

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

IN THE MATTER OF:)

J S)

OAH No. 12-0061-CSS

CSSD No. 001110290

DECISION AND ORDER

I. Introduction and Procedural Background

The obligor, J S, challenges the Child Support Services Division's (CSSD) decision to deny his request for a modification review of the April 6, 2006 Modified Administrative Child Support and Medical Support Order ordering him to pay child support in the amount of \$797 per month for two children. The custodian of record is J C f/k/a P. The obligee children are A and B.

Mr. S requested a formal hearing to challenge CSSD's decision. He participated in person. Ms. C participated by telephone. CSSD was represented by child support specialist Andrew Rawls. At the hearing the parties agreed to address Mr. S's request for a modification review rather than the issue of denial. Additional evidence was received into the record. The evidence not previously available to CSSD supports modification. Accordingly, Mr. S's request for modification is granted. His monthly child support obligation for two children is modified to \$280 effective January 1, 2012.

II. Facts

A. Procedural Background

In April 2006, Mr. S was ordered to pay ongoing child support in the amount of \$797 per month for two children.¹ CSSD received a request for modification from Mr. S on December 7, 2011.² On December 14, 2011, CSSD issued a Notice of Petition for Modification of Administrative Support Order requesting Mr. S provide information regarding his income.³ When no information was received, Mr. S was contacted by CSSD. He informed CSSD he would not be providing information because he wished to pursue the matter in civil court.

¹ Exhibit 1.

² Exhibit 2.

³ Exhibit 3.

Because Mr. S did not provide income information, CSSD had nothing to review. Accordingly, Mr. S's request was denied by CSSD on February 15, 2012.⁴ Mr. S appealed. With his appeal Mr. S submitted the previously requested income information.⁵ He also supported his request for modification by submitting a written statement that he has four children in his home, he does not work, and he has been on public assistance for a number of years.

B. *Relevant Facts*

Mr. S is now in his late 30s. In his early 20s he was convicted of a felony. While in prison he was trained in welding and held a certificate demonstrating his skills.

The April 2006 order was based on income earned while working as a sign fabricator, when he earned in excess of \$45,000. He voluntarily left that position to take care of his children.⁶

He eventually found work as a welder, and in 2009 was working for the No Name earning \$22 per hour as a welder. His wife was having a baby, and wanting to be with her, he left that position. When he contacted the employer to return he was told he had been replaced.

Mr. S no longer works as a welder or a sign fabricator. He testified that he has made efforts to find steady employment but has been unable to do so. Work as a sign fabricator is unavailable. The unchallenged testimony established that there are only two sign fabricators in the area and that Mr. S has been seeking work with them but they are not hiring. His work history shows a pattern of working a few weeks to a few months before either quitting due to transportation difficulties, being moved to an "on call" status but never called to work, or the job was a temporary position.⁷

He relies upon public assistance, his earnings, and his wife's minimal income to meet living expenses.⁸ His earnings reported to the Alaska Department of Labor from 2008 forward are as follows:

2008	\$3,431.63
2009	\$6,382.51
2010	\$900

⁴ Exhibit 4.

⁵ Exhibit 5.

⁶ S Testimony.

⁷ S Testimony.

⁸ In 2010 he and his wife had reported adjustable gross income totaling \$17,571. Exhibit 5 at 3.

2011 \$328.50.

In January 2012, Mr. S obtained a month long job as a laborer earning \$12 per hour. He has recently obtained a job delivering food. He works 15 hours a week and is paid \$8.00 per hour plus tips. This appears to be a permanent position.

Mr. S has four children who are younger than the obligee children. Not all reside with him.

III. Discussion

Mr. S, as the individual appealing the February 15, 2012 denial, has the burden of proving that it is error.⁹ He does this by providing additional evidence or identifying evidence already in the record that supports his belief that his child support obligation should be modified.

Modification of child support orders may be made upon a showing of “good cause and material change in circumstances.”¹⁰ If the newly calculated child support amount is more than 15% different than the previous order, Civil Rule 90.3 assumes a material change in circumstances has occurred and the support amount may be modified.¹¹ A parent is obligated both by statute and at common law to support his or her children.¹²

To determine whether there has been a material change in circumstance it is necessary to first identify Mr. S’s anticipated annual gross income for 2012. Determining an obligor’s annual income for purposes of child support is “necessarily... speculative because the relevant income figure is expected future income.”¹³ Child support determinations calculated under Civil Rule 90.3 from an obligor’s actual income figures are presumed to be correct.

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.¹⁴ It is also important to bear in mind that child support is calculated based on

⁹ “At the hearing, the person requesting the hearing has the burden of proving that the action by the department to which that person objects is incorrect.” 15 AAC 05.030(h).

¹⁰ AS 25.27.190(e).

¹¹ Civil Rule 90.3(h).

¹² *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.

¹³ See Civil Rule 90.3, Commentary III-E.

¹⁴ Civil Rule 90.3 Commentary, Part III-C.

