

IN THE SUPREME COURT FOR THE STATE OF ALASKA
ORDER NO. 1192

Amending Civil Rule 67
and Civil Rule 90.3
concerning child support.

IT IS ORDERED:

1. Civil Rule 67 is amended to provide:

Rule 67. Deposit in Court [- COLLECTION AND ENFORCEMENT OF CHILD SUPPORT PAYMENTS].

[(A)] Upon notice to every other party and upon leave of court, a party may deposit with the court all or any part of any sum of money or any other thing capable of physical delivery which is the subject of the action or due under a judgment. Money deposited with the court under this rule shall be managed in accordance with the provisions of Rule 5, Rules Governing the Administration of All Courts. The court shall release the deposit to the party entitled to it when that party becomes entitled to it. No interest shall accrue against a party making a deposit, to the extent of that deposit, after it is made.

[(B)] ALL ORDERS FOR PAYMENT OR MODIFICATION OF CHILD SUPPORT SHALL BE ENTERED ON A FORM DEVELOPED BY THE ADMINISTRATIVE DIRECTOR. A PARTY MAY LODGE A DUPLICATE OF THE COURT FORM PRODUCED BY A LASER PRINTER OR SIMILAR DEVICE. A DEVICE MAY ALSO PRINT, IN A CONTRASTING TYPESTYLE EQUIVALENT TO THAT PRODUCED BY A TYPEWRITER, TEXT THAT OTHERWISE WOULD HAVE BEEN ENTERED BY A TYPEWRITER OR WORD

PROCESSOR. A PARTY OR ATTORNEY WHO LODGES A DUPLICATE CERTIFIES BY LODGING THE DUPLICATE THAT IT IS IDENTICAL TO THE CURRENT VERSION OF THE COURT FORM.]

2. Civil Rule 90.3 is amended to provide:

Rule 90.3. Child Support Awards.

(a) Guidelines -- Sole or Primary Physical Custody. A child support award in a case in which one parent is awarded sole or primary physical custody as defined by paragraph (f) will be calculated as an amount equal to the adjusted annual income of the non-custodial parent multiplied by a percentage specified in subparagraph (a)(2).

(1) Adjusted annual income as used in this rule means the parent's total income from all sources minus:

(A) mandatory deductions such as federal income tax, social security tax, mandatory retirement deductions and mandatory union dues;

(B) child support and alimony payments arising from prior relationships which are required by other court or administrative proceedings and actually paid; [AND]

(C) child support for children from prior relationships living with the

parent, calculated by using the formula provided by this rule; and

(D)[(C)] work related child care expenses for the children who are the subject of the child support order.

(2) The percentage by which the non-custodial parent's adjusted income must be multiplied in order to calculate the child support award is:

- (A) 20% (.20) for one child;
- (B) 27% (.27) for two children;
- (C) 33% (.33) for three children; and
- (D) an extra 3% (.03) for each additional child.

(3) The court may allow the obligor parent to reduce child support payments up to 50% for any period in which that parent has extended visitation of over 27 consecutive days. The order must specify the amount of the reduction which is allowable if the extended visitation is exercised.

(b) Shared Physical Custody. A child support award in a case in which the parents are awarded shared physical custody as defined by paragraph (f) will be calculated by:

(1) Calculating the annual amount each parent would pay to the other parent under

paragraph (a) assuming the other parent had primary custody.

- (2) Multiplying this amount for each parent by the percentage of time the other parent will have physical custody of the children. However, if the court finds that the percentage of time each parent will have physical custody will not accurately reflect the ratio of funds each parent will directly spend on supporting the children, the court shall vary this percentage to reflect its findings.
- (3) The parent with the larger figure calculated in the preceding subparagraph is the obligor parent and the annual award is equal to the difference between the two figures multiplied by 1.5. However, if this figure is higher than the amount of support which would be calculated under paragraph (a) assuming sole or primary custody, the annual support is the amount calculated under paragraph (a).
- (4) The child support award is to be paid in 12 equal monthly installments unless shared custody is based on the obligor parent having physical custody for periods of 30 consecutive days or more. In that case, the total annual award will be paid in equal installments over those months in which the obligor parent does

