

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

IN THE MATTER OF:)

K C. D)

) OAH No. 12-0791-CSS

) CSSD No. 001161224

DECISION AND ORDER

I. Introduction

The obligor, K C. D, appeals a Decision on Request for Modification Review that the Child Support Services Division (CSSD) issued in his case on September 25, 2012. The obligee child is B, 3 years old. The other party is D E. K.

The formal hearing was held on November 14, 2012. Mr. D appeared by telephone; Ms. K could not be reached and thus did not participate. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based upon the record and after careful consideration, CSSD's Decision on Request for Modification Review is affirmed. Mr. D is voluntarily and unreasonably underemployed for child support purposes, so his support obligation should not be modified. His child support remains at \$474 per month, as set by CSSD in 2010.

II. Facts

A. Procedural History

Mr. D's child support for B was set at \$474 per month in May 2010.¹ On July 17, 2012, Mr. D initiated a modification review of the order.² On July 31, 2012, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.³ Mr. D provided income information.⁴ On September 25, 2012, CSSD issued a Decision on Request for Modification Review denying the petition for the reason that Mr. D had not shown that he had a "substantial

1 Exh. 1.
2 Exh. 2.
3 Exh. 3.
4 Exh. 4.

change of circumstances” sufficient to modify his child support obligation.⁵ Mr. D filed an appeal on September 7, 2012.⁶

*B. Material Facts*⁷

Mr. D and Ms. K are the parents of B, born in March 2009. B lives with Ms. K, so this is a primary custody case.

Mr. D, who is 25 years old, lives in No Name, where he grew up. His partner’s name is L. They have three children in the home, L’s 6-year-old child from a prior relationship, plus their 2-year-old and a newborn baby. L recently started working full-time at a clinic, where she receives \$14-\$15 per hour.

Mr. D works for the Native Village of No Name as the lead carpenter for the crew that builds homes in the village. They work during the summer months and typically build 4-5 houses per season. Mr. D’s wage is \$30.30 per hour.⁸ He was laid off for the season on October 24, 2012.⁹

When he is not working during the off season, Mr. D collects unemployment and spends his time concentrating on dog mushing. He began racing competitively a few years ago, and has had limited success. From 2009-2012, he won \$8,925.¹⁰ Further, Mr. D is signed up for the 2013 No Name, where he will be a rookie.¹¹ He ran the 2012 No Name, but had to scratch in No Name because his dogs got kennel cough.

Mr. D’s dog mushing is essentially a family affair. His mother testified that his father helps out financially, such as with providing food for the obligor’s 40 dogs. Mr. D testified that it takes about \$20,000 per year to take care of the dogs in his kennel, and that in addition to hunting and fishing, he puts money away from each check to support them. Mr. D has also given Ms. K subsistence fish and moose, but that recently the harvest of both resources has not been significant enough to provide her with much help with food.

⁵ Exh. 5.

⁶ Exh. 6.

⁷ The facts are taken from Mr. D’s hearing testimony, unless otherwise stated.

⁸ Exh. 11 at pg. 2. This is the obligor’s post-hearing exhibit, filed on November 15, 2012, and marked by the administrative law judge as Exhibit 11.

⁹ Exh. 10 at pg. 3.

¹⁰ http://_____, accessed December 13, 2012.

¹¹ http://_____, accessed December 13, 2012.

Before going to work for the village, Mr. D worked for three quarters of 2011 as a heavy duty truck driver for No Name, Inc., when the company was in No Name building a new tank farm there. He worked for No Name for part of the year and earned \$16,738.94.¹²

Prior to working for No Name, Mr. D worked for at least two years for No Name Services as a fuel truck driver, but he left the company at the end of 2010.¹³ When asked why he no longer worked there, Mr. D testified:

Well, the reason was, I was running the No Name that year in 2010, which is a thousand mile dog race from No Name to No Name. And I . . . my employer No Name if I could have a month off for this race, right? And they denied my request and I just said well, you know, I trained hard and I did put a lot of time and effort into this dog team and I end up telling No Name, you know, well I made my choice and I'm gonna go with the dogs. And that year I end up coming in 7th in the No Name, rookie of the year. And I don't regret quitting, but you know, it's a lot less money, but . . . I like what I do now as a carpenter, you know I love being a carpenter. I love building things. I just wish that there was more opportunity here to do things like that instead of just a few months out of the year.¹⁴

Mr. D quit his job with No Name on December 15, 2010.¹⁵ He placed well enough in the No Name to receive some earnings in 2010, but as a result of quitting his job with No Name to compete in the race, he has not had consistent full-time employment since then.

CSSD obtained Mr. D's earnings history from 2009 forward from the Alaska Department of Labor and Workforce Development.¹⁶ It indicates that in 2009, he earned \$34,958.95 from No Name and \$32,304.38 in 2010.¹⁷ In 2011, he earned a total of \$22,250.83 from No Name and the Native Village of No Name.

For 2012, Mr. D was on track to earn about the same amount as he did in 2011. He had year-to-date earnings from the Native village of \$16,524.65 through November 2, 2012,¹⁸ plus unemployment benefits for the beginning of the year of \$234.50 per week,¹⁹ which totals \$1,500.²⁰ He was expected to receive additional unemployment benefits of \$234.50 per week for

¹² Exh. 10 at pg. 1.

¹³ Exh. 10 at pg. 3.

¹⁴ K C. D hearing testimony at 26:30 into the recording.

¹⁵ Exh. 7 at pg. 3.

¹⁶ Exh. 10.

¹⁷ Exh. 10 at pg. 1.

¹⁸ Exh. 11 at pg. 4.

¹⁹ Exh. 10 at pg. 2.

