

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

In the Matter of:)
)
 E R. C) OAH No. 13-1859-CSS
) CSSD Case Nos. 001160195, 001190696
_____)

DECISION AND ORDER

I. Introduction

The obligor parent, E R. C, appeals a Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD) on November 14, 2013.¹ CSSD's order increased Mr. C's monthly child support obligation due to the addition of two children to Mr. C's child support case. Mr. C asserts that his monthly child support payment should not be increased because he is currently unemployed.² This decision concludes that an income averaging approach under Civil Rule 90.3 is the best indicator of Mr. C's current earning ability, and takes into account Mr. C's past periodic unemployment. Accordingly, based on income averaging, Mr. C's ongoing child support obligation is set at \$403 per month beginning November 1, 2013.

II. Facts

A. Material Facts

Mr. C has four children in foster care: E (age 2), B (age 3), T (age 4), and O (age 5).³ Mr. C has previously been employed as a laborer and in electrical work.⁴ Records obtained by CSSD from the Department of Labor and Workforce Development (DOL) indicate that Mr. C received gross wages of \$7,840.45 in the last two quarters of 2011; \$13,490.83 in 2012; and \$3,455.69 in 2013.⁵ In addition to wages, Mr. C received unemployment insurance benefits (UIB) in the amount of \$2,226.00 for 2011; \$2,332 for 2012; and \$970.00 for 2013.⁶

According to DOL records, Mr. C was terminated from three of his last four jobs for misconduct, and was laid off from the fourth job due to a lack of available work.⁷

¹ Exs. 4, 5.
² Ex. 5; E C hearing testimony.
³ Ex. 4 p. 1; undisputed hearing testimony.
⁴ E C hearing testimony.
⁵ Ex. 6 p. 1.
⁶ Ex. 6 pp. 1 - 2.
⁷ Ex. 6 pp. 2 - 3.

Mr. C was incarcerated from approximately January 2013 through June 2013.⁸ He was employed during the third and fourth quarters of 2013. He last worked in early December 2013; the temporary job he was working ended on December 4, 2013 and he has been unemployed since that time. He applied for UIB in early January 2014 but has not received much money from UIB payments thus far because he first had to serve a penalty / disqualification period. Mr. C testified that he has been seeking employment since December 2013 but has not found any thus far. He testified that he is "fairly broke."

Mr. C has not had his own home or apartment for about 18 months.⁹ He lived in his father's motor home for most of the summer of 2013. He is currently living with other family members. He does not pay rent, but contributes \$200.00 - \$400.00 per month toward the payment of utilities. He does not own a car / truck but purchases a monthly bus pass. He makes payments of about \$174.00 per month on his snow machine. He currently receives Food Stamps. He has some credit card debt, but is not currently able to make payments. He was able to spend some money on his children this past Christmas.

B. Relevant Procedural History

At some time prior to 2013 CSSD issued an Administrative Child Support and Medical Support Order setting Mr. C's monthly child support obligation. On May 1, 2013 Mr. C requested modification of his child support obligation.¹⁰ On June 3, 2013 CSSD granted his request and issued a Modified Administrative Child Support and Medical Support Order setting Mr. C's monthly child support obligation for two children (O and T) at \$54.00.¹¹

On October 30, 2013 CSSD notified Mr. C that it would be adding additional children to his child support case.¹² On November 14, 2013 CSSD issued a Modified Administrative Child Support and Medical Support Order adding Mr. C's two youngest children (B and E) to his case.¹³ CSSD's order of November 14, 2013 increased Mr. C's ongoing child support obligation from \$54.00 per month to \$318.00 per month, effective September 1, 2013.¹⁴ Mr. C appealed CSSD's order on December 24, 2013.¹⁵

⁸ All factual findings in this paragraph are based on Mr. C's hearing testimony unless otherwise noted.

⁹ All factual findings in this paragraph are based on Mr. C's hearing testimony unless otherwise noted.