not have physical custody. [THE ORDER MUST PROVIDE THAT IF THIS PHYSICAL CUSTODY IS NOT EXERCISED, THE OBLIGOR PARENT MUST PAY ADDITIONAL CHILD SUPPORT IN AN AMOUNT EQUAL TO WHAT MUST BE PAID IN MONTHS IN WHICH THE OBLIGOR PARENT IS NOT ENTITLED TO PHYSICAL CUSTODY.]

(5) The child support order shall provide that failure to exercise sufficient physical custody to qualify for shared physical custody under this rule is grounds for modification of the child support order. Denial of visitation by the custodial parent is not cause to increase child support.

(c) Exceptions.

(1) The court may vary the child support award as calculated under the other provisions of this rule for good cause upon proof by clear and convincing evidence that manifest injustice would result if the support award were not varied. The court must specify in writing the reason for the variation, the amount of support which would have been required but for the variation, and the estimated value of any property conveyed instead of support calculated under the other provisions of this rule. Good cause may include a finding:

- (A) that unusual circumstances, such as especially large family size, significant income of a child, divided custody as defined by paragraph (f) of this rule, health or other extraordinary expenses, or unusually low expenses, 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. The court shall consider the custodial parent's income in this determination; or
- (B) a finding that the parent with the child support obligation has a gross income which is below the poverty level as set forth in the Federal Register. However, a parent who would be required to pay child support pursuant to paragraph (a) or (b) must be ordered to pay a minimum child support amount of no less than \$50.00 per month except as provided in paragraphs (a)(3) and (b).
- (2) Paragraphs (a) and (b) do not apply to the extent that the parent has an adjusted annual income of over \$72,000 [\$60,000]. In such a case, the court may make an additional award only if it is just and proper, taking into account the needs of the children, the standard of

living of the children and the extent to which that standard should be reflective of the supporting parent's ability to pay.

(d) Health Care Coverage [INSURANCE -- CREDITS].

(1) Health Insurance. The court shall address coverage of the children's health care needs and require health insurance for the children if insurance is available to either parent at a reasonable cost. The court shall consider whether the children are eligible for services through the Indian Health Service (or any other entity) or other insurance coverage before ordering the obligor to provide health care coverage through insurance or other means. The court shall allocate equally the cost of this insurance between the parties unless the court orders otherwise for good cause. An obligor's child support obligation will be decreased by the amount of the obligee's portion of health insurance payments ordered by the court and actually paid by the obligor. A child support award will be increased by the obligor's portion of health insurance if the obligee is ordered to, and actually does obtain and pay for insurance. [IN CALCULATING A CHILD SUPPORT AWARD, CREDIT WILL BE GIVEN FOR MEDICAL AND DENTAL INSURANCE, OR EDUCATIONAL PAYMENTS FOR THE CHILDREN

WHICH ARE REQUIRED BY THE COURT OR ADMINISTRATIVE ORDER AND ACTUALLY PAID.]

(2) Uncovered Health Care Expenses. The court shall allocate equally between the parties the cost of reasonable health care expenses not covered by insurance unless the court orders otherwise for good cause, except that a reasonable, uncovered expense in excess of \$5,000 must be allocated based on the parties relative financial circumstances when the expense occurs. A party shall reimburse the other party for his or her share of the uncovered expenses within 30 days of receipt of the bill for the health care, payment verification, and, if applicable, a health insurance statement indicating what portion of the cost is uncovered.

- (e) Child Support Affidavit and Documentation. Each parent in a court proceeding at which child support is involved must file a pleading under oath which states the parent's adjusted annual income and the components of this income as provided in subparagraph (a)(1). This statement must be filed with a party's initial pleading (such as the dissolution petition, divorce complaint or answer, etc.). The [THIS] statement must be accompanied by documentation verifying the income. For any infraction of these rules, the court may withhold or assess costs or attorney's fees as the circumstances of the case and

discouragement of like conduct in the future may require; and such costs and attorney's fees may be imposed upon offending attorneys or parties.

