

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

In the Matter of)	
)	
E X)	OAH No. 18-1198-CSS
_____)	Agency No. 001155081

DECISION AND ORDER

I. Introduction

E X appeals a Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD) on October 30, 2018. The modification increased his child support obligation for his daughter, T, to \$738 per month.

Mr. X showed that he likely does not earn \$52,000 per year, as CSSD initially determined, and the order should be adjusted. However, because Mr. X is voluntarily and unreasonably underemployed for part of each year, the calculation should be based on potential income from his seasonal work as a carpenter, plus off-season work as a general laborer. After applicable deductions, this income results in a monthly support amount of \$526 for one child. The Modified Administrative Child Support and Medical Support Order is adjusted to reflect this obligation, effective September 1, 2018 and ongoing.

II. Facts and Proceedings

E X and B M are the parents of T, age 12. Both parents live in No Name. Mr. X graduated from high school in 2001, so he is approximately 35 years old. He has no medical conditions or physical disabilities that limit his ability to work.

A. Procedural History

In 2010, CSSD set Mr. Wiggin's ongoing support obligation for T at \$255 per month.¹ It based this calculation on imputed income from a full-time job paying minimum wage (then \$7.75 per hour), plus the PFD.²

Ms. M initiated a modification review in August 2018, and CSSD sent each parent notice of the petition on August 14, 2018.³ Mr. X did not provide any income information. However, CSSD received information from his employer, Employer A, that he worked full-time as a carpenter and earned \$25 per hour.⁴

On October 30, 2018, CSSD issued the Modified Child Support and Medical Support Order

¹ Exhibit 1.
² *Id.*
³ Exhibit 2.
⁴ Exhibit 3; X testimony.

that is the subject of this appeal.⁵ Based on the information provided by Mr. X's employer, CSSD calculated his expected 2018 gross wage income at \$52,000, plus the PFD.⁶ This assumed full-time, year-round work at \$25 per hour. It resulted in a child support amount of \$738 per month.⁷

Mr. X requested an administrative appeal and argued that he actually earns significantly less than CSSD determined.⁸ The formal hearing took place by telephone on December 13, 2018. Mr. X and Ms. M represented themselves. Child Support Specialist Brandi Estes represented CSSD. The hearing was audio-recorded. All submitted documents were admitted to the record, which closed at the end of the day on December 13th.

B. Relevant Factual History

Mr. X has training and job experience in the construction industry, working as a carpenter and doing concrete work.⁹ The work is seasonal; he typically works from April through October. For the last two construction seasons, he has worked for Employer A.¹⁰ In 2018, Mr. X worked through late November because mild temperatures made ongoing work possible. Earning \$25 per hour, his 2018 gross wages from this job totaled \$26,872.32.¹¹

During the construction off-season, Mr. X earns income in different ways. For three seasons (one in Colorado and two in Alaska), he worked as a general laborer, laying fiber optic cable. He declined to provide specific information about the dates of this employment, his employers' name, or his income from this work. Mr. X indicated only that the job did not require any special certification.

When he is not laying fiber optic cable during the off-season, Mr. X earns cash income from a variety of endeavors that he declined to describe in any detail. They include selling firewood and plowing snow. He did not quantify the income he earns from his side jobs, saying it varies widely from year to year and he does not keep track of it.¹² He asserted that he earns just enough to pay his living expenses, which he keeps to a bare minimum. His housing and other living expenses are low because he moves around often and stays at the homes of friends and family.

As of the December 13, 2018 hearing in this case, Mr. X was about to start a job search for

⁵ Exhibit 4.

⁶ \$25/hour x 40 hours/week x 52 weeks/year = \$52,000.

⁷ Exhibit 4.

⁸ Exhibit 5.

⁹ X testimony; Exhibit 3, p. 1.

¹⁰ X testimony; X submission (paystub issued 11/30/18).

¹¹ X submission (paystub).

¹² When he plows snow, he drives a truck owned by a friend. He earns \$45 per driveway and said he may have earned a couple hundred dollars per month.

work as a general laborer. He estimated that he will earn \$15 to \$20 per hour when he finds employment.

