(Current as of October 16, 2023)

Civil Rule 90.3

COMMENTARY

I. INTRODUCTION

A. Committee Commentary. This commentary to Civil Rule 90.3 was prepared by the Child Support Guidelines Committee. The commentary has not been adopted or approved by the Supreme Court, but is published by the court for informational purposes and to assist users of Rule 90.3.

B. Purpose. The primary purpose of Rule 90.3 is to ensure that child support orders are adequate to meet the needs of children, subject to the ability of parents to pay.

The second purpose of 90.3 is to promote consistent child support awards among families with similar circumstances. Third, the rule is intended to simplify and make more predictable the process of determining child support, both for the courts and the parties. Predictable and consistent child support awards will encourage the parties to settle disputes amicably and, if resolution by the court is required, will make this process simpler and less expensive.

The final purpose of 90.3 is to ensure that Alaska courts comply with state and federal law. AS 25.24.160(a)(1) requires that child support be set in an amount which is "just and proper...."The Child Support Enforcement Amendments of 1984 (P.L. 98–378) and its implementing regulations (45 CFR 302.56) require states to adopt statewide guidelines for establishing child support. The Family Support Act of 1988 (P.L. 100–485) requires that the guidelines presumptively apply to all child support awards and that the guidelines be reviewed every four years.

The Nature of Child Support. Every parent has a duty to support his or her child. Child support is the contribution to a child's maintenance required of both parents. The amount of support a child is entitled to receive from a particular parent is determined by that parent's ability to provide for the child. Typically, the obligation to pay child support begins on the child's date of birth if the parents are not living together, or on the date the parents stop living together if separation is after the birth of the child.

C. Scope of Application. Rule 90.3 applies to all proceedings involving child support, whether temporary or permanent, contested or non-contested, including without limitation actions involving separation, divorce, dissolution, support modification, domestic violence, paternity, Child in Need of Aid and Delinquency. The support guidelines in the rule may be varied only as provided by paragraph (c) of the rule. Rule 90.3 applies to support of children aged 18 authorized by Chapter 117, SLA 1992, but otherwise does not apply to set support which may be required for adult children.

II. PERCENTAGE OF INCOME APPROACH

Rule 90.3 employs the percentage of income approach. This approach is based on economic analyses which show the proportion of income parents devote to their children in intact families is relatively constant across income levels up to a certain upper limit. Applications of the rule should result in a non-custodial parent paying approximately what the parent would have spent on the children if the family was intact.

Integral to the rule is the expectation that the custodial parent will contribute at least the same percentage of income to support the children. The rule operates on the principle that as the income available to both parents increases, the amount available to support the children also will increase. Thus, at least in the primary custodial situation, the contribution of one parent does not affect the obligation of the other parent.

III. DEFINING INCOME

A. Generally. The first step in determination of child support is calculating a "parent's total income from all sources" Rule 90.3(a)(1). This phrase should be interpreted broadly to include benefits which would have been available for support if the family had remained intact. Income includes, but is not limited to:

1. salaries and wages (including overtime and tips);

2. commissions;

3. severance pay;

4. royalties;

5. bonuses and profit sharing;

6. interest and dividends, including permanent fund dividends;

7. income derived from self-employment and from businesses or partnerships;

8. social security;

9. veterans' benefits, except those that are means based;

10. insurance benefits in place of earned income such as workers' compensation or periodic disability payments;

11. workers' compensation;

12. unemployment compensation;

13. pensions;

14. annuities;

15. income from trusts;

16. capital gains in real and personal property transactions to the extent that they represent a regular source of income;

17. spousal support received from a person not a party to the order;

18. contractual agreements;

19. perquisites or in-kind compensation to the extent that they are significant and reduce living expenses, including but not limited to employer provided housing (including military housing) and transportation benefits (but excluding employer provided health insurance benefits);

20. income from life insurance or endowment contracts;

21. income from interest in an estate (direct or through a trust);

22. lottery or gambling winnings received either in a lump sum or an annuity;

23. prizes and awards;

24. net rental income;

25. disability benefits;

26. G.I. benefits (excluding education allotments);

27. National Guard and Reserves drill pay; and

28. Armed Service Members base pay plus the obligor's allowances for quarters, rations, COLA and specialty pay.

Lump sum withdrawals from pension or profit sharing plans or other funds will not be counted as income to the extent that the proceeds have already been counted as income for the purposes of calculating child support under this rule (i.e., contributions to a voluntary pension plan).

