

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

IN THE MATTER OF:)

A. M.)

) OAH No. 09-0361-CSS

) CSSD No. 001156186

DECISION AND ORDER

I. Introduction

On August 3, 2009 a formal hearing was held to consider the child support obligation of A. M. for the support of his children, children K. M., born 00/00/00; O. M., born 00/00/06; and F. M., born 00/00/07 (Obligees).¹ The custodian of record is B. J. and she participated telephonically. Erinn Brian represented CSSD. Ms. Brian and Mr. M. participated in person. Information received at the formal hearing and submitted before the record closed on August 17, 2009, establishes that Mr. M. is not entitled to a hardship variance and that his total child support payment for three children should be \$481 per month from October 2008 through December 2008 and \$902 per month from January 2009 forward. Additionally, Mr. M. should receive direct credit for prior child support payments totaling \$2,400.

II. Facts

Mr. M. and Ms. J. are the parents of three children. Paternity is not in dispute. The youngest child, F., is under two years of age and suffers from cancer, a neurological impairment, and receives her nourishment through a feeding tube.² Ms. J. is unable to work due to F.'s "intense medical needs."³ Ms. J. requested child support services for her children in Maryland where they reside. In October 2008, the State of Maryland requested child support services on behalf of Ms. J.⁴

When it received Maryland's request, CSSD sent Mr. M. an Administrative Order to Provide Financial and Medical Insurance Information.⁵ This order was dated December 4, 2008. When Mr. M. failed to respond, CSSD based Mr. M.'s child support obligation on his earnings as reported to the Alaska Department of Labor for 2008 plus the amount of the 2008 Permanent Fund Dividend (PFD). Using these income figures CSSD issued an Administrative Child Support and

¹ Exhibit 1.

² Exhibit 11.

³ Exhibit 11 at 4.

⁴ Exhibit 1.

⁵ Exhibit 2.

Medical Support Order setting Mr. M.'s ongoing child support at \$430 per month effective April 1, 2009. This order also established total arrears of \$2,580, going back to March 2009.⁶ Mr. M. filed a request for an Administrative Review, not because he disputed the monthly child support amount, but because he believed he should be credited with direct payments to Ms. J. starting in September 2008⁷. Ms. J. also requested an Administrative Review, arguing that CSSD used too little income in calculating Mr. M.'s child support obligation. Ms. J. alleged that Mr. M. worked two jobs and owned a fish import/export business but presented no evidence other than her uncorroborated allegation.⁸

CSSD conducted an Administrative Review, but neither parent responded to CSSD's request for 2008 and 2009 income information. Using updated Alaska Department of Labor records, CSSD recalculated Mr. M.'s child support using reported income plus a permanent fund dividend (PFD) and issued an Amended Administrative Child Support and Medical Support Order dated June 15, 2009 (June 2009 Order).⁹ This Order set Mr. M.'s ongoing child support for three children at \$762 per month effective July 1, 2009, with arrears from October 2008 totaling \$4,346.¹⁰

Mr. M. appealed believing that the June 2009 Order overstates his income because it included the PFD which he is not eligible for, and because he did not receive credit for all direct payments to Ms. J. since September 2008. Specifically, Mr. M. believes he is entitled to a \$700 credit for a payment made in September 2008 and for an additional \$519 credit for a payment made in October 2008. Mr. M. also believes his child support obligation should be varied or he will suffer a hardship.

At hearing, Mr. M. provided current pay stubs. He is paid hourly and has the option to take a salaried position with benefits; however, he is reluctant to do so because he would lose the ability to earn overtime. Mr. M. testified that if he were to become a salaried employee it would reduce the amount of income available to support himself and the children.

⁶ Exhibit 3.

⁷ Exhibit 6.

⁸ Exhibit 7.

⁹ Exhibit 9.