III. Discussion

As the person who filed the appeal, Mr. X has the burden of proving by a preponderance of the evidence that the Modified Administrative Child and Medical Support Order dated October 30, 2018 is incorrect.¹³ He met this burden.

Child support orders may be modified upon a showing of “good cause and material change in circumstances.”¹⁴ If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes a “material change in circumstances” has been established. Mr. X’s former obligation was \$255 per month, so a change of \$38.25 or more per month satisfies this standard.¹⁵ Even when there is not a 15% change, however, CSSD may modify a support order if three or more years have elapsed since the order was issued or last modified.¹⁶ Mr. X’s support obligation was last reviewed in 2010, so this modification is additionally justified by the passage of time.

A modification is effective beginning the month after the parties are served with notice of the request for a modification review.¹⁷ Here, CSSD provided notice in August 2018. Therefore, the modification is effective as of September 1, 2018.

Under Civil Rule 90.3(a), the noncustodial parent’s child support amount is to be calculated based on his or her "total income from all sources," minus specified deductions. In determining total income from all sources, the relevant time period is the period for which the support is being paid.¹⁸ By its nature, the income determination can be a somewhat uncertain endeavor, since it includes an assessment of expected future income.¹⁹ The obligor parent has the burden of proving his or her earning capacity.²⁰

Mr. X argued that his actual 2018 income is significantly less than CSSD assumed in the modified support order. This appears to be true. He earned \$26,872.32 working as a carpenter for seven months of the year, plus an unquantified amount at other jobs during the five months of the construction off-season. Mr. X also argued that the 2018 construction season was longer than

¹³ 15 AAC 05.030(h).

¹⁴ AS 25.27.190(e).

¹⁵ \$255 x 15% = \$38.25.

¹⁶ 15 AAC 125.321(b)(2)(C).

¹⁷ 15 AAC 125.321(d).

¹⁸ 15 AAC 125.050(a); Civil Rule 90.3, Commentary III.E.

¹⁹ Civil Rule 90.3, Commentary III.E.

²⁰ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

usual, so his construction income is unusually high and not representative of his typical construction income. Ms. M agreed, saying Mr. X probably does not earn \$52,000 per year. She urged adoption of a child support calculation based on minimal income.²¹

During the hearing, the parties discussed whether they might agree on the annual wages Mr. X typically earns from construction and his other endeavors. However, their efforts were hampered by the lack of evidence showing his income history. They discussed incomes as low as \$22,000 to \$25,000 but did not reach an agreement.²² This decision concludes that those discussions significantly underestimated Mr. X's actual and potential income. The parents' request for an income determination in the \$22,000 to \$25,000 range is therefore denied as unsupported by the evidence.

Mr. X's vague and evasive testimony made it impossible to determine his actual 2018 income (or income in prior years) with any confidence. In addition, to the extent his actual income is low because of regular periods of voluntary unemployment, his lifestyle choices do not mandate a lesser child support obligation for T.

A. Mr. X is voluntarily & unreasonably underemployed.

To support his request for a reduced income finding, Mr. X suggested that he only works sporadically and earns minimal income during the construction off-season. To the extent this is true, it raises the issue of voluntary and unreasonable unemployment or underemployment.

When voluntary and unreasonable unemployment is alleged, the tribunal must determine whether the parent has engaged in voluntary conduct for the purpose of becoming or remaining unemployed or underemployed.²³ An integral part of the analysis is whether the parent's lack of employment is a result of "economic factors," as in being laid off, or of "purely personal choices."²⁴ It is not necessary to prove the individual is purposefully avoiding a child support obligation, or acting in bad faith, before imputing income.²⁵ The totality of the circumstances is to

²¹ Ms. M's opinion is not entitled to deference, as the support is owed for T's support and care. Ms. M also did not show that her financial situation is so secure as to justify a minimal obligation by Mr. X, despite his ability to work and earn substantially more income than he historically has earned. Further, it appears that some of Mr. X's child support payments may be owed to the State of Alaska rather than Ms. M.

