

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

IN THE MATTER OF:)

M. K. D.)

) OAH No. 09-0494-CSS

) CSSD No. 001100774

REVISED DECISION AND ORDER

I. Introduction

The Obligor, M. K. D., appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (“CSSD”) issued in his case on July 21, 2009. The Obligee child is M., who is 10 years old.

The hearing was held on October 14, 2009. Both Mr. D., who is represented by Jody A. Reausaw, and the custodian, P. L. B., appeared telephonically. Andrew Rawls and Erinn Brian, Child Support Specialists, represented CSSD. The hearing was recorded and the record closed on October 28, 2009.

The child support decision was issued on November 17, 2009. Mr. D. subsequently filed a Proposal for Action requesting that the decision not be adopted by the commissioner but rather, remanded to the administrative law judge to take additional evidence and make additional findings regarding Mr. D.’ child support obligation. Specifically, Mr. D. asserted that shortly after the formal hearing his position was eliminated due to a reduction in force and although he was able to obtain other employment with the company, it is at a significantly lower hourly wage.

On December 18, 2009, Deputy Commissioner Jerry Burnett remanded the decision to the administrative law judge to take additional evidence about Mr. D.’ income and to make additional findings about his child support obligation.

The supplemental hearing was held on January 25, 2010. Mr. D. again appeared by telephone with his attorney. Ms. B. could not be reached for the hearing. A telephone call was placed to her contact number but the call was not answered. A message was left on Ms. B.’s voice mail that directed her to contact the Office of Administrative Hearings if she had any questions about the supplemental hearing. Later in the day, Ms. B. submitted a written request

for a new hearing by facsimile. She stated she missed the hearing because she was the only person at work and could not take a telephone call.

Ms. B. is not entitled to a new hearing. She participated in the first hearing in this appeal and had the opportunity to present all of her evidence at that time. The supplemental hearing was held for the specific purpose of taking additional evidence about Mr. D.' income and making additional findings about his child support obligation. It was a narrow issue and did not require additional evidence from Ms. B.

This revised decision on remand replaces the original decision and order in its entirety. Based on the record and after due deliberation, Mr. D.' appeal is granted in part and denied in part. His child support is modified to \$1,190 per month, effective December 1, 2008; and further modified to \$1,074 per month, effective January 2009 through December 2009. Finally, Mr. D.' ongoing child support is modified to \$727 per month, effective January 1, 2010, and ongoing. The obligor's claim of financial hardship and defense against an upward modification both fail.

II. Facts

A. Background

Mr. D.' child support obligation for M. was set at \$821 per month in October 2007.¹ Ms. B. requested a modification on November 17, 2008.² On November 19, 2008, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.³ CSSD did not receive financial information from Mr. D.⁴ On July 21, 2009, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified his ongoing child support to \$1,246 per month, effective December 1, 2008.⁵ Mr. D. appealed on September 3, 2009, asserting primarily that CSSD did not give him the appropriate deductions for union dues, retirement, and state taxes in Delaware and New Jersey, and that he is earning less than in previous years.⁶

¹ Exh. 1.

² Exh. 2.

³ Exh. 3.

⁴ Pre-hearing brief at pg. 1.

⁵ Exh. 4. The effective date of a modification is the first month after CSSD issues the notice that a petition for modification has been filed. 15 AAC 125.321(d). In this case, the notice was issued on November 19, 2008.

⁶ Exh. 5.

B. Material Facts

Mr. D. lives in the State of Delaware and works in New Jersey at a power plant operated by C. E. Until December 27, 2009, his job description was Power Plant Operator. In every three-week period, Mr. D. worked each shift – day, swing and nights – for one week at a time. As a result of this shift rotation, he was not able to take on a part time job.

As a Power Plant Operator, Mr. D. earned \$35.99 per hour. In addition, he received a shift differential of \$62 per week for working the swing and night shifts, which, on an annual basis, equaled approximately \$3,224 in additional income.⁷ Without the addition of overtime earnings, Mr. D.’ annual income would have been about \$78,083.20, including the shift differential.⁸ However, he worked a significant amount of overtime and each year increased his base income by over 45%.

For 2008, Mr. D.’ actual annual income totaled \$112,882.⁹ Based on this income figure, his child support amount for 2008 – specifically, December 2008 only – is correctly calculated at \$1,190.¹⁰ This calculation includes the appropriate deductions for union dues, retirement, and state taxes in Delaware and New Jersey.

