CIVIL RULE 90.3

COMMENTARY

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III. DEFINING INCOME

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C. Potential Income. The court may calculate child support imputing ~~based on a determination of the~~ potential income to ~~of~~ a parent who the court determines is voluntarily and unreasonably ~~is~~ unemployed or underemployed based on an analysis of the factors enumerated in the rule. ~~A determination of potential income may not be made for a parent who is physically or mentally incapacitated, or who is caring for a child under two years of age to whom the parents owe a joint legal responsibility. Potential income will be based upon the parent's work history, qualifications and job opportunities.~~ The court shall consider the totality of the circumstances in deciding whether to impute income and the amount. ~~When a parent makes a career change, this consideration should include the extent to which the children will ultimately benefit from the change. The court also may impute potential income for non-income or low income producing assets.~~

D. Low-Income Adjustment. A non-custodial parent with a gross annual income of $30,000 or less must calculate annual adjusted income under two different methods. *See* Rule 90.3(a)(5). First, the parent calculates their annual adjusted income by using the formula under subparagraph (a)(1) with "itemized deductions". Second, the parent calculates their adjusted annual income by applying the low-income adjustment formula that provides for a $7,500 "standard deduction" from gross annual income. For purposes of calculating child support, the parent's adjusted annual income is the lesser of the two calculations. The child support amount is still subject to the $50 monthly minimum in subparagraph (c)(3). The low-income adjustment was added in 2023 to take into consideration the noncustodial parent's basic subsistence

needs and limited ability to pay, as required by federal regulations governing child support guidelines. *See* 45 C.F.R. § 302.56(c)(1)(ii).

E.~~D.~~ Deductions. A very limited number of expenses may be deducted from income. Mandatory deductions such as taxes and mandatory union dues are allowable. The parent claiming a deduction must provide evidence to support it.

1. Mandatory retirement contributions are a deduction. Voluntary contributions, up to the limit stated in the rule, are also a deduction if the earnings on the retirement account or plan are tax-free or tax-deferred. If a parent is not a participant in a mandatory plan, the limit on voluntary contributions is 7.5 % of the parent's total ~~gross wages and self-employment~~ income. If a parent is a participant in a mandatory plan, the limit on voluntary contributions is 7.5 % of the parent's total ~~gross wages and self-employment~~ income minus the amount of the mandatory contribution. Some examples of plans and accounts that qualify for the voluntary contribution are: those qualified under the Internal Revenue Code, 26 USC §§ 401, 403, 408 or 457 (such as a traditional IRA, Roth IRA, SEP-IRA, SIMPLE IRA, Keogh Plan, 401(k) Plan, etc.); Thrift Savings Plans under 5 USC § 8440, 37 USC § 211, etc.; and any other pension plan as defined by § 3 (2) of ERISA (P.L. 93–406; 29 USC § 1002(2)).

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4. A deduction is allowed for the out-of-pocket cost of health insurance premiums, including dental and vision coverage, paid by the parent and for the parent's own coverage to a maximum of 10% of the parent's total ~~gross wages and self-employment~~ income. The deduction may not include the cost to cover other members of the household, such as the parent's spouse or children. If the insurance for the parent also covers other members of the parent's household, and evidence is unavailable as to the specific cost of insuring only the parent subject to this order, the deductible cost for the parent may be determined by allocating the total cost of coverage pro rata among all covered family members.

A deduction is also allowed for the out-of-pocket cost of life insurance premiums when the beneficiary(ies) is the child(ren) covered by the child support order or the individual to whom the support is owed. This deduction is available for any policy held for the benefit of the children covered by the child support order or the individual to whom the support is owed but the total deduction may not exceed $1,200 annually (or $100 per month). If the policy lists beneficiaries in addition to the child/children covered by the child support order or the individual to whom the support is owed, the allowable deduction is determined by allocating the total cost of the premiums pro rata among all beneficiaries. Any person claiming a deduction for life insurance premiums must provide proof of the policy and beneficiaries if requested by the other parent, the court, or the Child Support Services Division. An example of qualifying life insurance is Servicemembers' Group Life Insurance, commonly listed as SGLI on the service member's Leave and Earnings Statement.

Also, reasonable child care expenses that are necessary to enable a parent to work, or to be enrolled in an educational program which will improve employment opportunities, are deductible. However, the expense must be for the children who are the subject of the support order.

F.~~E.~~ Time Period for Calculating Income. * * * *

IV. PRIMARY CUSTODY

A. Generally. "Primary custody" as this term is used in Rule 90.3 covers the usual custodial situation in which one parent will have physical custody of the child—in other words, the child will be living with that parent—for over seventy percent of the year. The shared custody calculation in paragraph (b) applies only if the other parent will have physical custody of the child at least thirty percent of the year (110 overnights per year). The visitation schedule must be specified in the decree or in the agreement of the parties which has been ratified by the court. ***See also*** Commentary ~~commentary~~ V.A.

