

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

IN THE MATTER OF)	OAH No. 13-1035-CSS
B E. E)	CSSD No. 001126621
_____)	

DECISION AND ORDER

I. Introduction

This case is B E's appeal of an order issued by the Child Support Services Division (Division), which denied his request to lower his monthly ongoing child support obligation and raised it instead. The order being appealed is the Division's Modified Administrative Child and Medical Support Order, which raised Mr. E's monthly ongoing child support order for his child, D, from \$328 to \$582. This order was issued on June 28, 2013 and was effective May 1, 2013.

On August 15 and September 5, 2013, a hearing was held to consider Mr. E's appeal. L R. U, the custodial parent in this case, participated. Mr. E also participated. The Child Support Services Division (Division) was represented by Andrew Rawls, Child Support Services Specialist.

Having reviewed the record in this case and after due deliberation, I conclude that the Division's modification order should be overturned. Mr. E's ongoing child support obligation for D should remain at \$328 per month, because at this time, there has not been a change in the parties' circumstances that would justify a modification of child support. While the evidence in the record shows that Mr. E's annual income and earning capacity is probably about equal to the amount used to set his current monthly ongoing child support obligation, Mr. E's recent health and employment issues make it difficult to estimate what he will be able to earn in the next twelve months. A modification may be appropriate once Mr. E finds new employment and has a more recent steady earnings history.

II. Facts

This case is a modification action.¹ Mr. E filed the request for modification 2013 because he was unemployed. The Division granted Mr. E's request for modification review, but the

Division determined that there should be an increase in Mr. E's ongoing child support amount based on Mr. E's earnings in 2012.²

Mr. E's current ongoing child support of \$328 per month was set based on estimated annual earnings of \$22,263 in 2005.³ In the 2013 modification order, the Division increased Mr. E's ongoing child support to \$582 per month effective May 1, 2013. The modified amount was based on Mr. E's annual earnings in 2012. The Division used this 2012 estimated level of annual income amount because the lack of reported income for Mr. E for 2013.⁴

After the Division granted his request for a modification, but increased his ongoing child support, Mr. E requested a formal hearing.⁵

At the hearing, Mr. E testified that he had a long history working as a server in restaurants that required a very high level of speed and focus, but he had lost one job due to substance abuse problems. He found another server job in 2013, and started to get treatment for his anxiety disorder and his alcoholism, but he found that he could not perform this stressful and fast-paced job while he was taking his medication. Mr. E quit this job in August and has been unemployed, looking for less stressful work, since this job ended.⁶

III. Discussion

In a child support hearing, a party challenging the order on appeal has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.⁷ At the hearing, the Division agreed that the evidence showed that its determination that there had been a material change in circumstance that would justify a modification of ongoing child support was incorrect. While the evidence in the record shows that Mr. E is not entitled to a reduction his ongoing child support obligation for D, the evidence of his earnings in 2012 does not show that his ongoing child support should be increased, given the evidence of his employment and

¹ Alaska Civil Rule 90.3(h) governs modification actions.

² Exhibit 1-9.

³ Exhibits 4.

⁴ Exhibits 9.

⁵ Exhibits 10.

⁶ Recording of Hearing-Testimony of Mr. E.

⁷ Alaska Regulation 15 AAC 05.030(h).

medical problems in 2013.⁸

Income can also be imputed to an obligor in cases of unreasonable voluntary underemployment.⁹ The Alaska Supreme Court has recognized that an obligor parent should not be locked into a particular job or field, nor prevented from seeking personal or professional advancement.¹⁰ On the other hand, a noncustodial parent who voluntarily reduces his or her income should not automatically receive a corresponding reduction in his or her child support obligation.¹¹

Obligor parents should not always have to pay support based on their maximum earning capacity when they choose to earn less than they could.¹² The custodial parent and the children should not, however, be forced to finance the noncustodial parent's lifestyle choice if that choice is unreasonable given the duty to provide child support.¹³ The Alaska Supreme Court has indicated that the circumstances surrounding an obligor's failure to maximize earnings should be carefully considered, and then a determination made about whether, under all the circumstances in the case, income should be imputed.¹⁴

In this case it is appropriate to impute income. Although he quit his last job, the evidence in this record shows that it is more likely than not that Mr. E is not unreasonably and voluntarily underemployed.¹⁵

Although it is not appropriate to impute his 2012 earnings to calculate his modified ongoing child support, Mr. E failed to show either that it is more likely than not that he is not or could not earn an annual income equal to the amount of annual income that was used to set his current ongoing child support order, \$22,263.28. This amount of annual earnings is less than full-time earnings for a job that pays of \$11.50 per hour. Mr. E has not shown that he is not capable of earning at least this much. Mr. E's recent work history includes periods of unemployment, as

⁸ Recording of Hearing.

⁹ Alaska Civil Rule 90.3(a)(4).

¹⁰ See *Pattee v. Pattee*, 744 P.2d 659 (Alaska 1987).

¹¹ *Pattee v. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

¹² See *Pattee v. Pattee*, 744 P.2d 659 (Alaska 1987).

¹³ *Olmstead v. Ziegler*, 42 P3d 1102 (Alaska 1987).

¹⁴ See *Pattee v. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

¹⁵ Recording of Hearing.

he has started to take constructive action to deal with his addictions and his medical problem, but these are not circumstances that justify a downward modification of his ongoing child support obligation to his daughter.

IV. Conclusion

I conclude that Mr. E's request for a modification of his ongoing child support should be denied. The existing order with a monthly ongoing obligation of \$328 per month should remain in effect. The child support amount in the existing order was calculated using the primary custody formula in Civil Rule 90.3(a) without variance.

V. Child Support Order

1. The Division's Modified Administrative Child and Medical Support Order, which was issued on June 28, 2013 is overturned.
2. The Petition for Modification of Administrative Child and Medical Support Order issued on April 26, 2013 is denied.
3. The Division's Modification of Administrative Child and Medical Support Order, which was issued on April 11, 2005 remains in effect.
4. Mr. E's ongoing child support for his child, D, will remain at \$328 per month.

DATED this 11th day of September 2013.

By: Signed
Mark T. Handley
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 9th day of October, 2013.

By: Signed
Signature
Mark T. Handley
Name
Administrative Law Judge
Title

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