

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

In the Matter of:)	
)	OAH No. 14-0289-CSS
K B. C)	CSSD No. 001150420
_____)	

DECISION AND ORDER

I. Introduction

The obligor parent, K B. C, appeals a Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD). The order, dated January 28, 2014, increased Mr. C's child support obligation from \$339.00 per month to \$400.00 per month effective January 1, 2014.¹

Mr. C asserts that his monthly child support payment should be decreased because he has lung problems, wishes to further his education, and can only work part-time if he is in trade school or college.² CSSD asserts that Mr. C has reduced his current employment from full-time to part-time based on factors unrelated to his medical condition, and that his child support obligation should therefore be based on full-time employment at his current job.

This decision concludes that, while Mr. C was forced to leave his *prior* employment on the North Slope for medical reasons beyond his control, there are no medical problems preventing Mr. C from working full-time at his *present* employment. Further, basing Mr. C's child support obligation on part-time earnings instead of on his prior full-time earnings, in order to allow him to attend trade school or college, would force his children to finance his education. CSSD was therefore correct to base Mr. C's child support obligation on his earnings from his most recent full-time employment. Accordingly, CSSD's Decision on Request for Modification Review dated January 28, 2014 is affirmed, and CSSD's Modified Administrative Child Support and Medical Support Order dated January 28, 2014 remains in effect. Mr. C's child support obligation for three children, based on O A's physical custody of the children, is set at \$400.00 per month effective January 1, 2014 and ongoing.

¹ Ex. 11.

² Ex. 12; K C hearing testimony.

II. Facts

A. *Material Facts*³

Mr. C is Sudanese.⁴ He married O P. A in Ethiopia in 1999⁵ and subsequently emigrated to the United States.⁶ The parties initially lived in Minnesota but moved to Alaska in 2006.⁷ The parties have three children: E, currently nine years old; F, currently seven years old; and G, currently five years old.⁸ Mr. C also has two additional children from a subsequent relationship (Y and Z) who live in Ethiopia.⁹

When Mr. C first came to America in 1999 he did cleaning / janitorial work and also worked at a plastics manufacturing plant in Minneapolis.¹⁰ He began working for No Name on the North Slope shortly after coming to Alaska in 2006.¹¹ His work involved metalwork (buffing and grinding).¹² In 2010 Mr. C developed shortness of breath, which he attributed to inhaling airborne particulates generated by his metalwork.¹³ As a result, he was unable to pass a spirometry test which was required by his employer in order to wear a respirator, and on April 8, 2011 he quit his job with No Name on the North Slope and returned to Anchorage.¹⁴

Medical evidence in the record supports Mr. C's claim that he has lung problems which have prevented him from returning to his prior work on the North Slope.¹⁵ A doctor who (on July 21, 2011) reviewed Mr. C's pulmonary spirometry test results from August 3, 2010 wrote that "[w]ith the lung volumes indicated by spirometry, [Mr. C was] unqualified to wear a respirator."¹⁶ However, the doctor further stated that if Mr. C underwent "necessary evaluation" and was "placed on a medical regimen and his lung volume improved, it might be possible" for him to qualify to wear a respirator again "in the future."¹⁷ A physician's assistant (PA) who examined Mr. C and his spirometry test records in November 2012 opined that these test records "suggest a marked decrease

³ All factual findings in this section are based on Mr. C's hearing testimony unless otherwise noted.

⁴ Ex. 2 p. 2.

⁵ Ex. 1 p. 1.

⁶ Ex. 2 p. 2.

⁷ Ex. 2 p. 2.

⁸ Ex. 1 p. 1; CSSD pre-hearing brief; undisputed hearing testimony.

⁹ Ex. E; Ex. 7 p. 1; K C hearing testimony.

¹⁰ K C hearing testimony.

¹¹ Ex. A p. 1; Ex. 2 p. 2.

¹² Ex. A p. 1.

¹³ Ex. A p. 1.

¹⁴ Ex. A p. 1; Ex. 2 p. 2; K C hearing testimony.

¹⁵ This was also the conclusion of the administrative law judge who issued the decision in OAH Case No. 11-0256-CSS (Ex. 2 pp. 3 - 4).

¹⁶ Ex. B.