(f) Definitions.

(1) Shared Physical Custody. 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.

(2) Sole or Primary Physical Custody. A parent has sole or primary physical custody of children for purposes of this rule when the other parent has physical control of the children less than 30 percent of the year.

(3) Divided Custody. Parents have divided custody under this rule if one parent has sole or primary physical custody of one or more children of the relationship and the other parent has sole or primary custody of one or more other children of the relationship.

(4) Health Care Expenses. Health care expenses include medical, dental, vision and mental health counseling expenses.

(g) Travel Expenses. After determining an award of child support under this rule, the court may allocate reasonable travel expenses which are necessary to exercise visitation between the

parties as may be just and proper for them to contribute.

(h) Modification.

(1) A final child support award may be modified [IF ALLOWED BY FEDERAL LAW OR] upon a showing of a material change of circumstances as provided by state law. A material change of circumstances will be presumed if support as calculated under this rule is more than 15 percent greater or less than the outstanding support order. For purposes of this paragraph, support includes health insurance payments made pursuant to (d)(1) of this rule.

(2) Child support arrearage may not be modified retroactively. A modification which is effective on or after the date that a motion for modification, or a notice of petition for modification by the Child Support Enforcement Division, is served on the opposing party is not considered a retroactive modification.

(i) State Custody. When the state takes custody of all children of a parent, the parent's support obligation to the state is an amount equal to the adjusted annual income of the parent multiplied by the percentage specified in subparagraph (a)(2). If the state takes custody of some but not all children, the parent's support obligation to the state is an

amount equal to the adjusted annual income of the parent, multiplied by the percentage specified in subparagraph (a)(2) for the total number of the parent's children, multiplied by the number of the parent's children in state custody, divided by the total number of the parent's children. For purposes of this paragraph, a parent's children only include children of the parent who live with the parent, are substantially supported by the parent or who are in state custody.

(j) Support Order Forms. All orders for payment or modification of child support shall be entered on a form developed by the administrative director. A party may lodge a duplicate of the court form produced by a laser printer or similar device. A device may also print, in a contrasting typestyle equivalent to that produced by a typewriter, text that otherwise would have been entered by a typewriter or word processor. A party or attorney who lodges a duplicate certifies by lodging the duplicate that it is identical to the current version of the court form.

NOTE: This rule is adopted under the supreme court's interpretive authority pursuant to Article IV, Section I of the Alaska Constitution. Thus, it may be superseded by legislation even if the legislation does not meet the procedural requirements for changing rules promulgated under Article IV, Section 15.

3. The attached commentary to Civil Rule 90.3 which was prepared by the Child Support Guidelines

Committee will be published in the Rules of Court immediately following Civil Rule 90.3. The commentary has not been adopted or approved by the Supreme Court, but is published for informational purposes and to assist users of Rule 90.3.

DATED: March 10, 1995

EFFECTIVE DATE: July 15, 1995

/s/
Chief Justice Moore

/s/
Justice Rabinowitz

/s/
Justice Matthews

/s/
Justice Compton

/s/
Justice Eastaugh

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 level of support under the rule is comparable to the national average, but it is significantly above what had been a usual support award in Alaska. The increase was necessary to avoid the impoverishment of custodial parents and to minimize the public's burden of supporting children through the Aid to Families with Dependent Children program. However, the primary focus of the increase in support awards was to promote the welfare of the children who benefit from the support.

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(2) 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.

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 [ANY] 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 sole or 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;
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 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. Veteran Administration benefits;
27. G.I. benefits (excluding education allotments);

28. National Guard and Reserves drill pay; and

29. 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).

Means based sources of income such as 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).

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, [DEPRECIATION OF REAL ESTATE,] 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 based on a determination of the potential income of a parent who voluntarily is unemployed or underemployed. 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 also may impute potential income for non-income or low income producing assets.

