

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

IN THE MATTER OF:)

E K. J)

) OAH No. 13-1774-CSS

) CSSD No. 001174547

DECISION AND ORDER

I. Introduction

E K. J appealed a Modified Administrative Child Support and Medical Support Order issued by CSSD on December 31, 2013, increasing his monthly child support obligation from \$150 per month to \$250 per month. Two hearings were held. Mr. J and child support specialist Andrew Rawls appeared in person for both hearings. The custodian, T L, participated in the first hearing by telephone. She could not be reached for the second hearing and did not participate. The obligee child is F.

Mr. J is requesting a hardship variance from the ordered increase in child support. However, new information has come to light that shows CSSD understated Mr. J's income. When calculated to reflect all sources of income after allowable deductions, Mr. J's child support for one child should be \$516 effective November 1, 2013. He has failed to present clear and convincing evidence that his child support obligation should be varied from this amount.

II. Facts

Mr. J's child support for F was established in 2011.¹ As explained in the December 2011 Decision and Order Upon Consent of the Parties:

Mr. J is a union electrician who is currently out of work and, according to CSSD, "hanging on by the skin of his teeth." He has recently been awarded custody of an older son and has gone through all of his savings in an effort to save his home and support his older child. CSSD indicated that F, the child in this case, is not currently in Ms. L's custody. CSSD calculated Mr. J's child support obligation for F at \$354 per month, which takes into consideration his deduction for supporting an older child, pursuant to Civil Rule 90.3(a)(1)(D). However, given the obligor's circumstances, CSSD recommended that a variance for financial hardship be granted and that Mr. J's child support be set at \$150 per month. Mr. J agreed. In order to avoid manifest injustice, the parties' agreement should be adopted pursuant to the provisions of Civil Rule 90.3(c).^[2]

On October 8, 2013, CSSD received Ms. L's request for modification of the 2011 Order. She wrote that she knew Mr. J had additional sources of income that would support an increase

¹ Exhibit 1.

² *Id.*

in child support.³ Ms. L also informed CSSD that her husband was supporting F with no support from the state and the only support received from Mr. J was what the state garnished from his unemployment or earnings.⁴

CSSD commenced modification proceedings October 17, 2013.⁵ Locating no earnings information, CSSD imputed income to Mr. J at the minimum wage. This amount, after standard deductions, resulted in a \$250 per month child support obligation for one child.⁶ Mr. J appealed, asking for a financial hardship variance because he was an unemployed single father.⁷

At hearing, Mr. J presented evidence on his financial situation. He has primary custody of one child who is older than F. Mr. J is a journeyman electrician and as a union member, he obtains employment through the union hall. He cannot go out and apply for jobs in his field. CSSD reviewed the Alaska Department of Labor and Workforce Development Database and found the following information regarding reported earnings and unemployment benefits:⁸

- In 2011, Mr. J received wages and unemployment totaling \$31,097.15.⁹
- In 2012, Mr. J received wages and unemployment totaling \$28,699.¹⁰

The Department of Labor data shows that it is common for Mr. J to work only one-half to three-quarters of the year.¹¹

Ms. L's allegation that Mr. J is a landlord is well founded. He owns a four-plex, rents three of the units and lives in one of them. According to his 2012 Federal Income Tax return, Mr. J's 2012 gross rental receipts for three units total \$41,100. Utilities are included in the rent. Mr. J does not pay rent or utilities for the unit he occupies. His monthly mortgage payment for the building is \$3,300 or \$835 per unit.

CSSD contends that the rental value of Mr. J's unit should be included as income for purposes of child support. CSSD asks that Mr. J's request for a hardship variance be denied because he has not established by clear and convincing evidence that, unless varied, the amount of support is manifestly unjust.

Mr. J contends that the rental value of the unit he occupies should not be included as income. He believes that his child support amount should be varied because he does not have the

³ Exhibit 2.

⁴ *Id.*

⁵ Exhibit 3.

⁶ Exhibit 7

⁷ Exhibits 5, 8.

⁸ Exhibit 9.

⁹ \$21,304.18 Wages + \$9,793 Unemployment.

¹⁰ \$18,657.91 Wages + \$10,042 Unemployment.

¹¹ Exhibit 9.

cash flow to pay the amount of child support calculated by CSSD and maintain his property. He testified that his monthly expenses, including 1/4th of the mortgage, total \$1,830.

III. Discussion

A. *Controlling Law*

Child support orders may be modified upon a showing of “good cause and material change in circumstances.”¹² 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. J’s child support has been \$150 per month since January 2011. Thus, a child support calculation of \$172 or more would be sufficient to warrant modification in this case.¹³

A parent is obligated both by statute and at common law to support his or her children.¹⁴ When calculating ongoing child support, determining an obligor’s annual income for purposes of child support is “necessarily... speculative because the relevant income figure is expected future income.”¹⁵ However, child support determinations calculated under Civil Rule 90.3 from an obligor’s actual income figures are presumed to be correct.

Civil Rule 90.3(a)(1) provides that a noncustodial parent’s child support obligation is to be calculated from his or her “total income from all sources.” The obligor has the burden of proving his or her earning capacity.¹⁶ It is undisputed that in 2012, Mr. J’s reported earnings, unemployment insurance, and Permanent Fund Dividend totaled \$29,577. Mr. J vehemently objected to including the value of his unit in the four-plex as income for purposes of child support.