The calculation of child support for the primary custodial case under Rule 90.3(a) simply involves multiplying the obligor's adjusted income times the relevant percentage given in subparagraph (a)(2). (Normally, the portion of an adjusted annual income over $138,000~~$126,000~~ per year will not be counted. ***See*** Commentary VI.D.) As discussed above, the rule assumes that the custodial parent also will support the children with at least the same percentage of his or her income.

B. Visitation Credit. * * * *

V. SHARED, DIVIDED, AND HYBRID PHYSICAL CUSTODY

A. Shared Custody—Generally.

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B. Calculation of Shared Custody Support. The calculation of support in shared custody cases is based on two premises. First, the fact that the obligor is spending a substantial amount of the time with the children probably means the obligor also is paying directly for a substantial amount of the expenses of the children. Thus, the first step in calculating shared custody support is to calculate reciprocal support amounts for the time each parent will have custody based on the income of the other parent. The "high income" limit of paragraph (c)(2) ($138,000~~$126,000~~) applies to the determination of adjusted income at the first stage of this process. A parent's annual support amount for purposes of this calculation will be no less than $600. The support amounts then are offset.

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VI. EXCEPTIONS

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D. High Income of a Parent. Rule 90.3 provides that the percentages for child support will not be applied to a parent's adjusted annual income of over $138,000~~$126,000~~. An additional award may be made only if the other parent is able to present evidence which justifies departure from this general rule. The standard of

proof for a departure is preponderance of the evidence, unlike the higher standard of clear and convincing evidence required for a showing of manifest injustice under exception (c)(1). The factors which the court should consider when making an additional award in high income cases are specified in the rule.

E. Retroactive Establishment.

1. Retroactive Establishment of Child Support. * * * *

2. Retroactive Application of Amendments. When establishing support for a period of time before a complaint or petition was served, the court should apply the most current version of the rule, except for portions of the rule that state dollar amounts. This is because Civil Rule 90.3, unlike most other court rules, is interpretive. The most current version of the rule is presumably the most refined interpretation to date of the statute calling for fair and equitable child support awards. For example, the credit for prior children living with the obligor was not found in early versions of the rule, but nonetheless should be applied when support is being established. However, the dollar amounts in the rule, such as the minimum support amount (increased from $40 to $50) and the income cap (increased over the years from $60,000 to $138,000~~$126,000~~), have been revised over time to reflect inflation or for other reasons. With regard to these amounts, the court should apply the version of the rule that was in effect in the month for which support is being calculated.

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VII. HEALTH CARE COVERAGE

A. Health Insurance. Rule 90.3(d) requires that the court address coverage of the children's health care needs including expenses not covered by insurance. The court must require health insurance if the insurance is available to either party at a reasonable cost. There is a rebuttable presumption that the cost of health insurance is reasonable if the cost does not exceed five percent of the adjusted annual income of the parent who may be required to purchase the insurance. In determining whether

the presumption has been rebutted, the court should consider any evidence relevant to its conclusion, including the cost of any health insurance for the children that either parent was paying before the action was commenced. This recognizes that a cost that a parent voluntarily paid for a child's insurance before an action was commenced was likely a cost that the parent considered to be reasonable. Additionally, when evaluating whether the presumption is rebutted, the court may consider the other parent's income, other available options for insurance, and the need for the children to have health insurance.

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VIII. CHILD SUPPORT AFFIDAVIT AND DOCUMENTATION

A. Affidavit and Documentation. Each parent in a proceeding involving a determination of child support must provide the court with an income statement, including claimed deductions, under oath. The rule also requires that the income statement of a parent be verified with documentation of current and past income as well as claimed deductions. Suitable documentation of earnings and claimed deductions might include paystubs, employer statements, or copies of federal tax returns. The income statement, with documentation, must be filed with the party's first pleading in the action. This first pleading is the dissolution petition in a dissolution, the complaint or answer in a divorce, the custody petition or response in a child custody case under AS 25.20.060, or the motion or opposition in a motion to modify child support or motion to change custody. The court may impose sanctions on a party who does not timely file the income statement with appropriate documentation. The rule repeats language set out in Civil Rule 95(a). In a default case the court must decide support on the best available information, but should require the present party to make reasonable efforts to obtain reasonably accurate information. The court may use the best evidence available, including statistics maintained by the Department of Labor and Workforce Development, to determine the parent's total income from all sources.

