

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

In the Matter of)	
)	
H L. F)	OAH No. 17-0204-CSS
_____)	Agency No. 001094862

DECISION AND ORDER

I. Introduction

In November 2016, K D asked the Child Support Services Division (CSSD) to modify H F’ monthly child support obligation for the parties’ daughter, T. CSSD denied the request and Ms. D appealed, arguing that Mr. F is earning unreported income. At the hearing, Mr. F countered that his monthly child support obligation should be reduced on hardship grounds. Because the evidence presented did not establish either that Mr. F has unreported earned income, or that he is entitled to a hardship variance from his very low existing child support payment, CSSD’s decision is hereby affirmed. The parties’ 2013 child support order therefore remains in full force and effect.

II. Facts

H F and K D are the parents of 17-year-old T and 19-year-old Z, both of whom have long lived out-of-state with Ms. D. Only T is still covered by an ongoing child support order. The parties have a long and acrimonious history in which disputes over child support have played a central role. This case, however, concerns only the amount of Mr. F’ ongoing child support obligation for T, and, specifically, whether that amount should be modified based on a material change in circumstances.

Mr. F lives in Anchorage. He is married, but his wife moved out of the family home several months ago. At the time of the hearing Mr. F was living in the marital home, which is owned by his wife but which was under foreclosure. Mr. F believed that foreclosure on the home was imminent, and he was expecting to move into a camper on a property he owns in No Name City.

Mr. F has a diagnosis of Chronic Obstructive Pulmonary Disease (COPD), based on which he receives social security disability payments. Mr. F’ federal income tax records for 2013, 2014, and 2015 reflect no income other than disability payments and the Permanent Fund Dividend, and Mr. F asserted in this proceeding that these remain his only source of

income.¹ Mr. F recently applied for and was granted a hardship waiver on his child support *withholding* order.²

Mr. F' ongoing child support obligation was established in a January 2013 Decision and Order, which set that obligation at \$240 per month for one child – although his actual out-of-pocket amount was much lower due to a direct credit from Children's Insurance Benefit (CIB) payments.³ The January 2013 Decision and Order found that Mr. F' COPD prevents him from “performing any sort of job that demands physical exertion,” and concluded that he was unable to work.⁴ Neither party appealed that order.

Ms. D requested modification of the support order in January 2016, but CSSD denied that request. She later appealed that denial, but that appeal was dismissed in November 2016 as untimely.⁵ Ms. D did not appeal this dismissal.

In November 2016, Ms. D again requested that CSSD modify the support order. CSSD requested that Ms. D provide proof of changed circumstances that would justify modification. Upon receipt of documentation from Ms. D relating to the girls' health insurance coverage, CSSD initiated a modification review.⁶ CSSD notified the parties in December 2016 of the request for modification and requested that they provide evidence relevant to the support calculation.

On January 31, 2017, CSSD denied the request for modification.⁷ Ms. D appealed, writing: “Mr. F is self-employed and not reporting his income. His income is significantly higher than reported. I would like the opportunity to present witnesses.” The hearing on Ms. D's appeal was held on April 27, 2017. Ms. D participated by phone and represented herself; she presented her own testimony and that of X Y, a former friend of Mr. F. Mr. F

¹ Ex. 5. At least until recently Mr. F also received financial support from wife, who works in the legal field for the State of Alaska. See Ex. 1, p. 4. However, they no longer live together. In November 2016, Mr. F' wife sought and an Alaska court granted a short-term domestic violence protective order against him. Mrs. F then withdrew her petition at the long-term stage, however.

² Ex. A; Ex. C. As was discussed at the hearing, CSSD's withholding order determines the total amount withheld from an obligor's income payments. This can include not just the ongoing monthly support amount but also a withholding related to arrears. The withholding order is not at issue in this appeal.

³ OAH Case No. 12-0105-CSS, Revised Decision and Order (Comm'r Rev. January 2013). At the time of the 2013 order, both T and Z were still minors. The order set Mr. F' ongoing support amount at \$324 per month for two children (\$240 for one child), but also noted that the direct credit of \$252 based on CIB payments reduced his out-of-pocket payment to \$72 per month. Ex. 1, pp. 1-2.

