

calculated arrears based on new income information, and did not set any ongoing support because the obligee child had turned 18. Ms. T appealed that order, and the Commissioner overturned CSSD's decision and reinstated the child support obligation from the 1990 NFFR.³

More than four years later, Mr. F contacted CSSD to contest the existing child support order. After some discussion, Mr. F was eventually told he could appeal to the Superior Court, which he did. The Superior Court remanded this matter to CSSD to conduct a formal hearing.

ALJ Howard determined that a hearing could not be held until CSSD actually conducted a default review, and she remanded this matter to CSSD.⁴ In 2013, after conducting its default review, CSSD vacated the NFFR and reinstated the arrears as originally calculated in 2007 order that had previously been overturned.

Ms. T appealed that order, and a hearing was held before ALJ Friedman. The decision in that case held, in part, that the default review had been improperly granted because CSSD had not made a factual finding as to whether granting the review would cause undue hardship due to a party's reliance on the support order.⁵ The matter was again remanded to CSSD, this time to determine whether Ms. T reasonably relied on the support obligation set in the 1990 NFFR and whether setting it aside would cause her undue hardship because of that reliance.

On November 22, 2013, CSSD reversed its most recent order, and denied Mr. F's request to vacate the 1990 default order. CSSD stated, in part:

Ms. T provided clear and convincing evidence that she relied on her child support every month and that the default would [] cause a hardship to her household.

Mr. F appealed that decision. ALJ Howard issued a decision holding that CSSD had used the wrong standard in deciding whether Ms. T had relied on the 1990 order.⁶ The standard is not whether Ms. T needed child support payments – she clearly did – but whether she took some action in reliance on her expectation of actually receiving those child support payments. Judge Howard found that there was no evidence to support a finding of reasonable reliance. Judge Howard found that CSSD should have granted Mr. F's request for a default review, and should have recalculated his obligation for all of the prior years in which he owed support. The matter was again remanded to CSSD to conduct that calculation.

³ OAH No. 07-0317-CSS.

⁴ OAH No. 12-0159-CSS.

⁵ OAH No. 13-0952-CSS. *See* 15 AAC 125.121(e).

⁶ OAH No. 14-0349-CSS (Exhibit 1 to CSSD's Pre-hearing Brief).

CSSD issued a new Administrative Child Support and Medical Support Order on October 7, 2014.⁷ Ms. T and Mr. F each appealed that order, and their appeals were consolidated for hearing.

III. Discussion

A. Ms. T's Appeal

Ms. T raised one issue on appeal. Mr. F had received a payment in the fall of 1988.⁸ Mr. F testified that the payment was approximately \$74,000 as an inheritance from his father's estate, while Ms. T believed it to be approximately \$79,000 from a payout on a life insurance policy owned by Mr. F's father.

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." The Commentary to Civil Rule 90.3 states that a parent's income includes income from life insurance or endowment contracts.⁹ However, the Commentary also states that the "principal amount of one-time gifts and inheritances should not be considered as income, but interest from the principal amount should be considered as income . . ."¹⁰ Similarly, the Supreme Court has held that the principal amount from gifts or inheritances should not be considered.¹¹

Civil Rule 90.3 distinguishes one-time gifts or inheritances from ongoing income. Certain types of life insurance contracts do provide a series of payments over time. Those payments would typically be included as part of an obligor's income when calculating child support. One-time payments, on the other hand, should not be included. Instead, only the income earned from the principal amount should be included. Thus, it does not matter whether the money Mr. F received in 1988 was a payment from his father's estate or a payment from a life insurance policy. Either way, the amount was a one-time payment. The principal amount should not be included as income.

As the Supreme Court has held, however, investment income from the principal may be included in a child support calculation. In this case, Mr. F acknowledged receiving \$74,000 in the fall of 1988. There was no testimony concerning whether that money was spent or invested,

⁷ Exhibit 4.

⁸ F Testimony; T Testimony. Ms. T believed the payment was at a later date, but acknowledged that she was not certain of the date.