D. Deductions. A very limited number of expenses may be deducted from income. Mandatory deductions such as taxes and mandatory union dues are allowable.

Child support and alimony payments paid to another person arising out of different cases are deductible if three conditions are met. First, the child support or alimony actually must be paid. Second, it must be required by a court or administrative order. (Support which is paid voluntarily without a court or administrative order may be considered under Rule 90.3(c).) Third, it must relate to a prior relationship. A child support order for children of a second marriage should take into account an order to pay support to children of a first marriage, but not vice-versa. But see commentary VIB2.

A deduction also is allowed for the support of the children of prior relationships even if the party is the custodial parent of the "prior" children and does not make child support payments to the other parent of the children. In this situation support provided directly to the children is calculated by Rule 90.3 as if the children from the prior relationship were the only children.

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.

E. 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. SOLE OR PRIMARY CUSTODY

A. Generally. "Sole or 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 calculations 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 VA.

The calculation of child support for the sole or primary custodial case under 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 \$60,000 per year will not be counted. See Commentary VID.) 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 spouse 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 50% of total support for that month) 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 may consider exceptions pursuant to paragraph (c)(1) of this rule. The court shall insure [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 CUSTODY

A. Generally. "Shared custody" as this term is used in Rule 90.3 means that each parent has physical custody of the child at least thirty percent of the year according to a specified visitation schedule in the decree (110 overnights). "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. 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.

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 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 sole or 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. DIVIDED CUSTODY. THE FORMULA FOR SHARED CUSTODY DESCRIBED ABOVE WAS DEVELOPED PRIMARILY FOR THE SITUATIONS IN WHICH THE PARENTS SHARE CUSTODY OF THEIR ONLY CHILD, OR THE PARENTS SHARE CUSTODY OF SEVERAL CHILDREN, BUT THE CHILDREN STAY TOGETHER. CUSTODY OF SEVERAL CHILDREN ALSO CAN BE DIVIDED SO THAT AT ANY ONE TIME ONE PARENT MAY HAVE PHYSICAL CUSTODY OF ONE CHILD AND THE OTHER MAY HAVE PHYSICAL CUSTODY OF THE OTHER CHILDREN. SUCH AN ARRANGEMENT, DEPENDING ON THE CIRCUMSTANCES, MAY REQUIRE GREATER EXPENDITURES TO

SUPPORT THE CHILDREN BECAUSE IT IS SOMEWHAT LESS EXPENSIVE TO SUPPORT CHILDREN LIVING TOGETHER THAN IN TWO HOUSEHOLDS AT THE SAME TIME.

THE FIRST STEP IN DETERMINING SUPPORT IN SUCH A DIVIDED CUSTODY ARRANGEMENT IS TO APPLY THE USUAL SHARED CUSTODY FORMULA BY AVERAGING THE TIME ALL CHILDREN WILL SPEND WITH EACH PARENT. FOR EXAMPLE, IF ONE CHILD WILL LIVE WITH THE FATHER ALL OF THE TIME AND TWO WITH THE MOTHER, SUPPORT IS CALCULATED AS IF ALL THE CHILDREN SPENT ONE-THIRD OF THE TIME WITH THE FATHER. THE APPROPRIATE PERCENTAGE FIGURE FOR ALL THE CHILDREN (IN THE EXAMPLE, 3 OR 33%) THEN IS APPLIED.

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). 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...." SEE COMMENTARY VIB.]

C.[D.] 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. [ONE DIFFICULTY WITH TYING THE AMOUNT OF SUPPORT IN SHARED CUSTODY CASES TO THE AMOUNT OF TIME EACH PARENT IS EXPECTED TO SPEND WITH THE CHILDREN IS THAT PARENTS OFTEN FAIL TO EXERCISE VISITATION. IF THIS REGULARLY OCCURS, THE CUSTODIAL PARENT MAY BE FORCED TO SEEK A MODIFICATION BASED ON THE FAILURE TO EXERCISE VISITATION. HOWEVER, WHEN A LARGE BLOCK OF VISITATION IS NOT EXERCISED BY THE OBLIGOR, 90.3(B)(4) PROVIDES A REMEDY WITHOUT RETURNING TO COURT.

