

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

In the Matter of	)	
	)	
J U	)	OAH No. 15-0742-CSS
<hr style="width:40%; margin-left:0"/>	)	Agency No. 001102704

**DECISION AND ORDER**

**I. Introduction**

The obligor, J U, disputes the Child Support Services Division’s (CSSD’s) denial of his request to modify his monthly child support obligation. The obligee child is L, age 16. The custodian of record is E N. A hearing was held on July 30, 2015. A telephone message was left for Ms. N, but she did not call back or otherwise participate. Joseph West, Child Support Specialist, represented CSSD. Mr. U and Mr. West participated by telephone.

Having reviewed the record in this case and after due deliberation, Mr. U established that his child support obligation should be modified to \$224 per month, effective May 1, 2015.

**II. Facts**

Mr. U and Ms. N are the parents of L, who is 16 years old. Mr. U has another biological son, C, who is a few months younger than L.

Mr. U’s support for L has remained the same since it was established in 2001 when CSSD set Mr. U’s ongoing support at \$399.95 per month for one child.

On April 22, 2015, Mr. U sought to modify his 2001 order. On April 25, 2015, CSSD served a Notice of Petition for Modification.<sup>1</sup> As requested by the notice, Mr. U provided Child Support Affidavit Guidelines and income information.<sup>2</sup> 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.<sup>3</sup>

CSSD reviewed the information provided and denied Mr. U’s request for modification review. CSSD concluded that, because he was unemployed, there was no current income to assess. CSSD reviewed Mr. U’s prior earnings and concluded that a support calculation based

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<sup>1</sup> Exh. 5.  
<sup>2</sup> Exh. 6.  
<sup>3</sup> Exh. 6 pgs. 1, 2.

upon his “ability to earn” would result in an upward modification.<sup>4</sup> Mr. U appealed, arguing that he has been unemployed for 10 months, his unemployment benefits were about to end, and he has been unable to find work.<sup>5</sup>

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 and then he became depressed. He went to see his doctor, who told Mr. U 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.<sup>6</sup>

Mr. U is 57 years old. He does not have a college degree, but Mr. U completed three years of college with an emphasis in economics.<sup>7</sup> 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.<sup>8</sup>

In 2014, Mr. U earned \$38,942.45.<sup>9</sup> He has minimal monthly expenses. He lives alone in a two-bedroom apartment for which he pays rent in the amount of \$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.<sup>10</sup>

### **III. Discussion**

#### *A. Overview of Applicable Law*

Every parent is obligated both by statute and at common law to support his or her children.<sup>11</sup> 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.”<sup>12</sup>

Child support is calculated based on the adjusted annual income of the non-custodial parent.<sup>13</sup> 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

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<sup>4</sup> Exh. 7.

<sup>5</sup> Exh. 8.

<sup>6</sup> U Testimony.

<sup>7</sup> U Testimony.

<sup>8</sup> U Testimony.

<sup>9</sup> Exh. 9.

<sup>10</sup> U Testimony.

<sup>11</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.

<sup>12</sup> Civil Rule 90.3, Commentary I.B.

<sup>13</sup> Civil Rule 90.3(a).

calculating ongoing child support is “necessarily ... speculative because the relevant income figure is expected future income.”<sup>14</sup> The obligor parent has the burden of proving his or her earning capacity.<sup>15</sup>

Once child support has been established it can be modified upon a showing of “good cause and material change in circumstances.”<sup>16</sup> “The change ordinarily must be more or less permanent rather than temporary.”<sup>17</sup> Unemployment, for example, is typically presumed to be temporary.

There is a presumption of a material change if the newly calculated child support amount is more than a 15% change from the previous order.<sup>18</sup> Mr. U’s support was set at \$399 per month. A child support calculation of \$339.15 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.<sup>19</sup> 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.<sup>20</sup>

#### *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.<sup>21</sup> This determination is necessarily somewhat speculative because the relevant income figure is expected future income.<sup>22</sup> It is not a parent’s ability to earn, but rather a parent’s ability to pay that is the standard.<sup>23</sup>

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<sup>14</sup> See Civil Rule 90.3, Commentary III.E.

<sup>15</sup> *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

<sup>16</sup> AS 25.27.190(e).

<sup>17</sup> 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).

<sup>18</sup> Civil Rule 90.3(h).

<sup>19</sup> 15 AAC 125.321(d).

<sup>20</sup> Exh. 3.

<sup>21</sup> Civil Rule 90.3, Commentary, Section III(E).

<sup>22</sup> Civil Rule 90.3, Commentary, Section III(E).

<sup>23</sup> Civil Rule 90.3 I.B, Commentary, Section III(E).

In Mr. U's case, while he is unlikely to have the ability to pay support at its prior level in the near future, it is likely that he could earn the minimum wage working 30 hours per week 50 weeks per year. This results in annual gross earnings in the amount of \$13,125. After allowable deductions, when calculated according to Alaska Rule Civil procedure 90.3(a), Mr. U's child support is \$224 per month.<sup>24</sup> This is more than a 15% change in support. On this basis alone, there has been a material change in circumstance.

However, Mr. U's situation merits further discussion. Parents going through what appear to be *temporary periods* of unemployment can be expected to maintain their support obligations.<sup>25</sup> 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, but it is not the only factor. Also relevant is the length of time since the last modification, ten years.

For these reasons there has been a material change in circumstance and modification is appropriate.

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.<sup>26</sup> 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."<sup>27</sup> The presence of "unusual circumstances" in a particular case may be sufficient to establish "good cause" for a variation in the support award:

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 . . . .<sup>[28]</sup>

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 got a roommate he could

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<sup>24</sup> Attachment A.

<sup>25</sup> *Patch v. Patch*, 760 P.2d 526, 529–30 (Alaska 1988).

<sup>26</sup> Civil Rule 90.3, Commentary VI.B.

<sup>27</sup> Civil Rule 90.3(c).

<sup>28</sup> Civil Rule 90.3(c)(1).

save up to \$500 per month. This would leave him with monthly expenses in the total 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. This exceeds his monthly child support by \$98. An application of this formula does not result in a child support amount that is manifestly unjust.

#### **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 \$224 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.

#### **V. Child Support Order**

- The May 21, 2015 Decision on Request for Modification Review is vacated.
- Mr. U is liable for child support for L in the amount of \$224 per month effective May 1, 2015;
- All other provisions of the Administrative Child Support and Medical Support Order dated March 13, 2001 remain in full force and effect.

Dated: August 31, 2015

*Signed*

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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 15<sup>th</sup> 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.]