

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

IN THE MATTER OF:)

J. D. D.)

OAH No. 09-0554-CSS

CSSD No. 001144144

DECISION AND ORDER

I. Introduction

The Obligor, J. D. D., appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (“CSSD”) issued in his case on July 22, 2009. The Obligee child is A., who is 3 years old.

The hearing was held on November 9, 2009. Mr. D. appeared by telephone. The custodian, J. L. V., did not participate.¹ Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded; the record closed on December 29, 2009.

Mr. D. asserts that he did not receive notice of the modification until well after its effective date, that he is entitled to relief under the Servicemember’s Civil Relief Act,² and that he is entitled to hardship relief. As discussed below, most of Mr. D.’s requests are denied, but there is good cause for imposing a different effective date for his modified child support obligation.

II. Facts

Mr. D. is obligated to pay child support for one child, A. Mr. D.’s support obligation was set at \$494 per month in an order dated October 15, 2007.³ Mr. D. testified that he moved from Ft. Leavenworth, Kansas to Ft. Knox, Kentucky in November 2008. He further testified that he informed CSSD of his new address by telephone sometime that same month.

On December 8, 2008, CSSD was notified by Ms. V. that Mr. D. had a new address.⁴ On December 12, 2008, Ms. V. requested a modification of the child support order.⁵ On December

¹ Before the hearing was scheduled to begin, Ms. V. contacted the Office of Administrative Hearings (OAH) and stated she did not want to participate because she was at work.

² 50 U.S.C. App. § 501 *et. seq.* This act used to be known as the Soldiers and Sailors Relief Act.

³ Exh. 1.

⁴ CSSD’s Supplemental Brief dated December 15, 2009.

⁵ Exh. 2.

17, 2009, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order. Mr. D.'s notice was sent to his previous address in Kansas.⁶

On July 22, 2009, CSSD issued a Modified Administrative Child Support and Medical Support Order that set Mr. D.'s child support obligation at \$693 per month, effective January 1, 2009.⁷ Mr. D. testified that he was deployed to Iraq from January 10, 2009 through August 10, 2009. He says he did not receive actual notice of the petition to modify child support until September 30, 2009.⁸ He was, however, apparently on notice that a modification in the near future was a possibility.⁹

Based on updated pay information, CSSD recalculated the support obligation and asks that child support payments be set at \$707 per month from January 2009 through May 2009, and \$835 per month, effective June 1, 2009, and ongoing.¹⁰

III. Discussion

A. Effective Date of the Modification

While Mr. D. does not contest CSSD's calculations,¹¹ he does raise objections to the imposition of the modified support obligation. He first requests protection under the Servicemember's Civil Relief Act (SCRA). This act provides protections to members of the military, and applies to actions before administrative agencies.¹² Had Mr. D. received notice of the petition for modification, he would have been entitled to a stay of the proceedings.¹³ Stays protect servicemembers from having default judgments entered against them before they have an opportunity to appear and represent their rights in adverse legal proceedings. What the SCRA does not do, however, is extend the effective date of an original complaint or request.

⁶ Exh. 3 at pg. 1.

⁷ Exh. 4. The record does not disclose the mailing addresses used for this order.

⁸ Exh. 5.

⁹ According to CSSD's Supplemental Brief, Mr. D. called CSSD on September 11, 2008 to inform the agency that Ms. V. had told him she was going to request a modification while he was deployed.

¹⁰ Position on record at hearing and new calculations dated November 9, 2009.

¹¹ After CSSD received Mr. D.'s up-to-date income information, CSSD revised Mr. D.'s child support calculation to \$707 per month for the period from January 2009 through May 2009. *See* Exh. 6. As of June 1, 2009, Mr. D. received a pay raise, so CSSD used the current information to further revise his child support amount to \$835 per month as of that date. *See* Exh. 10. These figures were presented at the hearing.

¹² 50 U.S.C. App 511(5).

¹³ 50 U.S.C. App 522 (b) & (d).

