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

IN THE MATTER OF:	)	
	)	OAH No. 13-0739-CSS
C A. C	)	CSSD No. 001157229
	)	

DECISION AND ORDER

I. Introduction

The obligor, C A. C, has appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on April 25, 2013. The obligee child is F, 7 years old. The other party is M C. J.

Mr. C's child support obligation for F was set at $224 per month in 2009.[1] On March 17, 2013, Ms. J requested a modification review.[2] On March 28, 2013, CSSD issued a Notice of Petition for Modification of Administrative Support Order.[3] Mr. C did not provide financial information. On April 25, 2013, CSSD issued a Modified Administrative Child Support and Medical Support Order that modified Mr. C's child support to $537 per month, effective April 1, 2013.[4] Mr. C appealed on May 21, 2013, asserting that the income figure CSSD used was incorrect, and that his costly visitation expenses made it impossible for him to afford the child support amount.[5]

The formal hearing was held on June 18, 2013. Both parties appeared by telephone. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded.

The record initially closed on July 9, 2013, but it was later reopened on July 29, 2013 in order to request that Mr. C file more evidence, which he did. Subsequently, however, on his own initiative, Mr. C filed additional documents and a statement on January 27, 2014. Following a status conference on January 30, 2014, Ms. J objected to the admission of that evidence. For reasons that will become apparent below, Mr. C's supplemental evidence is admitted. Thus, record closure occurred on January 30, 2014, at the end of the status conference.

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1 Exh. 1.
2 Exh. 2.
3 Exh. 3.
4 Exh. 5.
5 Exh. 6.

Based on the record and after careful consideration, the Modified Administrative Child Support and Medical Support Order CSSD issued on April 25, 2013 is affirmed. Mr. C's child support is modified to $537 per month, as calculated by CSSD, effective April 1, 2013. Mr. C appealed CSSD's modification order, but he has not proven his income earning capacity, as required by Alaska law. Rather, Mr. C is voluntarily and unreasonably unemployed. Accordingly, his child support obligation for F shall be set based on the last income he received from employment.

II. Facts

Mr. C and Ms. J are the parents of F, 7 years old, who lives full-time with Ms. J. Mr. C has lived out of state since late 2010. In September 2011, the Alaska Superior Court in No Name awarded Ms. J primary physical custody of F, and granted both parties joint legal custody.[6] The court also awarded Mr. C liberal visitation for summer vacation, spring break and Christmas. The court ordered both Mr. C and Ms. J to split visitation costs, but Mr. C had not seen F between the time of the court hearing in No Name until the CSSD hearing in June 2013. Also, there is no mention in Mr. C's post-hearing filings that any visitations occurred after the June 2013 hearing.[7]

Mr. C testified that he is pursuing a degree in Business Finance, and that he completed approximately one-half of his course work at the University of Alaska (UAA). He said that after he moved to Colorado in late 2010, he could not obtain work in his field that paid over $30,000 per year because he did not have a degree.[8] He began selling cars in January 2011 because it was a job he could get rather "quickly." In 2011, Mr. C earned $43,494 from that employer, No Name, Inc.[9]

In December 2011, Mr. C and his employer had a disagreement about Christmas bonuses (he was the only employee not to receive one), so that issue made their relationship rather chilly thereafter. In July 2012, Mr. C was laid off from No Name for job abandonment as a result of

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[6] Exh. 9 at pg. 3.

[7] *See* Obligor's Exh. C. Since no visitations have occurred since the court hearing in No Name, the issue of visitation expenses will not be addressed here. If in the future Mr. C can prove that he has established a consistent pattern of paying those visitation expenses, he may be entitled to consideration of those expenses in a subsequent modification review.

[8] Any course work Mr. C did at UAA would have been completed prior to his move to Colorado in late 2010. At the 2013 hearing, Mr. C indicated that he had not resumed his studies.

