

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

IN THE MATTER OF)	OAH No. 13-1775-CSS
U K. X)	CSSD No. 001130353
_____)	

DECISION AND ORDER

I. Introduction

This case is S M. E's appeal of an order modifying U K. X's child support obligation. Ms. E is the custodial parent. The Child Support Services Division (Division) issued this order, decreasing Mr. X's ongoing monthly obligation for the support of their child, D, from \$494 to \$54, effective August 1, 2013.

On December 31, 2013, a formal hearing was held to consider Ms. E's appeal.¹ Mr. X did not participate in the hearing. Ms. E participated. Russell L. Crisp, Child Support Services Specialist, represented the Division. The hearing was audio-recorded. The record closed on December 31, 2013.

Based on the evidence presented at the hearing, the administrative law judge concludes that Mr. X's modified ongoing child support order should be set at \$354 based on the Division's latest calculation.

Ms. E appealed the Division's order that decreased ongoing child support at \$54 per month, was based on the Division's estimate of Mr. X's estimated 2013 annual income, but the Division only had the first two quarters of Mr. X's reported 2013 earnings and did not include any income for the third and fourth quarters in its estimate. The evidence at the hearing showed this annual income amount was not the best estimate of his current income or earning capacity. The Division's latest calculation uses Mr. X's 2012 reported earnings and unemployment benefits plus a PFD to estimate his annual income. This is the best estimate based on the evidence in the record. This estimated annual income results in a monthly ongoing child support amount of \$354. Modified ongoing child support should be set at this amount.

II. Facts

This case is an appeal of the Division's order decreasing Mr. X's ongoing child support

¹ The hearing was held under Alaska Statute 25.27.190.

obligation through the modification process.² Mr. X's child support for his child, D was set in 2005 at \$494 per month for the one child.³

Mr. X filed a request for modification on May 14, 2013.⁴ The Division issued notice of the petition for modification on July 18, 2013.⁵

The Division issued a Modified Administrative Child and Medical Support Order on November 27, 2013.⁶ The Division set Mr. X's modified ongoing child support from calculations using his estimated annual income. This projected estimate was \$3,416.50 per year and included only on Mr. X's year-to-date earnings on a paystub from the beginning of the third quarter of 2013 and a PFD.⁷ The calculations result in a monthly support amount of \$54 per month.⁸

Ms. E requested a formal hearing. Ms. E was concerned that the Division had underestimated Mr. X's income because she had received more in child support in 2013 than the Division's estimate of Mr. X's 2013 earnings.⁹

Mr. X did not provide a phone number for the hearing as instructed by the notice sent to him. Mr. X did not answer at his phone numbers of record for the hearing. Mr. X did not have voice mail that allowed a message to be left. The hearing record was not held open for ten days to give Mr. X time to file a request to reschedule the hearing because Ms. E had filed the appeal.¹⁰

Mr. X's reported earnings for the first, second and third quarters of 2013 plus a PFD totaled \$11,313.86.¹¹ This is much more than the Division used in its calculation for the order being appealed, but does not include any income for the fourth quarter of 2013, and may

² Alaska Civil Rule 90.3(h) governs child support modification actions.

³ Exhibit 1.

⁴ Exhibit 2.

⁵ Exhibit 3.

⁶ Exhibit 5.

⁷ Recording of Hearing & Exhibit 4, page 1 & Exhibit 5, page 9.

⁸ Exhibit 5, page 1.

⁹ Ms. E's request for a formal hearing is found at Exhibit 6.

¹⁰ Recording of Hearing.

¹¹ Exhibit 9, page 1.

therefore substantially understate Mr. X's annual income.¹² Mr. X's reported earnings for all four quarters of 2012 plus unemployment benefits and a PFD totaled \$24,083.¹³ The earnings records provided by the Division and discussed at the hearing indicate that Mr. X's 2012 annual income of his current income and earning capacity. These records show that Mr. X earned \$3,750 in the fourth quarter of 2012.¹⁴ Mr. X's fourth quarter 2013 earnings have not yet been reported.¹⁵

Based on the evidence in the record, I find that it is more likely than not that Mr. X's 2012 annual income of is the best estimate of his current income and earning capacity and the Division's latest calculation at Exhibit 10, page 1, using Mr. X 2012 income is correct. These calculations result in a monthly child support amount of \$354.¹⁶

III. Discussion

In a child support hearing, the person who filed the appeal, in this case, Ms. E, has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.¹⁷ Ms. E met her burden of proof to show that the ongoing monthly amount in the Division's order was incorrect. The evidence in the record shows that the Division under-estimated Mr. X's 2013 earnings because only the first quarter of Mr. X's reported earnings were used when the Division calculated Mr. X's modified child support. Only three quarters of Mr. X's 2013 earnings were available at the time of the hearing, but these incomplete reports for 2013 showed that the Division under-estimated Mr. X's 2013 earnings in its calculation of his modified ongoing child support obligation at \$54 per month.