¹⁷ Ex. B.

in both his FVC and FEV1 between September 2006 and December 2007," which decrease "persisted through a spirometry test done [in] June 2010."¹⁸ The PA wrote that Mr. C was then suffering from reactive airway disease and was using an inhaler at that time.¹⁹ Mr. C asserts that he still suffers from these breathing problems at the present time, and wants to get a job where he does not have to work outside. However, he testified that he currently owes money on his doctor's bill, and that his doctor will not provide an opinion letter confirming that his lung problems are continuing until Mr. C brings his account current.

Mr. C and Ms. A separated during the summer of 2010 and filed for divorce in 2011.²⁰ On May 23, 2011 the Anchorage Superior Court issued a divorce and custody decree.²¹ The decree awarded Ms. A sole legal custody and primary physical custody of the parties' three children.²² The decree stated that "Mr. C shall continue to pay child support in accordance with [CSSD's] previous administrative order," and that, "if Mr. C's employment status changes, he may seek to modify his child support obligation by appealing directly to CSSD."²³

On November 13, 2013 Mr. C began working full time for No Name as a lot attendant.²⁴ He earns \$10.00 per hour and is paid twice per month.²⁵ In late December 2013 Mr. C requested that his employer transfer him from full time status to part-time status so that he could attend college courses; his employer transferred him to part-time status effective January 6, 2014.²⁶ As a part-time employee Mr. C works 30 hours per week at \$10.00 per hour.²⁷

Federal income tax returns prepared by a professional tax service indicate that Mr. C received gross income of \$49,991.00 in 2010, \$30,274.00 in 2011, and \$15,464.00 in 2012.²⁸

¹⁸ Ex. A p. 1. FVC is an acronym which stands for "Forced Vital Capacity," which is basically lung capacity measured when the patient is exhaling with maximal speed and effort. *See* Dorland's Medical Dictionary for Health Consumers, accessed online at <http://medical-dictionary.thefreedictionary.com/forced+vital+capacity> (date accessed May 27, 2014). "FEV1" is an acronym which stands for "Forced Expiratory Volume in One Second," which is basically the maximum amount of air which a patient can exhale in one second. *See* Gale Encyclopedia of Medicine, accessed online at <http://medical-dictionary.thefreedictionary.com/FEV1> (date accessed May 27, 2014). These are both spirometric tests measuring pulmonary / respiratory function.

¹⁹ Ex. A p. 1.

²⁰ Ex. 1 p. 1.

²¹ Ex. 1.

²² Ex. 1 pp. 1 - 2.

²³ Ex. 1 p. 3.

²⁴ Ex. C; Ex. 5; K C hearing testimony.

²⁵ Exs. C, D, 5.

²⁶ Ex. 8 p. 1. Mr. C did in fact receive a high school diploma from the Adult Learning Center's High School Academy in February 2014 (Ex F), although there is no evidence in the record that he subsequently took college courses.

²⁷ Ex. 8 p. 2.

²⁸ Ex. 9 pp. 5, 7, 11, 13.

Other than the pay statements from his car lot attendant job, which Mr. C did not begin until November 13, 2013, no wage information is available for 2013.

Mr. C currently lives with his brother and his 78 year old mother in his brother's house.²⁹ Mr. C testified that he cannot afford to pay his share of the rent, but pays his brother \$100.00 per month for expenses. He does not own his own car, but he has a friend who allows him to borrow his truck, at which times Mr. C pays for gasoline. Mr. C estimates that he pays about \$140.00 per month for gasoline, and about \$180.00 per month for food.

Mr. C testified that he previously sent \$250.00 per month to Ethiopia for the support of his two children there, but that this amount was subsequently reduced to \$160.00 per month.³⁰ Records confirm that Mr. C has sent money in various amounts to Ethiopia periodically.³¹ Finally, Mr. C testified that he also pays \$50.00 per month toward the support of his mother.

Ms. A has a total of four children in her household.³² She has a boyfriend, but he does not live with her. She is currently employed as a packager. She earns \$9.00 per hour and works 40 hours per week: her gross income is about \$1,200.00 per month.