THE PRINCIPLE EMPLOYED IN THIS PROVISION IS THAT ANNUAL SHARED CHILD SUPPORT WILL BE PAID OVER THOSE MONTHS WHEN THE OBLIGOR PARENT DOES NOT HAVE CUSTODY FOR A MONTH FOR WHICH HE OR SHE WAS SUPPOSED TO EXERCISE CUSTODY, THE OBLIGOR MUST MAKE AN ADDITIONAL SUPPORT PAYMENT EQUAL TO HIS OR HER OTHER PAYMENTS FOR OTHER MONTHS.]

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 upon proof by the parent requesting support be varied that there is 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© 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 case. Three situations constituting "good cause" are discussed below in sections VIB-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 unusual circumstances, 90.3(c)(1)(A), or the exceptions for low or high incomes, 90.3(c)(1)(B) and (c)(2), 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. The subparagraph specifies several possible factors that the court may consider when deciding whether unusual circumstances exist. 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. [THIS WOULD OCCUR IF PAYMENT OF SUPPORT CALCULATED UNDER THE GUIDELINES WOULD CAUSE SUBSTANTIAL HARDSHIP TO THE "SUBSEQUENT" CHILDREN. IN CONSIDERING WHETHER SUBSTANTIAL HARDSHIP EXISTS, A COURT SHOULD CONSIDER THE INCOME, INCLUDING POTENTIAL INCOME, OF BOTH PARENTS OF 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.

[IN ADDITION, THE COURT SHOULD CONSIDER WHETHER THE "SUBSEQUENT" CHILDREN WERE BORN OR ADOPTED BEFORE RULE 90.3 WENT INTO EFFECT IN AUGUST 1987. A PARENT WHO HAD "SUBSEQUENT" CHILDREN BEFORE THIS DATE MAY HAVE HAD A REASONABLE EXPECTATION OF SUPPORTING THE "PRIOR" CHILDREN WITH SUBSTANTIALLY LESS SUPPORT THAN REQUIRED BY RULE 90.3. THUS, THE INCREASE IN SUPPORT UNDER RULE 90.3 AT LEAST INITIALLY MAY BE LESSENED TO ALLOW THE PARENT TO REORIENT HIS OR HER FINANCIAL AFFAIRS. HOWEVER, THIS REDUCTION OF THE 90.3 GUIDELINES ONLY MAY OCCUR WHEN SUBSTANTIAL HARDSHIP TO THE CHILDREN (NOT THE PARENT) OTHERWISE WOULD OCCUR.]

3. Divided Custody. The formula for shared custody described above was developed primarily for the

situations in which the parents share custody of their only child, or the parents share custody of several children, but the children stay together. Custody of several children also can be divided so that at any one time one parent may have physical custody of one child and the other may have physical custody of the other children. Such an arrangement, depending on the circumstances, may require greater expenditures to support the children because it is somewhat less expensive to support children living together than in two households at the same time.

The first step in determining support in such a divided custody arrangement is to apply the usual shared custody formula in 90.3(b) by averaging the time all children will spend with each parent. For example, if one child will live with the father all of the time and two with the mother, support is calculated as if all the children spent one-third of the time with the father. The appropriate percentage figure for all the children (in the example, 3 or 33%) then is applied.

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). 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...."

[3. *PRIOR CHILDREN.* RULE 90.3(A) PROVIDES FOR A DEDUCTION FROM INCOME FOR AN OBLIGOR'S PAYMENT OF CHILD SUPPORT TO SUPPORT CHILDREN OF A PRIOR RELATIONSHIP. HOWEVER, NO EXPLICIT DEDUCTION IS ALLOWED WHEN THE "PRIOR" CHILDREN LIVE WITH THE OBLIGOR AND THUS THE OBLIGOR FURNISHES SUPPORT DIRECTLY TO THE CHILDREN. IN SUCH A SITUATION, THE COURT SHOULD REDUCE THE SUPPORT OF THE OBLIGOR WHEN NECESSARY TO AVOID SUBSTANTIAL HARDSHIP TO THE "PRIOR" CHILDREN.]

