

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

In the Matter of	)	
	)	
K B. C	)	OAH No. 15-1389-CSS
<hr style="width:40%; margin-left:0"/>	)	Agency No. 001150420

**DECISION AND ORDER**

**I. Introduction**

K C appeals a Modified Administrative Child Support and Medical Support Order that increases his monthly child support obligation for three children from \$400 per month to \$487 per month. After a full hearing and based on the evidence in the record, Mr. C’s monthly child support obligation is set at \$319 per month, effective August 1, 2015.

**II. Facts and Procedural History**

**A. Facts**

Mr. C and O A are the divorced parents of three children, X (age 11), Y (age 8) and Z (age 6). Ms. A lives in Utah with the parties’ children and her two younger children, including a 4-month-old infant, as well as several other adults.

Mr. C has remarried since the parties divorced in 2011, but his new wife and their children live in No Name. One of their two children, U, is younger than X but older than Y and Z.<sup>1</sup> It has been Mr. C’s practice to spend part of the year in No Name and part of the year in Alaska. Mr. C attempts to support his new family by sending \$250 per month back to No Name; when he is unable to afford to do so, his family members help him.<sup>2</sup>

Neither Ms. A nor Mr. C is currently working.<sup>3</sup> Mr. C held a seasonal job during the summer of 2015, but has been unable to find employment since his seasonal job ended in August 2015.<sup>4</sup>

According to records from the Department of Labor and Workforce Development, Mr. C earned \$8,404 in 2013; \$9,556 in 2014; and \$5,962 in 2015.<sup>5</sup> Mr. C also received

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<sup>1</sup> Testimony of Mr. C; Ex. B, p. 1; Ex. 1, pp. 1-2.  
<sup>2</sup> Testimony of Mr. C; Ex. B, p. 1.  
<sup>3</sup> Testimony of Ms. A; Testimony of Mr. C.  
<sup>4</sup> Testimony of Mr. C.  
<sup>5</sup> Affidavit of Kimberly Sledgister; Ex. A, p. 6.

unemployment insurance benefits during each of those years – receiving \$6,630 in 2013, \$1,272 in 2014, and \$178 in 2015.<sup>6</sup>

For two months in 2014, and then four months in 2015, Mr. C was living in No Name with his wife and children. His wages there, approximately \$75 per month, are not included in the Department of Labor figures.

In July 2015, Mr. C moved into Section 8 housing through the “[redacted]” “Step Program.”<sup>7</sup> According to “[redacted]” website, the Step Program “is targeted to families with a ‘work able’ adult who possesses the potential to increase their employment and financial options. “[Redacted]” plans to support family economic goals with available community resources, skills training or educational courses, and counseling.”<sup>8</sup> There is no evidence in the record about what specific employment assistance Mr. C is receiving from that program. However, the terms of Mr. C’s rent subsidy provide that after the first year in the program, “[redacted]” will reduce its subsidy to only 60% of fair market rent, signifying an expectation that by August 2016, Mr. C will be earning enough to cover a greater share of the rent than is currently the case.<sup>9</sup> At present, however, Mr. C’s income-based subsidy provides 90% of the rent owed on his apartment.<sup>10</sup>

Mr. C’s child support was most recently set through a 2014 decision by the Office of Administrative Hearings. At the time, Mr. C was working full-time and later part-time, at No Name.<sup>11</sup> He subsequently lost that job, however, and has not worked for No Name since the second quarter of 2014.<sup>12</sup> Mr. C then spent most of the period from September 2014 through May 2015 in No Name, where his new wife and their children live.<sup>13</sup> During these

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<sup>6</sup> Ex. 13, p. 2.

<sup>7</sup> See Ex. B.

<sup>8</sup> <https://rentreform.ahfc.us/step-program/> (last visited December 15, 2015). Because Mr. C has submitted evidence of his participation in the “[Redacted]” Step Program, the Administrative Law Judge takes official notice of “[redacted]” description of that program pursuant to 2 AAC 64.300, and finds that the Proposal for Action process under 2 AAC 64.340(b) provides the parties with a reasonable opportunity under 2 AAC 64.300(a) to refute that the facts therein.

