

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

IN THE MATTER OF	)	OAH No. 16-0742-CSS
D F	)	CSSD No. 001141944
_____	)	

**DECISION AND ORDER**

**I. Introduction**

This case is D F’s appeal of an order issued by the Child Support Services Division (Division). The order being appealed is the Division’s Decision on Request for Modification Review. This order denied Mr. F’s petition for a downward modification of his ongoing child support order for his child, T. This order was issued on May 31, 2016.

On July 20, 2016, a hearing was held to consider Mr. F’s appeal. U K, the custodial parent participated. Mr. F also participated. The Division was represented by Kimberly Slegister, Child Support Services Specialist.

Having reviewed the record in this case and after due deliberation, I conclude that the Division’s order should be upheld. Mr. F did meet his burden of proof by providing credible earnings information, but Mr. F’s testimony regarding his new employment did not show that a modification of child support is appropriate at this time, because his earning capacity has not changed since ongoing child support was last set. Therefore, Mr. F’s ongoing child support obligation for T should remain at \$629 per month.

**II. Facts**

This case is a modification action.<sup>1</sup> The Division denied Mr. F’s request for modification review because the Division determined that he had not shown that there had been a material change in his income or earning capacity. Mr. F’s current ongoing child support was set based on an estimate of his income as fisherman in 2012.<sup>2</sup>

The Division denied Mr. F’s request for a downward modification, because, after he requested a modification over the phone, he did not timely provide the information the requested on his current income.<sup>3</sup>

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<sup>1</sup> Alaska Civil Rule 90.3(h) governs modification actions.

<sup>2</sup> Exhibits 1.

<sup>3</sup> Division’s Pre-Hearing Brief.

The Division did not have access to Mr. F's current income information both because he failed to timely provide it and his current employer has not been reporting his earnings. The Division was, therefore, not able to determine whether there had been a change in circumstances that would justify a modification of his ongoing child support obligation.<sup>4</sup>

Mr. F lives in Alaska and he works for his brother, who is not reporting Mr. F's earnings to the Alaska Department of Labor. Without documentation from Mr. F there was no income information available to determine if there was 15% change from the current child support amount that would justify a modification of Mr. F's ongoing child support obligation for T.<sup>5</sup> The Division provided a calculation that used estimated annual earnings of \$39,691. This estimate was based on Mr. F's last known, rather than his current, earnings. This is roughly the equivalent the pay of a full-time job earning \$20 per hour. After the Division denied his request for a downward modification, Mr. F requested a formal hearing.<sup>6</sup>

In 2012, Mr. F's ongoing child support obligation was set at \$629 per month after a formal hearing, based on this estimate of his 2011 income using his income tax return for that year. This income was earned working nine months of the year as a fisherman.<sup>7</sup> In his request for a formal hearing, Mr. F explained that he can no longer work as a fisherman. In submissions filed prior to the hearing Mr. F explained that he worked in the fishing industry for 22 years but can no longer do work that physically demanding because of arthritis. Mr. F now works in his brother's auto repair shop, No Name.<sup>8</sup>

Mr. F provided a copy of a written agreement with his brother to work as an apprentice in exchange for "Room and Board, phone and Child Support to the equivalent of \$12.00 per hour." The agreement purports remain in effect from 2015 through 2020. Attached this agreement is a letter signed by Mr. F's brother and sister-in-law explaining that Mr. F's expenses are covered during his apprenticeship, including medical expenses, but that at no time is he given any money. This letter also indicates that from January 2015 through June 2016, Mr. F earned \$12.00 per hour for 30 hours per week listing a total of \$1,400 per month for each month, and listed \$840

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<sup>4</sup> Division's Pre-Hearing Brief & Exhibit 4.

<sup>5</sup> Exhibit 4, page 3.

<sup>6</sup> Mr. F's appeal is found at Exhibits 5.

<sup>7</sup> Exhibit 1.

