

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

In the Matter of:)
)
 N D. C) OAH No. 13-0518-CSS
) CSSD No. 001183651
_____)

DECISION AND ORDER

I. Introduction

D L. D, the custodian of record, appeals an Administrative Review Decision issued by the Child Support Services Division (CSSD) on March 15, 2013, establishing N D. C's monthly child support obligation at \$400 in 2012 and \$50 in 2013.¹ Ms. D asserts that Mr. C is voluntarily under-employed and that his earning capacity gives him the ability to pay a greater amount of child support for their daughter, B C. D.²

Based on Mr. C's documented mental health problems, he is not voluntarily under-employed. Due to those problems, Mr. C's child support obligation should be set at \$50 per month from the date of establishment (June 1, 2012).

II. Facts

A. Relevant Procedural History

On June 11, 2012 the child support agency for Lincoln County, Wisconsin filed a Uniform Interstate Family Support Act (UIFSA) petition with CSSD.³ On June 19, 2012 CSSD issued an administrative order requiring that Mr. C provide financial and medical insurance information.⁴ Mr. C provided the requested information on June 29, 2012.⁵ On September 28, 2012 CSSD issued an Administrative Child and Medical Support Order that set Mr. C's monthly child support obligation at \$299, based on Ms. D's physical custody of the child.⁶ On January 15, 2013 Mr. C submitted an administrative review request to CSSD.⁷

¹ Ex. 7, pp. 1 - 2.
² Ex. 10, p. 1; D D hearing testimony.
³ Ex. 1.
⁴ Ex. 2.
⁵ Ex. 3.
⁶ Ex. 4.
⁷ Ex. 5.

The administrative review was conducted by phone on March 15, 2013.⁸ On that same date CSSD issued an Administrative Review Decision which decreased Mr. C's monthly child support obligation and arrears, based on the loss of funding for his supported employment.⁹ The Amended Administrative Child and Medical Support Order issued with the Administrative Review Decision decreased Mr. C's ongoing monthly child support obligation from \$299 to \$50, effective April 1, 2013, and established arrears in the total amount of \$2,936 for the period from June 1, 2012 through March 31, 2013.¹⁰ Ms. D appealed CSSD's decision on April 5, 2013.¹¹

The formal hearing began on May 8, 2013. Ms. D participated in the hearing by phone, represented herself, and testified on her own behalf. Mr. C also participated by phone, represented himself, and testified. Child Support Specialist Andrew Rawls participated by phone and represented CSSD. The Wisconsin child support agency chose not to participate. At the end of the hearing, the record was left open for post-hearing filings through May 22, 2013.

On May 14, 2013 CSSD filed a motion requesting that a supplemental hearing be held to enable Mr. C's caseworker from Anchorage Community Mental Health Services, Inc. (ACMHS) to testify. No objection to CSSD's motion was received, and a supplemental hearing was scheduled for July 17, 2013. However, Ms. D, Mr. C, and his caseworker were not available at the time of the supplemental hearing. Accordingly, the record was closed on that date.

B. Material Facts

Mr. C and Ms. D have one child: B, currently 14 years old.¹² B lives full time with Ms. D, who also has three other children.¹³ Mr. C does not have any other children.¹⁴

Mr. C suffers from schizophrenia and has spent time at Alaska Psychiatric Institute.¹⁵ He receives treatment from ACMHS and takes medication to control his disorder.¹⁶ Mr. C has had trouble obtaining and keeping employment, due to his schizophrenia and a felony conviction.¹⁷ In

⁸ Ex. 7, p. 1. Exhibit 7 calls this a review "hearing." Hearings are governed by the Code of Hearing Office Conduct. 2 AAC 64.010(b). This review was conducted by CSSD's lay advocate, something that would not occur if it were an actual hearing with each party afforded the rights normally available in a hearing, as opposed to an administrative investigation or review. *See also*, 15 AAC 05.020 (authorizing informal conferences in Department of Revenue appeals).

⁹ Ex. 7.

¹⁰ Ex. 8.

¹¹ Ex. 10.

¹² Ex. 4 p. 1; undisputed hearing testimony.

¹³ Ex. 1 p. 7.

¹⁴ Ex. 3 pp. 1 - 2, N C hearing testimony.

¹⁵ N C hearing testimony.

¹⁶ Ex. 17 p. 2; N C hearing testimony.

¹⁷ N C hearing testimony. Mr. C testified that he is currently taking two prescription medications to try to keep his schizophrenia in check.

