

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

IN THE MATTER OF:)

A. O.)

) OAH No. 09-0334-CSS

) CSSD No. 001097198

DECISION AND ORDER

I. Introduction

The Obligor, A. O., appealed a Notice of Denial of Modification Review that the Child Support Services Division (“CSSD”) issued in his case on April 28, 2009. The Obligee children are J. and C., 11 and 10 years of age, respectively.

The hearing was held on October 6, 2009. Mr. O. appeared in person with his attorney, Bryon E. Collins; the custodian, F. M. C., did not participate. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded and the record closed on October 20, 2009.

Based on the record and after careful consideration, Mr. O.’s child support is modified to \$386 per month for two children, effective November 1, 2009. The obligor’s request for relief based on financial hardship has been granted, as discussed below.

II. Facts

A. Procedural Background

Mr. O.’s child support obligation for J. and C. was set at \$50 per month in March 2003.¹ Ms. C. requested a modification on May 29, 2008.² On June 23, 2008, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.³ On October 10, 2008, CSSD issued a Modified Administrative Child Support and Medical Support Order that set Mr. O.’s modified child support at \$702 per month, effective July 1, 2008.⁴ On October 30, 2008, Mr. O. emailed a statement to CSSD that he did not agree with the modification.⁵ Also, he filed

¹ Exh. 1.
² Exh. 2.
³ Exh. 3.
⁴ Exh. 4.
⁵ Exh. 5.

a request for a modification on November 5, 2008.⁶ CSSD sent notice of the modification to the parties on November 18, 2008, and on April 28, 2009, issued a Notice of Denial of Modification Review for the reason that Mr. O. did not provide income information.⁷ Mr. O. appealed on June 4, 2009.

The hearing was calendared for July 8, 2009. Mr. O.'s attorney, Bryon E. Collins, appeared and indicated the obligor was not available by telephone because he was in K. fishing, so the hearing was continued until a later date. During the proceeding the parties agreed that Mr. O.'s October 30, 2008, email to CSSD disagreeing with the modification order should be considered an appeal of that order. Consequently the parties agreed that the hearing on the merits in this case would address CSSD's October 10, 2008, Modified Administrative Child Support and Medical Support Order and that Mr. O.'s later modification request and CSSD's denial of modification review were both moot.

B. Material Facts

Mr. O. was formerly employed at No Name Restaurant in Anchorage as the Executive Chef. He earned \$36,000 per year. The restaurant closed at the end of October 2008, after which time Mr. O. was unemployed until the end of January 2009. At that time, he became employed at L. I., where he was paid \$13 per hour. Mr. O. worked at L. I. for six months, when he returned to the village of K. to go subsistence fishing. He spent three months there and upon returning to Anchorage in August 2009, Mr. O. obtained employment at G., a restaurant in the downtown area. He works 35 hours per week on the average and is paid \$12 per hour.

Mr. O.'s total actual income in 2008 was \$33,269, including the PFD energy rebate.⁸ A standard child support calculation based on that income figure is \$620 per month for two children and \$460 per month for one child.⁹ CSSD estimated Mr. O.'s 2009 income at \$18,538.36. This figure was obtained from a total of his wage data for the first and second quarters of 2009;¹⁰ his year-to-date earnings from G. through the September 25, 2009 pay day;¹¹

⁶ Exh. 6.

⁷ Exh. 8.

⁸ Exh. 13.

⁹ *Id.*

¹⁰ The first quarter was \$3659.80; the second quarter was \$5,714.74. Post hearing brief at pg. 1.

¹¹ Mr. O.'s year-to-date earnings through September 25, 2009 equal \$3,368.82. Exh. 11.

plus his estimated earnings from September 20, 2009 through December 1, 2009.¹² The above total income estimate results in a child support calculation for 2009 of \$386 per month for two children and \$286 per month for one child.¹³

Mr. O. is married; he and his wife have two children, the second one of whom was born in early 2009. Mr. O.'s wife and children have gone to stay with family members in King Cove while Mr. O. continues to work in Anchorage. The obligor is currently homeless, having lost his housing after No Name Restaurant closed in 2008. He stays with friends as often as possible, but essentially Mr. O. lives in his car.

