

Mr. L. is single and self-employed. He owns and operates J.'s Handyman Services, a business which offers building maintenance and repair services.³ Mr. L. owns two residential four-plex buildings and a single family residence.⁴ Rental income from one four-plex and the single family residence were minimal during 2006 because Mr. L. owned these properties for only a short portion of the taxable year. Mr. L. resides in one of the two four-plexes.

Mr. L.' household contains six children and his significant other, E. G. Ms. G. is the biological mother of three of the children, and Mr. L. is the biological father of the other three minor children (T., K., and A.). D. S., custodian of T., is not the biological mother of T.⁵

The gross income of Mr. L. in 2005 was \$20,875.⁶ In 2006, Mr. L. received business income of \$10,611 and a permanent fund dividend of \$1107, for a total of \$11,718.⁷ Mr. L. claims monthly expenses as follows: food, \$500; natural gas, \$300; water, \$150; refuse, \$75; telephone, internet and cable (GCI package), \$50; sewer, \$100; cell phone, \$50; vehicle insurance, \$175; entertainment, \$25; the total of these estimated expenses is \$1425 per month. Mr. L. has no automobile installment payments, no credit cards, and no alcohol/tobacco expenses.

III. Discussion

This appeal raises two issues. First, what is the correct child support amount that Mr. L. should be paying for one child? Second, is Mr. L. entitled to a reduction in his child support obligation based on financial hardship as contemplated by Civil Rule 90.3(c)? The purpose of the hearing was to inquire of Mr. L. and obtain a current and accurate picture of his income and expenses. While not articulated in detail, the essence of Mr. L.'s testimony is that he does not have sufficient income to comfortably support his household and pay child support in the amount of \$624 per month.⁸ Stated differently, if child support is increased from \$ 50.00 per month to \$624 (or \$668 as urged by CSSD in its post-hearing brief) per month, Mr. L. claims that he will be saddled with an unreasonable financial hardship.

Child support amounts calculated under Civil Rule 90.3 from Mr. L.'s actual income figures are presumed to be correct. Civil Rule 90.3(a)(1) provides that Mr. L.'s child support

³ "Handyman" services typically do not require more than a business license, providing the project does not have a value in excess of \$5000, and the business does not hold itself out to the public as a contractor. AS 08.18.161(b). Mr. L. holds Alaska business license number 432245.

⁴ Schedule E of Mr. L. 2006 federal tax return and his testimony.

⁵ The whereabouts or identity of T.'s biological mother is not clear from the record.

⁶ Exhibit 6, 2005 federal income tax return for Mr. L.

⁷ Exhibit 6, Mr. L.' 2006 federal income tax return with schedules.

⁸ Exhibit 3, CSSD's Modified Administrative Child Support and Medical Support Order. In its post-hearing brief, CSSD calculated Mr. L.' child support obligation to be \$668 per month.

amount is to be calculated based on his “total income from all sources.” Mr. L. may obtain a reduction below the amount calculated, but only if he shows that “good cause” exists to support the reduction.⁹ To establish good cause, the obligor must prove by clear and convincing evidence¹⁰ that “manifest injustice would result if the support award were not varied.”¹¹ Depending upon the facts of a particular case, “good cause” might be established by showing “unusual circumstances”:

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....¹²

The first task at hand is to calculate what amount of child support Mr. L. should be paying for one child. CSSD has determined in its post-hearing brief that Mr. L.’ 2006 total gross income is \$41,566.96 by adding his self employment income of \$10,611 to the total amount of real property depreciation taken in 2006 for the three properties owned by Mr. L. at the close of the tax year in 2006. In his 2006 federal tax return, Mr. L. claimed MACRS¹³ depreciation in the amount of \$28,179.¹⁴ The result of treating depreciation like income is an incorrectly calculated total gross and adjusted annual income.