[9] Exh. 7.

going to Seattle with his girlfriend of four years to attend to her sick grandmother. The employer controverted his claim for unemployment, so he fought and won the case before the Colorado Department of Labor, which then began paying him unemployment benefits. In 2012, Mr. C earned $29,384 from No Name prior to his termination; $1,398 in unemployment benefits; and $1,300 in other taxable income, making his total 2012 income $32,084.[10]

Mr. C has remained unemployed since July 2012. He testified that he has submitted numerous resumes, both online and in person, to potential employers in the finance and asset management field, but he has not succeeded in obtaining employment. He hoped that his experience would provide the qualifications he needed to be hired. Mr. C acknowledged at the hearing that he might have to resume selling cars because he was running out of money.

Mr. C started a financial services company with a partner in 2012 after he was laid off by No Name, Inc. His federal income tax return for that year contains a Schedule C for NoName, a financial advisory company located in Colorado. The Schedule C reports Mr. C had zero income from the business in 2012, but over $10,000 in expenses for advertising, vehicle expenses, depreciation, insurance, office expense, supplies, travel and meals, business use of the home, business cell phone and furniture, and licensing fees.[11] Mr. C insisted that he does not have any clients and that the business has not done well, but his 2012 Schedule A contains additional business deductions of $280 for "travel to meet clients," and $504 for "cell phone for clients."[12] Interestingly, his Schedule C also contains a business deduction of $504 for a "business cell."[13] Lastly, in another of his post-hearing filings, Mr. C stated that "*[i]n January 2013*, [I] was looking for a full time job and in the process of starting a business with a partner."[14]

Finally, Mr. C submitted a list of household expenses totaling $2777.50 per month.[15] Most of the expenses are fairly reasonable, except for a $462 per month payment on credit card debt and a $187.50 monthly payment on his home equity line of credit.

III. Discussion

As the person who filed the appeal, Mr. C has the burden of proving by a preponderance of the evidence that the agency's modification order was incorrect.[16]

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10 Obligor's 2012 federal income tax return, received on January 27, 2014.
11 *Id.*
12 *Id.*
13 *Id.*
14 Obligor's Response to Interim Order for Additional Evidence, received August 13, 2013, at pg. 1.
15 Exh. 9 at pg. 1.

Child support orders may be modified upon a showing of "good cause and material change in circumstances."[17] 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. Mr. C's child support was set at $224 per month in 2009, so a child support amount of $257.60[18] or higher would be sufficient to meet the "material change in circumstances" requirement.

A modification is effective beginning the first of the month after the parties are served with notice that a modification has been requested.[19] Here, the notice was issued on March 28, 2013, so any modification of Mr. C's child support would be effective on April 1, 2013.[20]

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." CSSD used an annual income figure of $40,673 to calculate Mr. C's modified child support at $537 per month.[21] CSSD obtained this amount from the income Mr. C's employers reported he earned during the four consecutive quarters from the fourth quarter of 2011 through the third quarter of 2012.[22] These are the last quarters Mr. C was employed before being laid off by No Name, Inc. During the last three calendar years, Mr. C had earned income of $43,494 in 2011 and $32,084 in 2012; and in 2013 he received $10,718 in unemployment benefits.

An obligor parent has the burden of proving his or her earning capacity.[23] Mr. C requested the formal hearing, but the testimony and evidence he submitted raises more questions than answers. Mr. C has not proved his income earning capacity is anything other than CSSD's determination that his child support amount should be based on income of $40,673.