Mr. O.'s regular monthly expenses are \$300 for the payment on a 2005 Ford Taurus, which he purchased in 2008; \$200 for gasoline; \$15 for vehicle maintenance; \$243 for vehicle insurance; and \$120 for diapers. He still owes his prior landlord \$2,000 and Wells Fargo \$367, plus he has an unpaid medical bill of \$243. Mr. O.'s wife is currently on Medicaid, but she previously had an outstanding medical bill in excess of \$100,000. He testified that she appealed the bill and the hospital extinguished much of the debt. She also owes the bank \$1,500. While they still had housing, the O.s paid rent of \$875 plus \$200 for utilities. They had food stamps at the time but toward the end of each month had to supplement them with cash purchases. Mr. O. did not present testimony as to the extent of his financial support for his wife and children while they are in King Cove. They will not be able to return to Anchorage until he has secured housing for the family and can financially support them.

III. Discussion

Modification of child support orders may be made upon a showing of "good cause and material change in circumstances."¹⁴ If the newly calculated child support amount is more than 15% different than the previous order, the Rule assumes a material change in circumstances has occurred and the support amount may be modified.¹⁵ Mr. O.'s child support obligation for J. and C. was set at \$50 per month in 2003, so any calculated amount over \$57.50 will be sufficient to allow modification of his child support order.

¹² CSSD estimated this figure at \$5,796. Post hearing brief at pg. 1.

¹³ *Id.*

¹⁴ AS 25.27.190(e).

¹⁵ Civil Rule 90.3(h).

CSSD correctly calculated Mr. O.'s child support for two children at \$620 per month for 2008 and \$386 per month for 2009. Mr. O. testified that he cannot afford to pay the amounts and he requested a variance due to financial hardship.

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."¹⁶ 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^[17]

It is appropriate to consider all relevant evidence 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).¹⁸

This case presents unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. O. proved by clear and convincing evidence that manifest injustice would result if the child support amounts set forth above and calculated under Civil Rule 90.3 were not varied. However, rather than changing the child support amount, the evidence presented indicates that the best relief for Mr. O., and the one that will have the least impact on Ms. C. and the children, would be to delay the effective date of the modification. The result of this delay is that Mr. O.'s previous order for \$50 per month will remain in effect until November 1, 2009, at which time his child support will be modified to \$386 per month, the figure calculated for 2009 and ongoing based on Mr. O.'s actual income.

There are several reasons that delaying the effective date of the modification is the appropriate relief in this case. First, it reflects CSSD's failure to treat Mr. O.'s timely email as an appeal of its modification order and the delay that rejection, however unintentional, created in resolving this case. Second, it prevents the creation of instant arrears of approximately \$11,232

¹⁶ Civil Rule 90.3(c).

¹⁷ Civil Rule 90.3(c)(1).

¹⁸ See Civil Rule 90.3, Commentary VI.E.1.

that would have accrued from July 2008 through October 2009 under CSSD's modification order. Given the amount of Mr. O.'s income that would have been garnished to pay those arrears on a monthly basis, it would have been impossible for him to get out from under them so that he could obtain housing. This method of varying his obligation under Civil Rule 90.3(c) allows him to meet the current child support amount each month, along with a percentage of the nominal \$800 in arrears that will have accrued under a \$50 per month order from July 2008.

The bottom line is that in order to maintain his employment Mr. O. needs housing, regardless of whether his wife and children are able to join him from King Cove. He cannot live in his car much longer now that winter is upon us. If Mr. O. tries to stay in his car it will negatively impact his employability, particularly in the restaurant business. If Mr. O. remains employed, his financial stability will improve and he will be better able to pay support and provide for himself and his family going into the future.

IV. Conclusion

Mr. O. met his burden of proving by clear and convincing evidence that manifest injustice would result if his modified child support amount calculated under Civil Rule 90.3 were not varied. The effective date of the modification should be delayed until November 1, 2009, at which time Mr. O. should be liable for modified ongoing child support of \$386 per month for two children and \$286 per month for one child.

V. Child Support Order

- Mr. O. is liable for modified ongoing child support in the amount of \$386 per month for J. and C., effective November 1, 2009;
- All other provisions of CSSD's October 10, 2008, Modified Administrative Child Support and Medical Support Order, remain in full force and effect.

DATED this 27th day of October, 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 13th day of November, 2009.

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

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