

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

IN THE MATTER OF:)

B D. A)

) OAH No. 11-0420-CSS

) CSSD No. 001094213

DECISION AND ORDER

I. Introduction

The custodian of record, A R. M, has appealed the Decision on Request for Modification Review issued by the Child Support Services Division (CSSD) on September 28, 2011. That decision denied her request for modification of Mr. A's child support obligation of \$326 per month for two children, which was set in March 2000. CSSD denied her request on the basis that there was not a material change in circumstances, as required for a modification.

Both Ms. M and Mr. A participated in the hearing by telephone. Child Support Specialist Andrew Rawls represented CSSD. The obligee children are W, age 17, and E, age 15.

Throughout the hearing process evidence was received that was not previously provided to CSSD. Now that the record is complete and has been carefully considered, it would be manifestly unjust to affirm CSSD's denial of modification and thus leave Mr. A's prior support obligation intact. Based on the finding that this case presents unusual circumstances under the provisions of Civil Rule 90.3(c), the Decision on Request for Modification Review is reversed and it is concluded that modification of Mr. A's child support is appropriate at this time. Based on the evidence as a whole, potential income in the amount of \$55,000 is assigned to Mr. A. This income figure results in a child support obligation for two children in the amount of \$1,013 per month and \$751 per month for one child, effective September 1, 2011.

II. Facts

At issue is a seemingly simple inquiry: What is Mr. A's income for purposes of determining his child support obligation for W and E? As the hearing progressed, it became clear that the answer to this question was not as straightforward as the obligor asserted.

Ms. M requested modification on August 10, 2011.¹ CSSD served a Notice of Petition for Modification on August 16, 2011.² The notice requested income information from the

¹ Exh. 2.

parties. In response, Mr. A provided pay stubs and his 2010 W-2 form. These documents indicate that Mr. A earned \$15,000 in 2010.³ CSSD used the income reported by Mr. A to calculate a monthly child support amount of \$446 for two children.⁴ CSSD did not consider this increase from \$326 per month to be a material change in circumstances so Ms. M's request for modification was denied.⁵ CSSD was mistaken in its conclusion because a child support amount of \$446 per month is a 37% increase from \$326 per month.⁶ It is not known why CSSD came to this conclusion, but clearly, CSSD should have modified Mr. A's child support obligation at that time.

Ms. M appealed the modification denial, noting that Mr. A's paystub was misleading and did not accurately reflect his earnings. She identified several of his assets that she believed would be impossible to own or maintain with only \$15,000 in earnings per year.⁷

Mr. A did not present a complete financial picture when he submitted his 2010 W-2. He subsequently provided his personal tax return, as well as a 2010 tax return for No Name (hereinafter, "NN"), a business he has had since 1997.⁸ Originally, Mr. A owned it as a sole proprietorship, but he and his wife incorporated the business in 1998.⁹ Mr. A is Secretary and Vice President and owns 40% of the business; his wife is President and owns 60%. They jointly decide on NN's salary levels.

Mr. A was the sole employee of NN in 1998, and his salary was \$1,200 per month (\$14,400 per year).¹⁰ In 2010, NN had gross receipts of \$283,037,¹¹ and three employees: Mr. A, who earns \$15,000 per year; a full time "body man," who earns somewhat over \$50,000 per year; and a part time painter, who receives about \$30,000 per year. The business has operated at

² Exh. 3.

³ This amount is less than he would have earned working full time at a minimum wage job. The minimum wage in Alaska, which is \$7.75, multiplied by 2,080, the number of hours a full-time employee usually works in 52 weeks, equals \$16,120 in annual earnings.

⁴ Exh. 5 at pg 3.

⁵ *Id.* A material change in circumstances is presumed if there is a 15% change in child support. Civil Rule 90.3(h)(1).

⁶ $\$326 \times 1.37 = \446.62 .

⁷ Exh. 6.

⁸ Exh. 9.

⁹ Exh. 1 at pg. 2 (some of NN's history is taken from Mr. A's 1999 child support hearing: *In the Matter of Bryan D. A*, Caseload No. 990409, Dept. of Revenue March 7, 2000).

¹⁰ Exh. 1 at pg. 2.