<sup>8</sup> Exhibit A.

for his room and board, \$100 for his phone and \$500 per month in child support payments.<sup>9</sup>

At the hearing, Mr. F testified that these listed items are not money that he receives but rather estimates of the value of what he receives from his brother if he was actually being paid for the work that he does. Mr. F testified that he does not receive any money for his work except when his brother gives him money for a specific purpose such as \$20 to go out to eat.<sup>10</sup>

Mr. F testified that he has been working for his brother and receiving hands-on auto-mechanic training for about a year and a half and that his brother charges \$80 per hour for service charges on the repair work done in his shop. In the information that Mr. F submitted prior to the hearing, he indicated that he owed \$65,000 to the IRS. Mr. F testified that he works 30 to 40 hours per week and has been working for his brother and being trained as an auto-mechanic for about a year and a half. Mr. F testified that he hopes to become a certified mechanic in about a year.<sup>11</sup>

Based on the evidence in the record, I find that it is more likely than not that Mr. F is either unreasonably under-employed and is capable of earning an income equal to the income that used to set his current support obligation or is currently earning that level of income and is under-reporting his income.<sup>12</sup>

### **III. Discussion**

In a child support hearing, the person who filed the appeal, in this case Mr. F, has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.<sup>13</sup> At the hearing, Mr. F did not show that the Division's determination that his ongoing child support obligation for T should not be modified was incorrect.<sup>14</sup>

Civil Rule 90.3 allows a child support amount to be modified if the party requesting the change shows that a material change of circumstances has occurred.<sup>15</sup> The rule states that a material change of circumstances "will be presumed" if the modified support amount would alter

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<sup>9</sup> Exhibit A & Recording of Hearing.

<sup>10</sup> Recording of Hearing.

<sup>11</sup> Exhibit A & Recording of Hearing.

<sup>12</sup> Exhibit 1 & A & Recording of Hearing.

<sup>13</sup> Alaska Regulation 15 AAC 05.030(h).

<sup>14</sup> Recording of Hearing.

<sup>15</sup> Alaska Civil Rule 90.3(h)(1).

the outstanding support order by 15 percent.<sup>16</sup> Mr. F did not meet his burden to show that a material change of circumstances has occurred since Mr. F's ongoing child support was set at \$629 per month in 2012.

While Mr. F may have made a reasonable choice in his decision not to keep working in the fishing industry, he did not provide credible evidence to show that he is not, or cannot, earn an annual income that is at least the equivalent of what he earned when his child support was last set. Mr. F did not say that he was incapable of earning at least \$20 per hour. The State of Alaska does not require any certification to repair automobiles. Mr. F has been doing this work for over a year for his brother on a full-time basis. It is not plausible that this work, probably being billed at \$80 per hour, is worth less than \$20 per hour. Rather the record indicates that the purported arrangement Mr. F has worked out with his brother is probably an attempt to protect his earnings from garnishment by the Division and the IRS and is not an accurate reflection of the value of the actual compensation that he receives.

The value of employer provided benefits such as food and housing is included as income for the purpose of calculating child support.<sup>17</sup> This means that if the documents submitted by Mr. F reliably reflected the value of what he receives as compensation for his work for his brother were reliable, the value of this in-kind compensation would be counted as income and could be used to calculate his current earnings for the purpose of calculating ongoing child support.

The documents provided by Mr. F are not reliable evidence of the value of what he is receiving. For example, they are internally inconsistent. While these documents indicate that Mr. F is receiving in-kind benefits that equate to \$1400 in monthly earnings, the listed value of the listed monthly benefits provided by his brother equals \$1440. The hourly wage is listed as \$12 per hour for 30 hour per week; this would equal a month wage of \$1440 every four weeks. The value of the listed benefits appears to be set to equal the listed wage, rather than estimating the value of the in-kind benefits. The listed wage does not account for the income tax or other items that Mr. F should have withheld, which means that the listed wage patently underestimates the value of the listed in-kind benefits, because Mr. F would have to purchase these benefits with

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<sup>16</sup> Alaska Civil Rule 90.3, Commentary X.

net income in a legitimate employment arrangement.

The estimates in these documents are also inconsistent with Mr. F's sworn testimony. Mr. F admitted that he is working 30-40 hours per week rather than 30. The purported contract provides Mr. F will at "no time" be given any money, but Mr. F admitted that his brother gives him money to go out and get food "and other stuff."

The estimates in these documents do not appear to be reflective of the actual costs of providing for all the living expenses of an adult in Alaska. The annual value of the \$1400 per month estimated in-kind wage Mr. F's brother provides to cover all of his expenses, including \$500 per month in child support, is \$16,800. Less the \$500 per month in child support payments, this leaves only \$10,800 per year as the estimate of the value of what it cost his brother to cover all of Mr. F's living expenses.