Social security Children's Insurance Benefits (CIB) must be counted as income of the retired or disabled parent on whose behalf the payments are made. CIB paid to the other parent also constitute child support payments by the retired or disabled parent. See *Pacana v. State*, 941 P.2d 1263 (Alaska 1997).

Means based sources of income such as Alaska Temporary Assistance Program (ATAP), formerly Aid to Families with Dependent Children (AFDC), Food Stamps, and Supplemental Security Income (SSI) should not be considered as income. The principal amount of one-time gifts and inheritances should not be considered as income, but interest from the principal amount should be considered as income and the principal amount may be considered as to whether unusual circumstances

exist as provided by 90.3(c). Tax deferred dividends and interest earned on pension or retirement accounts, including individual retirement accounts, which are not distributed to the parent are not income. Child support is not income.

B. Self Employment Income. Income from self-employment, rent, royalties, or joint ownership of a partnership or closely held corporation includes the gross receipts minus the ordinary and necessary expenses required to produce the income. Ordinary and necessary expenses do not include amounts allowable by the IRS for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the court to be inappropriate. Expense reimbursements and in-kind payments such as use of a company car, free housing or reimbursed meals should be included as income if the amount is significant and reduces living expenses.

C. Potential Income. The court may calculate child support imputing potential income to a parent who the court determines is voluntarily and unreasonably unemployed or underemployed based on an analysis of the factors enumerated in the rule. The court shall consider the totality of the circumstances in deciding whether to impute income and the amount.

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. 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 income. If a parent is a participant in a mandatory plan, the limit on voluntary contributions is 7.5 % of the parent's total 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)).

2. Child support arising out of different relationships is deductible if two conditions are met. First, it must be required by a court or administrative order. (Support paid voluntarily without a court or administrative order may be considered under Rule 90.3(c).) Second, it must relate to prior children. The date of birth or adoption of a child determines whether a child is a prior child. *See Coleman v. McCullough*, 290 P.3d 413 (Alaska 2012). A child support order for children of a later marriage or relationship should take into account an order to pay support for children of a prior marriage or relationship, but not vice-versa. (*See* Commentary VI.B.2 regarding "subsequent" children.)

Spousal support paid to another person arising out of a different relationship is deductible if three conditions are met. First, the spousal support must actually be paid. Second, it must be required by a court or administrative order. Third, it must relate to a prior relationship.

3. A deduction also is allowed for in-kind support of prior children of a different relationship in the primary or shared physical custody of the parent. If the parent has primary physical custody of the prior children, the in-kind deduction is the amount calculated under Rule 90.3(a)(2), using the parent's current income, as if the prior children were the only children. If the parent has shared physical custody of the prior children, the in-kind deduction is calculated as follows: first, calculate the parent's support under Rule 90.3(a)(2), using the parent's current income, as if the prior children were the only children; second, multiply this number by the percentage of time the parent has physical custody of the prior children. A parent who pays support for prior children may also take a deduction under Rule 90.3(a)(1)(C) for support ordered and paid. Rule 90.3 was amended to allow deductions for both in-kind and paid support for shared custody of prior children. (*Gorton v. Mann*, 281 P.3d 81 (Alaska 2012) interpreted the previous version of the rule.) When adding the in-kind deduction to a deduction based on court or administrative-ordered support, the total deduction cannot exceed the amount calculated under subparagraph (a)(2). The deduction for in-kind support of prior children is not reduced by child support received from the other parent. *Faulkner v. Goldfuss*, 46 P.3d 993, 998 (Alaska 2002).

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 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. Time Period for Calculating Income. Child support is calculated as a certain percentage of the income which will be earned when the support is to be paid. This determination will necessarily be somewhat speculative because the relevant income figure is expected future income. The court must examine all available evidence to make the best possible calculation.

The determination of future income may be especially difficult when the obligor has had very erratic income in the past. In such a situation, the court may choose to average the obligor's past income over several years.

Despite the difficulty in estimating future income, a child support order should award a specific amount of support, rather than a percentage of whatever future income might be. The latter approach has been rejected because of enforcement and oversight difficulties.

