

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

In the Matter of:)
)
 K L. D) OAH No. 13-0577-CSS
) CSSD No. 001163025
_____)

DECISION AND ORDER

I. Introduction

The obligor, K L. D, appeals a Modified Administrative Child and Medical Support Order, issued by the Child Support Services Division (CSSD) on March 21, 2013, which substantially increased his child support obligation.¹ Mr. D asserts that his monthly child support payment should not be increased because the income figures on which the Division based its modified support award are significantly higher than his current income.² While Mr. D's prior income would have justified a substantial increase in his child support obligation, his current lack of income does not. Accordingly, Mr. D's child support obligation should be set at \$50.00 per month for one child.

II. Facts

A. Relevant Procedural History

On October 11, 2011 CSSD issued an Administrative Child Support and Medical Support Order that set Mr. D's child support obligation for U E. D at \$90 per month.³ On February 6, 2013 Ms. J submitted a child support modification request to CSSD.⁴ On February 12, 2013 CSSD notified Mr. D of the child support modification request.⁵ On March 21, 2013 CSSD issued a Modified Administrative Child Support and Medical Support Order that increased Mr. D's ongoing child support obligation to \$507 per month, effective March 1, 2013.⁶ The child support payment was based on estimated 2012 gross income of \$36,028.⁷ Mr. D appealed CSSD's modification order on April 19, 2013.⁸

¹ Ex. 6.
² Ex. 7; K D hearing testimony.
³ Ex. 1, p. 1.
⁴ Ex. 2.
⁵ Ex. 3, p. 3.
⁶ Ex. 6, p. 1.
⁷ Ex. 1, p. 1.
⁸ Ex. 7.

Mr. D's hearing was held on May 15, 2013. Mr. D participated in the hearing by phone, represented himself, and testified on his own behalf. Child Support Specialists Andrew Rawls and Robert Short attended the hearing in person and represented CSSD. Ms. J did not attend.⁹ At the end of the hearing, the record was left open through June 10, 2013, for the submission of post-hearing filings. The record was subsequently reopened, on CSSD's motion, due to delays in obtaining a copy of a child support order issued by the state of Washington. The record closed on July 18, 2013.

*B. Material Facts*¹⁰

Mr. D and Ms. J have one child, U, who is currently four years old.¹¹ In addition to U, Mr. D has three other children: B G D, who was seven months old at the time of the hearing; A N, who was five years old; and T S D, who was eight years old. B and T are Mr. D's biological children; A is his adoptive child.¹² Mr. D's household consists of his wife, his daughter B, and his son A. T lives with her mother, and under a Washington state child support order Mr. D pays \$50.00 per month toward her support.¹³

Mr. D is a carpenter. While employed as a carpenter his work schedule has varied, with less work available during the winter. During the non-winter months, when his work was relatively steady, he would work between 25 and 45 hours per week, depending on demand. State records indicate that Mr. D received gross wages of \$28,185 in 2011 and \$36,642 in 2012.¹⁴

Mr. D lost his job in late January 2013.¹⁵ In April 2013 Mr. D and his family moved from the small town in Kansas where they had lived to Spokane, Washington, because he thought the prospects for employment would be better there. He has been looking for work, and submitting job applications, but he was still unemployed at the time of the hearing. Mr. D's wife is not currently working either, and she receives no child support from A's father. At the time of the hearing the family was receiving financial assistance from family members.

Mr. D's family is currently renting. The monthly rent is \$750; Mr. D is receiving help from

⁹ A call was placed to Ms. G at the last telephone number she had provided to CSSD. A telephone company message stated that Ms. G's phone number was not in service. The CSSD representative was not aware of any other telephone numbers for Ms. G, and Ms. G never contacted the Office of Administrative Hearings to request a supplemental hearing.

¹⁰ All factual findings in this section are based on Mr. D's hearing testimony unless otherwise noted.

¹¹ CSSD pre-hearing brief; undisputed hearing testimony.

¹² Mr. D testified that formal adoption proceedings were underway, but were not yet concluded, at hearing time.

¹³ Ex. 10, p. 1.

¹⁴ Ex. 8, p. 1.

¹⁵ Mr. D lost his job because of a work-related dispute with another employee. There is no evidence in the record that he was eligible for or received unemployment benefits.

his grandparents to pay it. The monthly utilities total \$300 - \$350; monthly phone service is about \$180; and monthly internet and cable television charges total about \$100. Mr. D and his wife own a vehicle; the car payment is \$335 per month, car insurance is another \$170 per month, and gas is about \$200 per month. Mr. D estimates his family's monthly expense for food and personal hygiene products at about \$460. He and his wife also owe about \$5,000 in medical bills from the birth of their youngest child. They are unable to make regular payments toward this debt but pay when they can. They also have credit card debt, but are unable to make payments toward it at this time. At hearing Mr. D stated his desire to pay child support for those of his children that do not live with him. However, he stated that given his current financial circumstances, and the Washington state support award for T, he cannot afford to pay large sums for U's support at this time.

