.

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."<sup>17</sup> 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 . . . .<sup>[18]</sup>

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<sup>15</sup> Exh. 5 at pg. 6.

<sup>16</sup> Unnumbered exhibit attached to CSSD's Post-hearing brief at page 2. This exhibit shall be identified as Exhibit 8.

<sup>17</sup> Civil Rule 90.3(c).

<sup>18</sup> Civil Rule 90.3(c)(1).

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).<sup>19</sup>

Technically, Civil Rule 90.3 states that a parent's child support obligation should not be reduced because that parent has children younger than the child(ren) of the support order.<sup>20</sup> This is because a parent has a choice whether to have later-born children and should not do so at the expense of the older child(ren). 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."<sup>21</sup>

There should be some consideration given to Mr. K.'s current situation. He does not have sufficient income with which to pay his child support obligation as calculated and all of his household bills. Bankruptcy is a very realistic concern for the obligor. At the same time, Z. is now a teenager and his needs are more expensive than they were when he was younger. Z. is entitled to an increase in support from his father – Mr. K.'s child support has been the same amount for nearly six years, which has allowed him to forestall increasing the support he provides for Z. even as his income has gone up.

Based on the evidence presented, this case presents unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. K. proved by clear and convincing evidence that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 were not varied. The "unusual circumstances" present in this case are that the obligor's wife is expecting twins and has had to quit her job; Mr. K. is now responsible for all of the household expenses. Even if D. returns to work relatively soon after the birth of the twins, their childcare bill may be as high as \$1,800 per month. This means the net effect of D.'s renewed employment would not help the family as much as her prior income did.

Mr. K.'s modified child support calculation should be reduced, but not so much so that Ms. S. does not realize any increase. In order to augment the child support being provided to Z. but also to give Mr. K. some measure of relief, the modified child support amount should be set at \$440 per month. This figure is the mid-point between Mr. K.'s prior child support order of

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<sup>19</sup> See Civil Rule 90.3, Commentary VI.E.1.

<sup>20</sup> Civil Rule 90.3, Commentary VI.B.2.

<sup>21</sup> *Id.*

\$290 per month and the correct modification amount of \$589 per month. Mr. K.'s child support obligation should be revisited in a year or so. It is hoped that he will be able to make the necessary belt-tightening adjustments to afford the full support amount by that time. It would not be fair for Z. to have to rely on this reduced child support amount for the remainder of his minority.

#### **IV. Conclusion**

Mr. K. met his burden of proving that CSSD's Modified Administrative Child Support and Medical Support Order was incorrect, as required by 15 AAC 05.030(h). After the hearing, his modified child support was correctly calculated at \$589 per month, effective December 1, 2008. However, Mr. K. also met his burden of proving by clear and convincing evidence that manifest injustice would result if this modified child support amount calculated under Civil Rule 90.3 were not varied. There is good cause to reduce Mr. K.'s modified child support to \$440 per month, effective December 1, 2008.

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

- Mr. K. is liable for modified ongoing child support in the amount of \$440 per month, effective December 1, 2008;
- All other provisions of CSSD's April 23, 2009, Modified Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 8<sup>th</sup> day of July, 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 27<sup>th</sup> day of July, 2009.

By: Signed  
Signature  
Rebecca L. Pauli  
Name  
Administrative Law Judge  
Title

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