

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

In the matter of:	)	
	)	OAH No. 10-0174-CSS
H. N. N.	)	CSSD No. 001138134
_____	)	

**DECISION AND ORDER**

**I. Introduction**

H. N. N. appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on March 23, 2010. This order increased his monthly child support obligation from \$64 per month for one child to \$512. The obligee child is T. age 6. J. H. has primary physical custody of T.

Two hearings were held in the matter. The first hearing took place on May 3, 2010 and started 45 minutes late due to problems with the telephone service. At this hearing Mr. N. participated by telephone. Andrew Rawls, Child Support Specialist, appeared for CSSD. Ms. H. did not participate.<sup>1</sup> The second hearing took place on May 18, 2010. This time Ms. H. participated by phone and Mr. N. did not participate. Mr. Rawls appeared for CSSD. The record closed May 28, 2010 without further participation from Mr. N.<sup>2</sup>

CSSD's March 23, 2010 Modified Administrative Child Support Order is affirmed. Mr. N.'s ongoing monthly child support obligation for T. is \$512 effective January 1, 2010. While Mr. N.'s request for a variance in the amount of monthly child support is denied, he may qualify for a temporary reduction in withholding. Mr. N. should contact his case worker to discuss whether he would be eligible for a temporary reduction.

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<sup>1</sup> Several days prior to the May 3, 2010 hearing Ms. H. called OAH and indicated her desire to participate in the proceeding by providing a phone number where she could be reached. By the time the phones were working Ms. H. was not at the number provided.

<sup>2</sup> The supplemental hearing was set to inquire into the financial circumstances of Ms. H. and T. at the request of Mr. N. He was called at the number provided at the first hearing but there was no answer. Because this is Mr. N.'s appeal, the record remained open for 10 days as required by 15 AAC 05.030(j). The record closed on May 28, 2010 without further participation by Mr. N.

## II. Facts

### A. *Background*

Mr. N.'s child support has been set at \$64 per month since 2005.<sup>3</sup> In October 2009, Ms. H., requested modification of Mr. N.'s monthly child support obligation.<sup>4</sup>

Mr. N. did not respond to the agency's request for income information. Using data from the Alaska Department of Labor and Workforce Development, unemployment insurance, and Arctic Slope Regional Corporation dividend information, the Division calculated Mr. N.'s 2009 annual gross income to be \$36,990.96 and, using the support formula in Alaska Civil Rule 90.3, determined an ongoing monthly child support obligation for one child in the amount of \$512 per month.<sup>5</sup> The new support amount became effective January 1, 2010.

Mr. N. filed a timely appeal on March 30, 2010.<sup>6</sup> He seeks a variation from the amount of support calculated under Alaska Civil Rule 90.3 because he is unemployed, his income has decreased and he cannot afford an increase in child support and still provide for his two younger children and their mother.<sup>7</sup> In essence, Mr. N. argues that because he is not working, CSSD used an incorrect income figure for calculating child support. In the alternative, he is requesting a variance from the amount of child support ordered.

### B. *Mr. N.'s Income and Expenses*

Mr. N. is a resident of No Name, Alaska. No Name is located near the tip of the No Name peninsula. As is the case in many rural areas, unemployment exceeds the national average, however, as discussed below, Mr. N.'s unemployment is voluntary and not due to economic factors.

In 2008, Mr. N. was hired by the North Slope Borough as a maintenance worker. He voluntarily terminated his employment in the fourth quarter of 2009<sup>8</sup> because his job was too

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<sup>3</sup> Exhibit 1.

<sup>4</sup> Exhibit 2.

<sup>5</sup> Exhibit 4.

<sup>6</sup> Exhibit 5.

<sup>7</sup> Exhibit 5; N. Testimony.