In 2009, Mr. D.’ total income was somewhat lower, \$102,482.31,¹¹ due primarily to a reduction in overtime toward the end of the year. His supervisor testified at the first hearing that the outlook for offering overtime work to employees was grim because of the economic downturn and reduced electrical load, but that Mr. D. did accept it if the opportunity to work overtime was offered to him. Inserting the 2009 annual income figure into CSSD’s online child support calculator yields a child support amount for 2009 of \$1,074.¹² This calculation also includes deductions for union dues, retirement, and state taxes in Delaware and New Jersey.

On November 30, 2009, Mr. D. was notified by his employer that his Power Plant Operator position was going to be eliminated by the end of the year so he would have to bid on

⁷ \$62 per week x 52 weeks = \$3,224.

⁸ This is determined by multiplying Mr. D.’ hourly wage of \$35.99 per hour times 2080 hours (40 hrs. per week x 52 weeks), which equals \$74,859.20, then adding the approximate shift differential income of \$3,224. Quarterly base income for Mr. D. would be about \$19,520 ($\$78,083 \div 4$ quarters).

⁹ October 14, 2009, Affidavit of Andrew Rawls at pg. 1; Obligor’s October 21, 2009, “2009 Quarterly Income of M. D.” at pg. 1.

¹⁰ Exh. 6 at pg. 1.

¹¹ Exh. F at pg. 1.

¹² Attachment A.

vacant positions at other facilities.¹³ Mr. D. was able to secure another position, but his new pay is only \$22.26 per hour and it does not include a shift differential.¹⁴ Mr. D. will receive overtime in his new position, however, because he had to commit to working at least 30% overtime because of storms and other problems that cause power outages.¹⁵ Based on his new position in the company and his lower hourly wage, Mr. D. estimated his 2010 income at \$67,136.16.¹⁶ This figure includes an add-on for overtime of 45% rather than the minimum 30% the company expects him to work. Inserting this 2010 estimated income figure into CSSD's online child support calculator yields a child support amount of \$727 per month for 2010.¹⁷ As with the previous computations, this calculation also includes deductions for union dues, retirement, and state taxes in Delaware and New Jersey. CSSD reviewed this new calculation and indicated at the supplemental hearing that it appears to be correct.

Mr. D. currently lives alone in an apartment, but he and his fiancée want to purchase a home in the immediate future. They are expecting their first child in March or April of 2010. Mr. D.' fiancé is employed; if necessary, however, Mr. D. could move in with her.

Mr. D. has a significant amount of financial obligations over and above his household expenses. He reported regular monthly expenses of \$3,262, which includes \$750 for rent; \$150 for food at home; \$111.70 for electricity; \$150 for cable, telephone and Internet service; \$123.09 for a cellular phone; \$440 for the payment on a 2008 Ford Fusion; \$150 for gasoline; \$225.85 for vehicle insurance; \$114.48 for health insurance; \$66 for personal care items; \$40 for the copayment on allergy shots; and \$941.56 for the minimum payments on credit cards, bank loans and consumer debt, with a total amount owing of \$26,041.24.¹⁸

Ms. B. is a single parent with three children in the home. She is employed and her average monthly income is approximately \$1,600. Her rent is \$1,250 and she just completed finished paying off a 1996 Ford Explorer, which she purchased in October 2007. Her regular

¹³ Exh. G.

¹⁴ Supplemental hearing testimony of Mr. D..

¹⁵ *Id.*

¹⁶ Mr. D. estimated his 2010 income by multiplying his hourly wage of \$22.26 per hour times 2080 hours (40 hrs. per week x 52 weeks), which equals \$46,300.80. He then multiplied that figure times 45%, which results in an overtime add-on figure of \$20,835.36, and added the two numbers together to reach the total estimated income figure of \$67,136.16. *See* Exh. D.

¹⁷ Exh. D.

¹⁸ Obligor's Exh. B at pg. 1.

monthly bills are fairly normal and she does not have any outstanding credit card or consumer debt. She formerly received child support for her daughter in the amount of \$300 per month, but that payment stopped in March 2009; the girl's father cannot be located. Ms. B. has been traveling back and forth between Alaska and California for the last year. She hopes to make the move to California permanent in the near future.

III. Discussion

A. Mr. D.' Income

Modification of child support orders may be made upon a showing of “good cause and material change in circumstances.”¹⁹ 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.²⁰

Mr. D.' child support was set at \$821 per month in October 2007. In response to the custodian's petition, CSSD modified his child support to \$1,246 per month, effective December 1, 2008.²¹ CSSD used annual income of \$112,466.67, a figure the division reached by extrapolating an annual income amount from the earnings he received in the three quarters immediately prior to the July 2009 modification.²²

During the supplemental hearing, Mr. D. filed paystubs documenting that his total 2009 income was \$102,482.31. This figure is \$10,000 lower than the income amount CSSD used in the modification calculation, so the 2009 child support amount CSSD arrived at was incorrect. Mr. D.' actual income for 2009 was inserted into CSSD's online child support calculator and it yields a child support amount of \$1,074 per month for 2009.

