

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

In the Matter of)	
)	
E D)	OAH No. 15-0354-CSS
<hr style="width:40%; margin-left:0;"/>)	Agency No. 001142836

DECISION AND ORDER

I. Introduction

E D and B T-S are the parents of G, age nine, and Z, age seven. Since June 2006 Mr. D has been subject to an Administrative Child Support and Medical Support Order obligating him to pay \$50 per month in child support for G. In October 2014 the Child Support Services Division (CSSD) issued a Modified Administrative Child Support and Medical Support Order adding Z to the existing order and increasing Mr. D’s monthly support obligation for the two children to \$253 per month, effective August 1, 2014. Mr. D appeals. Based on the record as a whole and after careful consideration, this decision concludes that Mr. D’s monthly child support obligation was appropriately set at \$253 per month from August 1, 2014 through December 2014, and should be modified to \$50 per month thereafter.

II. Facts

E D and B T-S are the parents of G, age nine, and Z, age seven. In June 2006, CSSD issued an Administrative Child Support and Medical Support Order setting Mr. D’s ongoing child support for G at \$50 per month.¹ CSSD calculated Mr. D’s support obligation “based on zero income due to long term incarceration as reported by the Alaska Department of Corrections.”²

The record does not indicate when Mr. D’s period of long-term incarceration ended, but does reflect that he has had varying periods of incarceration and varying periods of employment with a single employer, No Name, since at least 2008.³ Mr. D’s reported annual earnings have varied from as low as \$3,510 (in 2009)⁴ to as high as \$15,690.75 (in

¹ Ex. 1.
² Ex. 1, p. 4.
³ See Ex. 6.
⁴ Ex. 6, p. 1. Mr. D also collected \$5,259 in unemployment benefits in 2009. Ex. 6, pp. 3-4.

2008).⁵ His quarterly earnings ranged from a low of \$561.00 to a high of \$8,367.75, with an average over eleven reported quarters of \$4,343.45 per quarter.⁶ In 2010 and 2011, Mr. D earned roughly \$9,000 annually despite spending five months of each year in DOC custody.⁷ In these two years, he also collected between \$3,700 and \$3,800 annually in unemployment benefits.⁸ Mr. D had no reported income for 2012 other than \$4,160 in unemployment benefits.⁹ He also had no reported income at all for 2013, but was in custody for 7 months that year.¹⁰

By 2014, Mr. D was again out of custody on probation, but was in “absconder” status.¹¹ He resumed working for No Name in the second quarter of the year.¹² On July 25, 2014, CSSD served Mr. D and Ms. T-S with a Notice of Adding a Child to a Support Order and Petition for Modification of Administrative Support Order.¹³ On October 7, 2014, CSSD issued a Modified Administrative Child Support and Medical Support Order adding Z to the existing order and increasing Mr. D’s monthly support obligation for two children to \$253 per month, effective August 1, 2014.¹⁴

In the meantime, on September 22, 2014, Mr. D was arrested on felony drug charges and remanded into the custody of the Department of Corrections.¹⁵ On October 8, 2014, however, Mr. D walked away from a minimum security correctional facility, and was charged with Escape.¹⁶ Mr. D remained in abscond/walkaway status for several months before being arrested on January 23, 2015. On January 27, 2015, CSSD served the October 2014 Modified Administrative Child Support and Medical Support Order on Mr. D.¹⁷

Mr. D appealed the October 2014 Modified Administrative Child Support and Medical Support Order, arguing that he had been unemployed beginning in August 2014,

⁵ See Ex. 6.

⁶ See Ex. 6, p. 1.

⁷ See Ex. 6.

⁸ Ex. 6, pp. 2-5.

⁹ Ex. 6, p. 1.

¹⁰ Ex. 6, p. 1; Ex. 7, pp. 1-2.

¹¹ Ex. 7, p. 1. See generally, <http://www.correct.state.ak.us/pnp/pdf/902.18.pdf> (last accessed July 8, 2015).

¹² Ex. 6, p. 1.

¹³ Ex. 2.

¹⁴ Ex. 4, pp. 1-5.

¹⁵ Ex. 7, p. 1.

