

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

IN THE MATTER OF:)

J. R. F.)

) OAH No. 09-0628-CSS

) CSSD No. 001158955

DECISION AND ORDER

I. Introduction

The obligor, J. R. F., appealed an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on October 6, 2009. The Obligee child is E., who is thirteen years old.

The formal hearing was held on December 17, 2009. Mr. F. and the custodian, A. J. L., both participated in the hearing. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded. The record closed on December 17, 2009.

Based on the record as a whole and after careful consideration, Mr. F.'s child support is set at \$547 per month, effective May 1, 2009, based on the shared custody formula. His request for a variance based on financial hardship is denied.

II. Facts

A. History

Ms. L. applied for child support services in May 2009.¹ On June 24, 2009, CSSD served an Administrative Child and Medical Support Order on Mr. F.² He requested an administrative review and provided income information.³ Following the administrative review, CSSD issued an Amended Administrative Child Support and Medical Support Order on October 6, 2009, that set Mr. F.'s ongoing support at \$1,112 per month, effective November 1, 2009, with arrears of \$6,372 for the period from May 2009 through October 2009.⁴ Mr. F. filed an appeal and requested a hearing on November 10, 2009, asserting primarily that CSSD used the wrong

¹ Pre-hearing brief at pg. 1.

² Exh. 2.

³ Exhs. 3 & 5.

⁴ Exh. 6.

income figure because it was based on temporary employment; the arrears are incorrect and will cause him to lose his house; and checks he wrote to Ms. L. were not credited to his account.⁵

B. Material Facts

Mr. F. works in the automotive industry as an auto body repairman. He previously worked for T. A. A. from 2003 through the fall of 2008, when he quit that job to take a position with H. as a mechanic and operator at the Beluga plant on the west side of Cook Inlet. In March 2009, H. moved Mr. F. to the Oooguruk oil field on the North Slope, where he worked until May 2009, when he quit because he wasn't receiving the benefits he had been led to expect at that job. Mr. F. quit his job for H. because he had been promised rehire employment at Total Able, but in fact, the company did not rehire Mr. F. after he left H.

In 2007, Mr. F. earned \$62,122.10 working for T. A. A., LLC.⁶ In 2008, he earned \$56,774.30, from T. A. A. through October 2008, when he went to work for H. The average of these two figures is \$59,448.20.⁷

Mr. F. was still unemployed at the time of the hearing. He testified he had inquired about work at every body shop in the area, and that he had a promise of employment at one business as soon as work picked up enough to warrant hiring another employee. He has been receiving unemployment benefits and supporting himself in part by selling his possessions.

Mr. F. has regular monthly expenses of about \$2,155, which includes \$1,200 for the mortgage; \$230 for gas and electricity; \$75 each for a cell phone, Internet connection and cable TV; \$400 for gasoline; and \$100 for vehicle insurance.⁸ He did not identify any expenses for food or personal care items, but nevertheless it is assumed he does have regular expenses for those items.⁹

Ms. L. is married and lives with her husband, T., the obligee E. and their son, B. Mr. L. provides the bulk of the income for their household. Ms. L. is employed as a teacher's assistant and earned \$8,222.26 in 2008. She is a high school graduate and in the past she has worked as a receptionist and waitress.

⁵ Exh. 7.

⁶ Exh. 5 at pg. 13.

⁷ $\$62,122.10 + \$56,774.30 = \$118,896.40 \div 2 = \$59,448.20.$

⁸ Exh. 9.

⁹ *See id.*

The L.s have regular monthly expenses of about \$3,008, which includes \$1,303 for the mortgage; \$800 for food; \$200 for eating out; \$220 for gas and electricity; \$68.50 for water; \$130 for Internet, telephone and cable TV service; \$200 for gasoline; and \$87 for vehicle insurance; \$200 for entertainment; and \$200 for personal care items.¹⁰ Mr. L. has a credit card, but Ms. L. did not indicate the amount owed on it.

Mr. F. and Ms. L. share custody of E. During the summer of 2009, they began exercising a 2 week-on, 2 week-off schedule, which, when school started, changed to one in which Ms. L. has E. Monday through Thursday nights and Mr. F. has her Friday through Sunday nights. During the hearing the amount of overnights E. spends with each parent was determined to constitute roughly a 55/45 schedule, with Ms. L. having her 55% of the time and Mr. F. having her 45% of the time. The parties expressed the desire for shared custody to continue, but Ms. L. does have some concerns about E. spending equal time with Mr. F. next summer if he is employed and not available as much as he was in 2009.

Mr. F. gave Ms. L. child support payments directly prior to the establishment of this administrative child support action. After the case was initiated as of May 1, 2009, Mr. F. has given her a check for \$300, dated May 12, 2009.¹¹ This check constitutes child support paid directly to Ms. L., and Mr. F. is entitled to a credit against his support obligation in the amount of \$300.

