

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

IN THE MATTER OF:)

C. W. R., JR.)

) OAH No. 06-0137-CSS

) CSSD No. 001128942

DECISION AND ORDER

I. Introduction

This matter involves the Obligor C. W. R., Jr.'s appeal of a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on February 1, 2006. The Obligee children are C., DOB 00/00/01, and L., DOB 00/00/96.

The formal hearing was held on March 10, 2006, and was conducted by Administrative Law Judge David G. Stebing. Mr. R. appeared by telephone; the Custodian, A. K. R., did not participate. Andrew Rawls, Child Support Specialist, represented CSSD. The record closed on March 31, 2006.

Following the departure of Administrative Law Judge Stebing from the Office of Administrative Hearings, the appeal was assigned to Kay L. Howard, Administrative Law Judge, who reviewed the entire record, including the audio recording of the hearing. Based on the record as a whole and after due deliberation, Mr. R.'s appeal is granted in part and denied in part. His ongoing child support should be set at \$219 per month for two children, based on his actual income. Mr. R. is not entitled to a \$50 per month minimum order based on his disability or financial hardship.

II. Facts

A. History

Mr. R.'s child support was set at \$416 per month for one child, C., in July 2004.¹ CSSD initiated a review in order to add the child L. to the support order. On September 21, 2005, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.² Mr. R. did not provide income information.³ On February 1, 2006, CSSD issued a Modified

¹ Exh. 3 at pg. 1.

² Exh. 1.

³ Pre-Hearing Brief at pg. 1.

Administrative Child Support and Medical Support Order that set Mr. R.'s modified ongoing child support at \$354 per month for two children, effective October 1, 2005, with additional arrears for L. of \$2750 for the period from November 2003 through September 2005.⁴ Mr. R. filed an appeal and requested a formal hearing on February 10, 2006.⁵

B. Material Facts

The Obligor, C. W. R., Jr., is 44 years old. He and the Custodian, A. K. R., have two children, C. and L., who live with Ms. R.⁶

In January 2002, Mr. R. was diagnosed with rheumatoid arthritis, a chronic disease that causes inflammation of the joints and surrounding tissues.⁷ He has been treated for the condition with oral medications and injections on a fairly regular basis since then, primarily at the Maniilaq Health Center in Kotzebue.⁸

Mr. R.'s disease has limited his ability to work, but he has not had to draw on public assistance benefits for help. Since 2003, he has supported himself with Native corporation dividends, the permanent fund dividend (PFD) and by living with his mother. In 2005, Mr. R. also had wages from employment.

In 2003, Mr. R.'s income totaled \$3507.56, which was from the PFD and \$2400 in Native corporation dividends.⁹ A child support amount calculated from these figures is \$58 per month for one child and \$79 per month for two children.¹⁰ In 2004, Mr. R.'s income totaled \$12,094.84, also from the PFD and \$11,175 in Native corporation dividends.¹¹ This income figure results in a child support amount of \$195 per month for one child and \$263 per month for two children.¹² In 2005, his income consisted of the PFD, \$7326.58 in wages and \$2400 in Native corporation dividends.¹³ These income figures yield a child support calculation of \$162 per month for one child and \$219 per month for two children.¹⁴

⁴ Exh. 3.

⁵ Exh. 4.

⁶ Unless otherwise indicated, the facts are taken from Mr. R.'s hearing testimony.

⁷ Exh. 7 at pg. 38.

⁸ See Exhs. 6 & 7.

⁹ Exh. 11 at pg. 2.

¹⁰ *Id.*

¹¹ Exh. 11 at pg. 3.

¹² *Id.*

¹³ Exh. 11 at pg. 4.

¹⁴ *Id.*

III. Discussion

A. Disability

The obligor parent has the burden of proving his or her earning capacity.¹⁵ An obligor who claims he or she cannot work, or pay child support, because of a disability, or similar impairment, must provide sufficient proof of the medical condition such as testimony or other evidence from a physician.¹⁶ If an obligor who is not working does not provide sufficient proof of a medical condition, the parent may be found to be voluntarily and unreasonably unemployed or underemployed.¹⁷

It is not necessary to prove the parent was purposefully avoiding a support obligation, or acting in bad faith, in order to find voluntary unemployment or underemployment.¹⁸ The Alaska Supreme Court has upheld lower court decisions finding noncustodial parents were not making their best efforts to obtain employment or remain employed.