⁹ Civil Rule 90.3 Commentary III.A.20.

¹⁰ Civil Rule 90.3 Commentary III.A.

¹¹ *Robinson v. Robinson*, 961 P.2d 1000, 1003 n. 3 (Alaska 1998) citing *Nass v. Seaton*, 904 P.2d 412, 416 (Alaska 1995).

but it appears the money was received before the birth of the parties' child. Mr. F was not obligated to invest it for the benefit of his future child,¹² and in the absence of evidence that he was actually receiving investment income (which would be included in his support obligation calculation), potential income from investing that money was properly excluded from his support obligation.

During the hearing, Ms. T also raised concerns about how CSSD calculated Mr. F's income. She did not list those concerns in her appeal, however Mr. F also appealed and she is allowed to dispute his assertions as to the manner in which his income should be calculated. Essentially, Ms. T argued that Mr. F was capable of earning more money each year, and that CSSD should have imputed more income to him. Her position is considered for the disputed calculations discussed below.

B. Mr. F's Appeal

Mr. F raises two major issues in his appeal. First, he argues that he has overpaid his child support according to CSSD's own calculations, and therefore should owe no arrears. Second, he asserts that CSSD should have used actual income for each year, rather than imputed income.

1. Alleged Overpayment

Mr. F's Exhibit C is a spread sheet created by CSSD.¹³ Juwan Sims, a supervisor in CSSD's audit and adjustment section, explained what this exhibit shows.¹⁴ This spreadsheet is organized chronologically from the date the obligor child was born through September 30, 2014, when the most recent interest accrual was recorded. The first column indicates the relevant date. The second column lists the relevant action, such as a payment received or interest charged. The third column shows the monthly child support obligation charged on the first of each month. The next two columns show amounts paid or other credits towards the support obligation.

The next three columns are under a heading called "Never Arrears." This section shows unpaid support amounts owed to the custodial parent. There are columns in this section for crediting support paid and interest paid, which reduce arrears, and a column for adding interest

¹² He may have known that Ms. T was pregnant at that time, but a parent's support obligation does not begin until the child is born. Thus, Mr. F was not legally required to invest that money for the benefit of his child.

¹³ Pages 1 and 2 of CSSD's spreadsheet were mistakenly marked as pages 11 and 12 of the exhibit. Pages 3 through 12 of the spreadsheet are marked as pages 1 through 10 of the Exhibit. This decision will refer to the Exhibit page numbers.

¹⁴ The discussion in this section is based on his testimony.

on unpaid amounts, which increases arrears. This section separately shows the unpaid child support and the unpaid accrued interest.

There are similar sections for “Permanently Assigned Arrears” and “Temporary/Conditional Arrears.” For any month that a custodial parent receives public assistance, the child support obligation is owed to the state. Those amounts are recorded in the permanently assigned arrears. The temporary section is used when a custodial parent goes on and off public assistance.¹⁵

When a child support payment is made, it is credited first to the “Never Arrears” support and interest amounts, and a check is issued to the custodial parent. Payments made when no money is owed to the custodial parent are credited to the amounts owed to the state.¹⁶

Each time a child support order is changed retroactively, the spreadsheet is changed. There have been changes to the monthly obligation amounts owed by Mr. F for 1989 through 2007 each time a new order is issued or reversed. One item that cannot be changed, however, is the amount of child support sent from CSSD to the custodial parent. Once a check is issued, it cannot be reversed.

The original support order in this case set Mr. F’s obligation at \$752 per month. Nothing happened to change that amount prior to 2007 when Mr. F first sought to set aside the default support order. Any payments made while arrears were owed to Ms. T would have been paid out to her based on the assumption that support was owed at the rate of \$752 per month. When the support obligation was retroactively reduced, the amount owed to Ms. T was also retroactively reduced, but the money previously disbursed to her could not be recovered.