III. Discussion

A parent is obligated both by statute and at common law to support his or her children.¹² This obligation begins when the child is born.¹³ However, by regulation, CSSD only collects support from the date the custodial parent requested child support services, or the date public assistance or F. care services were initiated on behalf of the child(ren), for no more than six years prior to service on the obligor of notice of his or her support obligation.¹⁴ Ms. L. applied for child support services in May 2009, so that is the first month for which Mr. F. is liable for paying child support through CSSD.

¹⁰ Exh. 10 at pg.

¹¹ Exh. 5 at pgs. 6-7.

¹² *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹³ *CSSD v. Kovac*, 984 P.2d 1109 (Alaska 1999).

¹⁴ 15 AAC 125.105(a)(1)-(2).

The person who filed the appeal, in this case, Mr. F., has the burden of proving by a preponderance of the evidence that the agency's calculations are incorrect.¹⁵

A. *Voluntary unemployment*

Civil Rule 90.3(a)(1) provides that a noncustodial parent's child support obligation is to be calculated from his or her "total income from all sources." The obligor has the burden of proving his or her earning capacity.¹⁶

In its amended order, CSSD found Mr. F. to be voluntarily unemployed.¹⁷ If CSSD finds a parent to be voluntarily and unreasonably unemployed or underemployed, it may calculate the child support amount from the parent's "potential income," which should be based on his or her "work history, qualifications and job opportunities."¹⁸

On the basis of its finding that Mr. F. is voluntarily and unreasonably unemployed, CSSD calculated his income for child support purposes at \$88,746.24, which the calculation worksheet indicates was extrapolated from his first quarter 2009 income as reported to the Alaska Department of Labor and Workforce Development.¹⁹ CSSD did not file any supporting documentation of Mr. F.'s quarterly earnings for 2009,²⁰ so it appears CSSD simply multiplied his first quarter 2009 income times 4 quarters to determine an annual income figure.

In cases in which CSSD is claiming voluntary unemployment, the court or administrative law judge must determine whether the parent has engaged in voluntary conduct "for the purpose of becoming or remaining unemployed."²¹ If the parent is voluntarily unemployed or underemployed, it is also necessary to determine whether the parent's unemployment is unreasonable. 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."²² It is not necessary to prove the individual was purposefully avoiding a support obligation, or acting in bad faith, in order to impute income to a noncustodial parent.²³

15 15 AAC 05.030(h).

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

17 Exh. 6 at pg. 4.

18 Civil Rule 90.3(a)(4).

19 *See* Exh. 6 at pg. 6.

20 A child support calculation worksheet is not evidence of an obligor's income.

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

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

23 *Kowalski*, 806 P.2d at 1371.

The Alaska Supreme Court further explained the essence of the analysis in *Beaudoin v. Beaudoin*²⁴ by stating that “the relevant inquiry under Civil Rule 90.3 is . . . whether a parent's current situation and earnings reflect a voluntary and unreasonable decision to earn less than the parent is capable of earning.” At the same time, however, the court thought it important to point out that:

. . . Rule 90.3(a)(4) does not rigorously command pursuit of maximum earnings. The rule's more modest objective is to give courts broad discretion to impute income based on realistic estimates of earning potential in cases of voluntary and *unreasonable* unemployment or underemployment.^[25]

The commentary to Civil Rule 90.3 directs that tribunals adjudicating child support “shall consider the totality of the circumstances in deciding whether to impute income.”²⁶

Based on the evidence as a whole, Mr. F. has not proven by a preponderance of the evidence that he is not voluntarily and unreasonably unemployed. Put another way, the evidence does not prove that CSSD’s finding is incorrect. Mr. F.’s initial decision in October 2008 to quit his job at T. A. A. to go to H. seems to have been fairly reasonable because he was going to be earning a much higher income working in the oil industry. But his decision in May 2009 to leave H. on a promise of being hired back at T. A. A. was not reasonable, given the amount of money he was now earning and the uncertain nature of the promise he would be rehired at the body shop. In addition, Mr. F.’s testimony about why he left H. is inconsistent with other evidence in the record. He said he left H. to go back to auto body work, but in a statement dated September 21, 2009, Mr. F. wrote to CSSD that he was:

currently working at enrolling for the spring term at UAA (Mat-Su) to prepare to enroll in the radiology tech program. I am 47 years old and the physical labor of my job area is beginning to take a toll on my body. I can not continue this trade. It is having an adverse affect on my health^[27]

Mr. F.’s enrollment at the university does not guarantee that his child support will be set based on his student’s income. He has not proven that he is not voluntarily and unreasonably

²⁴ 24 P.3d 523 (Alaska 2001).

²⁵ *Beaudoin*, 24 P.3d at 528 (emphasis in original).