<sup>8</sup> N. Testimony. The exact date of termination was not established. However, it is undisputed that Mr. N. began receiving unemployment benefits December 26, 2009. He also has income reported for the fourth quarter. Therefore, it is reasonable to conclude that he terminated employment in the fourth quarter of 2009.

hard, too stressful, and his girlfriend was working.<sup>9</sup> He explained that when he quit he anticipated obtaining a higher paying job on an upcoming project, but the project has been placed on hold. According to Alaska Department of Labor records, in 2008 Mr. N. earned \$8,210.63 and in 2009 he earned \$30,916.96. In 2009, he also received \$282 in unemployment benefits and \$5,792 in dividend payments from his regional corporation. Mr. N. agrees that his 2009 gross income from all sources totaled \$36,990.96. In the first quarter 2010, Mr. N. has reported earnings totaling \$417.90 from a temporary job as a gas station attendant. He also received \$3,991 in unemployment benefits.<sup>10</sup>

Mr. N. has a high school diploma and several certifications including certification as a Hazardous Waste Operations and Emergency Responder (HAZWOPER) and for working in confined spaces. He also has level one carpentry training. However, Mr. N. thought all of these certifications either have expired or are about to expire.<sup>11</sup> When asked whether he could return to his prior position at the North Slope Borough, Mr. N. testified that his position was recently advertised, he did apply, but that he knows of at least two other individuals who have also applied. He was hopeful he would be hired but could not be sure.

Mr. N., his girlfriend and their two children (ages 1 and 3 years old) have recently moved in with his mother and two other adults. His girlfriend works as a substitute for the local school district during the school year. In 2009, she earned \$4,000 but Mr. N. thinks she will earn more in 2010.<sup>12</sup> They do not pay rent at his mother's. However, when they lived in their own place their rent was \$800 per month and included water and electricity. While he no longer pays rent, Mr. N. offered that he still has the following monthly expenses: \$600 for food, \$60 for cellular service, \$400 for personal items (diapers, wipes, shampoo, etc.) and \$150 month for tobacco products. There was some testimony that he received food stamps but the exact amount was undetermined. Mr. N. has no car or other recreational vehicles. He did have a snow machine, which he sold to help with expenses. He also provides for his family by hunting and fishing.

Ms. H. and her husband live in a home they are buying in Kotzebue. In addition to T., there are two younger children in the home. The youngest is under two years old. Mr. H. has

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<sup>9</sup> N. Testimony.

<sup>10</sup> Exhibit 6.

<sup>11</sup> N. Testimony.

<sup>12</sup> N. Testimony.

annual wages in the amount of \$50,960.<sup>13</sup> Ms. H. is a human resources specialist and in 2009 she earned \$31,952. She testified that she expects to earn more in 2010 because in 2010 she was on unpaid maternity leave for several months.

Ms. H.'s monthly household expenses are as follows: \$1,382 for mortgage, \$700 for food; between \$300 and \$500 for stove oil; \$140.32 for water, sewer, and trash; \$300 for electricity; \$260 for internet, cable, and cellular; \$426 for car payment plus \$295 for insurance, gas and maintenance; health insurance \$560 per month; \$60 for home insurance; and \$350 for personal care items and tobacco. The H.s' also have consumer debt in the amount of \$4,800 upon which they make a monthly payment of \$400. Mr. H. recently borrowed from his 401K plan and has a monthly payment of \$105 for this debt. Ms. H. testified that they have reduced expenses by relying upon family members for child care. However, if Mr. H. gets called in unexpectedly and a family member is unable to watch the children, then she must pay for child care.

### **III. Discussion**

Mr. N.'s appeal can be parsed into two issues: 1) whether his 2009 income should be used for calculating his child support obligation now that he is unemployed and 2) whether he meets the criteria for a hardship variance and his child support reduced.

*A. Mr. N.'s child support should be based on what he would have earned had he not voluntarily terminated employment.*

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)."<sup>14</sup> By "adjusted annual income" the rule means "the parent's total income from all sources minus mandatory deductions ..." which include basic taxes, union dues, and retirement contributions.<sup>15</sup> Child support for one child is calculated at 20% of the resulting figure.<sup>16</sup> Typically, child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct.

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<sup>13</sup> Ms. H. testified that Mr. H. earns \$24 to \$25 per hour and works 40 hours per week. Mr. H.'s annual income was calculated using an hourly wage of \$24.50 x 2080 Hours.

<sup>14</sup> See Alaska R. Civ. P. 90.3(a).