“the income which will be earned when the support is to be paid”—that is, actual or potential *future* income.¹⁵

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.”¹⁶ 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.”¹⁷ 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.¹⁸

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.”¹⁹ The use of “potential income” in a child support obligation is not to punish the obligor parent; rather, it is to ensure that the child(ren) and the other parent are not “forced to finance” the obligor parent’s lifestyle.²⁰ The commentary states the court should consider “the totality of the circumstances” when deciding whether to impute income to the obligor parent.²¹ 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 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.^[22]

Mr. S emphasized that he is looking for more work but none was available. His testimony was not credible. His demeanor as demonstrated through his evasive answers on cross

15 Civil Rule 90.3 Commentary, Part III-E.
16 *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).
17 *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).
18 *Kowalski*, 806 P.2d at 1371.
19 15 AAC 125.020(b).
20 *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).
21 Civil Rule 90.3, Commentary III-C.
22 *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).

examination, and his attempt to rationalize all of his actions regardless of the impact on the obligee children, detracted from the believability that his inability to find and retain employment was not his fault. Rather, it is more likely true that Mr. S is not interested in taking the steps necessary to obtain and retain steady employment. Mr. S's "past income, skills, work history, and education and the job opportunities in the area where [he] physically resides"²³ support the conclusion that Mr. S's failure to find regular employment is a personal choice, not the result of economic factors. Therefore, it is appropriate to calculate his child support obligation based on a determination of his potential income.

Potential income is determined based upon Mr. S's work history, qualifications, and job opportunities.²⁴ The economy presents challenges for a convicted felon; however, if Mr. S chose to do so he could find a position where he earned more income either through more hours or higher wages. Mr. S is young. His work history as a welder and a sign fabricator demonstrate his ability to learn and adapt to challenging work environments.

While there are job opportunities available to Mr. S, it is unlikely that he will easily find full-time work (40 hours per week). Rather it is reasonable to expect that with his dependence on public transportation he could work 30 hours per week.

Mr. S has demonstrated that he has the ability to earn over \$20 per hour. However, his unchallenged testimony established that he no longer holds a welder certification and that employment as a sign fabricator is not readily available. He was able to find temporary work for \$12 per hour. The temporary nature of the position likely supported that high hourly rate. He presently makes \$8 per hour plus tips. Therefore, it is reasonable to expect that with minimal effort Mr. S could find a job paying \$8 at 30 hours per week.

Mr. S's child support obligation will be calculated using imputed annual income in the amount of \$13,654. When reduced for allowable annual deductions, this results in an adjusted annual income in the amount of \$12,446.08.²⁵ Applying the formula at Ak. R. Civ. P. 90.3(a)(2), Mr. S's monthly child support obligation for two children is \$280 per month.

²³ 15 AAC 125.020(b).

²⁴ Ak. R. Civ. P. 90.3(a)(4).

²⁵ $\$8 \times 30 = \$12,480$; $\$12,480 + \$1,174 \text{ PFD} = \$13,654$ per year. $\$13,654 - \$430.44 \text{ Federal Income Tax} - \$705.12 \text{ FICA} - \$72.36 \text{ Unemployment Insurance} = \$12,446.08$.

Having determined Mr. S's child support, calculated under Civil Rule 90.3(a), his request for a variance from paying that amount can be addressed. Mr. S requested his support be reduced because he supports four younger children and receives public assistance.

Child support may be varied if Mr. S can establish by clear and convincing evidence that the \$280 per month child support obligation would be manifestly unjust. 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."²⁶ 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:

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 children²⁷

The obligor has the burden of proving his or her earning capacity and establishing that he or she cannot meet their child support obligation.²⁸ Mr. S did not meet his burden. The evidence submitted is insufficient to support a finding that by clear and convincing evidence manifest injustice would result if the support award were not varied.

His public assistance was not included as income and therefore is of little relevance.

As explained at hearing, the existence of subsequent children will not generally constitute good cause.²⁹ Subsequent children may constitute an unusual circumstance if the failure to vary support would cause a substantial hardship to the subsequent children.³⁰ Mr. S has not worked on a regular basis in the past four years and the family has managed. When Mr. S obtains employment the family's income will almost double. Therefore, the subsequent children are likely to benefit, not suffer hardship, from Mr. S's employment and the corresponding increased household income.

²⁶ Civil Rule 90.3(c).

²⁷ Civil Rule 90.3(c)(1)(A).

²⁸ *Kowalski v. Kowalski*, 806 P.2d 1368, 1371 – 1372 (Alaska 1991).

²⁹ Comentary Civil Rule 90.3 IV(B)(2).

³⁰ *Id.*

IV. Conclusion

Mr. S has established by a preponderance of the evidence that there has been a material change in circumstances. He has not, however, established by clear and convincing evidence that the amount of support owing is manifestly unjust. Therefore, his request for a hardship variance is denied. Mr. S’s monthly child support obligation for two children, when calculated pursuant to Ak. R. Civ. P. 90.3(a)(2) and (4), should be \$280 effective January 1, 2012.

V. Child Support Order

1. J S’s child support for two children is \$280 per month effective January 1, 2012.
2. All other provisions of CSSD’s Modified Administrative Child Support and Medical Support Order issued April 6, 2006 remain in full force and effect.

DATED this 9th day of April, 2012.

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 27th day of April, 2012.

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

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