¹⁶ Ex. 7, p. 1.

¹⁷ Ex. 4, pp. 11-12.

and that the increase was inappropriate in light of his incarceration.¹⁸ A hearing was held on May 15, 2015 at the Office of Administrative Hearings (OAH)¹⁹ before Administrative Law Judge Kay L. Howard.²⁰ Mr. D participated telephonically, as did Child Support Specialist Andrew Rawls, who represented the Division. Ms. T-S, the custodian, did not participate.²¹

At the hearing, Mr. Rawls explained that CSSD had calculated Mr. D's modified support amount by extrapolating income information that had been reported to the State of Alaska Department of Labor by Mr. D's then-employer, No Name.²² At the time of the modification, CSSD had access to Mr. D's reported second quarter earnings. Because Mr. D had provided no evidence to suggest he was somehow unable to work, CSSD calculated his 2014 annual income by multiplying the second quarter amount – \$3,125 – by four to obtain an estimated annual income of \$12,500.²³ After allowing for mandatory deductions, CSSD calculated Mr. D's adjusted annual income at \$11,231.24.²⁴ Under the Civil Rule 90.3 formula, CSSD then calculated Mr. D's monthly child support payment for two children to be \$253.00.²⁵

At the hearing, CSSD also provided evidence, obtained after the modification, of Mr. D's actual income for the remainder of 2014. Mr. D did not earn any reported income during the fourth quarter of 2014. During the third quarter, however, he earned \$7,615 in reported income – more than twice the quarterly amount CSSD had used to estimate his annual income for purposes of the Modified Administrative Child Support and Medical Support Order.²⁶

¹⁸ Ex.5. Mr. D submitted two written appeal documents. The first (Ex. 5, p. 1) referenced having been in jail since January 2015; the record (Ex. 5, p. 2) stated he had been incarcerated since October 2014.

¹⁹ Two previously-scheduled hearings in this matter had to be rescheduled, the first, on April 14, 2015, due a scheduling conflict relating to Mr. D's availability while incarcerated, the second, on May 5, 2015, apparently due to communication difficulties between the OAH and the Department of Corrections.

²⁰ Judge Howard has since retired. The undersigned has carefully reviewed the administrative record and all recorded hearing proceedings since this matter was reassigned to her.

²¹ Ms. T-S participated in the April 14 hearing, and indicated that she intended to participate in the next hearing. When the presiding judge attempted to reach her by phone for that hearing, however, her phone number was no longer in service.

²² Ex. 4, p. 6; Ex. 6, pp. 1-5.

²³ Ex. 4, pp. 4-5.

²⁴ Ex. 4, p. 6.

²⁵ Ex. 4, p. 6.

²⁶ Ex. 6, p. 1.

Mr. D argued that the October 2014 Modified Administrative Child Support and Medical Support Order was in error in light of his unemployment and subsequent incarceration. Mr. D testified that he had been unemployed with no income from August 1, 2014 until the time of the hearing. However, Mr. D did not explain why or how he became unemployed in August 2014.

At the hearing, Mr. D also described himself as having been “in the state’s custody” since September or October 2014. However, he also acknowledged having had periods of “absence from the facility.” His “absence from the facility” was due to Mr. D absconding from custody shortly after his arrest. Department of Corrections records show that Mr. D was arrested and remanded into custody on September 22, 2014 after nearly a year in absconder status.²⁷ But after being transferred to the minimum custody Cordova Center, he absconded again on October 8, 2014.²⁸ Mr. D then remained in “escape/walkaway” status until being arrested again on January 23, 2015.²⁹

Mr. D was unemployed after walking away from the Cordova Center. He testified that during his time on “walkaway” status in fall 2014 he was attempting to avoid the police, was not working and “was living off [his] mother.” Mr. D did not describe any attempts to obtain employment – although he did unsuccessfully apply for unemployment insurance during this time. He was eventually arrested and remanded into custody on January 23, 2015, and is currently facing at least five years of incarceration.