B. Relevant Procedural History

In May 2010 CSSD issued its original Administrative Child Support and Medical Support Order which set Mr. C's child support obligation at \$1,148.00 per month.³³ This support order was based on Mr. C's comparatively high income from his employment on the North Slope.³⁴ However, within eleven months of entry of the original support order, Mr. C was no longer working on the North Slope.³⁵ On May 17, 2011 Mr. C submitted a modification request to CSSD.³⁶ CSSD originally denied Mr. C's modification request on the grounds that he was voluntarily unemployed.³⁷ However, Mr. C appealed CSSD's denial of his modification request, and on

²⁹ All factual findings in this paragraph are based on Mr. C's hearing testimony unless otherwise stated.

³⁰ Ex. 7 p. 1; K C hearing testimony.

³¹ Ex. 7 pp. 2 - 5. At hearing, Mr. C implied that his child support obligation toward the three children at issue in this case should be reduced based on his need to provide support for his two subsequent children. However, the official commentary to Civil Rule 90.3 states that in most instances, a subsequent family will not present good cause to vary the otherwise applicable child support guidelines:

A parent with a support obligation may have other children living with him or her who were born or adopted after the support obligation arose. The existence of such "subsequent" children, even if the obligor has a legal obligation to support these children, will not generally constitute good cause to vary the guidelines.

Alaska Rule of Civil Procedure, 90.3, Official Commentary at Section VI(B)(2).

³² All factual findings in this paragraph are based on Ms. A's hearing testimony unless otherwise stated.

³³ Ex. 2 p. 2.

³⁴ Ex. 2 pp. 3 - 4.

³⁵ Ex. 2.

³⁶ Ex. 2 p. 2.

³⁷ Ex. 2 pp. 2 - 3.

November 7, 2011 an administrative law judge (ALJ) issued a decision granting Mr. C's modification request.³⁸ The ALJ found, based on the information provided during the hearing, that Mr. C was unable to work his more lucrative North Slope job due to his lung problems, and that his former income should therefore not be imputed to him.³⁹ The ALJ concluded that Mr. C's child support obligation should be recalculated based on the income he was then receiving, which consisted of unemployment insurance benefits (UIB).⁴⁰ The ALJ reduced Mr. C's monthly child support obligation from \$1,148.00 to \$339.00 effective June 1, 2011.⁴¹

In December 2013 Mr. C submitted the modification request at issue in this case.⁴² On January 28, 2014 CSSD granted Mr. C's modification request⁴³ and issued a Modified Administrative Child and Medical Support Order.⁴⁴ However, instead of lowering Mr. C's monthly child support obligation, it increased it from \$339.00 to \$400.00 effective January 1, 2014.⁴⁵ CSSD's modified child support payment was based on annual gross income of \$16,500.00 and annual adjusted income of \$14,550.48.⁴⁶ Mr. C appealed CSSD's modification order on February 6, 2014, stating that he is partially disabled and can only work part-time.⁴⁷

Mr. C's hearing was held on March 18, 2014. Mr. C attended the hearing in person, represented himself, and testified on his own behalf. Ms. A participated in the hearing by phone, represented herself, and testified on her own behalf using a Nuer interpreter. 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 of January 28, 2014 is incorrect.⁴⁸

³⁸ Ex. 2 pp. 4, 5, 7.

³⁹ Ex. 2 p. 4.

⁴⁰ Ex. 2 p. 4.

⁴¹ Ex. 2 pp. 4 - 5. The new child support figure was based on annual income of \$12,666.00 (Ex. 2 p. 3).

⁴² Ex. 4.

⁴³ Ex. 10.

⁴⁴ Ex. 11.

⁴⁵ Ex. 11 p. 1.

⁴⁶ Ex. 11 p. 6.

⁴⁷ Ex. 12 p. 1.

⁴⁸ 15 AAC 05.030(h).

B. Court Rules and Agency Regulations Regarding Calculation of Child Support

A parent is obligated both by statute and at common law to support his or her children.⁴⁹ A parent's duty of support begins on the child's date of birth.⁵⁰ In cases where child support 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.⁵¹

In Alaska, the rules for calculating child support are contained primarily in Rule 90.3 of the Alaska Rules of Civil Procedure (Civil Rules). How support is calculated depends on the type of custody exercised by the parents of the children.⁵² Under Civil Rule 90.3(a)(1), where the custodial parent has primary physical custody of the child, the first step in calculating child support is to determine the non-custodial parent's total income from all sources. The second step is to subtract any applicable deductions from the non-custodial parent's gross income; the resulting number is referred to as adjusted income. The third step is to multiply the non-custodial parent's adjusted income by the percentage specified in Civil Rule 90.3 applicable to the number of children for whom support must be paid.⁵³ In this case there are three children for whom support must be paid. In order to calculate a child support award for three children, the non-custodial parent's adjusted annual income is multiplied by 33%.⁵⁴ The annual child support obligation is then divided by twelve to obtain the monthly child support payment.