Income affidavits must be filed even by a parent whose income is not presently being used to calculate child support. That parent's income may be relevant if there is a request by either parent for a variation under subsection (c), or it may be needed to determine what percentage of uncovered health care expenses each parent will pay under subsection (d)(2) or how much of travel expenses each parent will pay under subsection (g). In addition, the court may wish to enter an order which automatically shifts the child support obligation if a child changes his or her primary residence, as permitted under *Karpuleon v. Karpuleon*, 881 P.2d 318 (Alaska 1994).

B. Request for Income Information. Paragraph (h) of the rule allows child support orders to be modified if a material change of circumstances is shown. There is a presumption that a ~~A~~ change in a parent's adjusted annual income qualifies as a 'material change' if it would increase or decrease the support amount by 15 percent. Paragraph (e)(2) of the rule provides an informal method either parent can use, while a support order is in effect, to learn whether there has been a large enough change in the other parent's income to justify a change in the amount of child support. This paragraph allows a parent to send the other parent a written request for documents such as tax returns and pay stubs showing the other parent's income for the prior calendar year (January through December) and the present. However, the parent making this request must attach to the request a copy of the same type of documents showing his or her own income for the prior calendar year, and the present. This request can only be made once each year. The parent who receives the request must provide the requested information within 30 days after the request is made. The parents can then do the necessary calculations to determine whether a motion to modify child support should be filed. In addition, a parent may always use the formal discovery procedures provided in the other civil rules to obtain income information from the other parent.

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X. MODIFICATION

A. Material Change in Circumstances.

Alaska law allows the modification of support orders upon a material change in circumstances. A significant amendment to Rule 90.3 constitutes a material change in circumstances pursuant to AS 25.24.170(b). Rule 90.3(h) states that a material change in circumstances will be presumed whenever the change would result in an increase or decrease of support under the rule of at least 15%. However, a support order can provide that the support obligation will be adjusted without further order of the court upon a change of health insurance costs and notice of the change to the other parent (and CSSD if CSSD is handling collections).

See Flannery v. Flannery, 950 P.2d 126 (Alaska 1997), concerning what constitutes a material change of circumstances when the parties by agreement originally set support at a level higher than would have normally been required under Rule 90.3.

A temporary reduction in income normally will not justify an ongoing modification reducing child support. However, a temporary, unforeseen, and involuntary reduction in income may justify a temporary reduction in support subject to the retroactivity provisions in Rule 90.3(h)(2). In considering such a reduction, the court should consider the needs of the children, the ability of the other parent to provide support, liquid assets available to provide support, and the future earning capability of the obligor parent. *See Flannery v. Flannery*, 950 P.2d 126, 133 (Alaska 1997); *Patch v. Patch*, 760 P.2d 526, 530 (Alaska 1988).

Federal law, recognized in AS 25.24.170(b) and AS 25.27.193 and referenced in a Note to Civil Rule 90.3(h)(1), appears on its face to require allowing modifications every three years without a showing of a material change in circumstances. *See* 42 U.S.C. 666(a)(10)(A)(iii). However, in response to questions from states, the federal Office of Child Support Enforcement (OCSE), the federal agency that enforces the

federal child support law and promulgates implementing regulations, ~~has~~ clarified ~~stated (in Action Transmittal OCSE-97-10, pages 28–31)~~ that federal law allows states to apply rules and regulations that require a reasonable quantitative standard for modifying a child support order. *See* OCSE Action Transmittal OCSE-97-10, pages 28–31. ~~existing regulations which allow reasonable quantitative standards for modifications (such as Alaska's 15% standard) continue to apply.~~ Thus, in Alaska, the 15% presumptive threshold continues to apply to a request to modify a child support order.

B. No Retroactive Modification.

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C. Preclusion.

The sometimes harsh effect of the rule against retroactive modification may be mitigated by the preclusion provision of Rule 90.3, which limits collection of a support arrearage in limited and appropriate cases. Preclusion may be applied to limit collection by a parent's assignee, such as the child support services agency of this or another state. Clear and convincing evidence is required to support a finding of preclusion. Preclusion may apply only in cases in which the obligor assumed primary physical custody of a child for the time period for which the obligee now attempts to collect support. The time period must be more than six ~~nine~~ consecutive months. Preclusion does not apply in cases in which the proportion of shared custody changed or when there is a shift from primary physical custody to shared custody. Preclusion may apply when the obligor assumes primary physical custody of any number of the children on which the support obligation in arrearage is based. *Murphy v. Newlynn*, 34 P.3d 331 (Alaska 2001). As an alternative to preclusion, AS 25.27.020(b) may allow a reduction of support owed to the other parent when the obligor assumes custody of one or more of the children. *See State v. Gause*, 967 P.2d 599 (Alaska 1998).

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