

THIRD JUDICIAL DISTRICT AT PALMER

BRISTOL PALIN

Petitioner,

v.

LEVI JOHNSTON,

Respondent.

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)
) **PARTIAL OPPOSITION**
) **TO MOTION FOR INTERIM**
) **CHILD SUPPORT**
)
)

Case No. 3PA-S09-2261 CI

There is no question that the upper limit available for determination of child support in Alaska is \$100,000 “unless the other parent is able to present evidence which justifies departure from this rule.” See AK.R.Civ.P.90.3(D). There is no question that interim child support is available by statute. See AS 25.24.140(a)(3). There is no question that, ordinarily, AK.R.Civ.P. 90.3 controls, except in cases involving extraordinary circumstances¹, but “[t]he determination of future income may be especially difficult when the obligor has had erratic income in the past. In such a situation, the court may choose to average the obligor’s past income over several years.” See AK.R.Civ.P. 90.3 (E). There is no rule against an income average based award coupled with a prophylactic to ensure Bristol may make a timely motion to modify. Cf *In re the Marriage of Mosley*, 165 Cal.App. 4th 1375; 82 Cal.Rptr. 497 (Cal.App. 2008).²

¹ *Vachon v. Pugliese*, 931 P.2d 371 (Alaska 1996)

²

As the California Court of Appeals put it: “[t]he trial court in *In re Marriage of Ostler & Smith*, supra, 223 Cal.App.3d 33, got it right when it stated: “ ‘No future bonus is

Levi Johnston's income spiked dramatically in 2009 as a result of media exposure generated by the Presidential campaign of 2008. Prior to 2009, Johnston never made over approximately \$10,000 annually. He was a minor for three of those years. If this court does not find that Johnston's case constitutes "extraordinary" circumstances under AK.R.Civ.P. 90.3 (E), Johnston urges the court to find "unusual circumstances" justifying a departure from the rule. See AK.R.Civ.P. 90.3 (c)(1).

Johnston contends that : (1) unusual circumstances exist; and (2) "these unusual circumstances make application of the usual formula unjust." See Commentary to AK.R.Civ.P. (c)(1). Here is the pertinent language of the rule:

The court may vary the child support award 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 relief available under 90.3 (c) (1) does not preclude an income averaging approach. Accordingly, under principles of equity and pursuant to either AK.R.Civ.P. 90.3 (c) (1) or AK.R.Civ.P. 90.3 (E), this court has authority to deviate from the percentage schedule. Further, the court's discretion is relatively broad. As the Supreme Court put it in *Coats v. Finn*, 779 P.2d 775, 777 (Alaska 1989):

guaranteed. It would therefore not be appropriate to base a support order on Husband's bonus income and then require him to file motions to modify at such times as the bonus is reduced. It would be more fair to all parties to base the support order on Husband's income from salary ... , and to allocate a portion of the future bonus income to the children and to Wife by way of a percentage interest so that future litigation will not be necessary as the bonus income changes.' " (Id. at pp. 41-42.) It would be an abuse of discretion for the court to leave Paul near penniless while he awaits the potential of a bonus each year, especially in light of the current plight of homebuilders. See *In re the Marriage of Mosley*, 82.Cal.Rptr. 497, 505,506.

Under the rule, "good cause" may include any of several enumerated exceptions. Alaska R. Civ. P. 90.3(c)(1)(A) and (B), (6). However, the language of the rule contemplates that the exceptions listed under subsection (c)(1) are not exclusive. As a result, we are not limited in our determination whether other circumstances might constitute "good cause" for departing from the rule's formula.

In short, there is ample authority for this court to deviate from the rule's percentage schedule based on the following : (1) Johnston's viability as a media figure is too speculative to assess at this juncture; (2) that Johnston's income average over the past five years shows that the income he earned in 2009 was anomalous; and (3) that Johnston's prospective income is essentially unknowable, not just difficult to estimate.

The Supreme Court's discussion of "good cause" in the case involving Coats and Finn should be the analytical guidepost here. As the Supreme Court put it:

"Good cause" is a relative term. Its meaning must be determined by the context in which it is used and the nature of the action and procedures involved. Wray v. Folsom, 166 F. Supp. 390, 394 (W.D. Ark. 1958). In the present context, when a party demonstrates that application of the rule's formula will produce an unfair result, common sense dictates that "good cause" exists to depart from the formula. For these purposes, an unfair result is an award which substantially exceeds or falls short of the amount needed to provide for the child's reasonable needs.