⁴ See Ex. 1, pp. 3-4.

⁵ OAH Case No. 16-0834-CSS (Commissioner of Revenue 2016).

⁶ Ex. 2; Ex. 3.

⁷ Ex. 6.

participated in person and represented himself. CSSD was represented by Brandi Estes and Joseph West.

Ms. D testified that she has not seen Mr. F since 2001. When they were together nearly two decades ago, he worked for cash. To her knowledge, other than when he worked briefly on the North Slope, he has “always” worked for cash. Based on their long history of legal disputes, and what she characterizes as a “history of working under the table for cash,” Ms. D believes Mr. F is currently working under the table and hiding income.

Ms. D called X Y as a witness. Mr. Y is a former friend of Mr. F who sued Mr. F in 2015 over money he claimed Mr. F owed him.⁸ Most of Mr. Y’s testimony concerned the dispute that led to his lawsuit against Mr. F. In brief, in May 2014 Mr. F had approached Mr. Y, asking him to finance a bid on a federal auction lot of fish camp items. The bid was successful, but each man later disputed their arrangement and whether they had received the benefit of their bargain. Lost friendship and a lawsuit ensued. Mr. Y also testified that during this time frame Mr. F was supposed to repair various boats and vehicles for him, but did not perform the work or did not perform it satisfactorily. In addition to testimony about the business dispute, Mr. Y also testified that in 2014 the two men went fishing together several times and helped each other several times with physical labor on one another’s property.

Mr. Y and Mr. F were openly hostile to one another at the hearing, and the palpable animosity between them led me to doubt that either of them was being completely truthful in his telling of events. Thus, when Mr. Y volunteered that Mr. F once told him that he quit his lucrative North Slope job to evade child support obligations, and that he preferred to be paid in cash to evade taxation, it was difficult to credit this testimony, particularly given the absence of any detail about the circumstances under which these admissions were supposedly made. More broadly, as to the central allegation that Mr. F is currently hiding income, Mr. Y and Mr. F have not spoken in years, and the events he was describing occurred between 2012 and 2014. Mr. Y had no personal knowledge about Mr. F’s *current* financial, occupational, or physical condition.⁹

⁸ Mr. F filed a counterclaim, and the matter resolved in early 2017. See Anchorage Superior Court Case No. 3AN-16-00000CI, and Ex. D-1.

⁹ Y testimony (“I don’t know if he’s working now, but he was capable of working in 2014.”).

Mr. F denies that he is either working or capable of doing so. Regarding his interactions with Mr. Y, Mr. F said he helped Mr. Y as a friend, but that help largely consisted of arranging for repairs to be done by others.¹⁰ Mr. F denied that his activity level as documented in photographs provided by Mr. Y – or as described in his counterclaim to Mr. Y’s suit – undermine the prior finding that he is unable to work. Mr. F explained that he is “not paralyzed,” and “can move around,” but has “limited stamina.” As to his overall financial situation, Mr. F testified that his wife has moved out of the family home, the home is being foreclosed on, he is living on \$750 per month, and his expenses outpace his income.

Before the hearing, Ms. D submitted five exhibits that were admitted into the record, as were CSSD’s exhibits.¹¹ Mr. F brought to the hearing three additional documents that had not been disclosed under the schedule set in the prehearing order. These were: a January 2017 CSSD notice granting a temporary hardship request relating to his *withholding* order, paperwork he submitted in support of that hardship request, and seventeen pages of medical records.¹² The record was held open to allow Ms. D a chance to respond to those exhibits; Ms. D submitted six more exhibits as well as a motion to strike Mr. F’ testimony.¹³ Mr. F then filed a motion to strike the testimony of Ms. D and Mr. Y.¹⁴ The motions to strike were denied, and the record closed on May 12, 2017.

¹⁰ Mr. F testified that, to the extent his counterclaim against Mr. Y had referenced repairs performed for Mr. Y, those repairs had been performed by Mr. F’ adult son, A, a self-employed mechanic with whom Mr. F shares a business license.