¹⁰ For 2008, CSSD determined Mr. M.'s monthly child support obligation for three children to be \$558 using wages reported by the Department of Labor (\$20,505.56) plus PFD (\$3,269) less standard deductions. Exhibit 9 at 7. For 2009, CSSD determined Mr. M.'s child support obligation for three children to be \$762 per month. It based its 2009 calculation using an extrapolation of Mr. M.'s reported 2009 first quarter wages (\$7,855.60 x 4 = 31,422.40) plus estimated PFD (\$2,069) less standard deductions. Exhibit 9 at 8.

CSSD annualized the average of the three most recent pay stubs which resulted in an annual projected gross income of \$40,264.29. CSSD agreed that the PFD should not be included for purposes of calculating child support. Using CSSD's online child support calculator, after deducting standard expenses (federal income tax, unemployment, and FICA) this leaves an adjusted annual income of \$32,800.89 or \$2,733.41 per month which results in a monthly child support payment for three children in the amount of \$902.¹¹

Mr. M. lives with his girlfriend in a home he rents for \$1600 per month.¹² His girlfriend is unable to work because she is an alien and has not received a visa that will permit employment.¹³ This may change in the future. Mr. M. estimates household food and personal expenses average \$800 a month and his utilities, including cable and internet, average \$280 a month.¹⁴ He does not have a car payment but estimates he spends \$186 per month for gas and insurance.¹⁵ Additionally, he sends his parents \$200 per month.¹⁶ His monthly expenses total \$3,066 and exceed his monthly projected income. It is for this reason that Mr. M. seeks a hardship variance.

While he does not disagree that his earnings to date result in an annualized *projected* income of \$40,264.29, Mr. M. objects to CSSD using projected income because he is paid hourly and his income could change depending upon the amount of overtime available. To date, Ms. J. has received sporadic support from Mr. M. and would like for him to fulfill his obligation to his children. She also believes he has overstated his living expenses because Ms. J. testified that Mr. M. lives rent free with a relative.

III. Discussion

In a child support hearing, the person who filed the appeal has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.¹⁷ Mr. M. raises three objections to CSSD's calculations: 1) his projected income is speculative; 2) he should receive additional direct credits not included by CSSD; and 3) unless varied, his child support obligation will result in a hardship to Mr. M. To address Mr. M.'s appeal and request for a hardship variance

11 Exhibit 15.
12 M. Testimony; Exhibits 16 and 17.
13 M. Testimony.
14 M. Testimony; Exhibits 16 and 17.
15 *Id.*
16 M. Testimony.
17 Alaska Regulation 15 AAC 05.030(h).

it must first be determined what his child support obligation is under Civil Rule 90.3(a). It is from this figure that any variance will be considered, before direct credit payments can be dealt with.

A. Child Support Calculated Under Civil Rule 90.3(a).

A parent is obligated both by statute and common law to support his or her children.¹⁸ When one parent has primary custody of the children, the other parent's child support obligation is "calculated as an amount equal to the adjusted annual income of the non-custodial parent multiplied by a percentage specified in [Civil Rule 90.3](a)(2)."¹⁹ By "adjusted annual income" the rule means "the parent's total income from all sources minus mandatory deductions."²⁰

In 2008, Mr. M.'s reported income was \$20,505.56 without the PFD. The parties are in agreement that Mr. M.'s 2008 child support obligation for three children is \$481 per month from October 2008 through December 2008. If Mr. M.'s income for 2009 has increased or decreased enough to cause a change that is greater than 15% in child support from 2008, then his support obligation should be modified.²¹

Based on the most recent actual earnings extrapolated to provide an annual income, Mr. M. is on track to earn \$40,264.29 in 2009. A PFD is not included in this income figure because Mr. M. will not receive a PFD until 2010 at the earliest, if he is eligible. Ms. J. alleged that Mr. M. had other sources of income. However, she has presented no evidence to corroborate her testimony. Therefore, no additional income will be imputed and using reported income, CSSD's child support calculator program projects allowable annual deductions of \$7,463.4 for taxes and unemployment insurance, leaving adjusted annual income of \$32,800.89.²² This results in a child support obligation for three children in the amount of \$10,824.29 per year or \$902 per month. Because this is a change greater than 15% effective January 2009 and ongoing, Mr. M.'s monthly child support obligation is increased to \$902 per month.²³

Mr. M. has expressed concern that because he is paid hourly this may not be an accurate reflection of his potential future income. He is correct, it may be more or it may be less. If he finds his hours are significantly decreased or significantly increased Mr. M. may request modification of

¹⁸ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.