June 2011 he obtained what amounted to supported employment, performing janitorial work for or through ACMHS.¹⁸ He earned gross wages from this job of \$6,285.41 in 2011 and \$27,045.92 in 2012.¹⁹ However, in January or February 2013 the grant funding for Mr. C's position was cut and, through no fault of his own, his employment with ACMHS was terminated.²⁰ Since then the only jobs he had were with a pallet factory (full time for four days) and with a janitorial company (part time for two weeks).²¹ Mr. C testified that he had to quit those jobs for mental health reasons, but that he was looking for work and had applied for a housekeeping job.²² Because Mr. C is under treatment for schizophrenia, he is supposed to receive clearance from his psychiatrist or caseworker before accepting new employment, and he has not yet received that clearance.²³

In 2010 Mr. C was found disabled due to his schizophrenia and began receiving Supplemental Security Income (SSI) from the Social Security Administration (SSA).²⁴ These payments were suspended while Mr. C was employed (from about June 2011 - February 2013), but have now resumed.²⁵ Mr. C's SSI payment of \$473.34 per month is currently his only cash income.²⁶ As a result of his low income, Mr. C qualifies for and receives Medicaid and Food Stamp benefits.²⁷ Mr. C lives in a studio apartment and pays \$725 per month in rent.²⁸ His other main monthly expenses are \$125.00 for car insurance, \$50.00 for phone service, and \$20.00 for cigarettes. He uses his \$120.00 per month in Food Stamp benefits to pay for food.

Based on the foregoing income information, CSSD concluded that, during the period June 2012 through December 2012, Mr. C had gross annual income of \$27,923.92, and adjusted annual income of \$23,877.88.²⁹ However, CSSD found that, beginning in January 2013, Mr. C's annual income decreased to only \$878.00 (*i.e.* that his only countable income was the annual Alaska Permanent Fund Dividend).³⁰ Based on this, CSSD determined that Mr. C's child support obligation was \$398 per month for the period June 2012 through December 2013, and \$50 per

¹⁸ Ex. 1, pp. 17 - 18; Ex. 17, p. 2; N C hearing testimony.

¹⁹ Ex. 11, p. 1.

²⁰ Ex. 6, p. 2; Ex. 9, p. 2; Ex. 17, p. 2.

²¹ N C hearing testimony.

²² N C hearing testimony.

²³ N C hearing testimony.

²⁴ Ex. 17, pp. 3 - 4; N C hearing testimony.

²⁵ N C hearing testimony.

²⁶ N C hearing testimony. Mr. C has a protective payee who pays his bills using his SSI income.

²⁷ N C hearing testimony.

²⁸ All factual findings in this paragraph are from Mr. C's hearing testimony.

²⁹ Ex. 8, pp. 7 - 9.

³⁰ Ex. 8, pp. 7 - 9.

month beginning January 2013 and ongoing.³¹

Ms. D is unmarried but has a boyfriend who helps out financially.³² Her income consists of \$600.00 per month in child support for her three other children.³³ Her primary expenses consist of \$500.00 per month in rent and \$100.00 per month for gas and/or electricity.³⁴

III. Discussion

A. *The Legal Basis of Mr. C's Child Support Obligation*

The type of custody involved in this case, in which Ms. D has physical custody of the child more than 70% of the time, is known as "primary physical custody."³⁵ Calculating child support in primary physical custody situations is usually a two-step process. First, the noncustodial / obligor parent's income is calculated, and any applicable deductions are applied.³⁶ Second, the resulting income figure (adjusted income) is multiplied by a certain percentage, depending on how many children are involved.³⁷ Where (as here) there is only one child at issue, the noncustodial / obligor parent's adjusted income is multiplied by 20% (.20).³⁸

B. *CSSD Correctly set Mr. C's 2013 Support Obligation at \$50*

Ms. D asserts that Mr. C is not really disabled, that his unemployment is voluntary, and that his child support obligation should therefore be set at the amount it would be were he still working full-time. As the person who filed the appeal in this case, Ms. D has the burden of proving these assertions by a preponderance of the evidence.³⁹

Potential income can be imputed to a parent who is voluntarily and unreasonably unemployed or under-employed.⁴⁰ However, potential income may not be imputed to a parent who is physically or mentally incapacitated.⁴¹ Here, Mr. C has documented mental health problems, is under the care of a doctor, was found to be disabled due to his schizophrenia by the Social Security Administration, and was previously only able to maintain employment that was supported by his mental health care provider. He has not yet received his doctor's clearance to return to work.

³¹ Ex. 8, p. 7.