Under Civil Rule 90.3, a parent's current / ongoing child support obligation should be based on the amount the parent can be expected to earn during the period the support is being paid.⁵⁵ This determination is necessarily somewhat speculative because the relevant income figure is expected future income.⁵⁶ In cases in which the obligor parent's income is relatively steady, this calculation can be based on the obligor's parent's income from the previous year. If a person has erratic income from year to year, Civil Rule 90.3 allows child support to be based on an average of several years' income.⁵⁷ The facts of the particular case generally determine which approach should be used.⁵⁸

⁴⁹ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); A.S. 25.20.030.

⁵⁰ *State of Alaska, Department of Revenue, Child Support Enforcement Division ex rel. Hawthorne v. Rios*, 938 P.2d 1013, 1015 (Alaska 1997).

⁵¹ 15 AAC 125.105(a)(1)-(2).

⁵² Civil Rule 90.3(a), (b) (recognizing four types of custody [primary, shared, divided, and hybrid] and identifying a calculation for each type). See also Civil Rule 90.3(f) (defining types of custody).

⁵³ Civil Rule 90.3(a)(2).

⁵⁴ Civil Rule 90.3(a)(2)(C).

⁵⁵ Civil Rule 90.3, Commentary, Section III(E).

⁵⁶ Civil Rule 90.3, Commentary, Section III(E).

⁵⁷ Civil Rule 90.3, Commentary, Section III(E); see also *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).

C. Mr. C's Support Obligation Must be Based on Full-Time Employment

The law allows income to be imputed to a parent who is voluntarily and unreasonably unemployed or underemployed.⁵⁹ If a parent is found to be voluntarily and unreasonably unemployed or underemployed, his or her child support amount may be calculated from that parent's "potential income," which is based on his or her "work history, qualifications and job opportunities."⁶⁰ In deciding whether an obligor is unreasonably underemployed, the adjudicator "must consider the totality of the circumstances . . . [which] include such factors as whether the obligor's reduced income is temporary, whether the change is the result of economic factors or of purely personal choices, the children's needs, and the parents' needs and financial abilities."⁶¹ A child support obligation will not be modified for an obligor who has reduced income in an effort to decrease child support, since such conduct amounts to bad faith.⁶² However, a showing of bad faith is not a prerequisite to a finding that unemployment or underemployment is voluntary.⁶³ The obligor parent (in this case Mr. C) bears the burden of proving his current earning capacity and of showing that his underemployment is not voluntary.⁶⁴

In this case, the preponderance of the evidence shows that Mr. C was forced to leave his *prior* employment on the North Slope for medical reasons beyond his control. His lung function was not good enough to allow him to wear a respirator, which was required for his grinding and buffing work. However, the medical evidence in the record does not state that Mr. C cannot work; it states only that his lung function is not good enough to allow him to wear a respirator. Mr. C's *current* employment does not require him to use a respirator. Accordingly, there are no medical problems preventing Mr. C from working full-time at his *present* employment.

Mr. C also asserts that he needs to switch from full-time employment to part-time employment in order to advance his education. He argues that, by furthering his education now, he will be able to get a higher-paying, less physically demanding job later.

⁵⁸ See *Byers v. Ovitt*, 133 P.3d 676, 683 (Alaska 2006) (noting that a court may determine a party's income by various means).

⁵⁹ Civil Rule 90.3(a)(4); see also *Tillmon v. Tillmon*, 189 P.3d 1022, 1030 (Alaska 2008).

⁶⁰ Civil Rule 90.3(a)(4).

⁶¹ *Sawicki v. Haxby*, 186 P.3d 546, 550 (Alaska 2008) (internal citations and quotation marks omitted).