¹¹ Exh. 9 at pg. 21. Mr. A testified that at one time NN had sales of \$500,000.

a loss since 2008 and has not paid dividends. Mr. A does take cash draws but has no record of the amount or how often he takes money. When asked about in-kind contributions the business makes toward his personal expenses, e.g. providing gasoline, Mr. A testified that he pays for the gas for the truck and then uses it as a tax deduction. However Mr. A did not identify where he claimed any unreimbursed job expenses.

The corporation's 2010 tax return stated as an asset loans to shareholders in the total amount of \$76,689.¹² The corporation did not report any interest income.¹³ In a December 19, 2011 letter, Mr. A wrote, consistent with his testimony, that the balance owing on the loans to shareholders account had not changed since 2009, and that they always intended to repay those amounts. He and his wife recently sold a piece of recreational property and testified that they have paid the loan in full. The timing of the sale is questionable because it occurred during the hearing process, but because the loans to shareholders were made at least two years prior to the filing of the request for modification, the question whether those funds can be attributed to Mr. A as earnings is not relevant to this proceeding. Moreover, it has not been established that the As rely upon capital gains in real property as a regular source of income, so the sale of their recreational property is not relevant to this proceeding. Capital gains in real and personal property transactions are only included in an obligor's income to the extent that they represent a regular source of income.¹⁴

Mr. A testified that many of the assets that Ms. M identified to support her claim that his income was understated were either owned by the business (truck), received as payment by a customer (boat), or belonged to a friend (toy hauler travel trailer). When asked about his income, Mr. A emphasized that the only income he receives is what is reported on his W-2, \$15,000 per year. When the 2011 Permanent Fund Dividend (PFD) is included, his asserted annual income totals \$16,174. This results in a monthly gross income in the amount of \$1,348.¹⁵ Mr. A's monthly expenses totaled \$3,555.¹⁶ His expenses exceed his income by over \$2,200 per month. When asked about this discrepancy he explained that his wife is employed full-time and

¹² Exh. 9 at pg. 24.

¹³ Exh. 9 at pg. 37.

¹⁴ Civil Rule 90.3, Commentary, III.

¹⁵ $\$16,174 \div 12 = \$1,348$.

¹⁶ The total amount is based on Mr. A's testimony. For those expenses where he gave a range such as \$150 - \$200, the lesser amount was used.

essentially supports him by paying the majority of their expenses. The record indicates she works and earns \$63,576 per year.¹⁷

Once Mr. A provided testimony and financial records, CSSD submitted another child support calculation for consideration. In this subsequent calculation, CSSD contended that the loans to shareholders line item in NN's 2010 tax return should be treated as unearned income. Using that figure, plus his wages and PFD, CSSD proposed that Mr. A's adjusted annual income should be \$91,246.¹⁸ This figure yielded a child support calculation of \$1,521, which CSSD submitted for consideration.¹⁹

III. Discussion

Child support orders may be modified upon a showing of "good cause and material change in circumstances."²⁰ If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes "material change in circumstances" has been established and the order may be modified. Mr. A's child support has been \$326 per month, as set in March 2000. Thus, a child support calculation of \$375 or more would be sufficient to warrant modification in this case.²¹

A modification is effective beginning the first of the next month after CSSD issues a notice to the parties that a modification has been requested.²² In this case, the notice was issued on August 16, 2011, so a modification would be effective as of September 1, 2011.²³

Civil Rule 90.3(a)(1) provides that an obligor parent's child support amount is to be calculated based on his or her "total income from all sources." The primary purpose of the rule governing child support is to ensure the child support obligation is adequate to meet the needs of the child, subject to the ability of the obligor to pay.²⁴ This is accomplished by replicating the support that would be available for the child had the family remained intact.²⁵ This requires that

¹⁷ Exh. 9 at pg. 1. This amount is greater than their 2010 tax return reported, but it is the more recent number.

¹⁸ Exh. 13.

¹⁹ *Id.*

²⁰ AS 25.27.190(e).

²¹ \$326 x 1.15 = \$375.

²² 15 AAC 125.321(d).

²³ Exh. 3.

²⁴ Civil Rule 90.3, Commentary I.B.

²⁵ Civil Rule 90.3, Commentary III.