<sup>15</sup> Alaska R. Civ. P. 90.3(a)(1).

<sup>16</sup> Alaska R. Civ. P. 90.3(a)(2)(D).

Because child support is calculated based on annual income, temporary periods of unemployment do not negate the support obligation. Additionally, child support may be based on the potential income of a person who is voluntarily and unreasonably unemployed or underemployed.<sup>17</sup> It is also important to bear in mind that child support is calculated based on “the income which will be earned when the support is to be paid”—that is, actual or potential *future* income.<sup>18</sup>

In cases in which a parent seeks a reduction in child support because the parent is unemployed, the court or administrative law judge must determine whether the parent has engaged in voluntary conduct “for the purpose of becoming or remaining unemployed.”<sup>19</sup> If the parent is voluntarily unemployed or underemployed, it is also necessary to determine whether the parent’s unemployment is unreasonable. An integral part of the analysis is whether the parent’s lack of employment is a result of “economic factors,” as in being laid off, or of “purely personal choices.”<sup>20</sup> It is not necessary to prove the individual was purposefully avoiding a support obligation, or acting in bad faith, in order to impute income to a noncustodial parent.<sup>21</sup>

If a parent is found to be voluntarily unemployed or underemployed, potential income will be based on that parent’s “past income, skills, work history, and education and the job opportunities in the area where the parent physically resides.”<sup>22</sup> The use of “potential income” in a child support obligation is not to punish the obligor parent; rather, it is to insure that the child(ren) and the other parent are not “forced to finance” the obligor parent's lifestyle.<sup>23</sup> The commentary states the court should consider “the totality of the circumstances” when deciding whether to impute income to the obligor parent.<sup>24</sup> A primary goal of imputing income, according to the Alaska Supreme Court, is to compel the parent to find full-time employment:

An important reason -- if not the chief reason -- for imputing income to a voluntarily underemployed parent is to goad the parent into full employment by attaching an unpleasant consequence (a mounting child support debt or, in certain cases of shared custody, a reduced child support payment) to

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17 Civil Rule 90.3 Commentary, Part III-C.  
18 Civil Rule 90.3 Commentary, Part III-E.  
19 *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).  
20 *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).  
21 *Kowalski*, 806 P.2d at 1371.  
22 15 AAC 125.020(b).  
23 *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).  
24 Civil Rule 90.3, Commentary III.C.

continued inaction. Indeed, in primary and shared custody situations alike, an order imputing income often yields no tangible benefits to the children unless and until it impels the underemployed parent to find a job.<sup>[25]</sup>

Here, preponderance of the evidence establishes that Mr. N. is voluntarily and unreasonably unemployed. He had a full time position which he voluntarily terminated before having secured other employment. His prior employer is actively seeking to fill the position he vacated. Therefore, it is more likely than not that Mr. N.'s present unemployment is the result of a personal choice and not economic factors. Therefore, his potential future income for purposes of child support should be based on his "work history, qualifications and job opportunities."<sup>26</sup>

In this case, the best estimate of future income is achieved by looking at Mr. N.'s 2009 income. When compared to his 2008 earnings, the 2009 figure seems fairly ambitious. However, the fact that his position exists and the employer is hiring to fill the position, supports a finding that it is more likely than not that had he stayed employed, he would be earning and still could possibly earn wages at his 2009 level. Mr. N.'s 2009 gross income is the starting point from which his request for hardship will be analyzed. CSSD did not overstate his income for purposes of calculating child support.

*B. Mr. N. Did Not Establish Manifest Injustice Would Result If The Support Award Were Not Varied So A Variance Is Not Appropriate.*

When calculated using Mr. N.'s 2009 gross income, his child support obligation is \$512 per month for one child. He may obtain a reduction from this amount, but only if he 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>27</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>[28]</sup>

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<sup>25</sup> *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).

<sup>26</sup> Civil Rule 90.3(a)(4).

<sup>27</sup> Civil Rule 90.3(c).