III. Discussion

As the party who brought this appeal, Mr. D has the burden of proving, by a preponderance of the evidence, that the Department’s Modification Order is incorrect.³⁰ Mr. D has met his burden as to the time period that he has actually been in custody – that is, January 2015 to the present – but not as to the time that he was in absconder status.

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²⁷ At the time of his September 2014 arrest, Mr. D had been in “absconder status” since November 2013. Ex. 7, p. 1.

²⁸ Ex. 7, p. 1.

²⁹ Ex. 7, p. 1; testimony of Mr. D.

³⁰ 15 AAC 05.030(h); 2 AAC 64.290(e).

A. *Applicable Law*

A parent is obligated both by statute and at common law to support his or her children.³¹ 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 and Social Security. The obligor parent has the burden of proving his or her earning capacity.³²

Child support orders may be modified upon a showing of "good cause and material change in circumstances."³³ But "[t]he change ordinarily must be more or less permanent rather than temporary."³⁴ Unemployment, for example, is typically presumed to be temporary, and therefore to not automatically warrant a modification. Concerning the specific issue of how incarceration impacts an obligor's child support obligation, the Alaska Supreme Court has held that, to secure a reduction in child support payments, an obligor must have "suffered more than a temporary or insubstantial setback in earnings as a result of his incarceration."³⁵

A modification is effective beginning the first of the month after the parties are served with notice that a modification has been requested.³⁶ Because CSSD sent the parties notice of the petition for modification on July 25, 2014, this modification is effective as of August 1, 2014.³⁷

B. *Child Support Calculation Prior to January 23, 2015 Arrest and Remand*

As a threshold matter, Mr. D is not entitled to have his support obligation set at the statutory minimum for the period of time that he was supposed to be in custody but was instead on the run. At the time of his walk away, Mr. D was an unclassified felon. Accordingly, under the rules of the Cordova Center, had he remained at the Cordova Center, he would have been ineligible for work.³⁸ Under those circumstances, and given his likely long-term incarceration, his child custody support amount would have had to be reduced to

³¹ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.

³² *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

³³ AS 25.27.190(e).

³⁴ See *Patch v. Patch*, 760 P.2d 526, 530 (Alaska 1988) ("[A] trial court should be reluctant to modify child support obligations when the obligor's loss of income appears only temporary"); *Curley v. Curley*, 588 P.2d 289, 291 (Alaska 1979).

³⁵ *Bendixen v. Bendixen*, 962 P.2d 170, 173 (Alaska 1998) (citing *Patch*, 760 P.2d at 526).

³⁶ 15 AAC 125.321(d).

³⁷ Exh. 3.

³⁸ D testimony.

\$50 per month.³⁹ However, Mr. D did not remain in custody. Instead, he walked away from custody.⁴⁰ Having chosen to abscond from custody, Mr. D cannot claim that being in custody – which he was not – entitles him to a reduction in his Rule 90.3 obligations.

Mr. D has also not met his burden of proving that the support amount should be lowered because he was unemployed after August 2014.

Under Civil Rule 90.3, a parent’s child support obligation should be based on the amount the parent can be expected to earn during the period in which the support is being paid.⁴¹ Determining an obligor’s annual income for purposes of calculating ongoing child support is “necessarily ... speculative because the relevant income figure is expected future income.”⁴² Here, CSSD calculated Mr. D’s support amount based on one quarter of documented earnings – his earnings from the second quarter of 2014 – from which CSSD extrapolated an expected annual income.⁴³

Of note, Mr. D then earned more than twice that quarterly amount in the next quarter, putting him on track for an annual income well above the \$12,500 estimated by CSSD.⁴⁴ Mr. D did not earn that income, however, because from August onwards he was unemployed. Mr. D provided no explanation for how he became unemployed, nor for his failure to obtain subsequent employment. However, at least as of September 2014, Mr. D was on the run from law enforcement and “living off [his] mother.”⁴⁵

Mr. D’s testimony about this period supports a finding that he was voluntarily and unreasonably unemployed during this period. He offered no evidence to suggest that his unemployment was caused by anything other than his desire to avoid law enforcement, and his mother’s willingness to support him. Under these circumstances, reducing Mr. D’s child support obligation for this period of time would require G, Z and Ms. T-S to subsidize his ill-advised and illegal choices.