²⁶ Civil Rule 90.3, Commentary III.C.

²⁷ Exh. 5 at pg. 3.

unemployed,²⁸ so Mr. F.'s child support should be calculated based on his "work history, qualifications and job opportunities."²⁹ As discussed above, Mr. F.'s average income in 2007 and 2008 from his auto body work was \$59,448.20. This figure should be used to calculate his child support obligation. Mr. F. testified he would be returning to his trade as soon as possible, so his income from auto body work is the correct amount to use.

B. Shared Custody

Where parents exercise shared custody of their children, Civil Rule 90.3 provides that child support is to be calculated differently than in a situation in which one parent has primary custody. In general, and depending on the percentage of time each parent has overnight visitation, the parent obligated to pay child support will have a somewhat lower monthly support amount than in a primary custody scenario. The rule defines shared custody as follows:

A parent has shared physical custody of children for purposes of this rule if the children reside with that parent for a period specified in writing of at least 30 percent of the year, regardless of the status of legal custody.^[30]

In order for a visitation day to count toward the required 30% of the year, the child(ren) must stay overnight with the respective parent.³¹ One year is equal to 365 days, so 30% of the overnights in one year equal 110 overnights. This is the minimum number of overnights needed on an annual basis to reach the threshold definition of shared custody.³²

If there is no court order regarding custody, a finding of shared custody under Civil Rule 90.3(f)(1) should be based on a written agreement, but the parties to child support actions rarely have one. Thus, the administrative law judge must make findings of fact regarding whether shared custody exists and, if so, what percentage of shared custody each party exercises. The

²⁸ It should also be noted that Mr. F. quit his job at H. in May 2009, the same month Ms. L. applied for child support services. The coincidental timing raises the question whether Mr. F. left H. because his income there would lead to a higher child support amount, but because there was no testimony on the relationship between these two events, this possible explanation is specifically rejected as being too speculative.

²⁹ Civil Rule 90.3(a)(4).

³⁰ Civil Rule 90.3(f)(1).

³¹ Civil Rule 90.3, Commentary V.A.

³² In general, a party having visitation with a child for 8 or 9 overnights per month (96 – 108 overnights total), on average, will attain the 110 overnight minimum with the addition of a few extra nights during the year, such as during the holidays or other vacation periods.

parents agreed at the hearing that they exercise shared custody and the time periods E. spends with each one results in a 55/45 split.

Shared custody child support is calculated by determining each parent's primary custody child support obligation to the other parent, as if each parent had primary custody of the child(ren). The figures are then inserted into a mathematical formula that calculates the paying parent's child support from a combination of both parents' primary custody support obligations and their individual shared custody percentages.

Mr. F.'s primary custody support amount for 2009, based on the income figure imputed to him, is \$783 per month.³³ Ms. L.'s primary custody support amount for 2009 is \$147 per month.³⁴ Inserting the parties' respective primary custody support amounts into the shared custody formula results in Mr. F. being obligated to pay \$547 per month.³⁵

C. Financial hardship

Mr. F. testified that he cannot afford to pay child support and requested a variance pursuant to Civil Rule 90.3(c). 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."³⁶ The presence of "unusual circumstances" in a particular case 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^[37]

It is appropriate to consider all relevant evidence, including the circumstances of the custodian and obligee child to determine if the support amount should be set at a different level than provided for under the schedule in Civil Rule 90.3(a).³⁸

33 Attachment A.
34 Attachment B.
35 Attachment C.
36 Civil Rule 90.3(c).
37 Civil Rule 90.3(c)(1).
38 Civil Rule 90.3, Commentary VI.E.1.

Based on the evidence presented, this case does not present unusual circumstances of the type contemplated by Civil Rule 90.3. Mr. F. did not prove by clear and convincing evidence that manifest injustice would result if the child support amount calculated under Civil Rule 90.3 were not varied. Mr. F. is voluntarily and unreasonably unemployed and his financial circumstances will improve when he begins working again. The obligor may lack the ability to pay the total child support amount every month while he is unemployed, and he will no doubt incur arrears while he is unemployed, but Mr. F. should be able to start paying those off once he starts working again.

IV. Conclusion

Mr. F. is voluntarily and unreasonably unemployed. His potential income is based on his earnings as an auto body repairman, which is employment he testified he would be returning to. Mr. F.'s child support is now correctly calculated at \$547 per month, effective May 1, 2009. He is entitled to a credit of \$300 for the payment he made to Ms. L. in May 2009.

V. Child Support Order

- Mr. F. is liable for child support in the amount of \$547 per month, effective May 1, 2009;
- Mr. F. is entitled to a credit of \$300 for a direct child support payment he made to Ms. L. in May 2009;
- All other provisions of October 6, 2009, Amended Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 6th day of January, 2010.

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 and Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 25th day of January, 2010.

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

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