<sup>28</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>29</sup>

In 2010, Mr. N.'s monthly expenses total \$1,210.<sup>30</sup> His first quarter 2010 earnings plus unemployment benefits result in an annualized average gross income of \$1,365.16 per month.<sup>31</sup> When calculated using the division's online Guideline Calculator, Mr. N.'s monthly net income is \$1,303.73.<sup>32</sup> Mr. N.'s monthly net income exceeds his monthly expenses by \$93.72. Because there is no income figure provided for any dividends that may have been received in the first quarter 2010, dividend income was not included. If dividend income was received by Mr. N., then his income is understated. Mr. N.'s girlfriend and mother of his two subsequent children had monthly average gross earnings of \$333.33 per month.<sup>33</sup> When adjusted for deductions using the division's online Guideline Calculator, his girlfriend's monthly net income is \$306.16.<sup>34</sup> When combined, their net monthly income exceeds expenses by \$399.89.

Ms. H.'s monthly household expenses including consumer debt are \$5,273.32. The household monthly net income calculated using the division's online Guideline Calculator is \$5,233.87.<sup>35</sup> Ms. H.'s household monthly expenses exceed the household's monthly net income by \$39.45.

Mr. N. argues that the cost of living associated with rural Alaska and his subsequent children living in the home should be considered good cause to vary his child support obligation calculated in accordance with Civil Rule 90.3. However, Civil Rule 90.3 specifically states that in general, an obligor parent's child support obligation should not be reduced for that parent's younger children unless the obligor can establish that failure to vary the child support will cause a substantial hardship to the subsequent children.<sup>36</sup> This is because a parent has the choice not to start a second family if he or she cannot support the children from his or her first family. When, as here, the monthly income of Mr. N.'s household exceeds its expenses, he has not established

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<sup>29</sup> See Civil Rule 90.3, Commentary VI.E.1.

<sup>30</sup> If his prior rent were included, his monthly expenses would total \$2,010. Rent is not included because he is no longer incurring this expense.

<sup>31</sup>  $\$1,365.16 = (\$417.9 + [\$3,991 \times 4]/3)$ .

<sup>32</sup>  $\$1,303.72 = \$1,365.16 - \$2.66 \text{ [FICA]} - \$0.17 \text{ [Unemployment]} - \$58.60 \text{ [Federal Income Tax]}$ .

<sup>33</sup>  $(\$4,000/12) = \$333.33$ .

<sup>34</sup>  $\$306.16 = \$333.33 - \$25.5 \text{ [FICA]} - \$1.67 \text{ [Unemployment]}$ .

<sup>35</sup>  $\$5,233.87 = [\$84,217/12] - \$528.56 \text{ [FICA]} - \$13.63 \text{ [Unemployment]} - \$1,242.02 \text{ [Federal Income Tax]}$ .

<sup>36</sup> 15 AAC 125.075(a)(2)(F); See Civil Rule 90.3, Commentary VI.B.2.

by clear and convincing evidence that failure to vary the child support amount for T. is manifestly unjust and would result in a substantial hardship to the subsequent children.

Therefore, based on the evidence presented, this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. There are no "unusual circumstances" present to warrant varying Mr. N.'s monthly child support calculated under Civil Rule 90.3 for T..

The division, in certain circumstances, will find it is appropriate for an obligor to temporarily reduce their withholding for child support. A temporary reduction is different from a variance. A temporary reduction in withholding does not change the amount of child support ordered but permits an obligor to pay a reduced amount on a temporary basis without falling in arrears. Conversely, a variance changes the amount of child support ordered to be paid and is a permanent reduction in the amount of child support owed. If Mr. N. finds he cannot keep up on his child support he may want to contact his case worker and inquire whether he would qualify for a temporary reduction.

**IV. Conclusion**

This evidence presented does not establish the presence of an unusual circumstance that would result in a variance under Civil Rule 90.3. Therefore, the March 23, 2010 Modified Administrative Child Support and Medical Support Order should be affirmed and Mr. N.'s appeal should be denied.

**V. Child Support Order**

The March 23, 2010 Modified Administrative Child Support and Medical Support Order is affirmed.

DATED this 16<sup>th</sup> day of June, 2010.

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 6<sup>th</sup> day of July, 2010.

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

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