Child support may be based on the potential income of a person who is voluntarily and unreasonably unemployed or underemployed.⁴⁶ The income calculation on which the

³⁹ See Civil Rule 90.3(c)(1)(B).

⁴⁰ See Ex. 7.

⁴¹ Civil Rule 90.3, Commentary, Section III(E).

⁴² See Civil Rule 90.3, Commentary III.E.

⁴³ See Ex. 4, p. 4.

⁴⁴ Ex. 6, p 1; Ex. 4, p. 6.

⁴⁵ D testimony.

⁴⁶ Civil Rule 90.3 Commentary, Part III-C.

modification order is based appropriately calculated Mr. D's potential income. Mr. D's testimony and the record evidence establish that he has previously been able to find and keep employment even while in "absconder status," including through 2014.⁴⁷ Mr. D did not adequately explain why he did not or could not have likewise earned income during the period of time that he was in walk-away or absconder status in fall 2014.⁴⁸ Given Mr. D's actual 2014 income of \$10,740 through just the third quarter, and his apparent lack of effort to obtain employment between August and December 2014, the calculations used to estimate Mr. D's 2014 employment remain a reasonable basis for setting Mr. D's child support obligations during that time.

In short, Mr. D has not met his burden of proving that CSSD erred in estimating his 2014 income at \$12,500 for purposes of calculating his monthly child support obligation.⁴⁹

C. Child Support Calculation for Period of Long Term Incarceration

As to the period since he was last remanded into custody, however, Mr. D is correct that his child support obligation should be reduced to the statutory minimum of \$50 per month.⁵⁰ Mr. D testified that he is currently facing multiple years in custody. Under those circumstances, modification to the statutory minimum is undisputedly appropriate. CSSD agreed at the hearing that Mr. D's child support should be reduced to \$50 per month effective January 2015.

IV. Conclusion

Mr. D is not entitled to an incarceration-based reduction in his child support amount for the period of time that he was in absconder, escape or walk away status. As to the period of time between August 1, 2014 and December 31, 2014, his appeal is denied.

⁴⁷ Exhibit 7 shows that Mr. D absconded from his probation obligations on November 5, 2013, three weeks after he started probation, and remained in "absconder" status until his arrest on September 22, 2014. Ex. 7, p. 1. Exhibit 6 reflects that Mr. D worked for No Name – a longtime employer – during part of this time, earning \$3,125 in the second quarter of 2014, and \$7,615.00 in the third quarter of 2014 – all during times when he was in absconder status. Ex. 6, p. 1.

⁴⁸ Mr. D testified that he applied for unemployment insurance during this time but was denied due to his outstanding warrant. But Mr. D did not explain why he did not apply for another job.

⁴⁹ Indeed, the Department of Labor records provided by CSSD show that even without working at all during the period of "absconding," Mr. D came close to actually earning the amount imputed to him in the October 2014 Modified Administrative Child Support and Medical Support Order. Given the complete lack of evidence that he could not have worked between August and December 2014, he has not met his burden to show that the Order's 2014 income amount is in error.

⁵⁰ See Civil Rule 90.3(c)(1)(B).

However, Mr. D is correct that his long-term incarceration, which began on January 23, 2015, is grounds for returning the support amount to the previously-set statutory minimum. Accordingly, for the period beginning January 1, 2015 and onwards, Mr. D satisfied his burden of showing that the amount set in the October 2014 Modified Administrative Child Support and Medical Support Order is in error and should be reduced.

V. Child Support Order

1. E D is liable for child support in the amount of \$253.00 per month for two children effective August 1, 2014 through December 31, 2014.
2. E D is liable for child support in the amount of \$50 per month for two children effective January 1, 2015 and ongoing.
3. All other terms of the Modified Administrative Child Support and Medical Support Order dated October 7, 2014 remain in full force and effect.

Dated: July 8, 2015

Signed _____
Cheryl Mandala
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 within 30 days after the date of this decision.

DATED this 23rd day of July, 2015.

By: *Signed* _____
Signature
Cheryl Mandala
Name
Administrative Law Judge
Title

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