¹¹ Ms. D’s prehearing exhibits were Mr. F’ January 2016 counterclaim against Mr. Y and other documents related to that case (Ex. D-1); the Final Decision in OAH Case No. 12-0105-CSS (Ex. D-2); 2016 email correspondence relating to the children’s health care coverage (Ex. D-3); records related to the No Name Business owned by Mr. F and his son (Ex. D-4); 2016 Municipal tax records for Mr. F’ wife’s home, No Name City tax records relating to Mr. F’ No Name City property, and photocopies of photographs of Mr. F fishing, cleaning a fish, and holding a shovel (Ex. D-5). Ms. D also subpoenaed records about the Y-F dispute from Mr. Y’s attorney; these records were returned to OAH and were also admitted into the record.

¹² Ex. A, B, C.

¹³ Ms. D submitted: A “Statement of Financial Affairs filed” in March 2017 by Mr. F’ wife in her federal bankruptcy proceeding (Ex. D 1A); New Jersey court records relating to a series of restraining orders Ms. D has obtained against Mr. F since 2001 (Ex. D 2A); a December 2014 order denying Mr. F’ motion to modify the restitution amount in his federal criminal case (Exs. D-3A, 4A); a phone log apparently documenting an August 2016 discussion between Mrs. F and a CSSD representative (Ex. D-5A); and Alaska court records relating to the short-term Domestic Violence Protective Order obtained by Mr. F’ current wife in November 2016 (Ex. D-6A).

¹⁴ Mr. F also filed what he called an “affidavit” from his wife, although the document was mostly argumentative, rather than testamentary, in nature.

III. Discussion

Under Civil Rule 90.3, a parent's ongoing support obligation should be based on the amount the parent can be expected to earn during the period the support is being paid.¹⁵ Child support orders may be modified upon a showing of "good cause and material change in circumstances."¹⁶ A change in circumstances is presumed "material" if it would alter the existing child support amount by more than fifteen percent.¹⁷

In a child support appeal, the parent who files the appeal has the burden of proving by a preponderance of the evidence that the department's decision was incorrect.¹⁸ A parent seeking a hardship exemption to Rule 90.3 calculations must show by clear and convincing evidence that applying the calculation under the circumstances will cause manifest injustice.

A. The existence of a domestic violence protective order does not obviate a parent's obligations under Rule 90.3

As a threshold matter, Mr. F argued at the hearing that he is not obligated to pay child support because his parental rights have been "effectively terminated" by a court in New Jersey. The basis of this argument is that Ms. D has successfully obtained from New Jersey courts a series of restraining orders against Mr. F.¹⁹ Although the restraining order places significant restrictions on Mr. F' vis-à-vis his children, it is not an "order terminating his parental rights" for child support purposes. To the extent Mr. F feels that a restraining order entered against him in another state unduly burdens him, his recourse is with the issuing court or through an appeal of that order. He did not establish that his parental rights have been "terminated," and thus did not establish that he is excused from the obligation to pay child support under Rule 90.3.

B. Ms. D's request to modify the existing support order

Ms. D argues that she is entitled to a modification of the ongoing support amount because of changed circumstances. The evidence did not establish that CSSD erred in declining to find changed circumstances. The gravamen of Ms. D's claim is that Mr. F is

¹⁵ Civil Rule 90.3, Commentary, Section III(E).

¹⁶ AS 25.27.190(e).

¹⁷ Alaska Civil Rule 90.3, Commentary X.

¹⁸ 15 AAC 05.030(h); 2 AAC 64.290(e).

¹⁹ See Ex. D-2A.

working under the table and concealing income.²⁰ Ms. D did not meet her burden of proving that Mr. F' income is actually higher than the amounts used in CSSD's calculation.

Ms. D primarily relies on evidence relating to Mr. F' activities between 2012 and 2014. Even if that evidence were accepted as tending to show that Mr. F was not as completely disabled as he claimed in 2012 – because, for example, he engaged in some boating, fishing, yard work, and small engine repair – it fell short of establishing that Mr. F was “working under the table” at that time.²¹ Far more critically for the current dispute, that evidence falls significantly short of establishing that Mr. F is presently earning unreported income. Ms. D has not seen Mr. F since 2001, and Mr. Y has not interacted with him since 2015 at the latest. As such, neither has personal knowledge of his Mr. F' current physical or financial situation.