If a parent is found to be voluntarily unemployed or underemployed, the child support is calculated using his or her “potential income,” which is based on the parent’s “work history, qualifications and job opportunities.”¹⁹ The use of “potential income” in a child support obligation is not to punish the Obligor parent; rather, it is to insure that the children and the other parent are not forced to finance the Obligor parent's lifestyle.²⁰ The commentary states the court should consider “the totality of the circumstances” when deciding whether to impute income to the obligor parent.²¹ A primary goal of imputing income, according to the Alaska Supreme Court, is to compel the parent to find full-time employment:

An important reason -- if not the chief reason -- for imputing income to a voluntarily underemployed parent is to goad the parent into full employment by attaching an unpleasant consequence (a mounting child support debt or, in certain cases of shared custody, a reduced child support payment) to continued inaction. Indeed, in primary and shared custody situations alike, an order imputing income often yields no tangible benefits to the children unless and until it impels the underemployed parent to find a job.^[22]

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

¹⁶ *Id.* at 1371.

¹⁷ Civil Rule 90.3(a)(4).

¹⁸ *Kowalski* at 1371.

¹⁹ Civil Rule 90.3, Commentary III.C.

²⁰ *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

²¹ Civil Rule 90.3, Commentary III.C.

²² *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).

CSSD did not specifically find Mr. R. to be voluntarily unemployed in the Modified Administrative Child Support and Medical Support Order, but the agency imputed the minimum wage to him, which suggests an implicit finding of voluntary unemployment.²³

CSSD stated in its Post-Hearing Brief that although Mr. R. did not provide a letter from his physician specifically discussing the obligor's fitness for employment, he still established from the medical records that he has rheumatoid arthritis, which is a serious disease, and he takes regular injections in an effort to control it. CSSD therefore conceded that although Mr. R.'s lack of continuous full-time employment may be voluntary, it is not unreasonable.

The administrative law judge, after having considered the "totality of the circumstances," agrees with CSSD and finds that Mr. R. is not voluntarily and unreasonably unemployed or underemployed. He encounters difficulties with episodic flare-ups of his rheumatoid arthritis that make it extremely difficult to work at times and he must take orally or have injected several medications in order to control it. As a result, Mr. R. is not able to work on a full-time basis. CSSD's assessment of Mr. R.'s condition is reasonable and it should be adopted.

As a result of the finding that Mr. R. is not voluntarily and unreasonably unemployed or underemployed, his modified child support and the additional arrears for L. should be recalculated based on his actual income, not income imputed to him from the minimum wage. CSSD submitted revised calculations after the hearing using his actual income. The division proposed that Mr. R.'s modified ongoing child support for C. and L. should be set at \$219 per month for two children, which was calculated from his actual 2005 income.²⁴

Mr. R. also owes a small additional amount for L. from November 2003, when public assistance benefits began to be paid on his behalf. When a noncustodial parent who has previously paid support for a child becomes liable for paying support for another child of that same relationship, CSSD's regulations direct the agency to add the later child to the previous support order rather than establishing a different order for the later child.²⁵ Any arrears owed for the later child are determined by adding the next "incremental percentage increase in support related to the additional child"²⁶

²³ See Exh. 3 at pg. 4; Exh. 4.

²⁴ See Exh. 11 at pg. 4.

²⁵ 15 AAC 125.340.

²⁶ 15 AAC 125.340(e)(1).