¹⁹ See Alaska R. Civ. P. 90.3(a).

²⁰ Civil Rule 90.3(a)(1); Civil Rule 90.3 Commentary II-D.

²¹ 15 AAC 125.105(e); 15 AAC 125.321(b)(1).

²² Exhibit 15.

²³ 15 AAC 125.105(e).

his child support obligation. Child support is calculated based on “the income which will be earned when the support is to be paid. This determination will necessarily be somewhat speculative because the relevant income figure is expected future income.”²⁴ In this case, the best estimate of future income is based on Mr. M.’s annualized actual prior earnings. Child support calculated under Civil Rule 90.3 from an obligor’s actual income is presumed to be correct.

B. Direct Credit

Credits for direct payments of child support are allowed even after an obligor has been notified that he should pay through CSSD, as long as the payments are not for a period when the children were receiving public assistance and the obligor provides clear and convincing evidence that the payments were made.²⁵ These strict rules that apply to credits for direct and in-kind payments of child support do not all apply to payments made prior to the establishment of a child support order.²⁶ However, when giving credit for direct payments, CSSD may only give credit “up to the amount of the support that is charged for the period for which support is established” unless “a parent provides clear and convincing evidence that both parents intended the payment or contribution to be applied toward future child support.”²⁷

Mr. M. seeks credit for direct payment of child support to Ms. J. totaling \$3,100:

September 2008	102	\$700
October 2008	106	\$600
	104	\$400
November 2008	105	\$300
February 2009	Wire Transfer	\$500
March 2009	108	\$600

Each check is noted at the bottom to be “For Child Support.”²⁸ CSSD did not receive the UIFSA petition until October 28, 2008 and did not issue the Administrative Order to Provide Financial and Medical Insurance Information until December 4, 2008. Payments before December were made before Mr. M. was served with any notice of an administrative proceeding.

²⁴ Civil Rule 90.3 Commentary, Part III-E.

²⁵ 15 AAC 125.465.

²⁶ *Ogard v. Ogard*, 808 P.2d 815, 817 (Alaska 1991) & Alaska Regulation 15AAC 125.105(b) & (c).

²⁷ 15 AAC 125.105(d).

²⁸ Exhibit 10 at 5 – 9, 11.

CSSD agrees that Mr. M. should receive direct credits totaling \$1,881. The difference lies in the September payment for \$700 and the remaining \$519 payment in October. CSSD does not believe that Mr. M. is entitled to a credit in the amount of \$700 for in September 2008 because there was no child support owing in that period. Nor does CSSD believe Mr. M. is entitled to a direct credit in excess of \$481 per month in October 2008 because Ms. J. would not agree that the entire \$1,000 was for child support.

CSSD is correct that no direct credit should be received for the September payment. The September payment precedes the time covered by the child support order and, therefore, was not for the period of arrears. The period of arrears begins in October 2008. The September check was dated September 2, 2008. Accordingly, the September payment is not eligible for direct credit.

