

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

In the Matter of:)
)
D N. E) OAH No. 14-1191-CSS
) CSSD No. 001195747
_____)

CORRECTED DECISION AND ORDER¹

I. Introduction

D N. E appealed an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on June 24, 2014. The obligee children are Z, 9; Y, 8; and X, 7. The other party to the case is F R. C.

The hearing was held on July 31, 2014. Mr. E appeared in person; Ms. C participated by telephone. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record and after careful consideration, Mr. E's child support for Z, Y, and X is set at \$396 for December 2013; and \$494 per month for three children (\$404 for two children; \$299 for one child) from January 2014 to the present, and ongoing. Mr. E is voluntarily and unreasonably unemployed.

II. Facts

A. Procedural History

Ms. C applied for child support services for Z, Y, and X in December 2013.² CSSD initiated a child support action against Mr. E by issuing an Administrative Child Support and Medical Support Order on March 11, 2014. The order set Mr. E's ongoing child support at \$508 per month for three children, with arrears of \$2,032 going back to December 2013.³ Mr. E requested an administrative review and provided two paystubs.⁴ Following the review, CSSD issued an Amended Administrative Child and Medical Support Order on June 24, 2014, that set Mr. E's ongoing child support at \$514 per month, with arrears of \$3,578 for the period from December 2013 through June 2014.⁵ Mr. E filed an appeal on July 7, 2014, claiming that he is unemployed and does not have the capacity to pay that amount.⁶

¹ Ms. C's name was corrected in the first line of the Procedural History, along with the date on line three.
² Exh. 1.
³ Exh. 2.
⁴ Exh. 4.
⁵ Exh. 6.
⁶ Exh. 7.

B. Material Facts

Mr. E is currently unemployed. He previously worked at the Facility T in Anchorage for about one year. In 2013, his income during the last three quarters of the year totaled \$15,414.18.⁷ A child support amount calculated from that annual income amount is \$396 per month for three children.⁸

In the first quarter of 2014, Mr. E earned \$4,467.95 at the Facility T.⁹ When that amount is added to his income during the previous three quarters, Mr. E's total income for four consecutive quarters was \$19,882.13.¹⁰ Even though the four quarters of earnings overlap two calendar years, that figure represents Mr. E's actual annual income and his income-earning ability for a one-year period of time. A child support amount calculated from that annual income figure equals \$494 per month for three children (\$404 for two children; \$299 for one child).¹¹

Mr. E left his job at the Facility T in March 2014 in order to move to No Name, also known as the "No Name," with his girlfriend, N. Mr. E testified that they were previously living in a one-room efficiency apartment in Anchorage, and they couldn't afford to get a three-bedroom apartment because the rent would have been around \$2,000 per month. So they moved to No Name, where they located a three-bedroom apartment for only \$1,300 per month.

Mr. E stated he and N needed a three-bedroom house because she has visitation with her children during the time she is home from her job on the North Slope. N works for Facility S in the North Slope on a 3-on/3-off schedule, and she has her three children for at least one week during her rotation home. Mr. E said he tries to make it relaxing for her when she's home, so he cooks for her children while they are at her place for visitation.

Mr. E said at the hearing that he does not receive unemployment benefits because he did not qualify for them when he left his job at the Facility T. Since Mr. E is unemployed, N is essentially supporting him. He acknowledged that he is "living on the gratuity of others." Mr. E even has the use of N's car while she is at work.

Mr. E's primary work experience is in warehouse, janitorial and retail jobs, and he has also worked as a kitchen helper. He stated he spends 3-4 hours per day job hunting online, such

⁷ There was no income reported for him in the first quarter of 2013. Exh. 9.

⁸ Attachment A.

⁹ Exh. 9.

¹⁰ $\$15,414.18 + \$4,467.95 = \$19,882.13$. The four consecutive quarters are the second quarter of 2013 through the first quarter of 2014.

¹¹ See Exh. 6 at pg. 9. CSSD prepared this calculation for 2013, but the income he earned during the first quarter of 2014 cannot be included.

as on craigslist or the Job Service website, plus company websites. He could not estimate the number of employers he has contacted, but as of the date of the hearing, Mr. E claimed he had submitted at least 35 applications online, and had had one interview, at Facility R. At first he said he is seeking \$10-\$20 per hour working in a job that involves driving, security, loss prevention, or sales. However, Mr. E later stated that his father works on the North Slope, so he is focusing on trying to get a job with an employer there with his father's assistance.

Mr. E testified that since the end of May 2014, he had had visitation with Z, Y, and X on the average of 14-16 overnights per month. He said he had requested that Ms. C allow the children to live with him during the 2014-2015 school year, but she had refused, so after school started he probably would have the children only on weekends.

