

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

In the Matter of)	
)	
J U)	OAH No. 15-0739-CSS
<hr style="width:45%; margin-left:0"/>)	Agency No. 001124340

DECISION AND ORDER

I. Introduction

The obligor, J U, petitioned to have his child support modified. His support obligation was last modified on April 23, 2014 when it was reduced to \$358 per month for one child. The Child Support Services Division (CSSD) denied his petition. The obligee child is C, age 16. The custodian of record is O R. F. Ms. F was reached by telephone, but stated she did not want to participate in the hearing. Joseph West, Child Support Specialist, represented CSSD. Mr. U and Mr. West participated by telephone.

II. Facts

Mr. U and Ms. F are the parents of C, who is 16 years old. Mr. U has another biological son, L, who is a few months older than C. On April 22, 2015, Mr. U contacted CSSD, asking that his child support be modified. CSSD mailed a Notice of the Petition for Modification on April 27, 2015.¹ Mr. U's support obligation was last modified in April 2014 when it was reduced from \$478 per month to \$358 per month for one child.²

As requested by the notice, Mr. U provided Child Support Affidavit Guidelines and income information.³ Mr. U reported that he expected his 2015 total income from all sources to be \$37,288, and in 2014, he reported total income in the amount of \$36,667.⁴

CSSD reviewed the information provided and denied the request for modification review because Mr. U was unemployed and there was no current income to assess.⁵ CSSD also denied the request because, using Mr. U's prior earnings, his "ability to earn" would result in an upward

¹ Exh. 3.
² Exh. 2.
³ Exh. 4.
⁴ Exh. 4.
⁵ Exh. 5.

modification.⁶ Mr. U appealed, arguing that he has been looking for work and he was concerned about becoming homeless once his unemployment benefits and savings were exhausted.⁷

When asked why he lost his job, Mr. U testified that he had been employed as a chef with the same employer for over 14 years until he became depressed and saw his doctor. His doctor told him to take three days off of work. At the end of the three days, Mr. U was not ready to return to work so he was terminated.⁸

Mr. U is 57 years old. While he does not have a college degree, Mr. U completed three years of college with an emphasis in economics.⁹ English is his second language. Mr. U testified that he has been looking for work, not only applying for cooking jobs, but also maintenance and landscaping positions. He remains hopeful that he will find work soon.¹⁰

In 2014, Mr. U earned \$38,942.45.¹¹ He has minimal monthly expenses and lives alone. He rents a two-bedroom apartment for which he pays \$900 per month; rides a bike, walks or takes the bus; telephone and other utilities total \$100 per month; and he pays \$300 for food.¹²

III. Discussion

A. Overview of Applicable Law

Every parent is obligated both by statute and at common law to support his or her children.¹³ Child support obligations are determined under Alaska Civil Rule 90.3. “The primary purpose of Rule 90.3 is to ensure that child support orders are adequate to meet the needs of children, subject to the ability of parents to pay.”¹⁴

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. Determining an obligor’s annual income for purposes of calculating ongoing child support is “necessarily ... speculative because the relevant income

⁶ Exh. 5.

⁷ Exh. 6.

⁸ U Testimony.

⁹ U Testimony.

¹⁰ U Testimony.

¹¹ Exh. 7.

¹² U Testimony.

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

¹⁴ Civil Rule 90.3, Commentary I.B.

figure is expected future income.”¹⁵ The obligor parent has the burden of proving his or her earning capacity.¹⁶

Child support orders may be modified upon a showing of “good cause and material change in circumstances.”¹⁷ But “[t]he change ordinarily must be more or less permanent rather than temporary.”¹⁸ Unemployment, for example, is typically presumed to be temporary. If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes “material change in circumstances” has been established and the order may be modified. Mr. U’s support was set at \$358 per month in April 2014. A child support calculation of \$304 or lower would be sufficient to modify his child support obligation at this time.

Finally, a modification is effective beginning the first of the month after the parties are served with notice that a modification has been requested.¹⁹ Because CSSD sent the parties notice of the petition for modification on April 27, 2015, any modification would be effective as of May 1, 2015.²⁰

B. Child Support Calculation

When CSSD denied Mr. U’s request for modification, it did so based on his “ability to earn,” recognizing that under an “ability to earn” standard, Mr. U’s support obligation would increase. 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.²¹ This determination is necessarily somewhat speculative because the relevant income figure is expected future income.²² The amount earned, more often than not, translates to a parent’s ability to pay. Ability to pay is the standard.²³

¹⁵ See Civil Rule 90.3, Commentary III.E.