²⁰ Exh. 10 at pgs. 1-2.

the remaining nine weeks of the year, which equals \$2,110.50,²¹ and results in total unemployment benefits of \$3,610.50 for 2012.²² Combining his earnings and unemployment benefits yields total annual income of \$20,135.15 for 2012.²³

III. Discussion

A. *Controlling Law*

Child support orders may be modified upon a showing of “good cause and material change in circumstances.”²⁴ 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. In May 2010, CSSD set Mr. D’s child support at \$474 per month, effective July 2009.²⁵ That support amount was based on his actual earnings at No Name.²⁶

As the person who filed the appeal, Mr. D has the burden of proving by a preponderance of the evidence that CSSD denied his petition for modification in error.²⁷

B. *Child Support Calculation*

Civil Rule 90.3(a)(1) provides that an obligor's child support amount is to be calculated based on his or her "total income from all sources." The obligor parent has the burden of proving his or her earning capacity.²⁸

Mr. D’s testimony that he quit his job at No Name in order to run the 2010 No Name raises the issue of voluntary underemployment. If a parent is found to be voluntarily and unreasonably unemployed or underemployed, his or her child support amount may be calculated from that parent’s “potential income,” which is based on his or her “work history, qualifications and job opportunities.”²⁹ Since Mr. D currently earns at least some income during the year, the question is whether he is voluntarily and unreasonably underemployed.

²¹ \$234.50 x 9 = \$2,110.50.

²² \$1,500 + \$2,110.50 = \$3,610.50.

²³ \$16,524.65 + \$3,610.50 = \$20,135.15.

²⁴ AS 25.27.190(e).

²⁵ Exh. 1 at pgs. 8-9.

²⁶ See Exh. 7 at pg. 1.

²⁷ 15 AAC 05.030(h); see also 2 AAC 64.290(e).

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

²⁹ Civil Rule 90.3(a)(4).

In cases in which voluntary underemployment is raised, the court or administrative law judge must determine whether the parent has engaged in voluntary conduct “for the purpose of becoming or remaining unemployed [or underemployed].”³⁰ In addition to the question whether the parent’s lack of work is voluntary, it is also necessary to determine whether the parent’s underemployment 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.”³¹ 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 parent.³² The commentary to Civil Rule 90.3 directs that tribunals adjudicating child support “shall consider the totality of the circumstances in deciding whether to impute income to a party based on voluntary unemployment.”³³

The record was reopened after the hearing to give the parties an opportunity to address this issue. Both CSSD and Mr. D filed statements on December 21, 2012.

CSSD asserts that Mr. D is voluntarily underemployed because he “left stable employment to engage in a sporting event that was unlikely to produce the amount of income he earned at No Name.”³⁴ CSSD pointed out that the obligor’s paternity of B was established in October 2009 and that the initial child support order was issued in March 2010, thus leaving Mr. D “no doubt” that he had a child to support with Ms. K.³⁵

Mr. D’s letter addressing the issue of voluntary underemployment claims that “I may have been misunderstood or misstated in our teleconference hearing in November. I did not quit my job with No Name; I was terminated for taking time off to get in a dog race (No Name X race).”³⁶ The obligor claims that he is always able to find seasonal work, even in light of the limited job opportunities in No Name. Finally, Mr. D asserts he is not trying to get out of paying child support; he is only requesting that his monthly support be reduced due to his lack of income.³⁷

³⁰ *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

³¹ *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

³² *Kowalski*, 806 P.2d at 1371.

³³ Civil Rule 90.3, Commentary III.C.

³⁴ CSSD’s Position Statement at pg. 1.

³⁵ *Id.*

³⁶ Mr. D’s letter, received on December 21, 2012 by email; the original was received by postal mail on January 2, 2013.

³⁷ *Id.*

After careful consideration, this decision finds that Mr. D is voluntarily and unreasonably underemployed as a result of quitting his job at No Name to compete in the 2010 No Name sled dog race. The statement in his letter that he did not quit his job, but rather, was terminated for taking time off to get in the 2010 No Name, is in direct contradiction to his hearing testimony. During the hearing, Mr. D clearly testified that his employer denied his request for time off and that as a result, he chose to “go with the dogs.” Mr. D also stated during the hearing that he “does not regret quitting” his job. This acknowledgment that he quit is consistent with the report received by CSSD from the Alaska Department of Labor and Workforce Development that Mr. D was not fired, but quit his job at No Name.³⁸

Alaska law is clear that a parent’s duty to support his or her children takes priority over other debts, obligations and lifestyle decisions, including having younger-born children in the home.³⁹ Mr. D voluntarily left his employment in order to pursue an activity that had little hope of providing him with the income he received from that job. His subsequent employment has also not provided him with a similar level of income. Because his decision was voluntary, Mr. D’s resulting loss of income should not be transferred to B as a loss of support. An obligor parent is free to change jobs and careers, but the custodial parent and child should not have to finance that change.⁴⁰ Mr. D’s child support should remain as first calculated by CSSD from his income at No Name.

IV. Conclusion

Mr. D did not meet his burden of proving that CSSD’s denial of his petition for modification was erroneous. Mr. D is voluntarily and unreasonably underemployed. As a result, his child support obligation should remain at \$474 per month, the amount originally calculated from his employment at the job he left voluntarily. CSSD’s Decision on Request for Modification Review should be affirmed.

V. Child Support Order

- CSSD’s Decision on Request for Modification Review dated September 25, 2012, that denied Mr. D’s petition for modification, is affirmed;

³⁸ Exh. 7 at pg. 3.

³⁹ See *Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

⁴⁰ *Olmstead v. Ziegler*, 42 P.3d 1102, 1105 (Alaska 2002).

- Mr. D remains liable for child support in the amount of \$474 per month.

DATED this 17th day of January, 2013.

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 1st day of March, 2013.

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

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