³² Ex. 1, p. 6; Ex. 16, p. 2.

³³ Ex. 1, pp. 6 - 7.

³⁴ Ex. 1, p. 14.

³⁵ Civil Rule 90.3(f)(2). Mr. C did not dispute that Ms. D has primary physical custody of B.

³⁶ Civil Rule 90.3(a).

³⁷ Civil Rule 90.3(b)(2).

³⁸ Civil Rule 90.3(a)(2)(a).

³⁹ 15 AAC 05.030(h).

⁴⁰ Civil Rule 90. 3(a)(4); *see also Tillmon v. Tillmon*, 189 P.3d 1022, 1030 (Alaska 2008).

⁴¹ Civil Rule 90.3(a)(4).

Accordingly, the preponderance of the evidence shows that potential income may not be imputed to Mr. C because of his mental incapacity.

Mr. C's only current sources of income are his SSI payments of \$473.34 per month (\$5,680.08 per year) and the annual Alaska permanent fund dividend (\$878). CSSD did not count Mr. C's SSI as income in its Administrative Review Decision because SSI is not countable income under Civil Rule 90.3.⁴² Accordingly, Mr. C's annual income for purposes of child support is \$878. Twenty percent of this amount is \$175.60 per year (\$14.63 per month). However, under Civil Rule 90.3(c)(3), the minimum child support amount that may be ordered in this situation is \$50 per month (\$600 per year). Accordingly, CSSD was correct to set Mr. C's ongoing child support obligation at \$50 per month under Civil Rule 90.3(a).

C. Mr. C's 2012 Support Obligation Should be Decreased Under Civil Rule 90.3(c)

Mr. C asserted at hearing that, based on his low income level, an injustice will result if he is required to pay more than \$50.00 per month in child support.⁴³ Accordingly, it is necessary to determine whether the 2012 portion of Mr. C's support obligation should, like the 2013 portion (discussed above), be reduced to \$50 per month.

Ms. C's assertions constitute a request for a variance of the child support award under Civil Rule 90.3(c)(1). Such a variance can be granted only where there is proof by clear and convincing evidence that unusual circumstances exist and that manifest injustice will result if the support award is not varied. In this case, Mr. C has proven clearly and convincingly that this case involves unusual circumstances justifying variance of the amount of child support which Mr. C might otherwise be required to pay. First, Mr. C is legally disabled, and his disability payments are small. Although Mr. C's expenses are modest, they are still almost double his meager income. Second, although Mr. C has obtained supported employment in the past, his schizophrenia and his felony conviction make obtaining and maintaining employment difficult. Mr. C credibly testified that, after his supported employment ended, he attempted to work two other non-supported jobs, but was unable to maintain employment at either job due to his schizophrenia.

It is clear that Ms. D's budget is also tight and that additional support would be very helpful for B. However, B is now 14 years old, and Ms. D did not seek support for her until approximately 14 months ago. There is no evidence in the record that Ms. D's financial situation over the last 14 months is worse now than it was previously. Because Ms. D was able to support B without child

⁴² See Official Commentary to Civil Rule 90.3 at Section III(A).

⁴³ N C hearing testimony.

support in the past, it is more likely than not that she will be able to do so with \$50.00 more per month than she received previously. Further, if Mr. C's income increases, Ms. D may seek increased child support at that time by filing a new request for modification under 15 AAC 125.321. Considering the totality of the circumstances, Mr. C's 2012 support obligation, back to the June 2012 date of establishment, should be reduced to \$50 per month (\$600 per year) under Civil Rule 90.3(c)(1-3).

IV. Conclusion

Ms. D failed to prove, by a preponderance of the evidence, that Mr. C's monthly support obligation should be increased beyond that established by CSSD's Administrative Review Decision and Administrative Child and Medical Support Order dated March 15, 2013. However, Mr. C proved, by clear and convincing evidence, that the support obligation set by CSSD at \$398 per month for the period June 2012 through December 2012 should be reduced to prevent manifest injustice pursuant to Civil Rule 90.3(c). Accordingly, Mr. C's child support obligation is set at \$50 per month from June 1, 2012 and ongoing. There was a request for a variance under Civil Rule 90.3(c) in this appeal, and that request was granted.

V. Child Support Order

- Mr. C's liability for child support for B from June 1, 2012 and ongoing is set at \$50 per month.
- All other provisions of CSSD's Administrative Child and Medical Support Order dated March 15, 2013 remain in full force and effect.

DATED this 9th day of August, 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 26th day of August, 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.]