Ms. C contested Mr. E's testimony about visitation. She stated Mr. E had the children on a week-on, week-off schedule in June 2014, and, at the time of the hearing, they had been with him about one week plus a few days in July. She agreed Mr. E had requested that the children live with him, but she asserted she had never agreed to the idea. Ms. C added that during the last school year, Mr. E had the children on average only about four overnights per month. He claimed his visitation ranged from two to eight overnights per month.

III. Discussion

As the person who filed the appeal, Mr. E has the burden of proving by a preponderance of the evidence that CSSD's Amended Administrative Child and Medical Support Order is incorrect.¹²

A parent is obligated both by statute and at common law to support his or her children.¹³ In cases established by CSSD, the agency collects support from the date the custodial parent requests child support services, or the date public assistance or Medicaid benefits are initiated on behalf of the child.¹⁴ In this case, Ms. C applied for child support services in December 2013, so that is the month during which Mr. E's obligation to support Z, Y, and X through CSSD should begin.

A. Child support calculation

Civil Rule 90.3(a)(1) provides that an obligor's child support amount is to be calculated based on his or her "total income from all sources," minus mandatory deductions such as taxes

¹² 15 AAC 05.030(h).

¹³ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁴ 15 AAC 125.105(a)(1)-(2).

and Social Security. Mr. E is unemployed, so he does not have an income from which to calculate a child support figure. At the end of the hearing, CSSD stressed the fact that Mr. E left his job in order to move. This argument raises the issue of voluntary and unreasonable unemployment.

If a parent is found to be voluntarily and unreasonably unemployed, his or her child support amount may be calculated from that parent's "potential income," which should be based on his or her "work history, qualifications and job opportunities."¹⁵

In cases in which voluntary unemployment is alleged, the court or administrative law judge must determine whether the parent has engaged in voluntary conduct "for the purpose of becoming or remaining unemployed."¹⁶ It is also necessary to determine whether the parent's unemployment is unreasonable. An integral part of the analysis is whether the parent's lack of employment is a result of "economic factors," as in being laid off, or of "purely personal choices."¹⁷ It is not necessary to prove the individual was purposefully avoiding a support obligation, or acting in bad faith, in order to impute income to a noncustodial parent.¹⁸ The commentary to Civil Rule 90.3 directs that tribunals adjudicating child support "shall consider the totality of the circumstances in deciding whether to impute income to a party based on voluntary unemployment."¹⁹

After careful consideration, this decision finds that Mr. E is voluntarily and unreasonably unemployed. Mr. E voluntarily left his employment at the Facility T in order to move to No Name. Mr. E claims the move was so that he and N could afford a larger apartment, apparently to allow each of them to exercise overnight visitation with their respective children. Mr. E said they could not afford \$2,000 per month rent in Anchorage, and they are currently paying \$1,300 per month in No Name. There is no evidence in the record regarding housing costs in Anchorage, but it is not necessary to have that information in order to analyze Mr. E's testimony. He said he moved to No Name to save rent of what amounted to be about \$700 per month. On an annual basis, this equals savings of \$8,400²⁰ but Mr. E was earning nearly \$20,000 per year at

¹⁵ Civil Rule 90.3(a)(4).

¹⁶ *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

¹⁷ *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

¹⁸ *Kowalski*, 806 P.2d at 1371.

¹⁹ Civil Rule 90.3, Commentary III.C.

²⁰ \$700 x 12 = \$8,400.

the Facility T, or \$17,954.81 after mandatory deductions.²¹ In other words, Mr. E gave up about \$18,000 in net income in order to save \$8,400 in rent.

Mr. E said he is now living “on the gratuity” of others, meaning N, but in reality, by asking for a reduction in child support, his biological children are being forced to finance his move. Alaska law is clear that a parent has a duty to support his or her children, and this duty takes priority over lifestyle decisions such as choosing to leave a job.²² Because his choice to leave his employment was voluntary, Mr. E’s lack of income should not be transferred to Z, Y, and X. An obligor parent is free to change jobs and careers, and even to be unemployed for a time, but his or her children should not have to finance the interruption of the obligor parent’s income and the financial support to which they are entitled.²³

Because Mr. E has been found to be voluntarily and unreasonably unemployed, his child support amount may be calculated from his “potential income,” which is based on his “work history, qualifications and job opportunities.”²⁴ A primary goal of imputing income, according to the Alaska Supreme Court, is to compel the parent to find full-time employment:

An important reason -- if not the chief reason -- for imputing income to a voluntarily underemployed parent is to goad the parent into full employment by attaching an unpleasant consequence (a mounting child support debt or, in certain cases of shared custody, a reduced child support payment) to continued inaction. Indeed, in primary and shared custody situations alike, an order imputing income often yields no tangible benefits to the children unless and until it impels the underemployed parent to find a job.^[25]

CSSD obtained Mr. E’s income information for 2013 and the first quarter of 2014 from the Alaska Department of Labor and Workforce Development (DOL). Based on that information, CSSD calculated his 2013 child support using income from the first quarter of 2014. According to Civil Rule 90.3(a), this method was incorrect for the 2013 calculation because it used a portion of Mr. E’s income from the *next* calendar year.²⁶ Mr. E is obligated to pay support in 2013 for just the month of December, but even so, it must be calculated using

²¹ After taxes and other mandatory deductions, Mr. E would have been taking home about \$17,954.81 per year. See Exh. 6 at pg. 9, line 3.