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 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 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. An obligor who exercises extended visitation, even if the visitation does not reach the thirty percent level of shared custody, probably will spend significant funds directly for the children during visitation. The parent with primary custody conversely will have somewhat lower expenses during the extended visitation even though that parent's fixed costs such as housing will not decrease. Consequently, 90.3(a)(3) authorizes the trial court, in its discretion, to allow a partial credit (up to 75% of total support for the period of extended visitation) against a child support obligation. In considering a visitation credit, the court may consider the financial consequences to the parties of the visitation arrangement and a credit. The court shall ensure that support for the child, including contributions from both parents, is adequate to meet the child's needs while the child resides with the custodial parent. A visitation credit may be taken only if the extended visitation actually exercised exceeds 27 consecutive days and the court has authorized the specific amount of the credit. Nominal time with the custodial parent during the visitation period, including occasional overnights, does not defeat the visitation credit.

V. SHARED, DIVIDED, AND HYBRID PHYSICAL CUSTODY

A. Shared Custody—Generally.

"Shared custody" as this term is used in Rule 90.3 means that each parent has physical custody of the children at least thirty percent of the year according to a specified visitation schedule in the decree. "Shared custody" as used in 90.3 has no relation to whether a court has awarded sole or joint legal custody. "Shared custody" is solely dependent on the time that the decree or agreement of the parties which has been ratified by the court specifies the children will spend with each parent.

In order for a day of visitation to count towards the required thirty percent, the children normally must remain overnight with that parent. (Thirty percent of the overnights in a year total 110 overnights.) Thus, a day or an evening of visitation by itself will not count towards the total of time necessary for shared custody. Visitation from Saturday morning until Sunday evening would count as one overnight. However, the court may use another method of calculating the percentages of custody when counting overnights does not accurately reflect the ratio of expenditures by the parents.

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) 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.

This calculation assumes that the parents are sharing expenses in roughly the same proportion as they are sharing custody. If this assumption is not true, the court should make an appropriate adjustment in the calculation.

The second premise is that the total funds necessary to support children will be substantially greater when custody is shared. For example, each parent will have to provide housing for the children. Thus, the amount calculated in the first step is increased by 50% to reflect these increased shared custody costs. However, the obligor's support obligation never will exceed the amount which would be calculated for primary custody under 90.3(a). The amount which would be calculated under 90.3(a) should include any appropriate visitation credit as provided by (a)(3).

C. Failure to Exercise Shared Custody. An inequity may arise under the shared custody calculation of support if the obligor does not actually exercise the custody necessary to make shared custody applicable (i.e., at least 30% of the time). If the obligor parent does not actually exercise sufficient physical custody to qualify for the shared custody calculation in the rule (at least 110 overnights per year—See Commentary, Section V.A), then (a)(2) of this rule will apply to the child support calculation. Failure to exercise custody in this regard is grounds for modification of support, even if the custody order is not modified. However, this provision may not be interpreted to allow the custodial parent to profit by denying visitation.

D. Divided Custody. Rule 90.3(f)(3) defines divided custody as when both parents have primary physical custody of at least one of the parent's children and the parents do not share custody of any of their children. The calculation of support for divided custody is a two-part process.

The first step is to offset the amounts of support each parent would pay the other for the children in that parent's primary custody calculated under 90.3(a). For example, if the father has primary custody of one child and the mother primary custody of three children (four children total), the father would owe support to the mother of 33% (three children) of his adjusted annual income. This amount would be offset by 20% (one child) of the mother's adjusted annual income. This method was implicitly approved in *Bunn v. House,* 934 P.2d 753, 755–58 (Alaska 1997). Note that this method of calculation supercedes the method used in *Rowen v. Rowen,* 963 P.2d 249, 254 (Alaska 1998).

The second step in determining divided custody support is for the court to carefully consider whether the support amount should be varied under paragraph (c)(1). A divided custody case should be treated as an unusual circumstance under which support will be varied if such a variation is "just and proper...."

E. Hybrid Custody. Rule 90.3(f)(4) defines hybrid custody as when at least one parent has primary physical custody of at least one child of the relationship, and the parents share physical custody of at least one child of the relationship.