<sup>9</sup> See Ex. B.

<sup>10</sup> See Ex. B.

<sup>11</sup> Ex. 1, p. 8.

<sup>12</sup> Affidavit of Kimberly Sledgister; Testimony of Mr. C.

<sup>13</sup> Mr. C was in No Name from September 2, 2014 through November 12, 2014, and then again from January 18, 2015 through May 18, 2015. Ex. A, pp. 7-12.

visits Mr. C worked at what he refers to as his “permanent job in No Name,” earning the equivalent of \$75 per month.<sup>14</sup>

After returning to Alaska, Mr. C secured seasonal fish processing work. Between two employers, his total reported wages for the third quarter of 2015 were \$5,962.09 -- \$2,308.83 from No Name, and \$3,653.26 from No Name.<sup>15</sup> Mr. C started the seasonal/on-call position at No Name on June 23, 2015, earning \$8.75 per hour, with variable hours. Documents for a six-week period show Mr. C working between 19 and 93 hours per week, with most weeks averaging around 40 hours per week.<sup>16</sup> The job ended on August 3, 2015, at the end of the “season.”<sup>17</sup>

Mr. C has been unsuccessful in finding employment since the end of the season. He would have gone back to No Name in October 2015, but his accumulation of child support arrears led to the suspension of his passport.<sup>18</sup>

At the time of the December 2015 hearing, Mr. C had been unemployed for four months, was living in Section 8 housing, and was supporting himself through Food Stamps and financial assistance from family members and members of his church.<sup>19</sup>

## **B. Procedural History**

In June 2015, Mr. C requested that CSSD modify the parties’ child support order. Mr. C informed CSSD of his seasonal/on-call work at No Name, and also provided evidence that he divides his time between Alaska and No Name, earning considerably less while in No Name.<sup>20</sup>

In September 2015, CSSD issued a Modified Administrative Child Support Order increasing Mr. C’s support obligation from \$400 per month to \$487 per month.<sup>21</sup> The Order’s Findings of Facts stated that “the calculation was based on *ability to earn* Alaska

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<sup>14</sup> Ex. 8; Testimony of Mr. C. Although characterizing the No Name job as his “permanent job,” Mr. C also applies for and receives the Alaska PFD each year, signifying through that application process an intent to remain in Alaska indefinitely. *See* Ex. B; AS 43.23.005(a); AS 43.23.095(7) (PFD eligibility requirements).

<sup>15</sup> Affidavit of Kimberly Sledgister.

<sup>16</sup> Ex. 6, pp. 3-4.

<sup>17</sup> Ex. 10; Testimony of Mr. C.

<sup>18</sup> Federal regulations authorize suspension of a passport where an obligor owes more than \$2,500 in child support arrears. *See* 22 C.F.R. § 51.60(a)(2). As of December 16, 2015, Mr. C owes Ms. A \$7,249.50 in child support arrears. CSSD Submission to Record, December 16, 2015.

<sup>19</sup> Testimony of Mr. C; Ex. 12; Ex. B.

<sup>20</sup> *See* Ex. 2, 5, 6, 7, 8.

<sup>21</sup> Ex. 11.

minimum wage (\$8.75 per hour times 2,080 full-time annual hours) plus the Alaska Permanent Fund Dividend.”<sup>22</sup> Mr. C appealed, arguing that his support obligation should not have gone up when his actual income had gone down.<sup>23</sup>

The hearing was held on December 2, 2015.<sup>24</sup> All materials submitted by the parties were received into evidence. Mr. C attended in person and represented himself. Ms. A attended telephonically with the assistance of a personal acquaintance, M N, who interpreted in the Nuer language when necessary. CSSD was represented by Kimberly Sledgister. Following the hearing, the record was held open for CSSD to submit a revised proposed support calculation, and for the parties to submit any response to that proposal.<sup>25</sup>