Because Mr. D. lost his operator job at the end of 2009 and is now working in another position, his estimated income for 2010 is much lower than previous years, at \$67,136.16. Although his employer expects him to put in at least 30% overtime, Mr. D. estimated his annual income for 2010 by adding 45% overtime rather than the minimum 30% the company requires.

¹⁹ AS 25.27.190(e).

²⁰ Civil Rule 90.3(h).

²¹ Exh. 4 at pg. 6.

²² *Id.*

Inserting this 2010 estimated income figure into CSSD's online child support calculator yields a child support amount of \$727 per month for 2010.²³

B. Child Support Variance

To the extent Mr. D. originally argued he cannot afford the modified child support amount CSSD set in its modification order, his argument will be applied to the corrected calculations discussed above.

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."²⁴ 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^[25]

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).²⁶

Although not a part of the actual rule, the Commentary to Civil Rule 90.3 indicates that it may be possible for an obligor parent to successfully defend against an upward modification upon proving he or she has taken on additional income for the purpose of providing for a subsequent family:

[T]he interests of [a] subsequent family may be taken into account as a defense to a modification action where an obligor proves he or she has taken a second job or otherwise increased his or her income specifically to better provide for a subsequent family. This defense to an upward modification action should not be allowed to

²³ Exh. D.

²⁴ Civil Rule 90.3(c).

²⁵ Civil Rule 90.3(c)(1).

²⁶ Civil Rule 90.3, Commentary VI.E.1.

the extent that . . . the obligor's increase in income is limited to ordinary salary increases.

In considering whether substantial hardship to "subsequent" children exists, or whether the existence of a subsequent family should defeat a motion to increase child support, the court should consider the income, including the potential income, of both parents of the 'subsequent' children.^[27]

According to the Alaska Supreme Court, the tribunal must determine whether the obligor parent increased his or her income for the "express purpose" of providing for a new family.²⁸

Based on the evidence presented, this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. D. did not prove by clear and convincing evidence that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 were not varied. There are no "unusual circumstances" present to warrant varying his child support calculated under Civil Rule 90.3 for M..

Mr. D. asserts that his child support should not be upwardly modified because of the needs of his subsequent family. However, Mr. D. has not met his burden of proof on this issue. While it may be true that he and his fiancée are expecting a child in early 2010, Mr. D. does not yet have a subsequent family. Thus, he cannot establish any specific needs this upcoming subsequent family has other than the desire of Mr. D. and his fiancée to purchase a home in the immediate future. Mr. D.' fiancée is employed, so she should be able to contribute to the needs of their future family, as well.

Mr. D. also cannot establish that he has taken on additional income for the "express purpose" of providing for the new family he is expecting. Rather, the record shows that Mr. D. has been working a substantial amount of overtime since at least 2007, and that his 2008 and 2009 income levels are merely the result of his decision to work overtime every quarter, on a fairly routine basis.

The custodian in this matter, Ms. B., is a single parent with three children in the home and monthly financial obligations that are not adequately covered by her income. M. is now 10 years of age, and under Alaska law it is well established that the cost of supporting him will

²⁷ Civil Rule 90.3, Commentary VI.B.2.

²⁸ *Schuyler v. Briner*, 13 P.3d 738, 743 (Alaska 2000).

likely only increase as he reaches his teenage years.²⁹ Accordingly, Mr. D. cannot establish good cause for reducing the child support amounts calculated under Civil Rule 90.3 in his case.

IV. Conclusion

Mr. D. met his burden of proving CSSD's Modified Administrative Child Support and Medical Support Order was incorrect and his modified child support obligation has now been corrected. However, Mr. D. did not meet 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. Mr. D. does not yet have a subsequent family, but even if he did, he has not taken on additional income for the "express purpose" of providing for a subsequent family. His child support is correctly calculated at \$1,190 per month, effective December 1, 2008; \$1,074 per month, effective January 2009 through December 2009; and \$727 per month, effective January 1, 2010, and ongoing. These figures should be adopted.

V. Child Support Order

- Mr. D.' child support obligation for M. is modified to \$1,190, effective December 1, 2008; further modified to \$1,074 per month, effective January 2009 through December 2009; and further modified to \$727 per month, effective January 1, 2010, and ongoing;
- All other provisions of CSSD's July 21, 2009, Modified Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 27th day of January, 2010.

By: Signed
Kay L. Howard
Administrative Law Judge

²⁹ See Civil Rule 90.3, Commentary VI.B.6.

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 1st day of February, 2010.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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