

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

IN THE MATTER OF)	OAH No. 14-0028-CSS
T X)	CSSD No. 001122020
_____)	

DECISION AND ORDER

I. Introduction

This case is T X's appeal of an order modifying his ongoing child support obligation for his child, E. B R. T is the custodial parent. The Child Support Services Division (Division) issued this order, increasing Mr. X's ongoing monthly obligation for the support of their child, E, from \$50 to \$294, effective October 1, 2013.

On January 22, 2014, a formal hearing was held to consider Mr. X's appeal.¹ Mr. X did not participate in the hearing. Ms. T also did not participate.² Russell L. Crisp, Child Support Services Specialist, represented the Division. The hearing was audio-recorded. The record closed at the end of the hearing.

Mr. X appealed the Division's order that increased ongoing child support to \$294 per month. That order was based on the Division's estimate of Mr. X's estimated 2013 annual income, but the Division did not base this estimate on Mr. X's reported 2013 earnings. Instead, the Division imputed full-time year-round earnings of \$9.00 per hour in this estimate. Prior to the hearing, the Division ran new calculations based on Mr. X's estimated 2013 annual income without any earnings, based on Mr. X's incarceration.

The evidence at the hearing showed this new annual income estimate was probably the best estimate of his current income and earning capacity. This calculation shows Mr. X's ongoing child support obligation for E should remain at the minimum monthly amount of \$50.

II. Facts

This case is an appeal of the Division's order increasing Mr. X's ongoing child support obligation through the modification process.³ Mr. X's child support for his child, E was set in

¹ The hearing was held under Alaska Statute 25.27.190.

² Neither Mr. X nor Ms. T provided phone numbers for the hearing or were available at their phone numbers of record.

³ Alaska Civil Rule 90.3(h) governs child support modification actions.

2003 at \$50 per month.⁴

Mr. X filed a request for modification on August 28, 2013.⁵ The Division issued notice of the petition for modification on August 29, 2013.⁶

The Division issued a Modified Administrative Child and Medical Support Order on December 24, 2013.⁷ The Division set Mr. X's modified ongoing child support from calculations using his estimated annual income. This projected estimate was imputed full-time year-round earnings of \$9.00 per hour and a PFD.⁸ The calculations result in a monthly support amount of \$294 per month.⁹

Mr. X requested a formal hearing. Mr. X was concerned that the Division had overestimated Mr. X's income because he was on an ankle monitor as the result of a felony conviction, and would not be released until 2015.¹⁰

Prior to the hearing, the Division provided new calculations and Mr. X's reported earnings information from the last few years. The Division also agreed with Mr. X that his ongoing child support for E should be not be increased based on his historical earnings and the physical restrictions imposed by his criminal sentence. The Division's new calculations indicated that Mr. X's ongoing child support should remain at \$50 per month, which is the minimum monthly child support allowed under Alaska Civil Rule 90.3(c)(3).¹¹

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 have voice mail and a message was left, but he did not call in during the hearing or call in after asking to have the hearing rescheduled.

Mr. X had no reported earnings for the first three quarters of 2013.¹² This is probably due

⁴ Exhibit 1.

⁵ Exhibit 2.

⁶ Exhibit 3.

⁷ Exhibit 5.

⁸ Exhibit 5, page 8.

⁹ Exhibit 5.

¹⁰ Mr. X's request for a formal hearing is found at Exhibit 6.

¹¹ Exhibit 7, page 2 & Exhibit 9.

¹² Exhibit 9.

to incarceration.¹³ Mr. X's reported earnings for all four quarters of 2012 totaled \$281.¹⁴ Mr. X's had no reported earnings for the all of 2011. The earnings records provided by the Division and discussed at the hearing indicate that Mr. X's current annual income of his current income and earning capacity would still result in a minimum child support order, which is \$50.¹⁵

Based on the evidence in the record, I find that it is more likely than not that the Division's latest calculation is correct and uses the best estimate of Mr. X's current income. These calculations result in a monthly child support amount of \$50. I also find that there has not there has not been a change in circumstances since child support for E was last set at this monthly amount that would justify a modification.¹⁶

III. Discussion

In a child support hearing, the person who filed the appeal, in this case, Mr. X, has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.¹⁷ Although he did not participate in the hearing, the Division admitted before the hearing that the modified order was incorrect. The evidence in the record shows that the Division over-estimated Mr. X's current earnings based on Mr. X's reported earnings history and the restrictions imposed on him as a result of his felony conviction. The hearing record was not held open for ten days to give Mr. X time to file a request to reschedule the hearing because this order gives Mr. X the relief that he requested.

The Division used only the \$416 in annual income it had used to calculate that Mr. X was entitled to a \$50 primary custody order prior to the hearing in the shared custody calculation that the Division submitted after the hearing. It would not be appropriate to impute additional income to Mr. X's in setting his support without additional evidence of Mr. X's earning capacity. Child support may be based on the potential income of a person who is voluntarily and unreasonably unemployed or underemployed.¹⁸ A noncustodial parent who voluntarily reduces his or her

¹³ Recording of Hearing, Exhibit 6 & Exhibit 4, page 3.

¹⁴ Exhibit 9.

¹⁵ Recording of Hearing & Exhibit 9.

¹⁶ Recording of Hearing.

¹⁷ Alaska Regulation 15 AAC 05.030(h).

¹⁸ Civil Rule 90.3 Commentary, Part III-C.

income does not automatically receive a corresponding reduction in his or her child support obligation.¹⁹ 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, but the evidence in the record simply does not show unreasonable underemployment.

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.²⁰ 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.²¹

The evidence in the record does not show that a material change of circumstances has occurred since Mr. X's ongoing child support was last set at \$50 per month. A material change of circumstances justifying an upward modification of ongoing child support has not occurred.

IV. Conclusion

Mr. X's ongoing child support should be not modified based on the Division's latest calculations. Modified ongoing child support for E should remain at \$50 per month, the minimum allowed under Alaska Civil Rule 90.3(c)(3). The child support amount in this order was 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 December 24, 2013 is overturned.
2. The Notice of Petition for Modification issued on August 29, 2013 is denied.
3. Mr. X's ongoing child support for E will remain at \$50 per month in accordance with the Division's Administrative Child and Medical Support Order dated August 12, 2003, which remains in effect.

DATED this 27th day of January 2014.

By: Signed
Mark T. Handley
Administrative Law Judge

¹⁹ *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

²⁰ Alaska Civil Rule 90.3(h)(1).

²¹ 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 19th day of February, 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.]