“income” to the obligor be broadly interpreted and that it should also include in-kind compensation if it is significant and reduces living expenses.²⁶

Here, Mr. A reported 2012 gross income of \$15,000 plus the PFD, for a total of \$16,174.²⁷ Using this figure, his monthly support obligation for two children would be \$446. However, this is not an accurate representation of his income from all sources. Mr. A and his wife set his salary amount at NN. This may have been reasonable a decade ago, especially since Mr. A was the sole employee at first. However, the business now has two other employees who earned a total of \$87,692 in 2010.²⁸ Of course, the As retain the right to pay Mr. A whatever they choose, but the figure they have essentially kept for over ten years is no longer reliable in relation to Mr. A’s child support obligation.

The obligor has the burden of proving his or her earning capacity.²⁹ Mr. A has not met this burden. He testified that for all intents and purposes, his wife’s income supports him so that they can choose to continue to pay him \$15,000 annually.³⁰ But this salary does not accurately represent his involvement at NN. Mr. A’s W-2 is not credible, nor is it a reliable indicator of his earning capacity. If he is present at the shop and working on the jobs they have taken in, plus doing the onsite business management, at \$15,000, Mr. A is severely underpaid. On the other hand, if Mr. A is not at the shop all that much, he could be considered voluntarily and unreasonably underemployed.

Clearly, Mrs. A’s income allows Mr. A the latitude not to accurately report his earnings, or not to be fully employed. The commentary to Civil Rule 90.3 states that “a parent who does not work because of the income of a new spouse (or other person in the household) may be assigned a potential income.”³¹ A case such as this is considered an unusual circumstance under Civil Rule 90.3(c)(1). There is good cause to assign potential income to Mr. A. It would be manifestly unjust not to assign a potential income to him, thus varying the award CSSD previously calculated under Civil Rule 90.3(a).

²⁶ Civil Rule 90.3, Commentary, III.A.19.

²⁷ \$15,000 wages + \$1,174 Permanent Fund Dividend.

²⁸ Exh. 9 at pg. 21.

²⁹ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

³⁰ Mr. A acknowledged he takes draws from the business coffers and uses NN equipment for his own personal use, but the total value of those is unknown.

³¹ Civil Rule 90.3, Commentary VI.B.5.

Ms. M estimated that, with his work history and experience, Mr. A would be paid between \$50,000 and \$61,000.³² The best evidence of his potential income is the salary he pays his full-time employee. Mr. A testified that he pays his full-time “body man” \$50,000 annually, which is consistent with NN’s tax return.³³ Mr. A has experience in his field not only as a skilled employee but also as an owner and manager. Therefore, it is appropriate to assign income to him in the amount of \$55,000. The additional \$5,000 recognizes that Mr. A’s management experience is a valuable skill set beyond the normal auto body rebuilder. When this income figure (with the PFD added) is inserted into CSSD’s child support calculator, it results in a child support calculation of \$1,013 per month for two children and \$751 for one child per month.³⁴

IV. Conclusion

The person who files the appeal, in this case, Ms. M, has the burden of proving that CSSD has calculated Mr. A’s child support incorrectly.³⁵ She has met this burden. She has established by clear and convincing evidence that unless varied, the amount of child support is calculated under Civil Rule 90.3(a) would be manifestly unjust.

Mr. A’s child support should be set at \$1,013 per month for two children and \$751 for one child per month, pursuant to the unusual circumstances provisions of Civil Rule 90.3(c). The modification should be effective as of September 1, 2011.

V. Child Support Order

- Mr. A is liable for child support for W and E in the amount of \$1,013 per month for two children and \$751 for one child per month, effective September 1, 2011, and ongoing;
- All other provisions of the prior child support order entered in Mr. A’s case, the Child Support Decision adopted on March 7, 2000, remain in full force and effect.

³² Exh. 10 at 9. Ms. M noted an average income for an auto body repairer with Mr. A’s experience to be \$61,000. The scale went as high as the low \$90,000’s. These amounts went unchallenged.

³³ Exh. 9 at pg. 21.

³⁴ Attachment A.

³⁵ 15 AAC 05.030(h).

DATED this 5th day of April, 2012.

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 7th day of May, 2012.

By: Signed
Signature
Angela M. Rodell
Name
Deputy Commissioner
Title

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