Depreciation is not income to Mr. L. Depreciation is the amount of money that a taxpayer may deduct from income in his or her federal tax return for the exhaustion, wear, and tear of property used in a trade or business, or of property held for the production of income.¹⁵ Mr. L. owns a single family residence which is rented to others and is therefore a business. In a similar fashion, Mr. L. owns two four-plex apartment buildings which are rented to others, save one unit which he and his household members occupy. Only the portion of the properties occupied by Mr. L. as a personal residence is not part of the business.

Depreciation does not fall within the definition of “income” as contemplated by Civil Rule 90.3 and as defined in the commentary to Civil Rule 90.3.¹⁶ While not necessarily

⁹ Civil Rule 90.3(c)(1).

¹⁰ The clear and convincing standard of proof is more difficult to meet than the preponderance of the evidence standard.

¹¹ Civil Rule 90.3(c).

¹² Civil Rule 90.3(c) (1).

¹³ Modified Accelerated Cost Recovery System. Most tangible depreciable property placed in service after 1986 is depreciated under MACRS. The amortization period varies with the type of property. Residential rental property is depreciated over a 27.5 year period. *See* IRC section 168(e)(2)(A).

¹⁴ Exhibit 7, form 4562 attached to, and incorporated in, Mr. L.’ 2006 federal income tax return.

¹⁵ Internal Revenue Code, Reg. section 1.167(a).

¹⁶ Civil Rule 90.3 Commentary, section III (A).

exhaustive, the commentary recognizes twenty-nine categories of income and depreciation is not recognized therein as income. Thus, CSSD may not add the depreciation figure to Mr. L.'s income for the purpose of calculating his child support obligation.

Mr. L. is the owner of J.'s Handyman Service and his annual income fluctuates as is common with construction related activities. In 2005, Mr. L. had gross business income of \$20,875.¹⁷ In 2006, Mr. L. has gross business income of \$12,567.¹⁸ The significant difference between two years militates toward using the average of the two years as Mr. L.'s annual income for child support calculation purposes; the average for two years is \$16,721. Adding the permanent fund dividend for 2006 in the amount of \$1107 (rounded) to \$16,721 yields an annual income amount of \$17,828. Based upon this income, Mr. L.'s child support obligation for one child should be \$299 per month.¹⁹

The second task at hand is to determine whether Mr. L. has grounds to support lowering his child support amount below \$299 per month. While it is true that Mr. L. is under pressure to manage his expenses carefully, doing so is not unreasonable or unfair.²⁰ His daughter, T., is now eleven years old and her support needs cannot be met at the existing child support level of \$50 per month. Mr. L. cannot spend lavishly because his income only slightly exceeds his expenses, he has a reasonably good employment history and he appears to be budgeting his expenditures. As long as Mr. L.'s annual income remains low, the rental property depreciation should result in little or no income tax liability. To comfortably meet his financial obligation to his child, he may need additional or different employment, but Mr. L.'s physical and financial situation does not support a finding of "unusual circumstances".

Based on all of the evidence presented, and considering the aggregate circumstances of Mr. L., I do not find that Mr. L.'s case presents unusual circumstances as contemplated by Civil Rule 90.3(c). Mr. L. has not proven by clear and convincing evidence that manifest injustice will result if the child support amount calculated for his child under Civil Rule 90.3 is not reduced below \$299 per month.

IV. Conclusion

Based upon all of the evidence in the record, the correct child support amount that Mr. L. should pay for one child, T., is \$299 per month. Mr. L. has not proven clear and convincing

¹⁷ Exhibit 6.

¹⁸ Exhibit 7.

¹⁹ See attached child support guideline calculator.

²⁰ Exhibit 6. The record is not clear why the amount of \$244.00 per month is claimed as a child support expense by Mr. L.; the most likely explanation is that Mr. L. is paying arrearages.

evidence that payment of child support in the amount of \$299 per month will result in manifest injustice.

V. Child Support Order

Mr. L. is liable for modified ongoing child support in the amount of \$299 per month, effective June 1, 2007.

Dated this 6th day of August, 2007.

By: Signed
James T. Stanley
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 and Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 24th day of August, 2008.

By: Signed
Signature
James T. Stanley
Name
Administrative Law Judge
Title

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