The method for calculating child support in a hybrid custody situation in Rule 90.3(b)(3) comes from *Turinsky v. Long*, 910 P.2d 590, 596–97 n.13 (Alaska 1996).

Step One. Determine the percentage of income to use in both the "primary" and "shared" calculations as follows: divide the Rule 90.3(a)(2) percentage for the total number of children by the total number of children to determine a per-child percentage. For example, if there are four children, divide 36% by 4 to get a per child percent of 9%.

Step Two. Use Rule 90.3(a) to calculate the amount each parent owes for any children in the primary physical custody of the other parent. However, instead of using the percentages in (a)(2), use the per-child percent from Step One multiplied by the number of children in the other parent's primary physical custody. For example, if two of the four children are in the mother's primary physical custody, the father would owe 18% (2 x 9%) of his adjusted annual income for the support of those children.

Step Three. Use Rule 90.3(b) to determine the amount owed for the children in shared physical custody and which parent owes it. Use the per-child percentage from Step One multiplied by the number of children in shared physical custody instead of the percentage in (a)(2). For example, if two of the four children are in shared physical custody, each parent's adjusted annual income will be multiplied by 18% (2 x 9%).

Step Four. Add the amounts calculated in Steps Two and Three if they are owed by the same parent. Offset the amounts calculated in Steps Two and Three if they are owed by different parents. The result is the total amount owed each year.

Step Five. Consider whether the support amount should be varied under paragraph (c)(1) of the rule. Hybrid custody is an unusual circumstance in which support must be varied if such a variation is "just and proper."

Sample hybrid custody calculation: In the following sample calculation, there are four children in the family. Mother has primary custody of two, and the parents share custody of the other two. The shared two children will be in mother's physical custody 70 percent of the time and in father's 30 percent of the time. Father's adjusted annual income is $50,000. Mother's is $40,000. *Step One.* The percentage of income from (a)(2) of the rule for four children is 36 percent. Therefore, the percentage per child is 9 percent [36 divided by 4]. *Step Two.* Father owes mother $9000 per year for the two children in mother's primary custody [$50,000 x 18%]. *Step Three.* Father owes mother $6210 per year for the two children in shared custody [(father owes $50,000 x 18% = $9000 x 70% = $6300)—(mother owes $40,000 x 18% = $7200 x 30% = $2160). $6300 - $2160 = $4140 x 1.5 = $6210]. *Step Four.* Thus, for all four children, father owes mother $15,210 [$9000 + $6210].

VI. EXCEPTIONS

A. Generally. Child support in the great majority of cases should be awarded under 90.3(a) or (b) in order to promote consistency and to avoid a tendency to underestimate the needs of the children. Nevertheless, the circumstances in which support issues arise may authorize courts to vary support awards for good cause.

The court may apply this good cause exception only if the parent requesting that support be varied presents clear and convincing evidence that manifest injustice would result if the support award were not varied. In addition, a prerequisite of any variation under 90.3(c) is that the reasons for it must be specified in writing by the court.

What constitutes "good cause" will depend on the circumstances of each cause. Three situations constituting "good cause" are discussed below in sections VI.B D. These three specific exceptions are not exclusive; however, the general exception for good cause may not be interpreted to replace the specific exceptions. Absent the (c)(1) exception (unusual circumstances), the (c)(2) exception (high income), or the (c)(3) exception (low income), the rule presumes that support calculated under 90.3(a) or (b) does not result in manifest injustice.

B. Unusual Circumstances. 90.3(c)(1) provides that a court shall vary support if it finds, first, that unusual circumstances exist and, second, that these unusual circumstances make application of the usual formula unjust. Examples might include especially large family size, significant income of a child, health or other extraordinary expenses, or unusually low expenses. This determination should be made considering the custodial parent's income because the percentage of income approach used in Alaska tends to slightly understate support relative to the national average for cases in which the custodial spouse does not earn a significant income. This understatement relative to the national average becomes substantial if the custodial parent has child care expenses. The application of the unusual circumstances exception to particular types of factual situations is considered below.

1. Agreement of the Parents. The fact that the parties, whether or not represented by counsel, agree on an amount of support is not reason in itself to vary the guidelines. The children have an interest in adequate support independent of either parent's interest. Thus, approval of any agreement which varies the guidelines, whether in a dissolution, by stipulation or otherwise, must be based upon an explanation by the parties of what unusual factual circumstances justify the variation.