¹⁰ Ex. 1 p. 1.

¹¹ Ex. 1.

¹² Ex. 2.

¹³ Ex. 4.

¹⁴ Ex. 4 p. 1.

¹⁵ Ex. 5.

Mr. C's hearing was held on January 16, 2014. Mr. C participated in the hearing by phone, represented himself, and testified on his own behalf. Child Support Specialist Andrew Rawls participated in the hearing by phone and represented CSSD. The record closed at the end of the hearing.

III. Discussion

A. The Burden of Proof is on Mr. C as the Appellant

As the person who filed the appeal in this case, Mr. C has the burden of proving, by a preponderance of the evidence, that the child support amount established in CSSD's Modified Administrative Child Support and Medical Support Order dated November 14, 2013 is incorrect.¹⁶

B. The Legal Basis of Mr. C's Child Support Obligation

A parent is obligated both by statute and at common law to support his or her children.¹⁷ A parent's duty of support begins on the child's date of birth.¹⁸ In those cases in which the child support obligation is determined by CSSD, the agency collects support from the date a parent requests child support services, or the date public assistance or Medicaid benefits are initiated on behalf of the child.¹⁹

C. Modification of Child Support Awards

Under Civil Rule 90.3, a child support award may be modified upon a showing of a material change of circumstances.²⁰ A material change of circumstances will be presumed if the monthly child support payment, as calculated under Civil Rule 90.3, is more than 15 percent greater or less than the previous child support order.²¹ Modifications are generally effective on or after the date that a motion for modification, or a notice of petition for modification, is served on the opposing party.²² In this case CSSD initiated and gave notice of its modification review on October 30, 2013, so any modified support obligation should take effect in November 2013.²³

D. What is the Appropriate Child Support Payment in This Case?

In Alaska, the rules for calculating child support are contained in Civil Rule 90.3. Under Civil Rule 90.3(a)(1), where the custodial parent has primary physical custody of the child, the first

¹⁶ 15 AAC 05.030(h).

¹⁷ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); A.S. 25.20.030.

¹⁸ *State of Alaska, Department of Revenue, Child Support Enforcement Division ex rel. Hawthorne v. Rios*, 938 P.2d 1013, 1015 (Alaska 1997).

¹⁹ 15 AAC 125.105(a)(1)-(2).

²⁰ Civil Rule 90.3(h)(1).

²¹ Civil Rule 90.3(h)(1).

²² 15 AAC 125.321(d).

²³ Exs. 2 and 3; 15 AAC 125.321(d).

step in calculating child support is to determine the non-custodial parent's total income from all sources. The second step is to multiply the non-custodial parent's income by the percentage specified in Civil Rule 90.3 applicable to the number of children for whom support must be paid.²⁴ In this case, it is undisputed that Mr. C is the noncustodial parent. It is also undisputed that, pursuant to Civil Rule 90.3(a)(2), the percentage by which the noncustodial parent's adjusted income must be multiplied, in order to calculate child support for four children, is 36%. Rather, the issue in this case is the income to which the 36% multiplier should be applied. This in turn raises the issue of the appropriate time period over which to determine Mr. C's income, since his income has been erratic and interrupted by periods of unemployment.²⁵

One approach would be to apply the 36% multiplier to Mr. C's current income, which is essentially zero. Although 36% of zero is still zero, the minimum child support amount that may be ordered pursuant to Civil Rule 90.3(c) is \$50.00 per month (\$600.00 per year). So, this approach would result in a child support award of 50.00 per month in this case. However, the Alaska Supreme Court has held that even a large drop in income does not constitute a material change in circumstances for purposes of Civil Rule 90.3 if the drop in income is temporary, and that an obligor parent must provide evidence that a drop in income is permanent in order for the child support obligation to be decreased on that basis.²⁶ As of the date of the hearing, Mr. C had only been unemployed for about six weeks; there is no indication at this point that his unemployment will be long-term or permanent. Accordingly, even though Mr. C's income is currently zero, his child support obligation cannot be based on zero income at this time.