¹⁶ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

¹⁷ AS 25.27.190(e).

¹⁸ 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).

¹⁹ 15 AAC 125.321(d).

²⁰ Exh. 3.

²¹ Civil Rule 90.3, Commentary, Section III(E).

²² Civil Rule 90.3, Commentary, Section III(E).

²³ Commentary Civil Rule 90.3 I.B., Commentary, Section III(E).

Parents going through what appear to be *temporary periods* of unemployment can be expected to maintain their support obligations.²⁴ However, Mr. U has been unemployed for over ten months as of the date of the hearing, and he has been actively attempting to find employment. It appears that his unemployment, although likely not permanent, is no longer brief. When this occurs, the fact that an obligor parent is unemployed is a change in circumstance that may be relevant to the amount of child support.

However, here the circumstance that is most relevant to the amount of support owing for C is the modification of Mr. U's child support order for the older son, L.

Civil Rule 90.3(a)(1)(C) and (D) provide that a parent who pays support for a prior child or who supports a prior child in the home is entitled to a deduction from the parent's income in calculating the support obligation for a younger child. L is older than C and Mr. U has an obligation to support L. Thus, the obligor is entitled to a deduction from his income in C's child support calculation for supporting L. The deduction for L is the amount of child support Mr. U owes for L. In essence, a calculation is done in succession, starting with the oldest child, and C's calculation includes the deduction from the obligor's income that represents the older child.

First, Mr. U's support obligation to L is calculated. This amount is \$224 per month.²⁵ Next, C's support is calculated by including a deduction of \$224 per month support for L. This results in a monthly child support obligation for C in the amount of \$179 per month.²⁶ This is greater than a 15% change from the prior amount of support owing, \$358. Therefore, Mr. U's child support for C should be modified to \$179 per month effective May 1, 2015.

C. *Hardship Analysis*

The law presumes that child support calculated pursuant to Alaska Rule Civil Procedure 90.3(a) is appropriate in the vast majority of circumstances, and should only be departed from for good cause.²⁷ In order to establish good cause, the parent must prove by clear and convincing evidence that "manifest injustice would result if the support award were not varied."²⁸ The presence of "unusual circumstances" in a particular case may be sufficient to establish "good cause" for a variation in the support award:

²⁴ *Patch v. Patch*, 760 P.2d 526, 529–30 (Alaska 1988).

²⁵ Attachment A.

²⁶ Attachment B.

²⁷ Civil Rule 90.3, Commentary VI.B.

²⁸ Civil Rule 90.3(c).

Good cause may include a finding . . . that unusual circumstances exist which require variation of the award in order to award an amount of support which is just and proper for the parties to contribute toward the nurture and education of their children^[29]

Mr. U’s monthly expenses total \$1,300 per month. His monthly-adjusted gross income is \$1,122.75. His apartment and utilities total \$1,000 per month. If Mr. U had a roommate he could save up to \$500 per month. This would leave him with monthly expenses in the amount of \$800 per month (\$500 for rent and \$300 for food). After expenses, Mr. U would have a net income of \$322 per month. After paying support for L, Mr. U has \$98 remaining (\$322 - \$224 = \$98). As calculated using Alaska Rule Civil Procedure 90.3(a) Mr. U’s support for C is \$179. When this payment is included, Mr. U’s monthly expenses exceed his monthly income by \$81. However, this difference does not rise to the level of manifestly unjust. The record does not support a finding of good cause.

IV. Conclusion

After hearing the testimony and considering evidence not previously known by CSSD, Mr. U has established a material change in circumstance. He has not established that he is unable to obtain minimum wage employment. Nor has he established by clear and convincing evidence that his child support obligation calculated under Alaska Rule Civil Procedure 90.3(a) should be varied.

J U’s monthly support obligation should be modified to \$179 per month effective May 2014. This amount is calculated under Alaska Rule Civil Procedure 90.3(a), recognizing his ability to pay should be calculated using the minimum wage working 30 hours per week, 50 weeks per year.

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²⁹ Civil Rule 90.3(c)(1).

V. Child Support Order

- The May 21, 2015 Decision on Request for Modification Review is vacated.
- Mr. U is liable for child support for C in the amount of \$179 per month effective May 1, 2015;
- All other provisions of the Modified Administrative Child Support and Medical Support Order dated April 23, 2014 remain in full force and effect.

Dated: August 31, 2015.

Signed _____
Rebecca L. Pauli
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 15th day of September, 2015.

By: *Signed* _____
Signature
Lawrence A. Pederson _____
Name
Administrative Law Judge/OAH _____
Title

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