²² See *Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

²³ *Olmstead v. Ziegler*, 42 P.3d 1102, 1105 (Alaska 2002).

²⁴ Civil Rule 90.3(a)(4).

²⁵ *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).

²⁶ Civil Rule 90.3(a) specifically states that the income to be used is the non-custodial parent’s “adjusted annual income.”

only Mr. E's 2013 income. Mr. E's December 2013 child support obligation for Z, Y, and X is now correctly calculated at \$396.²⁷

Compared to the calculation for 2013, CSSD correctly calculated Mr. E's 2014 child support obligation at \$494 per month for three children (\$404 for two children; \$299 for one child). This calculation *did* use all four quarters of his income that were reported to the DOL, so there is now a correct estimate of his potential annual income. Mr. E's child support is now correctly calculated for both 2013 and 2014.

B. Shared custody

Where parents exercise shared custody of their children, Civil Rule 90.3 provides that child support is to be calculated differently than where one parent has primary custody. In general, and depending on the percentage of time each parent has overnight visitation, the parent obligated to pay child support in a shared custody situation would have a somewhat lower monthly support amount than where one parent exercises primary custody. The rule defines shared custody as follows:

A parent has shared physical custody of children for purposes of this rule if the children reside with that parent for a period specified in writing of at least 30 percent of the year, regardless of the status of legal custody.^[28]

In order for a visitation day to count toward the required 30% of the year, the children must stay overnight with the respective parent.²⁹ One year is equal to 365 days, so 30% of the year equals 110 overnights.³⁰ This is the minimum number of overnights needed on an annual basis to reach the threshold definition of shared custody.

If there is no court order regarding custody, a finding of shared custody under Civil Rule 90.3(f)(1) should be based on a written agreement, but the parties to child support actions rarely have one. In the absence of a written agreement, the parties' actual periods of overnight custody determine whether shared custody exists and, if so, what percentage of shared custody each party exercises.

The parent asserting shared custody has the burden of proof by a preponderance of the evidence.³¹ Mr. E and Ms. C have not executed a written agreement for shared custody, so Mr.

²⁷ Attachment A.

²⁸ Civil Rule 90.3(f)(1).

²⁹ Civil Rule 90.3, Commentary V.A.

³⁰ $365 \times .30 = 109.5$ (rounded to 110).

³¹ See 2 AAC 64.290(e).

E must prove that he has had the children at least 30% of the time, and on an ongoing basis, in order to meet the minimum requirements for a shared custody calculation.

Based on all of the evidence presented, Mr. E did not meet his burden of proving he exercises shared custody of Z, Y, and X. His testimony made clear that his increased visitation with the children in June and July was just for the kids' summer vacation, and that when the school year returned, he would mostly have them on weekends.³² Under these circumstances, Mr. E has not established that he and Ms. C have shared custody of their children.

IV. Conclusion

Mr. E met his burden of proving by a preponderance of the evidence that CSSD's Amended Administrative Child Support and Medical Support Order was incorrect as to the December 2013 calculation, which has been corrected to \$396 for three children.

Mr. E has not met his burden as to the child support calculation for 2014 and ongoing. Because he has been found to be voluntarily and unreasonably unemployed, income should be imputed to him in the annual amount represented by the four consecutive quarters of income he received from his prior employment at the Facility T in 2013 and 2014. This income figure yields a child support amount of \$494 per month for three children (\$404 for two children; \$299 for one child) from January 2014 to the present, and ongoing. There is no variance granted under Civil Rule 90.3(c).

V. Child Support Order

- Mr. E is liable for child support for Z, Y, and X in the amount of \$396 for December 2013; and \$494 per month for three children (\$404 for two children; \$299 for one child) from January 2014 to the present, and ongoing;

- All other provisions of the Amended Administrative Child Support and Medical Support Order dated June 24, 2014 remain in full force and effect.

DATED this 20th day of August, 2014.

Signed

Kay L. Howard

Administrative Law Judge

³² In the alternative to shared custody, Mr. E may be entitled to a visitation credit for time periods in the future during which he has the children for longer than 27 consecutive days. See Civil Rule 90.3(a)(3).

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 September, 2014.

By: Signed
Signature
Kay L. Howard
Name
Administrative Law Judge
Title

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