However, the entire \$1,000 received by Ms. J. in October is eligible for direct credit. The standard is whether Mr. M. has provided clear and convincing evidence that both parents intended the payment to be for child support and not a voluntary payment. In response to questioning by Ms. Brian, Ms. J. said that the difference between the \$481 and the \$1,000 was not child support. Her testimony was, understandably, emotional and focused on months when she had received no support from Mr. M. At the time of the payment, there was no set child support amount and Mr. M. was paying, presumably, what he believed he could afford. All checks paid to Ms. J. contained the notation that the check was for "child support." The month before he had paid \$700 for "child support." In October 2008, Mr. M. paid \$1,000. No evidence has been submitted regarding an agreement between the parents regarding what amount of child support would be paid. The evidence in the record shows that the entire \$1,000 payment in October was clearly intended, at the time of payment, to be support for the children. Accordingly, Mr. M. has established by clear and convincing evidence that he is entitled to a direct credit for an additional \$519 for October 2008.

C. Mr. M. has not presented persuasive evidence that there is good cause to reduce the amount of child support calculated under 90.3(a).

An obligor 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 claimant must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."²⁹ If the parent proves that "unusual circumstances" exist in his or her case, this may be sufficient to establish "good cause" for a reduction in the support award:

²⁹ Civil Rule 90.3(c).

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

The obligor has the burden of proving his or her earning capacity and establishing that he or she cannot meet their child support obligation.³¹ Based on the evidence presented, this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. M. did not prove by clear and convincing evidence that manifest injustice will result if the child support amount calculated under Civil Rule 90.3 is not varied.

Mr. M. has presented evidence of a financial situation where his monthly expenses, excluding child support, equals or exceeds his average monthly income. The crux of Mr. M.'s request for a variance is that he will have difficulty providing for his parents and maintaining his current lifestyle if child support is not varied.

Mr. M. submitted an unexecuted rental agreement on his home and has expressed concern regarding his obligation under the unexecuted agreement. His duty to support K., O., and F. take priority over other debts, obligations, and even subsequent children.³² K., O., and F. are entitled to receive child support in an amount commensurate with Mr. M.'s ability to pay, calculated pursuant to Civil Rule 90.3(a). Thus, in the absence of clear and convincing evidence of manifest injustice, it cannot be concluded that good cause exists to vary Mr. M.'s child support amount calculated under Civil Rule 90.3.

In this case, CSSD persuasively points out that Mr. M. is supporting his girlfriend and his parents when his primary obligation is to his children. Mr. M. has options available to him. He could get a roommate to share living expenses; he could find a less expensive residence. Ms. J. has had to quit working to care for the obligee children, the youngest of who is less than two years old and has a life threatening condition. Mr. M.'s children should not be "forced to finance" his life choices.³³ Under the circumstances, it is just to apply the regular formula for child support.

³⁰ Civil Rule 90.3(c)(1)(A).

³¹ *Kowalski v. Kowalski*, 806 P.2d 1368, 1371 – 1372 (Alaska 1991).

³² *See Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

³³ *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987) (Addressing imputation of income to a parent who is voluntarily or unreasonably unemployed or underemployed).

IV. Conclusion

Mr. M. did meet his burden of proving by a preponderance of the evidence that CSSD should not have included the PFD as income for purposes of child support. He also met his burden regarding a direct credit of \$519 in October 2008. Mr. M. has not meet his burden of proving by clear and convincing evidence that good cause exists to vary his child support amount calculated under Civil Rule 90.3. His child support obligation as of October 2008 and through December 2008 should be \$481 per month for three children. His child support obligation effective January 2009 and ongoing should be \$902 per month for three children.

V. Child Support Order

- Mr. M. is liable for child support for K., O., and F. M. in the amount of \$481 per month for three children for the period from October 2008 through December 2008 and \$902 per month for three children from January 2009 through June 2009, and ongoing.
- Mr. M. is entitled to a credit for direct payments of child support in the amount of \$1000 paid in October 2008, \$300 paid in November 2009; \$500 paid in February 2009; and \$600 paid in March 2009.
- All other provisions of the Amended Administrative Child Support and Medical Support Order issued June 15, 2009, remain in full force and effect.

DATED this 8th day of September, 2009.

By: Signed
Rebecca L. Pauli
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 25th day of September, 2009.

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

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