²² Mr. X explained that, because of his significant arrears balance, he cannot afford to pay ongoing and past due child support unless the ongoing calculation is based on a low income figure. However, his failure to remain current with child support payments does not justify a reduced ongoing support calculation. Mr. X also stated that Ms. M was withdrawing from CSSD services, so CSSD would no longer be enforcing his ongoing obligation. As explained during the hearing, this appeal addresses Mr. X's modified child support amount. Mr. X is encouraged to communicate with his CSSD caseworker regarding his arrears, any withholding concerns, and issues related to withdrawing from CSSD services.

²³ *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

²⁴ *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

²⁵ *Kowalski v. Kowalski*, 806 P.2d, 1368, 1371 (Alaska 1991).

be considered.²⁶

Alaska law is clear that a parent has a duty to support his or her children, and this duty takes priority over lifestyle decisions such as choosing not to work.²⁷ This is because the child should not be forced to finance the parent's choices by foregoing support to which the child is entitled.²⁸ Here, the evidence supports a finding that Mr. X is voluntarily and unreasonably underemployed for part of each year as a lifestyle choice rather than because of economic forces.

When a parent is voluntarily and unreasonably unemployed or underemployed, his or her child support obligation may be calculated from his or her "potential income," which is based on the parent's "work history, qualifications and job opportunities."²⁹ The tribunal is to rely on the best indicator of future earning capacity.³⁰ The ultimate goal of this determination is to arrive at an income figure that reflects economic reality.³¹

Mr. X lives in No Name, a growing area in which jobs are available. He has marketable skills and work experience that make him employable as a carpenter or a general laborer. For approximately six months every year, he can earn \$25 per hour as a carpenter or in other construction work. That work is predictable and available each year. It results in income of \$26,000.³² For the remaining six months of each year, he is capable of working as a general laborer, earning at least \$15 per hour. Assuming an average work week of 25 hours, which accommodates periods of transition between jobs, Mr. X would earn \$9,750.³³ On an annual basis, this results in total gross wages of \$35,750, which should be adopted for purposes of Mr. X's child support calculation.

B. Child Support Calculation Under Civil Rule 90.3(a)

After including the PFD and applying appropriate deductions, Mr. X's potential income results in a monthly child support obligation of \$526 for one child.³⁴ This reflects the best available evidence of his actual income, plus income he reasonably can be expected to earn when not employed as a carpenter. If Mr. X's circumstances materially change and he is willing to

²⁶ Civil Rule 90.3, Commentary III.C.

²⁷ See *Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998); *Olmstead v. Ziegler*, 42 P.3d 1102, 1105 (Alaska 2002).

²⁸ *Olmstead v. Ziegler*, 42 P.3d 1102, 1105 (Alaska 2002).

²⁹ Civil Rule 90.3(a)(4). See also 15 AAC 125.020(b).

³⁰ *Farr v. Little*, 411 P.3d 630, 635 (Alaska 2018); *McDonald v. Trihub*, 173 P.3d 416, 427 (Alaska 2007).

³¹ *Farr*, 411 P.3d at 635.

³² \$25/hour x 40 hours/week x 26 weeks = \$26,000.

³³ \$15/hour x 25 hours/week x 26 weeks = \$9,750.

³⁴ Attachment A.

provide more detailed information about both his income and his job search efforts, he can request another modification review in the future.

IV. Conclusion

Mr. X met his burden to show the Modified Administrative Child Support and Medical Support Order dated October 30, 2018 should be adjusted. For the reasons discussed above, the ongoing support amount should be \$526 per month, effective September 1, 2018. This calculation was done under the Civil Rule 90.3(a) primary custody formula without variation.

V. Child Support Order

- Mr. X's support amount for T is adjusted to \$526 per month, effective September 1, 2018 and ongoing;
- All other provisions of the Modified Administrative Child Support and Medical Support Order dated October 30, 2018 remain in full force and effect.

DATED: December 31, 2018.

By: Signed
Signature
Kathryn A. Swiderski
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

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 15th day of January, 2019.

By: Signed
Signature
Kathryn A. Swiderski
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]