B. *Mr. J’s Self Employment Income*

Civil Rule 90.3(a)(1) does not have a specific formula for determining the income of a self-employed obligor, but the commentary to the Rule provides this guidance:

Self Employment Income. Income from self-employment, rent, royalties, or joint ownership of a partnership or closely held corporation includes the gross receipts minus the ordinary and necessary expenses required to produce the income. Ordinary and necessary expenses do not include amounts allowable by the IRS for the accelerated component of depreciation expenses, investment tax credits, or other business expenses determined by the court to be inappropriate. Expense reimbursements and *in-kind payments such as* use of a company car, *free housing*

¹² AS 25.27.190(e).

¹³ \$150 x 1.15 = \$172.

¹⁴ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁵ See Civil Rule 90.3, Commentary III.E.

¹⁶ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

or reimbursed meals *should be included as income if the amount is significant and reduces living expenses.*^{17]}

As reported on his tax return, Mr. J is self-employed as a property manager of his four-plex. He collects rent, vets new renters, performs maintenance and pays all of the utilities. In exchange, he receives free housing. The monthly market value of his unit, including utilities, is \$1,141.¹⁸ Mr. J agreed that this is the fair market value of the unit he lives in. This is a significant amount that reduces Mr. J's living expenses. Therefore, it is appropriate to include the annual cost of this free housing, \$13,692 annually, as income for purposes of child support.¹⁹

C. 90.3(a) Child Support

Civil Rule 90.3(a) provides that a noncustodial parent's child support obligation is to be calculated from his or her total income from all sources less mandatory deductions. One such deduction is a deduction for support paid to a child from a prior relationship. Mr. J supports a child from a prior relationship. The amount of that support is a deduction for purposes of calculating the support owing for F. So the first step is to calculate the support owing for the child living with Mr. J under Civil Rule 90.3(a). Once the support paid for an older child in the home is determined, that amount will be deducted as a monthly expense when calculating child support owing for F.

Using his 2012 earnings and income as reported on this 2012 Tax Return, Mr. J's gross income for purposes of child support is \$43,269.²⁰ After mandatory deductions, including union dues,²¹ Mr. J is entitled to deduct \$644 per month as the cost of support for a prior child in the home.²²

When allowable deductions are included, Mr. J owes child support for F in the amount of \$516 per month, effective November 1, 2013.²³

D. Hardship

Mr. J requested a variance pursuant to Civil Rule 90.3(c). Child support determinations calculated under Civil Rule 90.3(a) from an obligor's actual income figures are presumed to be correct. The parent may obtain a reduction in the amount calculated, but only if he or she shows

¹⁷ Civil Rule 90.3, Commentary III.B (emphasis added).

¹⁸ In 2012 Mr. J received \$41,100 in rent from his three units. When averaged over 12 months, Mr. J received \$3,425 per month from three units. $\$3,425 / 3 \text{ units} = \$1,141$ per month per unit.

¹⁹ $\$1,141 \times 12 = \$13,962$.

²⁰ \$18,657.91 Wages + \$10,042 Unemployment + \$878 PFD + \$13,962 Free Housing.

²¹ Mr. J provided evidence that he paid union dues in the amount of \$1,036.95 in 2012, when averaged over 12 months, Mr. J paid union dues averaging \$86.41 per month.

²² Attachment A.

²³ Attachment B.

that “good cause” exists for the reduction. In order to establish good cause, the parent must prove by clear and convincing evidence that “manifest injustice would result if the support award were not varied.”²⁴ The presence of “unusual circumstances” in a particular case may be sufficient to establish “good cause” for a variation in the support award:

Good cause may include a finding . . . that unusual circumstances exist which require variation of the award in order to award an amount of support which is just and proper for the parties to contribute toward the nurture and education of their children^[25]

It is appropriate to consider all relevant evidence, including the circumstances of the custodian and obligee child to determine if the support amount should be set at a different level than provided for under the schedule in Civil Rule 90.3(a).²⁶

This case does not present unusual circumstances of the type contemplated by Civil Rule 90.3(c). Mr. J’s adjusted monthly gross income is \$2,532. His monthly expenses, not previously deducted, total \$1,830. His net monthly income before child support for F is \$702; support for F is \$516 per month. This leaves Mr. J with income exceeding expenses by \$186 per month.

Little is known of F’s current financial situation other than his mother is incarcerated with no known means of support and that F resides with his step-father. After considering all relevant circumstances, Mr. J has not established by clear and convincing evidence that it would be manifestly unjust if the support award calculated under Civil Rule 90.3(a) were not varied.

IV. Conclusion

Mr. J’s annual income includes \$13,962 for free housing. When all income and allowable deductions are considered, Mr. J owes \$516 per month for child support for F. This amount should be adopted, effective November 1, 2013. This case does not include a support variance under Civil Rule 90.3(c).

V. Child Support Order

- Mr. J is liable for modified child support for F in the amount of \$516 per month, effective November 1, 2013, and ongoing;

²⁴ Civil Rule 90.3(c).

²⁵ Civil Rule 90.3(c)(1).

²⁶ Civil Rule 90.3, Commentary VI.E.1.

- All other provisions of the Modified Administrative Child Support and Medical Support Order dated December 31, 2013 remain in full force and effect.

DATED this 19th day of March, 2014.

By: Signed
Rebecca L. Pauli
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 21st 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.]