

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

In the Matter of:)	
)	OAH No. 13-0112-CSS
U D. C, JR.)	CSSD No. 001120852
_____)	

DECISION AND ORDER

I. Introduction

The obligor, U D. C, Jr., appealed a decision denying his request to modify his child support that the Child Support Services Division (CSSD) issued on December 31, 2012.¹ The obligee child is D, age 12.²

The hearing was held on February 20, 2012. Both Mr. C and S B, the custodial parent, participated telephonically. Andrew Rawls, Child Support Specialist, who represented CSSD, participated telephonically.

Based upon the record and after careful consideration, CSSD's Decision on Mr. C's Request for Modification Review is affirmed. Mr. C is voluntarily and unreasonably underemployed for child support purposes, so his support obligation should not be modified. His child support remains at \$372 per month, as set by CSSD in 2004.

II. Facts

A. Procedural Background

Mr. C's child support obligation for D was set at \$372 per month on March 31, 2004.³ On October 23, 2012, Mr. C requested a modification review.⁴ On October 29, 2012, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order that requested their income information for the last two years.⁵ Mr. C did not respond to the notice. On December 31, 2012, CSSD issued a Decision on Request for Modification Review that denied Mr. C's petition for modification.⁶

¹ Ex. 4.
² Ex. 1.
³ Ex. 1.
⁴ Ex. 2.
⁵ Ex. 3.
⁶ Ex. 4.

On January 4, 2013, Mr. C provided CSSD with copies of some bank statements and income tax returns for tax years 2005 – 2011.⁷ He then appealed the denial of his modification request on January 23, 2013.⁸ The record was left open after the hearing to allow Mr. C to submit additional financial information⁹ and for CSSD’s response to that information.¹⁰

B. Material Facts

Mr. C lives in No Name, Alaska, where he has spent most of his life. He is married and has two young children in the home, both of whom are younger than D. He has a GED, a heating operator license, and a current Alaska Commercial Driver’s License (CDL). He was employed in 2005 as a heavy equipment operator, driving a dump truck.¹¹ Mr. C testified that his employer laid him off from that job at the end of October 2005 because of a concern that after Mr. C’s child support payments were deducted from his paycheck, that he did not receive enough take home pay to make his working worthwhile. He has had two other jobs since late 2005. One was based out of Florida for a trucking company. That job lasted approximately three months, and did not work out for several reasons. He worked for another trucking company in 2006 and was based out of No Name. The second employer told Mr. C that the employer was paying his child support. That job ended because the employer was not, in fact, paying his child support and also was not paying him wages. Since that time period, Mr. C has been only self-employed. He has provided handyman services, done construction work and heating system repairs, including a boiler installation, and cut firewood.¹² Mr. C’s 2006 – 2011 tax returns show that his net self-employment income is as follows:

2006	\$ 3,640 ¹³
2007	\$ 3,648 ¹⁴
2008	\$12,916 ¹⁵
2009	\$16,808 ¹⁶
2010	\$ 8,585 ¹⁷

⁷ Ex. 5.
⁸ Ex. 6.
⁹ Exs. 9 – 15.
¹⁰ Ex. 16.
¹¹ C testimony.
¹² C testimony.
¹³ Ex. 5, p. 14.
¹⁴ Ex. 5, p. 19.
¹⁵ Ex. 5, p. 26.
¹⁶ Ex. 5, p. 33.

2011 \$6,647¹⁸

Mr. C receives between \$20 to \$25 per hour for his services. In the week preceding his February 20, 2013 hearing, he had only eight hours of paid work. He has looked for work off and on, but he only wants work that will both pay his child support and provide enough to support his family. He testified that there are few higher paying jobs in the No Name area.¹⁹

III. Discussion

A. Controlling Law

Child support orders may be modified upon a showing of “good cause and material change in circumstances.”²⁰ In March 2004, CSSD set Mr. C’s child support at \$372 per month, effective May 2, 2004.²¹ That support amount was based upon CSSD’s findings that Mr. C was voluntarily unemployed or underemployed, with imputed yearly earnings of \$25,867 and the receipt of a PFD.²²

As the person who filed the appeal, Mr. C has the burden of proving by a preponderance of the evidence that CSSD denied his petition for modification in error.²³

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.²⁴

Since Mr. C currently earns at least some income during the year, the question is whether he is voluntarily and unreasonably underemployed. 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].”²⁵ 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

¹⁷ Ex. 5, p. 49.

¹⁸ Ex. 5, p. 53.

¹⁹ C testimony.

²⁰ AS 25.27.190(e).

²¹ Ex. 1, pp. 1 – 6.

²² Ex. 1, pp. 4, 12.

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

²⁴ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

²⁵ *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

result of "economic factors," as in being laid off, or of "purely personal choices."²⁶ 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.²⁷ 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."²⁸

CSSD asserts that Mr. C is voluntarily and unreasonably underemployed because he "is actively avoiding full time work to avoid paying child support."

Mr. C testified that he was laid off from his 2005 job by his employer after his employer expressed concerns that Mr. C's child support payments did not leave enough take home pay to make his working worthwhile. That scenario does not seem entirely credible. The amount of an employee's take home pay is more properly the employee's concern, not the employer's. Mr. C had two relatively brief jobs thereafter, but his tax returns from 2006 onward show only self-employment income. He candidly testified that he has looked for work off and on, but was looking for a job that would generate enough income to both pay his child support and give him enough take home pay to support his family.

Based on the record as a whole and after careful consideration, Mr. C is voluntarily and unreasonably underemployed. 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.²⁹ Given the fact he has worked as a trucker, in construction, as a heavy equipment operator, has heating repair training and experience, and has a CDL, Mr. C is capable of finding employment in the No Name area. In fact, he has actually worked as both a heavy equipment operator and as a truck driver while living in No Name. Mr. C is voluntarily underemployed because he will not consider taking a job unless he feels it will generate enough income to both pay his child support and support his family. He has thus avoided finding work that would pay child support directly from his paycheck. By becoming self-employed, he made a choice instead to support only his family. This is an unreasonable choice given the fact that Mr. C has an obligation to D. Mr. C's voluntary underemployment should not be transferred to D as a loss of support. An obligor parent is free to change jobs, but the custodial parent and

²⁶ *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

²⁷ *Kowalski*, 806 P.2d at 1371.

²⁸ Civil Rule 90.3, Commentary III.C.

²⁹ *See Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

child should not have to finance that change.³⁰ Mr. C's child support should remain as first calculated by CSSD in 2004.

IV. Conclusion

Mr. C did not meet his burden of proving that CSSD's denial of his petition for modification was erroneous. Mr. C is voluntarily and unreasonably underemployed. As a result, his child support obligation should remain at \$372 per month as determined by CSSD in 2004. CSSD's Decision on Request for Modification Review should be affirmed.

V. Child Support Order

- CSSD's Decision on Request for Modification Review dated December 31, 2012, that denied Mr. C's petition for modification, is affirmed;
- Mr. C remains liable for child support in the amount of \$372 per month.

DATED this 1st day of May, 2013.

Signed _____
Lawrence A. Pederson
Administrative Law Judge

³⁰ *Olmstead v. Ziegler*, 42 P.3d 1102, 1105 (Alaska 2002).

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 12th day of June, 2013.

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

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