In addition, Ms. T had been on public assistance at various times since 1989. Money was also owed to the state for the child support that accrued while she was receiving state benefits. There was money owed in both the unassigned and assigned arrears sections. When Mr. F’s monthly obligation was retroactively reduced, the new calculations in the spreadsheet showed that Ms. T been paid \$14,647.96 more than the amount that had been owed to her for months she was not on public assistance.¹⁷ It is money paid towards Mr. F’s child support obligation, but the excess money was not used to adjust the amounts owed to the state. Instead, the excess money

¹⁵ The testimony was not entirely clear on why or how the temporary section is used, but clarification is not necessary in order to resolve the issues in this hearing.

¹⁶ Presumably, that money is eventually transferred to the appropriate government account.

¹⁷ Exhibit C, page 9.

was simply zeroed out. The arrears and interest owed to the state remained the same, and the unpaid balance continued to accrue additional interest.

As of March 31, 2013, Mr. F owed the state only \$12,545.91 in support arrears, and \$14,810.91 in accrued interest.¹⁸ Had he been credited with the amount overpaid to Ms. T, his total obligation would have been reduced by more than one-half. Instead, he simply lost the benefit of those payments.¹⁹ It is not disputed that Mr. F made those payments, and he asks that he be given credit for the payments he made.

The issue raised by Mr. F is beyond the scope of this administrative proceeding. These two appeals were referred to OAH for the purpose of reviewing CSSD's calculation of the amount of child support due from Mr. F each month.²⁰ OAH does not have jurisdiction in this hearing to review or modify CSSD's accounting of the amounts paid over the years. Any challenge to that accounting would be a separate administrative action which, depending on the applicable statutes and regulations, might be reviewable by either OAH or the Superior Court.

2. *Support Calculations Not Based On Actual Income*

Mr. F's next major argument is that CSSD should have based his support obligation on his actual income. The most recent prior order said:

CSSD is instructed to conduct a default review of Mr. F's case based on his actual income. CSSD apparently is no longer in possession of his income information, so in the absence of actual income information, CSSD may reinstate a previous order granting Mr. F's petition for a default review.^[21]

Mr. F provided CSSD with actual information regarding his income from 1989 through 2007. Exhibits A and B. CSSD also had access to Department of Labor and Workforce Development records which show Mr. F's reported earnings through June of 2012, and unemployment benefits received through March 2, 2013.²²

¹⁸ *Id.*

¹⁹ When forgiving child support arrears under an arrears forgiveness agreement, CSSD may not reduce the amount owed to less than zero. 15 AAC 125.678(c). Mr. F was not participating in the arrears forgiveness program, and it is not clear what regulation or statute prohibits CSSD from crediting him with support payments actually made that CSSD had, in hindsight, incorrectly distributed to the custodian.

²⁰ See AS 25.27.170 (hearings to establish child support obligation).

²¹ OAH No. 14-0349-CSS, page 8. The previous default reviews in 2007 and 2013 established arrears at approximately \$31,000.

²² Mr. F's Supplemental Filing dated February 5, 2015 (this consists of Exhibit 13 submitted by CSSD in case number 13-0952-CSS).

CSSD indicated that it relied on actual information about Mr. F's income in re-calculating his support obligation.²³ CSSD also found that Mr. F was voluntarily unemployed or underemployed.²⁴ CSSD's order goes on to say

There is not sufficient documentation to qualify Mr. F's unemployment for 1997 – 2005 as voluntary [sic] due to a preexisting medical condition therefore, the income calculation for 1997 through 2005 as based on the Alaska historical minimum wage reported for those years and you are found to be voluntarily under/unemployed.^[25]

ALJ Howard's prior order is reasonably read to require CSSD to either base its decision on actual income information or reinstate the prior 2007 order that was based on actual information in CSSD's possession at that time. However, it does not specifically preclude what CSSD did here, which was to use the actual information and find, based on that actual information, that Mr. F was voluntarily unemployed or underemployed.