The more recent or current evidence Ms. D relies on is (1) the Alaska short-term Domestic Violence Protective Order (DVPO) issued to Mr. F' current wife, which required him to pay her \$500 and pay her car insurance; (2) evidence that Mr. F had some dental work performed; and (3) Court log notes from a hearing on the Alaska DVPO. None of this evidence – either alone or viewed as a whole – establishes that it is more likely true than not true that Mr. F is working and hiding income.

The ex parte DVPO is not evidence that Mr. F can actually afford to pay the amounts ordered, and certainly is not evidence that he is secretly working. The dental work is likewise not evidence of secret income. Lastly, what Ms. D calls a “transcript” are actually log notes from a hearing on the Alaska DVPO. Ms. D points to one entry in the log notes – “there was no domestic violence [/] there is no threat of domestic violence towards my wife

²⁰ Ms. D also argued that Mr. F' disability is self-induced because he was previously a heavy smoker. The record suggests that Mr. F is noncompliant with the medical regimen prescribed for his COPD. Ex. B, pp. 3-4. He testified that he cannot afford the medication; his medical records reflect that he has told his providers that he does not like to take the medication, forgets, or gets his inhalers confused with his wife's. Ex. B, p. 3-4. Even accepting that Mr. F could have contributed to his current medical condition by his past smoking or current noncompliance with his physician's recommendations – a proposition for which there is no expert testimony in the record — there is no authority by which his child support obligation could be adjusted upwards from his actual ability to pay based on what is essentially a moral judgment about his failure to take better care of himself. Neither Rule 90.3, CSSD's regulations, nor the controlling case law permit adjustment of a disabled obligor's child support obligation based on the perceived moral blameworthiness associated with the particular disabling condition.

²¹ This observation should not be read as inviting briefing, argument, or evidence on this question. The parties were informed in a prehearing order that this appeal would not be used to relitigate issues decided in the 2013 order; the only issue in this appeal is Mr. F' ongoing support obligation as of January 2017.

[/] this will be on courtview and affect employment”²² – as evidence that Mr. F is secretly employed. But the log notes are too vague to be admissible for the purpose advanced by Ms. D.²³ The notes are sufficiently unclear that they do not reliably show either that the statements were made by Mr. F, or that he said (or meant) what Ms. D infers. An equally likely interpretation is that Mr. F said this matter being on Courtview would impact his wife’s employment in the legal field. Thus, the log notes do not establish that Mr. F is more likely than not employed.

While Ms. D is credible in her *belief* that Mr. F is hiding income, she has no personal knowledge of his current situation. Her beliefs are not evidence, and speculation and innuendo are insufficient to justify a finding of a material change in circumstances in this case. Mr. F certainly appears healthier than he apparently did at the hearing in 2012, at least based on Judge Howard’s description of his appearance at that time. And there is evidence that he now performs some tasks he previously was unable to perform.²⁴ But there is insufficient evidence upon which to conclude he is no longer disabled, let alone that he is actually working, as Ms. D alleges.

Mr. F, now 61-years-old, continues to receive Social Security Disability payments.²⁵ His medical records reflect that he continues to suffer from the same disabling condition for which he was deemed eligible for disability five years ago.²⁶ He credibly testified that, while he is able to move around for short periods of time, he lacks the stamina to be on his

²² Ex. D-6A, p. 24.

²³ See 2 AAC 64.290(a)(1) (allowing admission of “evidence of the type on which a reasonable person might rely in the conduct of serious affairs”).

²⁴ In 2013, Judge Howard found that Mr. F was “no longer capable of participating in normal recreational pursuits such as hunting and fishing.” Ex. 1, p. 4. Mr. F now participates in such activities, describing himself as a “subsistence fisherman,” although he explained that he uses a motorized reel to lessen the exertion required. *See also*, Ex. B, p. 3 (“He states he is very active but does not do anything other than day to day household activities.”).