The arrangement in the purported contract also appears to be unreasonably exploitative of Mr. F. The terms of the agreement require Mr. F to work for annual in-kind benefits with a listed value of \$16,800, or between \$8 and \$9 per hour for five years, performing auto mechanic services, when presumably a larger and a larger percentage of these services will be billed out to his brother's customers at \$80 per hour, as Mr. F progresses with his training.

The purported contract and listed estimates of Mr. F in-kind wage and the value of the in-kind benefits he receives appear to be an attempt to provide a misleading description of an employment arrangement that is inconsistent with federal and state employment reporting requirements, an arrangement that protects Mr. F's wages from garnishment for child support, unpaid taxes, as well as ongoing mandatory withholding for taxes, social security, and unemployment insurance. Mr. F has admitted that he owes \$65,000 to the IRS. The purported contract makes no provision to pay down this debt. The purported contract does not provide for paying all of Mr. F's current ongoing monthly obligation or any of his accrued arrears. The purported contract does, however, protect Mr. F from enforcement actions to collect on these financial obligations by evading reporting withholding requirements and by evading garnishment of his earnings by purportedly compensating Mr. F only with in-kind benefits, and with no paycheck to be garnished.

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<sup>17</sup> Alaska Civil Rule 90.3, Commentary III.A.19.

Mr. F's and his brother's participation in this illegal arrangement further erodes the reliability of these documents as purported evidence of his current earnings. Mr. F is effectively admitting that he has an arrangement with his brother to work full-time "under the table" for his brother and then asking that his and his brother's, estimate of what he receives for that work, \$1400 per month, simply be accepted, despite the obvious flaws in that estimate. In sum, these estimates are not reliable because they are not internally inconsistent, they are inconsistent with the sworn testimony of Mr. F, the accuracy of these estimates is not sworn to in an affidavit or testimony, and the estimates are based on an illegal purported contract that is not an arms-length transaction because it is between Mr. F and a brother he currently lives with.

Mr. F argues that his ongoing child support should not be based on his past earnings in the fishing industry because he can no longer do that work. The Alaska Supreme Court has recognized that an obligor parent should not be locked into a particular job or field, nor prevented from seeking personal or professional advancement.<sup>18</sup> On the other hand, a noncustodial parent who voluntarily reduces his or her income should not automatically receive a corresponding reduction in his or her child support obligation.<sup>19</sup> A noncustodial parent's potential income can be imputed to that parent in cases of unreasonable voluntary underemployment.<sup>20</sup> In this case, Mr. F does not appear to be voluntarily under-employed, unless he has, in fact contracted to work full-time as an auto mechanic for the next five years for less than \$9 per hour. Rather, the evidence indicates that Mr. F has failed to provide a reliable documentation of his current earnings.

The methodology for calculating a child support calculation when the noncustodial parent is voluntarily unreasonably under-employed or fails to provide reliable income information is the same. When a parent with a child support obligation makes an accurate determination of his or her income impossible, income must be imputed to calculate the child support obligation. Rather than determining the parent's actual income, the parent's earning capacity is used to estimate the parent's potential income.<sup>21</sup> In this case, Mr. F is appealing the Division's order denying his request for a modification. This order was based on the Division's finding that he failed provide

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<sup>18</sup> See *Pattee v. Pattee*, 744 P.2d 659 (Alaska 1987).

<sup>19</sup> *Pattee v. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

<sup>20</sup> Alaska Civil Rule 90.3(a)(4).

income information showing that there had been a material change in circumstances. This means that using his current income, or his current earning capacity if he is voluntarily unreasonably under-employed, in a child support calculation, would result in at least a 15% change in his monthly obligation.

Mr. F failed to meet his burden to show that there has been a material change in circumstances. The evidence in the record, shows that Mr. F is capable of earning an income close to what he earned in 2011 the year. This is the income which his current monthly obligation is based. Mr. F is probably is earning an equivalent income now, but is under-reporting the compensation he receives.

#### **IV. Conclusion**

I conclude that the Division correctly denied Mr. F's request for a downward modification of his ongoing child support. The child support amount in his current order was calculated using the primary custody formula in Civil Rule 90.3(a).

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

The Division's Decision on Request for Modification Review issued on May 31, 2016, is affirmed.

DATED this 2nd day of August 2016.

By: Singed  
Mark T. Handley  
Administrative Law Judge

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<sup>21</sup> *Laybourn v. Powell*, 55 P.3d 745, 747 (Alaska 2002).

**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 26<sup>th</sup> day of August, 2016.

By: Signed  
Signature  
Mark T. Handley  
Name  
Administrative Law Judge  
Title

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