3. *Was Mr. F Voluntarily Unemployed or Underemployed?*

The next question that must be addressed is whether CSSD's finding of voluntary unemployment or underemployment was incorrect. As the person appealing CSSD's finding, he has the burden of proving that his unemployment or underemployment was involuntary.²⁶

Very little evidence was introduced on this issue. Ms. T noted that Mr. F was able to earn over \$36,000 in 2006 and over \$50,000 in 2007, so he should have been able to earn significant income in prior years. Mr. F submitted a report of his earnings as reported to Social Security.²⁷ This does show the earnings in 2006 and 2007 mentioned by Ms. T. It also shows he had no earnings in 2008, less than \$22,000 in wages in 2009, and \$4,334 in reported wages for 2010. However, he also had reported earnings of \$72,867 in 2011. Clearly Mr. F currently has a high earning capacity, but his earnings are not consistent each year. His higher recent earnings during recent years suggest he may have been able to earn more in prior years, but are not conclusive on that issue.

Mr. F testified that he hurt his back in a car accident and was off work for the last four months of 1991 and for the first month or two of 1992. He was injured again at work in 1992.²⁸

²³ Exhibit 4, page 4.

²⁴ *Id.*

²⁵ Exhibit 4, page 5. It is assumed that there is a typographical error in this sentence and that CSSD meant to say there was insufficient documentation to show that his unemployment was *involuntary*.

²⁶ 15 AAC 05.030(h).

²⁷ Exhibit B, page 25.

²⁸ F Testimony.

He received a workers compensation payment for temporary total disability for April 22, 1992 through April 15, 1993.²⁹ Mr. F also testified that he was unemployed from 1997 through 2005 because of his back injury. He provided similar information in his Child Support Guidelines affidavits for his 2007 hearing.³⁰ While his back injury may have prevented him from some types of employment, he has not established that he was unable to obtain *any* employment during this time. It is possible that there were no jobs available to F during this time, but he has not submitted sufficient information to prove his unemployment was involuntary except for the following times:

- September 1, 1991 through January 31, 1992; and
- April 22, 1992 through April 15, 1993

To the extent CSSD found that Mr. F was voluntarily unemployed or underemployed at other times, Mr. F has not met his burden of proving that CSSD's finding is incorrect.³¹

4. *Child Support Calculations*

If an obligor is found to be voluntarily unemployed or underemployed, CSSD may impute potential income to the obligor regardless of the obligor's actual income.³² CSSD used a variety of methods to calculate potential income. Each disputed year is addressed below.

a. 1991

CSSD imputed income to Mr. F based on his ability to earn minimum wage, plus a Permanent Fund Dividend (PFD).³³ As noted above, however, Mr. F was involuntarily unemployed for the last four months of 1991. He would have been available to work for approximately 34 weeks that year. His imputed income from minimum wage is \$6,460.³⁴ With the addition of a PFD check, his annual income for calculating his support obligation is \$7,391.34. Using CSSD's online child support calculator, Mr. F's obligation for 1991 is \$122 per month.³⁵

²⁹ Exhibit A, page 1.

³⁰ See summary of his answers in OAH No. 07-0317-CSS, pages 2 – 4.

³¹ ALJ Howard noted in a prior decision that Mr. F's chiropractor stated in a 2014 letter that since 1992, Mr. F has chronic low back pain which is intermittently incapacitating. OAH No. 14-0349-CSS, page 4. This letter was not introduced as an exhibit in this hearing, but to the extent it was referenced in the earlier decision, it is insufficient to show that Mr. F was unable to perform any work since 1992, especially since he did have significant employment in several different years beginning in 2006.

³² 15 AAC 125.060(a).

³³ Exhibit 4, page 10.

³⁴ 34 weeks X 40 hours/week X \$4.75/hour.