⁶² *Beard v. Morris*, 956 P.2d 418, 420 at footnote 3 (Alaska 1998); see also *Mansfield v. Taylor*, 480 S.E.2d 752, 755 (Va. 1997) (where one acts purposefully with the desire to evade one's support obligations, or evidences "a careless disregard for one's support obligations," modification is inappropriate); accord *State Department of Social Services v. Seals*, 701 So.2d 746, 748 (La.App.1997).

⁶³ *Kowalski v. Kowalski*, 806 P.2d 1368, 1371 (Alaska 1991).

⁶⁴ *Kowalski v. Kowalski*, 806 P.2d 1368 - 1370 (Alaska 1991).

Advancing one's education is a laudable goal, particularly when it may eventually benefit one's children through greater earning capacity. On the other hand, the promise of increased support in the *future* is of little benefit to children who require support *in the present*.

The Alaska Supreme Court addressed the issue presented here in *Olmstead v. Ziegler*, 42 P.3d 1102 (Alaska 2002). In that case, the obligor parent wished to go back to college in order to change careers and requested reduction of his child support. The trial court denied the obligor's motion for modification. The trial court stated that Mr. Olmstead had "elected to learn new things for a while, and perhaps take on a new career," and that he was "free to do so," but that "[Ms. Ziegler] and the child are not expected to finance these choices," and that the Court would not shift any of the burden of Mr. Olmstead's career choice "to the narrow shoulders of [the] child." On appeal, the Alaska Supreme Court quoted the trial court's analysis with approval, and upheld the trial court's denial of the obligor parent's motion for modification.

In this case, basing Mr. C's child support obligation on part-time earnings instead of on his prior full-time earnings would, as in *Olmstead v. Ziegler*, force his children to finance his education. Accordingly, Mr. C's child support obligation must be calculated based on his earnings from full-time employment.

In this case, CSSD based its child support calculation on Mr. C's recent (November 2013 - January 2014) full-time income from No Name.⁶⁵ This was a reasonable approach to take in January 2014 when CSSD's determination was made, and is still an appropriate approach because it is the most recent full-time employment held by Mr. C which he is still medically able to engage in. By way of comparison, basing Mr. C's child support obligation on his income for 2012 (the most recent year for which 12 months of income information is available) results in a monthly support payment of \$408.00, eight dollars more than the monthly support amount arrived at by CSSD.⁶⁶ Alternatively, basing Mr. C's child support obligation on the income he would be expected to receive in 2014, were he to work full-time for No Name at his current hourly rate, results in a monthly support payment of \$502.00, \$102.00 more than the monthly support amount arrived at by CSSD.⁶⁷

⁶⁵ Ex.11 p. 6.

⁶⁶ See calculations attached hereto as Ex. A. In 2012, Mr. C's income consisted solely of unemployment insurance benefits and the Alaska Permanent Fund Dividend (PFD).

⁶⁷ See calculations attached hereto as Ex. B. Multiplying Mr. C's current wage of \$10.00 per hour by eight hours per day results in gross wages of \$80.00 per day; multiplying Mr. C's gross wage of \$80.00 per day by the 253 work days in 2014 results in annual gross wages of \$20,240.00.

In summary, while Mr. C was forced to leave his prior employment on the North Slope for medical reasons beyond his control, there are no medical problems preventing Mr. C from working full-time at his present employment. Basing Mr. C's child support obligation on part-time earnings instead of on his prior full-time earnings, in order to allow him to attend trade school or college, would force his children to finance his education. CSSD was therefore correct to base Mr. C's child support obligation on his earnings from his most recent full-time employment.

IV. Conclusion

CSSD's Decision on Request for Modification Review dated January 28, 2014 is affirmed and CSSD's Modified Administrative Child Support and Medical Support Order dated January 28, 2014 remains in effect. Mr. C's child support obligation for three children, based on Ms. A's physical custody of the children, is set at \$400.00 per month effective January 1, 2014 and ongoing. No variance under Civil Rule 90.3(c) was requested or granted.

V. Child Support Order

- CSSD's Decision on Request for Modification Review dated January 28, 2014 is affirmed, and CSSD's Modified Administrative Child Support and Medical Support Order dated January 28, 2014 remains in effect.
- Mr. C is liable for child support for E, F, and G in the amount of \$400.00 per month effective January 1, 2014 and ongoing.

DATED this 29th day of May, 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 16th day of June, 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.]