Another possible approach would be to base Mr. C's income on an average of his reported wage rates, which according to DOL records have ranged from \$12.00 - \$19.46 per hour.²⁷ The resulting average hourly wage (\$15.73) would then be multiplied by 40 hours per week, 52 weeks per year, to determine total annual income. However, this approach would not give Mr. C credit for periods of employment he has had, some of which may have been involuntary, and could therefore result in setting too high a child support obligation.

A middle approach is appropriate here. If a person has erratic income from year to year, Civil Rule 90.3 allows the child support obligation to be based on an average of several years'

²⁴ Civil Rule 90.3(a)(2).

²⁵ See *Byers v. Ovitt*, 133 P.3d 676, 683 (Alaska 2006) (noting that a court may determine a party's income by various means).

²⁶ See *Hill v. Bloom*, 235 P.3d 215 (Alaska 2010), citing *Patch v. Patch*, 760 P.2d 526, 529-30 (Alaska 1988).

²⁷ Ex. 6 pp. 2 - 3.

worth of income.²⁸ On several occasions, the Alaska Supreme Court has approved support awards that were based on the averaging of the noncustodial parent's income over several years.²⁹ In this case, Mr. C's income has fluctuated significantly over the past three years.³⁰ Accordingly, Mr. C's prospective income is best estimated from his historical earnings.

The most complete income data contained in the record is for the two year period from the third quarter of 2011 through the third quarter of 2013.³¹ Averaging Mr. C's gross earned income, unemployment insurance benefits (UIB), and annual Permanent Fund Dividend (PFD) for this period results in average annual taxable gross income of \$14,944.49 over this two year period. This is the best estimate of Mr. C's anticipated income for the current year.³² Inserting this figure into the Civil Rule 90.3 calculation yields a child support payment of \$403.00 per month for four children. The worksheet showing the calculation has been labeled as Attachment A and is attached to this decision.

IV. Conclusion

Based on the evidence obtained through the hearing process, and utilizing income averaging, Mr. C's child support obligation should be set at \$403 per month beginning November 1, 2013.³³ This figure was calculated pursuant to Civil Rule 90.3 and should be adopted. No variance under Civil Rule 90.3(c) was requested or granted.

V. Child Support Order

- Mr. C's child support obligation for E, B, T, and O is set at \$403 per month effective November 1, 2013 and ongoing;
- All other provisions of the Modified Administrative Child Support and Medical Support Order dated November 14, 2013 remain in full force and effect.

²⁸ Civil Rule 90.3, Commentary, Section III(e).

²⁹ See, for example, *Pugil v. Cogar*, 811 P.2d 1062 (Alaska 1991); *Zimin v. Zimin*, 837 P.2d 118 (Alaska 1992); *Hill v. Bloom*, 235 P.3d 215 (Alaska 2010).

³⁰ Ex. 6.

³¹ Ex. 6.

³² By way of comparison, if child support were calculated based on the *lowest* reported wage that Mr. C has earned according to DOL records (\$12.00 per hour), his monthly child support obligation would be \$655.00 per month for four children (see Attachment B). Alternatively, even were child support calculated based on minimum wage (currently \$7.75 in Alaska), Mr. C's monthly child support obligation would still be \$449.00 per month for four children (see Attachment C). Using the income averaging approach employed in this decision balances Mr. C's historical income with the fact that he has historically been unemployed for at least three months each year. In other words, calculating Mr. C's child support obligation using an income averaging approach automatically factors-in Mr. C's past unemployment rate.

³³ Mr. C's past-due child support for B and E, referenced at Exhibit 4, pages 1 - 2, was not raised as an issue in this case and remains unaltered by this decision.

DATED this 21st day of February, 2014.

Signed

Jay Durych

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 10th day of March, 2014.

By: *Signed*

Signature

Jay D. Durych

Name

Administrative Law Judge

Title

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