

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

In the Matter of:)
)
 K P. L) OAH No. 13-0385-CSS
) CSSD No. 001150159

DECISION AND ORDER

I. Introduction

The obligor, K P. L, appeals a Modified Administrative Child Support and Medical Support Order, issued by the Child Support Services Division (CSSD) on January 14, 2013, which substantially increased his child support obligation.¹ Mr. L asserts that his monthly child support payment should not be increased because the income figure on which the Division based its modified support award is higher than his actual income.² Based on income averaging under Civil Rule 90.3, Mr. L's monthly child support payment should be increased, but not to the extent determined by CSSD. Mr. L's ongoing child support obligation is set at \$775 per month beginning December 1, 2012.

II. Facts

A. Relevant Procedural History

On March 13, 2008, CSSD issued an Administrative Child Support and Medical Support Order that set Mr. L's monthly child support obligation for two children at \$469.00 based on J L's primary physical custody of the children.³ On November 23, 2012 Ms. L submitted a child support modification request to CSSD.⁴ On January 14, 2013 CSSD issued a Modified Administrative Child Support and Medical Support Order that increased Mr. L's ongoing child support obligation from \$469.00 per month to \$929.00 per month, effective December 1, 2012.⁵ Mr. L appealed CSSD's decision sometime between February 14, 2013 and March 15, 2013.⁶

The formal hearing was held on April 11, 2013. Mr. L and Ms. L participated in the hearing by phone, represented themselves, and testified. Child Support Specialist Erinn Brian participated by phone and represented CSSD. At the end of the hearing, the record was left open through April

¹ Ex. 4 pp. 1 - 6.

² Ex. 6, p. 1; K L hearing testimony.

³ Ex. 1.

⁴ Ex. 2, p. 1.

⁵ Ex. 4, pp. 1 - 9.

⁶ Ex. 6, p. 1; hearing referral form. Although the exact date CSSD received Mr. L's hearing request is not evident from the record, no assertion has been made that Mr. L's appeal was untimely.

25, 2013 for the submission of post-hearing filings concerning Mr. L's actual current income and for revised calculations based thereon.

B. Material Facts

Mr. L and Ms. L have two children: Q (DOB 00/00/99) and E (DOB 00/00/01).⁷ Both children currently live primarily with their mother, but E stays with Mr. L on weekends, and Mr. L often has both children on holidays and for three months during the summer.⁸ However, Mr. L has not yet requested visitation credit,⁹ and so he has paid child support even when the children were staying with him for extended periods.¹⁰ In addition to monetary support, Mr. L also provides health insurance and school clothes for the two children, as well as gifts on their birthdays and holidays.¹¹

Mr. L is a carpenter. He testified at hearing that his income has averaged \$35,000 - \$38,000 per year over the last six to eight years. Records obtained by CSSD from the Department of Labor and Workforce Development (DOL) indicate that Mr. L received gross wages of \$32,774.16 in 2009; \$8,319.86 in 2010; \$29,716.57 in 2011; and \$25,688.50 in 2012.¹² Mr. L received gross wages of \$16,986 for the first quarter of 2013; if annualized, this would result in gross wages of \$67,944 for 2013.¹³ In addition to wages, Mr. L received unemployment insurance benefits (UIB) from 2009 through 2010.¹⁴ Mr. L received \$4,545.00 in UIB in 2009 and \$11,704.00 in 2010.

In 2012 Mr. L suffered a work-related injury and began receiving Worker's Compensation benefits (WCB).¹⁵ During 2012 he received a total of three different forms of WCB totaling \$26,075.00.¹⁶

Mr. L began his current job in August 2012.¹⁷ The amount of hours he works fluctuates; sometimes he works more than 40 hours per week, sometimes he works less. He anticipates that he

⁷ CSSD pre-hearing brief; undisputed hearing testimony.

⁸ Undisputed hearing testimony.

⁹ Pursuant to Alaska Rule of Civil Procedure ("Civil Rule") 90.3(a)(3), the court may allow the obligor parent to reduce child support payments by up to 75% for any period in which the obligor parent has extended visitation of over 27 consecutive days.

¹⁰ K L hearing testimony.

¹¹ K L hearing testimony.

¹² Ex. 7, p. 1.

¹³ Ex. 8, p. 2. Mr. L testified, however, that he expected to be laid off in August 2013, and that as he ages it is becoming more difficult for him to continue the heavy physical work associated with carpentry.

¹⁴ Ex. 7, pp. 1 - 3.

¹⁵ K L hearing testimony.

¹⁶ Ex. 8, p. 1.