Further, "good cause" may be present when application of the formula produces a result which requires the non-custodial parent, unreasonably, to contribute substantially more or less than his or her fair share of the amount needed to satisfy the

child's reasonable needs. In other non-enumerated cases, factors may exist which would establish "cause" for varying an award as calculated using the formula. See *Coats v. Finn*, at 777.

Prospectively setting Levi Johnston's child support obligation at \$1,750 a month would constitute a manifest injustice. Substantive Due Process³ militates in favor of deviation from the schedule. Alaska has no legitimate interest in pinning Levi Johnston's income at a level he enjoyed during the media activity that attended the aftermath of the 2008 presidential campaign. Therefore, in addition to equity, constitutional principles militate in favor of a departure.

The Petitioner cited two cases as authority⁴ for its motion for an interim award of \$18,350 (based on \$1,750 monthly arrears for 13 months or \$22,750 minus the \$4,400 already paid). While it is true that *Vachon v. Pugliese*, 931 P.2d 371, 381-382 (Alaska 1996) stands for the proposition that "extraordinary circumstances" permit a departure, nothing else in the opinion is pertinent to this case. *Vachon* dealt with a parent moving out of state and problems associated with "out of pocket" expenses, not speculative prospective income. If

³ The Third Circuit pointed out that courts analyzing equal protection and substantive due process claims "...employ essentially the same standard of review in cases involving economic or social legislation [but] the focus of the two clauses is different...Substantive due process looks to whether the law at issue bears any rational relationship to any interest that the state legitimately may promote." *Knight v. Tape, Inc.*, 935 F.2d 617, 627 (3rd Cir. 1991).

⁴ *Skinner v. Hagberg*, 183 P.3d 486, 490 (Alaska 2008) and *Vachon v. Pugliese*, 931 P.2d 371, 381-382 (Alaska 1996). *Skinner* was cited solely for the generally known standard in Alaska for child support from the time of birth regardless of notice or other equitable defenses available in other states. Johnston does not dispute the duty to support—only the amount of the obligation. *Vachon* merits a little discussion, something addressed here.

Johnston's future income were not so uncertain, he would not argue against the application of the schedule for the same reasons the court in *Vachon* observed. However, because this case involves speculative prospective income, the predictable value of an amount set under the percentage rules would also constitute a manifest injustice. Therefore, while the facility of a straight forward calculation is judicially economic, rational and commendable, a facile calculation in this case would result in undue hardship to Johnston and an inequitable result that simultaneously violates principles of substantive due process. The Petitioner's reliance on *Vachon* was therefore inapposite.

CONCLUSION

Levi Johnston stands before this court as a 19-year-old with good hopeful for an entertainment career but the chances of increased income are as unknowable as it would be for any young person working his way into the entertainment industry: not particularly good. Although Johnston hopes to be an exception to the rule, the prospect of continued success in the entertainment industry is so speculative as to be conjectural. Maybe he will, maybe he wont.

Johnston agrees to pay 20 per cent of his 2009 income, after deductions allowed under 90.3. Johnston agrees to provide quarterly income reports to the Petitioner, something that would allow Bristol to file a motion for modification, if appropriate, in a timely manner or work out the figures between the parties. Johnston agrees that any such motion would be heard on shortened time if necessary and relate back to the beginning of the quarter in which

his income rose. Because this court is not permitted under the rule ⁵to order a percentage of the prospective income, and must therefore set a specific amount, equity militates in favor of income averaging with an order providing Bristol with the above referenced protections.

Under such a regime, an income-averaging order would not cause Bristol or the minor child any prejudice, would not require court oversight, and would facilitate equitable disposition of any reasonable claim for increased child support.

Johnston requests leave to supply accounting data to the court prior to any disposition of this motion. Johnston further requests an evidentiary hearing, as well as interim discovery relating to Bristol Palin's income.

DATED this 4th day of February, 2010

Rex Lamont Butler ABN 8310105
REX LAMONT BUTLER AND ASSOCIATES, INC., P.C.
Counsel for Levi Johnston

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"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." See AK.R.Civ.P. 90.3 (E).

THIRD JUDICIAL DISTRICT AT PALMER

BRISTOL PALIN

Petitioner,

v.

LEVI JOHNSTON.

Respondent.

