

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

IN THE MATTER OF)

B C)

) OAH No. 13-1806-CSS

) CSSD No. 001063266

DECISION AND ORDER

I. Introduction

This case is B C's appeal of the Division's order modifying his ongoing monthly child support obligation for his children, J, E, H, A, and Q.

On January 8, 2014, a formal hearing was held for Mr. C's appeal. Mr. C participated in the hearing. J, E, H, A, and Q's mother, N B. T, the custodial parent, also participated. Andrew Rawls, Child Support Services Specialist, represented the Child Support Services Division (Division). The hearing was audio-recorded. The record closed at the end of the hearing.

Because there has not been a material change since Mr. C's ongoing monthly child support obligation for J, E, H, A, and Q was last set at \$507, his child support order should not be modified.

II. Facts

Mr. C's ongoing monthly child support obligation was set at \$507 per month in a Modified Administrative Child and Medical Support Order dated February 2, 2011.¹ The Division reviewed this child support order at Mr. C's request.² The Division issued a Notice of Petition for Modification on August 16, 2013.³

Mr. C did not provide the income information requested by the Division.⁴

The Division issued a Modified Administrative Child Support and Medical Support Order on November 13, 2013.⁵ In this order, the Division set Mr. C's modified ongoing child support at \$1,142 per month based on an estimate of Mr. C's income. This estimate was calculated by extrapolating full-time year-round earnings from employer provided information

¹ Exhibit 1.

² Exhibit 2.

³ Exhibit 3.

⁴ Division's Pre-Hearing Brief at page 1.

⁵ Exhibit 6.

that Mr. C was earning \$22 per hour.⁶ Mr. C requested a formal hearing and provided paystubs from his current employment.⁷

Prior to the hearing, the Division provided records of Mr. C's employer reported earnings going back to 2006 and his probation and incarceration records for the past several years from the Alaska Department of Corrections.⁸

At the hearing, Mr. C explained that his current hourly wage is only \$15 per hour. Mr. C works by shoveling sidewalks on an on-call basis. He lost the best job that he had this year after two weeks because he failed his background check due to his criminal record. Mr. C has been actively seeking full-time employment, even at minimum wage jobs. Mr. C was incarcerated on two different occasions in 2013 for a total of about 120 days.⁹

Mr. C has \$869 in employer reported earnings for 2013 and received \$4,671 in unemployment benefits.¹⁰ Mr. C's 2011 ongoing child support order for \$507 per month for five children was based on an annual income of \$17,401. This amount was calculated using imputed full-time year-round minimum-wage earnings.¹¹

III. Discussion

Alaska 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.¹² 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%.¹³

In a child support hearing, the person who filed the appeal, in this case Mr. C, has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.¹⁴

Mr. C showed that there has not been a material change in circumstances that would justify a modification since his child support was set at \$507 per month.

At this time, Mr. C's current annual income would result in a monthly child support amount that is less than he was paying before the latest modification action, but there has not been a material change in circumstances since his child support was set at \$507 per month. At

⁶ Exhibit 6, page 6.

⁷ Exhibit 7.

⁸ Exhibits 8 & 9.

⁹ Recording of Hearing-Testimony of Mr. C & Exhibit 9.

¹⁰ Exhibit 8.

¹¹ Exhibit 1, page 6.

¹² Alaska Civil Rule 90.3(h)(1).

¹³ Alaska Civil Rule 90.3, Commentary X.

¹⁴ Alaska Regulation 15 AAC 05.030(h).

this time, Mr. C's earning capacity is difficult to estimate. Given his job skills, his criminal record, and his recent history of frequent periods of incarceration, he does not yet have enough recent employment history to be able to determine if there has been a material change in circumstances since his child support was set at \$507 per month. As discussed at the hearing, the parties may wish to request another modification review in six months to a year.

Although Mr. C's ongoing child support is very low for the support of five children, it would not be appropriate to impute additional income to Mr. C's due to his failure to find and maintain year-round full-time employment due to his frequent incarceration. It is not appropriate to impute income to Mr. C based on the evidence of his limited earning capacity and his efforts to find better work in the record.

Child support may be based on the potential income of a person who is voluntarily and unreasonably unemployed or underemployed.¹⁵ A noncustodial parent who voluntarily reduces his or her income does not automatically receive a corresponding reduction in his or her child support obligation.¹⁶

If Mr. C could earn more income, but did not because he was unreasonably unemployed, it would be appropriate to set Mr. C's child support based on income he could earn without his criminal record and recent incarceration. Ms. T correctly pointed out at the hearing that these circumstances are the result of choices that Mr. C has made; however, the Alaska Supreme Court has recognized that although incarceration is often a foreseeable consequence of criminal misconduct and all criminal acts are in some sense voluntary, non-custodial parents who engage in criminal misconduct seldom desire the enforced unemployment that accompanies incarceration.¹⁷ The same could be said about the negative impact of a criminal record and recent incarceration on a parent's earning capacity. At this time, the evidence simply does not support a finding that Mr. C is not earning significantly more than full-time minimum wage earnings because he is unreasonably underemployed.

IV. Conclusion

There has not been a material change since Mr. C's ongoing monthly child support obligation for J, E, H, A, and Q was last set at \$507. Mr. C's child support order should not be

¹⁵ Civil Rule 90.3 Commentary, Part III-C.

¹⁶ *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

¹⁷ *Bendixen v. Bendixen*, 962 P.2d 170, 173 (Alaska 1998).

modified. The child support amounts in this order were calculated using the primary custody formula in Civil Rule 90.3(a).

V. CHILD SUPPORT ORDER

1. The Division’s Modified Administrative Child Support and Medical Support Order issued on November 13, 2013 is overturned.
2. The Notice of Petition for Modification issued on August 16, 2013 is denied.
3. Mr. C’s ongoing child support will remain at \$507 per month in accordance with the Division’s Modified Administrative Child and Medical Support Order dated February 2, 2011, which remains in effect.

DATED this 10th day of January, 2014.

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 30th 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.]