CSSD made calculations for the arrears that Mr. R. owes for L. during the time period from November 2003 through September 2005.²⁷ The arrears were calculated based on the following procedure: CSSD determined Mr. R.'s actual income for each year from 2003 through 2005, then calculated what Mr. R.'s support obligation for one child and for two children would be for each year.²⁸ For 2003, the numbers are \$58 per month for one child and \$79 per month for two children; for 2004, the amounts are \$195 for one child and \$263 for two children; and for 2005, the figures are \$162 for one child and \$219 for two children.²⁹ Since Mr. R. was already obligated to pay support for one child under the prior 2004 order, CSSD charged Mr. R. only the additional 7% amount that represents the incremental increase from one child to two children. For 2003, that amount is \$21 per month; for 2004, it is \$73 per month; and for 2005, it is \$57 per month.³⁰ Thus, the total arrears CSSD calculated Mr. R. owes for L. are \$1431, an amount that is \$1139 less than the \$2570 CSSD originally calculated using the minimum wage income figure instead of Mr. R.'s actual income.³¹

CSSD's calculations are correct and benefit Mr. R. because the agency used his actual income figures to determine Mr. R.'s arrearages for L. rather than the income amount used in the original modification calculations. This approach seems nonsensical at first because CSSD used a different income figure to determine Mr. R.'s arrears for L. during a time in which his obligation for C. is based on a higher income amount. But as pointed out by the Alaska Supreme Court in the case of *Spott v. Spott*, the division is essentially creating a new order for the additional child in an "add-a-kid" situation, so using a the correct income amount does not constitute an impermissible retroactive modification.³²

B. Hardship

Mr. R.'s ongoing modified child support is correctly calculated at \$219 per month, based on his actual income figures. Mr. R. requested a child support amount of \$50 per month, the minimum allowable under Civil Rule 90.3(c).

²⁷ The modification is effective as of October 1, 2005, so no additional arrears are assessed for L. as of that date; he is incorporated into the order instead. See Exh. 11 at pg. 1.

²⁸ Child support is calculated as 20% of an obligor parent's adjusted annual (net) income for one child, and 27% for two children, pursuant to Civil Rule 90.3(a)(2).

²⁹ Exh. 11 at pg. 1. See also Exh. 11 at pgs. 2-4, which are the actual calculations.

³⁰ See Exh. 11 at pg. 1.

³¹ See Exh. 4 at pgs. 1-4.

³² *Spott v. Spott*, 17 P.3d 52 (Alaska 2001).

Child support determinations calculated under Civil Rule 90.3 from an obligor's actual income figures are presumed to be correct. The parent may obtain a reduction in the amount calculated, but only if he or she shows that "good cause" exists for the reduction. 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." Civil Rule 90.3(c). If there are "unusual circumstances" in a particular case, this 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^[33]

It is appropriate to consider all relevant evidence to determine if the support amount should be set at a different level than provided under the schedule in Civil Rule 90.3(a).³⁴

I considered the totality of circumstances, and based on the evidence in the record, I find that this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. R. did not prove by clear and convincing evidence that manifest injustice will result if his modified child support is not varied from the amount calculated pursuant to Civil Rule 90.3. Mr. R. receives regular dividend payments from his Native Corporation in addition to the income from wages he occasionally earns. Also, Mr. R. did not establish he has any unusually high living expenses.

IV. Conclusion

Mr. R. met his burden of proving CSSD's original modification calculation was incorrect and that his modified ongoing child support should be recalculated. CSSD provided revised calculations after the hearing based on Mr. R.'s actual income for the time periods at issue and I conclude these constitute a reasonable measure of his ability to pay child support. CSSD's calculations should be adopted.

³³ Civil Rule 90.3(c)(1)(A).

³⁴ See Civil Rule 90.3, Commentary VI.E.1.

V. Child Support Order

- Mr. R. is liable for modified ongoing child support in the amount of \$219 per month for two children, effective October 1, 2005, and ongoing;
- Mr. R. is liable for additional arrears for the Obligee L. of \$21 per month for November 2003 through December 2003; \$73 per month for 2004; and \$57 per month for January 2005 through September 2005.

DATED this 8th day of December, 2006.

By: Signed
Kay L. Howard
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 26th day of December, 2006.

By: Signed
Signature
Kay L. Howard
Name
Administrative Law Judge
Title

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