¹⁷ All findings in this paragraph are from K L's hearing testimony unless otherwise noted.

will be laid off from his job after August 2013.¹⁸

III. Discussion

A. *The Burden of Proof is on Mr. L as the Appellant*

As the person who filed the appeal in this case, Mr. L has the burden of proving, by a preponderance of the evidence, that the child support amount established in CSSD's Modified Administrative Child Support and Medical Support Order dated January 14, 2013 is incorrect.¹⁹

B. *The Legal Basis of Mr. L's Child Support Obligation*

A parent is obligated both by statute and at common law to support his or her children.²⁰ A parent's duty of support begins on the child's date of birth.²¹ In those cases in which the child support obligation is determined by CSSD, the agency collects support from the date a parent requests child support services, or the date public assistance or Medicaid benefits are initiated on behalf of the child.²²

In Alaska, the rules for calculating child support are contained in Civil Rule 90.3. Under Civil Rule 90.3(a)(1), where the custodial parent has primary physical custody of the child, the first step in calculating child support is to determine the non-custodial parent's total income from all sources. The second step is to multiply the non-custodial parent's income by the percentage specified in Civil Rule 90.3 applicable to the number of children for whom support must be paid.²³ The non-custodial parent's adjusted income must be multiplied by 27% in order to calculate the child support award for two children.

C. *Modification of Child Support Awards*

Under Civil Rule 90.3, a child support award may be modified upon a showing of a material change of circumstances.²⁴ A material change of circumstances will be presumed if the monthly child support payment, as calculated under Civil Rule 90.3, is more than 15 percent greater or less than the previous child support order.²⁵ Modifications are generally effective on or after the date that a motion for modification, or a notice of petition for modification, is served on the opposing

¹⁸ K L hearing testimony.

¹⁹ 15 AAC 05.030(h).

²⁰ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); A.S. 25.20.030.

²¹ *State of Alaska, Department of Revenue, Child Support Enforcement Division ex rel. Hawthorne v. Rios*, 938 P.2d 1013, 1015 (Alaska 1997).

²² 15 AAC 125.105(a)(1)-(2).

²³ Civil Rule 90.3(a)(2).

²⁴ Civil Rule 90.3(h)(1).

²⁵ Civil Rule 90.3(h)(1).

party.²⁶ In this case, Ms. L submitted a request for modification to CSSD on November 28, 2012, and CSSD gave notice of that request to Mr. L on November 30, 2012, so any modified support obligation should take effect in December 2012.²⁷

D. What is the Appropriate Income Period on which Support Should be Based?

Mr. L's income has fluctuated significantly over the past four years.²⁸ If a person has erratic income from year to year, Civil Rule 90.3 allows the child support obligation to be based on an average of several years' worth of income.²⁹ On several occasions, the Alaska Supreme Court has approved support awards that were based on the averaging of the noncustodial parent's income over at least three years.³⁰

The best estimate of Mr. L's annual income is found in his historical earnings. The most complete income data contained in the record is for the four year period from 2009 through 2012, and for the first quarter of 2013. If Mr. L's income for the first quarter of 2013 is extrapolated to a full year, and added to his income for 2009 - 2012, Mr. L will have earned a total of \$206,767.09 over this five year period. This is an average of \$41,353.42 per year and is the best estimate of Mr. L's anticipated income for the current year.³¹ Inserting that figure into the Civil Rule 90.3 calculation yields a child support payment of \$775.00 per month for two children. This is a 39.5% increase over the previous monthly support obligation of \$469.00 per month established in March 2008. The worksheet showing the calculation has been labeled as Attachment A and is attached to this decision.

IV. Conclusion

Mr. L met his burden and proved, by a preponderance of the evidence, that CSSD's Modified Administrative Child Support and Medical Support Order of January 14, 2013 was incorrect. Based on the evidence obtained through the hearing process, and utilizing income

²⁶ 15 AAC 125.321(d).

²⁷ Exs. 2 and 3; 15 AAC 125.321(d).

²⁸ Exs. 7 and 8.

²⁹ Civil Rule 90.3, Commentary, Section III(e).

³⁰ See, for example, *Pugil v. Cogar*, 811 P.2d 1062 (Alaska 1991); *Zimin v. Zimin*, 837 P.2d 118 (Alaska 1992); *Hill v. Bloom*, 235 P.3d 215 (Alaska 2010).

³¹ By way of comparison, averaging the last three full years of income (for 2010, 2011, and 2012) results in average annual income of \$33,834.64. However, this figure does not adequately account for Mr. L's temporarily increased wages, which are expected to continue until August 2013. At the other extreme, extrapolating Mr. L's 2013-to-date income over an entire year, and averaging his actual income for 2011 and 2012 with that extrapolated income for 2013, results in average annual income of \$49,808.00. However, this figure is abnormally high because it assumes that Mr. L's current, higher-than-normal income will continue for 12 months, when Mr. L testified he expects it to last for only eight months. Using a five year average which includes Mr. L's current income balances out these extremes.

averaging, Mr. L's child support obligation should be increased from \$469.00 per month to \$775.00 per month, effective December 1, 2012. This figure was calculated pursuant to Civil Rule 90.3 and should be adopted. No variance under Civil Rule 90.3(c) was requested or granted.

V. Child Support Order

- Mr. L's child support obligation for Q and E is set at \$775 per month effective December 1, 2012 and ongoing;
- All other provisions of the Modified Administrative Child Support and Medical Support Order dated January 14, 2013 remain in full force and effect.

DATED this 15th day of May, 2013.

Signed _____
Jay Durych
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 3rd day of June, 2013.

By: *Signed* _____
Signature
Jay D. Durych _____
Name
Administrative Law Judge _____
Title

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