2. Subsequent Children. A parent with a support obligation may have other children living with him or her who were born or adopted after the support obligation arose. The existence of such "subsequent" children, even if the obligor has a legal obligation to support these children, will not generally constitute good cause to vary the guidelines. However, the circumstances of a particular case involving subsequent children might constitute unusual circumstances justifying variation of support. The court should reduce child support if the failure to do so would cause substantial hardship to the "subsequent" children.

In addition, the interests of the subsequent family may be taken into account as a defense to a modification action where an obligor proves he or she has taken a second job or otherwise increased his or her income specifically to better provide for a subsequent family. This defense to an upward modification action should not be allowed to the extent that the prior support was set at a lower amount prior to the adoption of this rule, or to the extent that the obligor's increase in income is limited to ordinary salary increases.

In considering whether substantial hardship to "subsequent" children exists, or whether the existence of a subsequent family should defeat a motion to increase child support, the court should consider the income, including the potential income, of both parents of the "subsequent" children.

3. Relocation of Custodial Parent. The relocation of the custodial parent to a state with a lower cost of living normally will not justify a reduction in support. The level of Alaska's guidelines is comparable to the national average. The fact that the obligor parent's income has in effect marginally increased relative to the children's living expenses simply enables the children to be supported at a slightly higher level.

4. Prior and Subsequent Debts. Prior or subsequent debts of the obligor, even if substantial, normally will not justify a reduction in support. The obligation to provide child support is more important than the obligation to fulfill most other obligations. However an obligor parent may attempt to present evidence which shows the existence of exceptional circumstances in an individual case.

5. Income of New Spouse (or other person in the household). The income of a new spouse of either the custodial or obligor parent normally will not justify a variation in support. Either party may attempt to show that exceptional circumstances exist in a particular case. A parent who does not work because of the income of a new spouse (or other person in the household) may be assigned a potential income.

6. Age of Children. While the costs of raising children who are very young or who are over about ten years old are generally greater than raising other children, this in itself does not justify an increase in support. However, it should be considered in concert with other circumstances, and a parent always may seek to establish exceptional expenses in a particular case.

7. Denial of Visitation. A denial of visitation may not be countered with a reduction in support. See AS 25.27.080(c). Neither may non-payment of support be countered by a denial of visitation. Courts should use their powers to strictly enforce the visitation and custody rights of obligor parents.

8. Property Settlement. A parent may justify variation of the guidelines by proving that a property settlement in a divorce or dissolution between the parents provided one of the parents with substantially more assets than the parent otherwise would have been entitled to, that this inequity was intended to justify increasing or decreasing child support, and that this intent specifically was stated on the record. Any such change in monthly child support may not exceed the actual excess of the property settlement apportioned over the minority of the child.

However, courts should not approve in the first instance unequal property settlements which are meant to increase or decrease child support payments. "Property divisions are final judgments which can be modified only under limited circumstances, whereas child support awards can be changed periodically under much more liberal standards. One should not be a trade-off for the other." *Arndt v. Arndt,* 777 P.2d 668, (Alaska 1989)

9. Overtime Income. In most cases income from overtime or a second job will be counted as adjusted annual income under Rule 90.3(a). However, the court has discretion not to include this income when, for example, the extra work is undertaken to pay off back child support.

C. Low Income of Obligor. Paragraphs (a) and (b) of the rule must be applied even in low-income situations. However, in a paragraph (a) [primary custody] calculation and in the first stage of a paragraph (b) [shared, divided or hybrid custody] calculation, if the calculations result in a support amount below $50.00 per month, a minimum support amount of $50.00 per month ($600 per year) must be set. This $50.00 minimum support applies for all children, not to each child separately. The minimum level may be reduced if an extended visitation credit is granted under Rule 90.3(a)(3). This

minimum support amount does not apply to final support amounts for shared, divided, or hybrid custody entered under Rule 90.3(b).

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. 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. It will sometimes be necessary for the court to establish support for a time when no complaint or petition for support had yet been served, and there was no other court or administrative order in effect. The court has determined that Civil Rule 90.3 applies to such calculations. *Vachon v. Pugliese*, 931 P.2d 371, 381–2 (Alaska 1996). However, in some circumstances unfairness may result from rigid application of the rule. The court should consider all relevant factors in such a situation, including whether the obligor was aware of the support obligation, especially if the obligor had children subsequent to that child. See also Commentary VI.B.2.