4. *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.

5. *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.

6. *Income of New Spouse.* 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.

7. *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.

8. *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 [HOWEVER, COURTS] should use their powers to strictly enforce the visitation and custody rights of obligor parents.

9. *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) [OP. NO. 3477 (JULY 28, 1989, ALASKA)].

C. *Low Income of Obligor.* 90.3(c)(1)(B) provides that the guidelines do not apply if the obligor has a gross income below the federal poverty level. The applicable figure from the Federal Register is for the obligor alone, without regard to any subsequent family of the obligor. Subsequent children, and any income from a subsequent spouse, are relevant, if at all, only under

90.3(c)(1)(A) concerning the unusual circumstances exception.

Even if the obligor has an income of less than the poverty level, or no income at all, a minimum support of \$50.00 per month applies. This \$50.00 minimum support applies for all children, not to each child separately. The minimum level may be reduced under 90.3(a)(3) based on a visitation credit, or reduced under 90.3(b) based on the offset of the other parent's support obligation.

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 \$72,000 [\$60,000, unless the other parent is able to present evidence which justifies departure from this general rule. The factors which the court should consider in such a determination are specified in the rule.

VII. HEALTH CARE COVERAGE [MEDICAL, EDUCATIONAL AND INSURANCE PAYMENTS]

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. [THE RULE ALSO PROVIDES THAT THE OBLIGOR WILL RECEIVE CREDIT AGAINST THE CHILD SUPPORT OBLIGATION FOR ANY SUCH PAYMENT IF THE PAYMENT IS REQUIRED BY THE COURT. ONLY ACTUAL COST TO THE OBLIGOR FOR THE CHILDREN MAY BE CREDITED.] 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 insure the children involved -- not the parent, the parent's new spouse or children of another relationship. This allocation 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.

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. 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 a reasonable uncovered expense in excess of \$5,000 will be addressed by the court when the expense arises.

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

Each parent in a proceeding involving a determination of child support must provide the court with an income statement under oath. The rule also requires that the income statement of a parent be verified with documentation of current and past income. Suitable documentation of earnings 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.

IX. TRAVEL EXPENSES

The court may review the circumstances of each case, including the award of support, to determine how to 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 the custodial parent's ability to provide the basic necessities for the children. Such a basic level of support must be placed above visitation if sufficient funds are not available for both.

X. MODIFICATION

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). 90.3(b) presumptively defines a material change in circumstances, whether based on a change in the parties' incomes or a significant amendment to the rule, as whenever the change would result in an increase or decrease of support under the rule of at least 15%.

[FEDERAL LAW WILL REQUIRE PERIODIC REVIEW OF CERTAIN SUPPORT ORDERS EVEN IN THE ABSENCE OF A SIGNIFICANT CHANGE IN CIRCUMSTANCES BEGINNING IN OCTOBER 1990 AND TO A GREATER EXTENT IN OCTOBER 1993. SEE FAMILY SUPPORT ACT OF 1988, P.L. 100-485, SECTION 103(C).]

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(g)(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 Enforcement 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.

XI. STATE CUSTODY

If the state takes 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 takes custody of only some of a parent's children. Therefore paragraph (b) of the rule, including the 1.5 multiplier in (b)(3), does not apply. 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 state is taking custody. For example, the state might take 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 state has custody of two of the parent's three children). Note that the calculation only takes into account children which are either in state 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.

Note that the deduction for child support paid for prior children specified in paragraph (a)(1)(B) of the rule would still apply in calculating annual adjusted income. The deduction for prior children living with the parent in (a)(1)(C) would not apply because these children are already taken into account as children living with the parent.

XII. SUPPORT ORDER FORMS

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