On December 3, 2015, CSSD submitted two revised calculations for consideration.<sup>26</sup> First, CSSD calculated Mr. C’s monthly support obligation based on *part-time* employment at his most recent hourly wage of \$8.75 per hour. The monthly support obligation for three children at this wage level is \$386 per month.<sup>27</sup> CSSD separately prepared a support calculation based on three quarters of part-time work in Alaska (again at \$8.75 per hour), and one quarter of employment in No Name. The monthly support calculation for three children based on that income amount is \$315 per month.<sup>28</sup> CSSD’s December 3, 2015 submission argued that the first of these calculations should be applied. CSSD further argued that, since the resulting support amount (\$386 per month) is not more than 15% greater than the amount set in June 2014, the support amount of \$400 should remain unchanged.<sup>29</sup>

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<sup>22</sup> Ex. 11, p. 5 (emphasis added). The Order first stated the support amount was set based on “total income from all sources,” but then stated “I do not have actual employment information for you.” *Id.*, p. 4.

<sup>23</sup> Ex. 12.

<sup>24</sup> An earlier hearing was rescheduled because Ms. A had not received notice of the hearing or CSSD’s exhibits. A second hearing attempt was discontinued due to difficulties securing the services of a Nuer interpreter for Ms. A.

<sup>25</sup> Ms. A indicated on the record that she was unlikely to submit any response, but that she opposed any change to the existing calculation.

<sup>26</sup> CSSD distributed its revised proposed calculations by email to both case parties.

<sup>27</sup> Ex. 16.

<sup>28</sup> Ex. 17.

<sup>29</sup> December 3, 2015 Submission to Record. Additionally, on December 16, 2015, CSSD submitted a pleading identifying the amount of arrears in this case (\$7,249.50), and specifying that Mr. C owes those arrears directly to Ms. A.

On December 8, 2015, Mr. C submitted a packet of documents, which were marked as Exhibit B. The record closed without further submission from either party.

### III. Discussion

A parent is obligated M by statute and at common law to support his or her children.<sup>30</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>31</sup> Calculations under Rule 90.3 should result in a non-custodial parent paying approximately what the parent would have spent on the children if the family was intact.<sup>32</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.”<sup>33</sup> The regulations implementing this rule direct that a parent’s ongoing support obligation be based on “the total annual income the parent is likely to earn or receive when the child support is to be paid.”<sup>34</sup> 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.”<sup>35</sup> The obligor parent has the burden of proving his or her earning capacity.<sup>36</sup>

Child support orders may be modified upon a showing of “good cause and material change in circumstances.”<sup>37</sup> “A material change of circumstances will be presumed if support as calculated under this rule is more than 15 percent greater or less than the outstanding support order.”<sup>38</sup> In a child support matter, the person who files the appeal – here, Mr. C – has the burden of proving that CSSD’s order was incorrect.<sup>39</sup>

CSSD’s September 2015 Order estimated Mr. C’s total 2015 income at \$20,272, including the \$2,072 PFD.<sup>40</sup> To arrive at that income amount, CSSD concluded that Mr. C could find a full-time (40 hours per week, or 2,080 hours per year) minimum wage job

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<sup>30</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987); AS 25.20.030.

<sup>31</sup> Civil Rule 90.3, Commentary I.B.

<sup>32</sup> Civil Rule 90.3, Commentary II.

<sup>33</sup> *See* 15 AAC 125.010 (adopting Civil Rule 90.3 by reference).

<sup>34</sup> 15 AAC 125.050 (c).

<sup>35</sup> *See* Civil Rule 90.3, Commentary III.E.

<sup>36</sup> *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

<sup>37</sup> AS 25.27.190(e).

<sup>38</sup> Civil Rule 90.3(h)(1).

<sup>39</sup> 15 AAC 05.030(h).

<sup>40</sup> Ex. 11, p. 6.

(\$8.75 per hour).<sup>41</sup> But CSSD's calculation yields a significant disparity between the income figure on which support is based, and Mr. C's actual reported wage income in recent years.

The 2014 support obligation was calculated based on three months of full-time income, which were then extrapolated out to determine an annual income at the same rate of pay.<sup>42</sup> While this approach was sound in light of the information available at the time, a longer-range view of Mr. C's ability to pay does not justify continuing to base his support obligation on a speculative income amount that time has proven to be incorrect.