³⁵ Attachment A.

b. 1992 and 1993

CSSD did not impute wages to Mr. F for 1992 or 1993. Instead, it imputed income from roommates at the rate of \$1,500 per month. CSSD stated that it used his monthly mortgage as the income amount.³⁶ Mr. F testified that his mortgage during those years was \$518 per month, and CSSD did not introduce any evidence to contradict that testimony. Since he would have received this help from his roommates even when he was involuntarily unable to work, that amount should be considered income for each month of both years. Accordingly, his income each year should have been imputed as \$6,216 per year, plus a PFD. Using CSSD's online calculator, Mr. F's support obligation should be set at \$116 per month for 1992 and \$117 per month for 1993.³⁷

c. 1997 - 2005

CSSD based Mr. F's child support obligation on his ability to earn minimum wage.³⁸ However, for each year it assumed that he would work 40 hours each week for all 52 weeks of the year. Most people who work minimum wage do not receive paid sick leave or paid days off. It is reasonable to assume that Mr. F would have worked an average of 50 weeks each year.³⁹ His support for these years should be based on earning minimum wage at 2000 hours per year (50 weeks times 40 hours each week), plus a PFD. Using CSSD's online calculator and inserting annual income based on the appropriate minimum wage for each year, Mr. F's child support obligation for each of the disputed years is⁴⁰

1997	\$180 per month
1998	\$184 per month
1999	\$187 per month
2000	\$190 per month
2001	\$190 per month
2002	\$190 per month
2003	\$224 per month ⁴¹
2004	\$222 per month

³⁶ Exhibit 4, page 5.

³⁷ Attachments B & C.

³⁸ Exhibit 4, page 16.

³⁹ See *In re G. A. C. Sr.*, OAH No. 14-0378-CSS (Commissioner of Revenue 2014), page 4; *In re E.M.C.*, OAH No. 11-0260-CSS (Commissioner of Revenue 2011), page 2, n. 10.

⁴⁰ Attachments D – L.

⁴¹ Minimum wage increased to \$7.15 per hour in 2003.

2005 \$221 per month

Mr. F noted in his appeal that ALJ Howard had operated a business at a loss, and asserts that income should not be imputed while he was operating this business. However, there is insufficient evidence in the record, or in ALJ Howard's decision, to determine when or how long this business was operated, or whether it was reasonable for Mr. F to start a new business instead of working a minimum wage job. He has not met his burden of showing that CSSD's decision to impute income to him during this time period was incorrect.

IV. Conclusion

CSSD was correct to disregard the inheritance or life insurance payment received by Mr. F in 1988. Mr. F did not meet his burden of showing that CSSD was wrong to consider him voluntarily unemployed or underemployed during the years he contested. However, some of those calculations have been modified as discussed above. Mr. F's child support obligation should be set in the amounts shown in the order below. This child support calculation was made pursuant to the guidelines in Civil Rule 90.3.

V. Order

- Mr. F's child support obligation is set at \$122 per month, for one child, for January 1, 1991 through December 31, 1991;
- Mr. F's child support obligation is set at \$117 per month, for one child, for January 1, 1992 through December 31, 1993;
- Mr. F's child support obligation is set at \$180 per month, for one child, for January 1, 1997 through December 31, 1997;
- Mr. F's child support obligation is set at \$184 per month, for one child, for January 1, 1998 through December 31, 1998;
- Mr. F's child support obligation is set at \$187 per month, for one child, for January 1, 1999 through December 31, 1999;
- Mr. F's child support obligation is set at \$190 per month, for one child, for January 1, 2000 through December 31, 2002;
- Mr. F's child support obligation is set at \$224 per month, for one child, for January 1, 2003 through December 31, 2003;
- Mr. F's child support obligation is set at \$222 per month, for one child, for January 1, 2004 through December 31, 2004;

- Mr. F's child support obligation is set at \$221 per month, for one child, for January 1, 2005 through December 31, 2005;
- All other provisions of the June 6, 2013 Administrative Child Support and Medical Support Order remain in effect.

Dated this 16th day of July, 2015.

Signed _____
Jeffrey A. Friedman
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 29th day of July, 2015.

By: *Signed* _____
Signature
Jeffrey A. Friedman
Name
Administrative Law Judge
Title

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