Mr. C's testimony that his low income is a "direct result of pursuing the business venture"[24] is not credible. Mr. C's low income is the direct result of not going back to work. Being a car salesman provided him income in excess of $40,000 in 2011, and at the hearing, he acknowledged he could return to that work. This testimony raises the issue of voluntary

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16 15 AAC 05.030(h).
17 AS 25.27.190(e).
18 $224 x 115% = $257.60.
19 15 AAC 125.321(d).
20 Exh. 3.
21 Exh. 5 at pg. 6.
22 Exh. 7.
23 *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).
24 Mr. C's statement dated January 27, 2014, at pg. 1, received with other documents that same date.

unemployment. If a parent is found to be voluntarily and unreasonably unemployed, 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."[25]

In cases in which voluntary unemployment 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."[26] In addition to the question whether the parent's lack of work is voluntary, it is also necessary to determine whether the parent's unemployment 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."[27] 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.[28] 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."[29]

After careful consideration of all the evidence, Mr. C is voluntarily and unreasonably unemployed. When viewed as a whole, Mr. C's testimony was not credible, primarily because of all of the inconsistencies in his testimony and other evidence. He insisted that he could not find employment, but acknowledged at the hearing that he could go back to selling cars. Also, he said in one document, and during the hearing, that he started the business in 2012, yet he asserted in one of his last written statements that he started the business in early 2013, which, obviously ignores the more than $10,000 in business expenses he deducted from his federal tax return for 2012.

As Ms. J suggested in the hearing, Mr. C obviously has a source of funds that has not been disclosed in this appeal. It could be the investments that go along with No Name, it could be the "partner" he described in his statements, it could be his girlfriend. Regardless, when the evidence is considered as a whole, the conclusion that is most reasonable is that Mr. C is voluntarily and unreasonably unemployed.

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25 Civil Rule 90.3(a)(4).
26 *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).
27 *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).
28 *Kowalski*, 806 P.2d at 1371.
29 Civil Rule 90.3, Commentary III.C.

Alaska law is clear that a parent has a duty to support his or her children, and this duty takes priority over lifestyle decisions such as choosing not to seek employment or trying in vain to get a business established.[30] Mr. C's choice not to seek employment that would provide him with an actual wage should not be transferred to F as a loss of support. An obligor parent is free to change jobs and careers, and even to be unemployed for a time, but his or her children should not have to finance a continued interruption in the obligor parent's income and support.[31]

Because Mr. C has been found to be voluntarily and unreasonably unemployed, his child support amount may be calculated from his "potential income," which is based on his "work history, qualifications and job opportunities."[32] A primary goal of imputing income, according to the Alaska Supreme Court, is to compel the parent to find full-time employment:

> An important reason -- if not the chief reason -- for imputing income to a voluntarily underemployed parent is to goad the parent into full employment by attaching an unpleasant consequence (a mounting child support debt or, in certain cases of shared custody, a reduced child support payment) to continued inaction. Indeed, in primary and shared custody situations alike, an order imputing income often yields no tangible benefits to the children unless and until it impels the underemployed parent to find a job.[33]

CSSD calculated Mr. C's modified child support at $537 per month based on his actual income during his last consecutive four quarters of employment.[34] Because he has chosen not to seek employment that would provide a reasonable and consistent income, Mr. C has not proven that his income earning capacity is not as CSSD determined. Therefore, his modified child support obligation should remain at $537 per month.

IV. Conclusion

Mr. C did not meet his burden of proving by a preponderance of the evidence that CSSD's Modified Administrative Child Support and Medical Support Order was incorrect. Mr. C is voluntarily and unreasonably unemployed because he chooses not to seek paying employment. As a result, his child support should remain at $537 per month, as set by CSSD during the modification review. CSSD's modification order should be affirmed. This is not a variance under Civil Rule 90.3(c).

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30 *See Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).
31 *Olmstead v. Ziegler*, 42 P.3d 1102, 1105 (Alaska 2002).
32 Civil Rule 90.3(a)(4).
33 *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).
34 Exh. 5 at pg. 6.

V. Child Support Order

- CSSD's Modified Administrative Child Support and Medical Support Order dated April 25, 2013, is affirmed;
- Mr. C's child support obligation for F shall remain at $537 per month, as set by CSSD in the modification order.

DATED this 11th day of March, 2014.

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 14th day of April, 2014.

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

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