Mr. C earned less than \$10,000 per year in M 2013 and 2014, and his reported income in 2015 has been just \$5,962. With unemployment insurance benefits included, his total employment-related income was \$15,034 in 2013, \$10,828 in 2014, and \$6,140 in 2015 – an average of \$10,667.33.

Support orders should be based on the obligor's ability to pay child support. Mr. C has earned roughly \$10,000 per year over the last three years.<sup>43</sup> He has now been unemployed for four months, and is supporting himself through a mix of public assistance and donations from family and his church. Under these circumstances, setting support based on an income of \$20,000 per year – or even the \$15,722 per year in CSSD's post-hearing submission – is unreasonable. Mr. C has established by a preponderance of the evidence that CSSD's calculation is incorrect.

When past annual income is erratic, as it is in this case, it is appropriate to average past income to estimate future income.<sup>44</sup> The most accurate estimate is presumptively achieved by averaging the last three years of income.<sup>45</sup> Averaging Mr. C's annual earnings for the last three years produces an average annual wage income of \$10,667.33. Adding this amount to the amount of the 2015 PFD (\$2,072) produces an annual gross income of \$12,729.33. According to CSSD's online calculator, the monthly child support obligation for three children based on this income is \$319.<sup>46</sup>

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<sup>41</sup> Ex. 11, pp. 5, 6.

<sup>42</sup> Ex. 1, p. 8.

<sup>43</sup> Affidavit of Kimberly Sledgister.

<sup>44</sup> Alaska Civil Rule 90.3, Commentary III.E.

<sup>45</sup> Alaska Regulation 15 AAC 125.030(d).

<sup>46</sup> See Attachment A.

Mr. C argues that support should be calculated at least in part based on his wages in No Name. CSSD contends that the job in No Name should not form the basis for the support calculation, arguing that Mr. C's return plans are too speculative to base an award on possible foreign employment during unknown periods of time. CSSD is correct. Mr. C owes a significant amount in child support arrears to Ms. A, and will not be able to travel to No Name until he has resolved that issue. Accordingly, his "permanent job" in No Name is not a realistic source of income for purposes of setting his current support amount. Accordingly, it will not be considered. As such, it is not necessary to address whether traveling to No Name for lengthy periods of each year would constitute "voluntary and unreasonable underemployment" for purposes of Mr. C's pre-existing child support obligations to X, Y and Z.

Mr. C also suggested at the hearing that he should be given a deduction for supporting his son, U, who is younger than X but older than Y and Z. A deduction for a prior child is intended to recognize that a parent is supporting the prior child – either through court-ordered support or because the child is in the parent's home.<sup>47</sup> Neither of these circumstances applies here. Mr. C neither lives with U nor pays court-ordered support. The fact that U lives with Mr. C's family members in No Name is not enough to bring him into the category of prior children in the home. Under the circumstances, a deduction is not legally available.

#### **IV. Conclusion**

Mr. C met his burden of showing that the modification was in error. The evidence developed through the hearing process establishes that the best predictor of Mr. C's ability to pay is to average his last three years' earnings. Support is calculated at \$319 per month effective August 1, 2015 and ongoing.

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

1. K B. C is liable for child support in the amount of \$319 per month for three children, effective August 1, 2015 and ongoing.

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<sup>47</sup> Alaska Civil Rule 90.3(a)(1)(C) (deduction for "child support and spousal support payments arising from prior relationships which are required by other court or administrative proceedings and actually paid"); (a)(1)(D) (deduction for "in-kind child support for children from prior relationships in the primary or shared physical custody of the parent"); Commentary III(D)(2), (3).

2. All other terms of the Modified Administrative Child Support and Medical Support Order dated September 28, 2015 remain in full force and effect.

Dated: December 28, 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 12<sup>th</sup> day of January, 2016.

By: *Signed* \_\_\_\_\_  
Signature  
Andrew M. Lebo  
Name  
Administrative Law Judge  
Title

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