²⁵ *See generally*, 42 U.S.C. § 423(d)(2)(A) (2012) (“An individual shall be determined to be under a disability only if his physical or mental impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), “work which exists in the national economy” means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.”).

²⁶ *See* Ex. 1, p. 3 (summarizing 2012 expert testimony describing Mr. F’ COPD as “severe” and “at the far end of the scale,” and that “COPD can be stabilized . . . but there is little chance of improvement”); Ex. B, p. 2 (Feb. 2014 letter from PA-C again describing Mr. F’ COPD as “severe” and as prohibiting him from working “outdoors in cold or windy weather [or] around engine fumes without respiratory distress.”); Ex. B, p. 3 (10/28/16 medical note reflecting continued COPD symptoms).

feet for very long, and lacks the mobility to do the kind of crawling around required for a boat mechanic.

In short, the very limited evidence of what Mr. F may have done in 2014 does not establish that he is currently earning unreported income. Ms. D did not meet her burden of showing a material change in circumstance justifying a modification of Mr. F' monthly support obligation.²⁷

C. Mr. F' request for a hardship variance

At the hearing, Mr. F argued that his ongoing monthly child support obligation should be reduced due to hardship. Child support determinations calculated from an obligor's actual income figures are presumed to be correct, and the law presumes that the Rule 90.3 calculation will apply in the vast majority of situations.²⁸ An obligor may obtain a reduction in that amount only if he or she shows that "good cause" exists for the reduction.

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" or that "unusual circumstances make application of the formula unjust."²⁹ Mr. F has not met this very high burden. To the contrary, it appears from the evidence in the record that the current CIB credit may actually have the effect of completely zeroing out Mr. F' out-of-pocket payment for the ongoing monthly support obligation.³⁰ Plainly, Mr. F cannot establish that the current ongoing support amount is a hardship under these facts.³¹ His request for a hardship variance of his ongoing support calculation is denied.

²⁷ To the extent that Ms. D is separately arguing that income should be imputed to Mr. F on the basis of unreasonable and voluntary underemployment, that request is denied because, for the reasons described above, there is insufficient evidence of a material change in circumstances since that issue was adjudicated in 2013.

²⁸ See Civil Rule 90.3, Commentary VI.A.

²⁹ Civil Rule 90.3(c).

³⁰ See 15 AAC 125.475; Ex. 4, p. 5 (monthly CIB payment of \$266.00 for T for January 2017); Ex. 6, pp. 4-5 (reflecting that application of a \$266 CIB credit would bring monthly payment to \$0.00).

³¹ Even under the slightly higher out-of-pocket amount of \$72 reflected in the 2013 order, Mr. F has not shown manifest injustice would result from applying Rule 90.3. Mr. F testified that his monthly expenses far exceed what he is able to pay. At the same time, he has four dogs living in his home, saying he has kept them because his wife could not do so. This testimony reflects personal choices by Mr. F and his wife that are inconsistent with such severe hardship that he cannot meet his statutorily-mandated child support obligation. Mr. F' obligation to support T takes precedence over virtually all other financial obligations, and certainly over lifestyle choices such as keeping and caring for family pets. Under the totality of the circumstances here – particularly including his very low or possibly non-existent monthly payment – Mr. F did not establish by clear and convincing evidence that injustice would result if the Rule 90.3 calculation were not varied.

IV. Conclusion

CSSD correctly denied the petition to modify. Mr. F did not establish he is entitled to a hardship variance. The prior support order remains in effect.

V. Child Support Order

1. The Division’s decision on request for modification review is AFFIRMED.
2. H L. F remains liable for child support in the amount of \$240 per month for one child, as then adjusted by applicable credits and debits, in accordance with the prior child support order issued in Mr. F’ case, *In the Matter of H L. F*, OAH No. 12-0105-CSS (Comm’r of Revenue 2013), which remains in full force and effect.

Dated: May 19, 2017

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 2nd day of June, 2017.

By: *Signed*

 Signature
 Cheryl Mandala

 Name
 Administrative Law Judge

 Title

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