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), 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.

F. Seasonal Income. In Alaska, seasonal employment is common. Obligors employed in such seasonal industries as commercial fishing, tourism, and construction often earn a large percentage of their income during only a few months of the year. It might be easier for some seasonally-employed obligors to meet their child support obligations if their child support orders required the bulk of their annual child support amount to be paid during the months they are employed. Thus, the rule allows courts the flexibility of ordering unequal monthly payments, as long as the total annual amount equals the amount calculated in paragraph (a) or (b) of the rule. The court should not make such an order unless it finds that the burden of budgeting for periods of unequal income should be placed on the obligee rather than the obligor.

The court's order must specify the annual support amount, the average monthly support amount, and the amount due for each month. For example, if the annual child support amount is $3600, the average monthly amount is $300. Instead of requiring 12 equal monthly payments of $300, the order could require payments of $500 per month from April through September and $100 per month from October through March.

Payments under the order must be set up so that a deficit situation will not occur. This means that, at any point in time, the total amount owed under the order (for the entire period the order has been in effect) must not be less than the amount that would have been owed for that entire period if no seasonal adjustment had been made. Therefore, in the above example, if the order is entered in April through September, it can order $500 monthly payments for the April–September period, followed by $100 monthly payments for October–March. However, if the order is entered anytime in October through March, the order must require $300 payments through March, then $500 payments from April through October, and then $100 payments the following October–March.

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.

The health insurance will be paid by the party to whom it is available. However, the court must allocate the cost of insurance between the parties. Note that the cost to be allocated is limited to that portion of the total cost necessary to the children involved - not the parent, the parent's new spouse or children of another relationship. If the insurance for the children also covers other members of the purchaser's family, and evidence is unavailable on the specific cost of insuring only the children subject to the order, the cost of covering the children must be determined by allocating the total cost of coverage pro rata among all covered family members. See *Rusenstrom v. Rusenstrom*, 981 P.2d 558 (Alaska 1999). If there is no additional cost to the employee for adding children to the coverage - that is, the cost of coverage is the same whether there are no dependants or several dependants - no portion of the cost of coverage may be allocated to the children. In such cases, no adjustment may be made to the child support obligation because none of the cost of coverage can be allocated to the children.

The allocation of the cost of the children's insurance between the parents should be 50/50 unless the court finds good cause to change that percentage. A substantial difference in the parties' relative financial circumstances may constitute good cause. The rule requires the court to adjust child support either upward or downward to reflect the allocation. Paragraph (h)(1) provides that payments for health care insurance are included in deciding whether there has been a 15% change in support which constitutes a material change of circumstances.

The court must also determine if the health insurance is accessible. Health insurance is accessible if the plan pays for health care services reasonably available to the child. "Accessibility" is broadly applied in the rule. Due to the geographical expanse of the state, "accessibility" is not limited to health care services available in the child's home town or village; some health care plans will pay for transportation to receive services from a health care provider in another city. If the health insurance pays for health care services in another city and transportation to the city, the insurance is considered accessible to the children.

B. Uncovered Health Care Expenses. Rule 90.3(d)(2) provides that the court also allocate reasonable health expenses not covered by insurance. The rule requires the party who did not obtain the health care to reimburse the other party within 30 days of receiving the necessary paperwork. The paperwork should include the medical bill, payment verification, and, if medical insurance applies, an insurance statement indicating any uncovered health care expenses. These materials should be sent to the other party within a reasonable time. The rule should be read to require prepayment of allowable uncovered medical cost when prepayment is required by the health care provider.

The rule provides that the usual 50/50 presumption does not apply for any amount in excess of $5,000 per calendar year. In such a situation, the excess expenses should be allocated based on the parties' relative financial circumstances during the approximate time period when the expenses occurred.

C. Definition of Health Care Expenses. Paragraph (f) defines health care expenses to include medical, dental, vision and mental health counseling expenses.

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 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.