While the SCRA should have allowed Mr. D. to delay CSSD's adoption of a modified support order, any delayed order still would have been effective on January 1, 2009. When CSSD modifies a child support order, the effective date is the first of the month after the notice was served on the nonrequesting parent.¹⁴ Since Mr. D. did ultimately have an opportunity to appear and defend his rights, any violation of the SCRA was eventually cured.¹⁵

Having been given the opportunity to submit evidence and contest CSSD's calculations, Mr. D.'s modification would be effective January 1, 2009, the first month after CSSD issued the Notice of Petition for Modification. There are some mitigating circumstances in this case, however. CSSD was aware that Mr. D. was serving in the military and that he might be deployed. Mr. D. testified that he notified CSSD of his new address in November 2008. While CSSD has no record of that notification, Ms. V. also informed CSSD in December 2008 of this new address. Having learned of Mr. D.'s possible change of address, and knowing that he might be deployed, CSSD was aware that there might be a problem with mailing the notice only to the old address. In this particular case, CSSD should also have sent a notice of the petition for modification to the new address Ms. V. reported, rather than waiting for an address verification from the U. S. Postal Service that never arrived.¹⁶

Based on the unique issues raised in this case regarding service of the notice on Mr. D., good cause under Civil Rule 90.3(c) exists to delay the effective date of the modified child support obligation.¹⁷ Determining what date to use requires balancing various interests. Mr. D. has the right to be aware of a potential modification so he can make his own financial decisions with that awareness in mind. For example, he has stated that he did not learn of the modification until September 30, 2009.¹⁸ This is ten days after he spent a substantial amount of money

¹⁴ 15 AAC 125.321(d). In modification proceedings, service of the notice is achieved via first class mail, pursuant to 15 AAC 125.316(c), which is sent to the party's last known address. 15 AAC 125.810(a). Service of the notice is considered complete upon mailing. Alaska Rule of Civil Procedure 5(b).

¹⁵ CSSD may want to determine whether it has an affirmative duty under the SCRA not to issue modification orders in circumstances involving servicemembers who have not responded to notices such as the one issued here. This act does impose affirmative duties on "plaintiffs" and CSSD may be considered a plaintiff for purposes of the SCRA.

¹⁶ See CSSD's Supplemental Brief dated December 17, 2009, at the second bullet.

¹⁷ Pursuant to Civil Rule 90.3(h)(2), child support orders may not be modified retroactively, but there is no prohibition against delaying the effective date of a modification.

¹⁸ Exh. 5, page 1.

purchasing a used truck.¹⁹ On the other hand, his child has a significant interest in receiving the correct amount of child support from Mr. D., which is to be administered by the custodian.

Mr. D. returned from Iraq on August 10, 2009. There would naturally be a period of readjustment after returning from that deployment. He indicated that he received actual notice on September 30, 2009. If actual notice were required to modify a child support order, this would make the modified award effective October 1, 2009. It is not fair, however, to make the custodial parent bear the entire brunt of CSSD's decision to mail the notice of hearing only to Mr. D.'s old address. Accordingly, the burden should be split equally between the two parents, and the effective date of the modification should be May 1, 2009.

B. Financial hardship

Mr. D.'s second issue on appeal is that he cannot afford the child support amount calculated by CSSD from his actual income. 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."²⁰ 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^[21]

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).²²

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. Neither his testimony nor the amount and type of expenses listed in his expense

¹⁹ Exh. 9.

²⁰ Civil Rule 90.3(c).

²¹ Civil Rule 90.3(c)(1).

²² See Civil Rule 90.3, Commentary VI.E.1.

checklist are sufficient to establish that imposing this child support obligation on him would result in manifest injustice under Civil Rule 90.3(c).

IV. Conclusion

Due to the issues that arose in this case regarding service of the notice of modification, good cause exists to delay the effective date of Mr. D.'s modification to May 1, 2009. Mr. D.'s child support is correctly calculated at \$707 per month, effective May 1, 2009, and \$835 per month, effective June 1, 2009. Accordingly, Mr. D.'s child support should be modified to \$707 per month, effective May 1, 2009, and further modified to \$835 per month, effective June 1, 2009, and ongoing. 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 reduced.

V. Child Support Order

- Mr. D.'s child support obligation for A. is modified to \$707 per month, effective May 1, 2009, and further modified to \$835 per month, effective June 1, 2009 and ongoing;
- All other provisions of CSSD's July 22, 2009, Modified Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 20th day of January, 2010.

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 8th day of February, 2010.

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

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