III. Discussion

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

As the person who filed the appeal in this case, Mr. D 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 of March 21, 2013 is incorrect.¹⁶

B. 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.¹⁷ 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.¹⁸ Modifications are generally effective on the first day of the month beginning after the date that a motion for modification, or a notice of petition for modification, is served on the opposing party.¹⁹ In this case, Ms. J submitted her request for modification to CSSD on February 6, 2013, so the modified child support obligation, if upheld, would take effect on March 1, 2013.²⁰

C. Mr. D's Support Obligation Should be Decreased Based on his Current Income

At the time CSSD issued the original Administrative Child Support and Medical Support Order for U on October 11, 2011, Mr. D's annual gross income was \$28,185. Normally, under Civil Rule 90.3(a), this income would have justified a monthly child support award of \$300 - \$400,

¹⁶ 15 AAC 05.030(h).

¹⁷ Civil Rule 90.3(h)(1).

¹⁸ Civil Rule 90.3(h)(1).

¹⁹ 15 AAC 125.321(d).

²⁰ Ex. 2; 15 AAC 125.321(d).

depending on available deductions. However, the record indicates that, for whatever reason, CSSD did not have accurate earnings information for Mr. D at that time, and child support was established in the amount of \$90 per month.

In 2012 Mr. D's annual gross income increased to \$36,642. Had a motion for modification of support been filed in 2012, Mr. D's income would have justified a monthly child support award of \$400 - \$500, again depending on available deductions. However, no motion to modify the existing support award was filed during that period.

In January 2013 Mr. D's income decreased from about \$3,000 per month to zero. Ms. J's motion to modify support was filed the next month.

Under Civil Rule 90.3, a parent's current / ongoing child support obligation should be based on the amount the parent can be expected to earn during the period the support is being paid.²¹ This determination is necessarily somewhat speculative because the relevant income figure is expected future income.²² In cases in which the obligor parent's income is relatively steady, this calculation can be based on the obligor's income from the previous year. 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.²³ The facts of the case generally determine which approach should be used.²⁴

In this case, CSSD based its determination on Mr. D's 2012 income.²⁵ This was not an unreasonable approach to take in March 2013 when CSSD's determination was made. Parents going through what appear to be *temporary periods* of unemployment can be expected to maintain their support obligations.²⁶ However, Mr. D had been unemployed for almost four months as of the date of his hearing, and it appears that his unemployment, although likely not permanent, can no longer be characterized as brief. The best estimate at this time is that Mr. D will not be earning any income for the foreseeable future, and his child support obligation should be set accordingly.²⁷

²¹ Civil Rule 90.3, Commentary, Section III(E).

²² Civil Rule 90.3, Commentary, Section III(E).

²³ Civil Rule 90.3, Commentary, Section III(E); *see also 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).

²⁴ *See Byers v. Ovitt*, 133 P.3d 676, 683 (Alaska 2006) (noting that a court may determine a party's income by various means).

²⁵ Ex. 6, pp. 4 - 5.

²⁶ *Patch v. Patch*, 760 P.2d 526, 529-30 (Alaska 1988).

²⁷ *See Authement v. Authement*, 1987 WL 1359377 (Alaska 1987) (the fact that an obligor parent is unemployed is a changed circumstance and relevant to the amount of child support).

Potential income can be imputed to a parent who is voluntarily and unreasonably unemployed or under-employed.²⁸ However, potential income is generally not imputed absent evidence of available job opportunities.²⁹ Here, the only evidence in the record is Mr. D's credible testimony that he has been looking and applying for work, but has not received any offers. While Mr. D bears the burden of proving his current earning capacity and showing that his unemployment is involuntary,³⁰ he has met that burden. Accordingly, no income should be imputed to Mr. D on that basis.

In summary, on the facts of this case, Mr. D's current ability to pay child support should not be based on historical income, on income averaging, or on imputed income. The only appropriate basis for a support award, at this time, is Mr. D's current income, which is zero. 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).

D. Alternatively, the Support Obligation Should be Decreased Under Civil Rule 90.3(c)

In this case Mr. D has asserted that, based on his low income level, injustice will result if the support award is not decreased.³¹ This constitutes 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.

Mr. D has proven clearly and convincingly that this case involves unusual circumstances justifying variance of the amount of child support which he might otherwise be required to pay. First, Mr. D has a substantial financial burden in providing for his household, but his current unemployment leaves him without any ability to support that burden. Second, Mr. D has another child support obligation, in the state of Washington, for a prior child. Were there evidence in the record indicating that Ms. J's financial circumstances are similarly dire, a variance might not be appropriate. However, there is no such evidence in the record. Considering the totality of the circumstances, *even were the support award calculated under Civil Rule 90.3(a) greater than \$50 per month*, the support obligation should be reduced to \$50 per month (\$600 per year) under Civil Rule 90.3(c)(1-3).

²⁸ Civil Rule 90.3(a)(4); *see also Tillmon v. Tillmon*, 189 P.3d 1022, 1030 (Alaska 2008).

²⁹ *See O'Connell v. Christenson*, 75 P.3d 1037, 1041 (Alaska 2003) (it must be clear that employment opportunities exist before income may be imputed).

³⁰ *See Kowalski v. Kowalski*, 806 P.2d 1368 - 1370 (Alaska 1991).

IV. Conclusion

CSSD's Modified Administrative Child and Medical Support Order dated March 21, 2013 was correct based on the information then available to CSSD. However, updated information was brought forth through the hearing process. Accordingly, Mr. D's child support obligation is set at \$50 per month from March 1, 2013 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. D is liable for child support for U in the amount of \$50 per month from March 1, 2013 and ongoing;
- All other provisions of CSSD's Modified Administrative Child and Medical Support Order dated March 21, 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.]