IX. TRAVEL EXPENSES

The court shall allocate any travel expenses that are necessary to exercise visitation. This allocation should generally be done on a percentage basis because the actual costs may not be known or may change. The court should take care that its allocation of these expenses does not interfere with a parent's ability to provide the basic necessities for the children.

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, clarified 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. Thus, in Alaska, the 15% presumptive threshold continues to apply to a request to modify a child support order.

B. No Retroactive Modification.

The Omnibus Budget Reconciliation Act of 1986, P.L. 99–509, Section 9103(a) (the Bradley Amendment), prohibits retroactive modification of child support arrearages. Rule 90.3(h)(2) is intended to restate this prohibition, including the exception allowed by federal law for modification during the pendency of a modification motion. Pursuant to this rule, the notice of petition for modification sent by the Child Support Services Division triggers the legal process for modification of child support awards and thus an increase or decrease of support back to the date of this notice does not constitute retroactive modification.

The prohibition against retroactive modification limits both requested decreases and increases in child support. See Prohibition of Retroactive Modification of Child Support Arrearages, 54 Fed. Reg. 15,763 (1989). Thus, either the custodial or the obligor parent should promptly apply for a modification of child support when a material change in circumstances occurs.

See Section VI.(B).(2) of the commentary as to the extent support of a "subsequent" family may be used as a defense to a modification action to increase child support.

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 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).

XI. THIRD PARTY CUSTODY

A. Support Owed to the Third Party

If the state or another third party entitled to child support has custody of all of a parent's children, child support is calculated in the same way as it would be calculated in other cases. In other words, support is equal to the parent's adjusted annual income multiplied by the relevant percentage in paragraph (a)(2) based on the number of children.

However, this basic calculation does not work when the state or other third party has custody of only some of a parent's children. In this case, the rule provides that the total support calculation (as calculated for the total number of the parent's children) be reduced to only the proportion of the parent's children of whom the third party has custody. For example, the third party might have custody of two of a parent's three children. Support would be calculated as the parent's adjusted annual income, multiplied by .33 (the relevant percentage for three children), multiplied by 2/3 (the third party has custody of two of the parent's three children). Note that the calculation only takes into account children which are either in third party custody, substantially supported by the parent, or living with the parent. A child of the parent, for example, living with a relative without substantial support would not be counted in the above calculation.

The deduction for prior children in (a)(1)(C) and (D) would not apply because these children are already taken into account as children living with or supported by the parent.

B. Support Owed Between the Parents

There will be instances when a third party is entitled to support for some of the parent's children, but one or both parents retain primary or shared custody of their remaining children. In this case, child support between the parents should be calculated using Rule 90.3 based on the pro rata support percentages for the children not in third party custody. After that calculation, any support owed may be offset with amounts owed under 90.3(i)(1) to minimize transactions.

For example, a father might have custody of two children and the mother's sister might have custody of, and be entitled to support for, the parents' third child. Both parents in this example have a $45,000 adjusted annual income. Under Rule 90.3(i)(1), the sister is entitled to $4,950 per year from the father [$45,000 (annual income) x 33% (percentage for three children) x 1/3 (custodian has one of three children)]. The sister also is entitled to the same amount from the mother. (The parents' incomes are the same and the mother supports the children living with the father.)

The pro rata percentage for each child under 90.3 (a)(2) would be 33% (three children), 3 or 11% per child. Under 90.3(i)(2), the mother owes the father $9,900 per year in support ($45,000 x 22%). If the support amounts are offset, the mother will owe her sister $9,900 per year and the father $4,950 per year. The court could decide, however, that it was preferable not to offset the support amounts because one of the parents might not pay the third party.

XII. SUPPORT ORDER FORMS

Subsection (j) was formerly Civil Rule 67(b).

XIII. DEPENDENT TAX DEDUCTION

Waggoner v. Foster, 904 P.2d 1234 (Alaska 1995), provides that tax deductions for the children should be allocated based on the child's best interests. AS 25.24.152 places some limits on giving the deduction to the parent with less physical custody. Federal income tax law also may limit who can take the deduction.

(Amended by SCO 1417 effective April 15, 2001; by SCO 1526 effective April 15, 2005; by SCO 1686 effective April 15, 2009; by SCO 1782 effective October 15, 2013; by SCO 1800 effective October 15, 2013; and by SCO 1919 effective April 16, 2018)