Ms. E was correctly concerned about the modification because the income used by the Division in the modification was implausibly low. At the hearing both the Division and Ms. E agreed that using Mr. X's 2012 annual income of was the best estimate of his current annual income. Although Mr. X's quarterly and his annual earnings have fluctuated somewhat over the

¹² Recording of Hearing & Exhibits 5, 9 & 10.

¹³ Exhibit 9, page 1& Exhibit 10, page 1.

¹⁴ Exhibit 9.

¹⁵ Recording of Hearing & Exhibit 9.

¹⁶ Recording of Hearing & Exhibits 9 & 10.

¹⁷ Alaska Regulation 15 AAC 05.030(h).

last few years, the record indicates that he tends to earn income and receive unemployment benefits in the last quarter of the year. In 2011 for instance, Mr. X earned \$14, 434.75 in the fourth quarter, which was more than half his reported earnings for that year.¹⁸

Because the fourth quarter 2013 earnings were not available to be included in the record, the Division was asked to use Mr. X's 2012 income in its latest calculations. Using Mr. X's 2012 annual earnings is consistent with the earning capacity reflected in his first three quarters of earnings in 2013 as well as his annual earnings for the past three calendar years.¹⁹

Ongoing child support should be calculated based using the best estimate income unless there is a showing by clear and convincing evidence that a variance of the calculated amount based on the child support guidelines is needed to prevent an injustice. The new monthly amount of \$354 calculated by the Division is correct, and there is not clear and convincing evidence in the record showing that an injustice will occur if ongoing child support is set at this amount.²⁰

Although Mr. X's ongoing child support will still be reduced if it is set based on his 2012 income, as discussed at the hearing it, would not be appropriate to impute additional income to Mr. X's in setting his support due to his decrease in income since 2005 and his failure to work year-round. Child support may be based on the potential income of a person who is voluntarily and unreasonably unemployed or underemployed.²¹ A noncustodial parent who voluntarily reduces his or her income does not automatically receive a corresponding reduction in his or her child support obligation.²² If Mr. X could earn more income, but was unreasonably unemployed, it would be appropriate to set Mr. X's child support based on income he could earn. It is not appropriate to impute income to Mr. X based on the limited evidence of his earning capacity in the record. The evidence in the record does not show unreasonable underemployment. Ms. E acknowledged that Mr. X probably has the limited employment opportunities in the area where he lives.²³

¹⁸ Exhibits 9, page 1.

¹⁹ Exhibits 9.

²⁰ Recording of Hearing.

²¹ Civil Rule 90.3 Commentary, Part III-C.

²² *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

²³ Recording of Hearing.

Civil Rule 90.3 allows a child support amount to be modified if the party requesting the change shows that a material change of circumstances has occurred.²⁴ The rule states that a material change of circumstances “will be presumed” if the modified support amount would alter the outstanding support order by 15 percent.²⁵

The evidence in the record shows that a material change of circumstances has occurred since Mr. X’s ongoing child support was set at \$494 per month. The modified ongoing amount calculated at \$354 per month is more than a 15 percent change from the outstanding order of \$494 per month. A material change of circumstances justifying an upward modification of ongoing child support has occurred.

Generally, a new monthly child support amount in a modification action should be effective the month after the parties are served with the petition. Following this general rule, the modification should be effective August 1, 2013, because the petition was issued in July of 2013.

IV. Conclusion

Mr. X’s ongoing child support should be modified based on the Division’s calculations. Modified ongoing child support should be set at \$354 per month, effective August 1, 2013, based on the Division’s latest calculation using Mr. X’s 2012 income. The child support amount in this order was calculated using the primary custody formula in Civil Rule 90.3(a).

V. Child Support Order

Mr. X’s Modified ongoing child support for D is set in the monthly amount of \$354, effective August 1, 2013.

All other provisions of the Division’s Modified Child Support and Medical Support Order issued on November 27, 2013 remain in effect.

DATED this 2nd day of January 2014.

By: Signed
Mark T. Handley
Administrative Law Judge

²⁴ Alaska Civil Rule 90.3(h)(1).

²⁵ Alaska Civil Rule 90.3, Commentary X.

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 January 2014

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

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