Case No. 3PA-S09-2261 CI

STATE OF ALASKA

THIRD JUDICIAL DISTRICT

**)AFFIDAVIT OF LEVI JOHNSTON
)IN SUPPORT OF PARTIAL OPPOSITION
)TO MOTION FOR INTERIM
)CHILD SUPPORT**

SS:

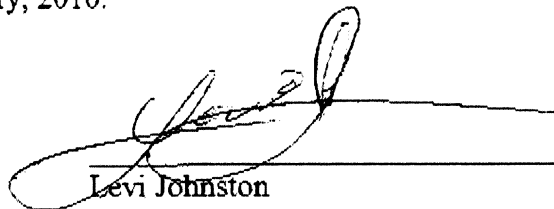
I, Levi Johnston, upon oath or affirmation, state as follows:

1. I am the respondent in the above entitled matter.
2. During 2009, I accepted payment for various contracts relating to entertainment fees.
3. The income was in excess of \$100,000.00, but I am still working on obtaining the accounting so I can only say I am not sure what the total amount will add up to.
4. I did not earn anywhere near that much in the past five years.
5. I have no idea how much I will make in 2010, but I can say that at this point the only contractual agreement that would provide further income at this point is for \$25,000 and some contingencies based on my Playgirl shoot.
6. I have not been able to spend much time with my child, not by choice, but because I have had some difficulty obtaining an agreement for visitation over the past year or so but things have been getting better of late.


7. I would agree to pay 20 percent of whatever my gross minus mandatory deductions for 2009 (in accordance with 90.3) in a lump sum but I do not see how I could possibly pay the \$1,750 a month that Bristol is requesting over the course of the coming year.

Further your affiant sayeth not.

DATED this 4th day of February, 2010.


Levi Johnston

SUBSCRIBED TO AND SWORN BEFORE ME this 4th day of February, 2010.


Notary Public State of Alaska
My Commission Ex: 03-06-10



IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
AT PALMER

Filed in the Trial Courts
State of Alaska Third Judicial District
At Palmer

FEB 09 2010

BRISTOL PALIN

Petitioner,

Clerk of the Trial Courts
By _____ Deputy

v

LEVI JOHNSTON

Respondent.

CASE NO. 3PA-09-2261 CI

CHILD CUSTODY JURISDICTION AFFIDAVIT

I, Levi Johnston, say on oath or affirm under penalty of perjury that:

1. The following children are the subject of the present custody proceedings:

Child's Name <u>Tripp E. Johnston</u>		Place of Birth <u>Wasilla, Alaska</u>		Birthdate <u>12/27/08</u>	Sex <u>M</u>
Present Address (since _____): [REDACTED]			Who Has Custody		Relationship <u>Father</u>
Prior Residences for past 5 years (dates)	City & State	Person Child Lived With (Name & Current Address)			Relationship
to					
to					
to					
to					

Child's Name		Place of Birth		Birthdate	Sex
Present Address (since ____ / ____ / ____):			Who Has Custody		Relationship
Prior Residences for past 5 years (dates)	City & State	Person Child Lived With (Name & Current Address)			Relationship
to					
to					
to					
to					

Child's Name		Place of Birth		Birthdate	Sex
Present Address (since ____ / ____ / ____):			Who Has Custody		Relationship
Prior Residences for past 5 years (dates)	City & State	Person Child Lived With (Name & Current Address)		Relationship	
to					
to					
to					
to					

Child's Name		Place of Birth		Birthdate	Sex
Present Address (since ____ / ____ / ____)			Who Has Custody		Relationship
Prior Residences for past 5 years (dates)	City & State	Person Child Lived With (Name & Current Address)		Relationship	
to					
to					
to					
to					

Child's Name		Place of Birth		Birthdate	Sex
Present Address (since ____ / ____ / ____)			Who Has Custody		Relationship
Prior Residences for past 5 years (dates)	City & State	Person Child Lived With (Name & Current Address)		Relationship	
to					
to					
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2. Have you participated as a party, a witness or in another capacity in another proceeding concerning the custody of any of the above children or visitation with them? ☐ Yes ☐ No

If yes, describe the previous child custody determination:

Name of Court _____ Case Number _____ Date _____

Court's Decision: _____

3. Do you know of a proceeding that could affect the current proceeding (including a proceeding relating to domestic violence, protective orders, termination of parental rights, adoption or enforcement of a court order)? ☐ Yes ☐ No

If so, describe: Name of Court _____ Case Number _____

Nature of Proceeding: _____

4. Do you know of any person not a party to this proceeding who has physical custody of any of the above children or claims to have the right to physical custody, legal custody, or visitation? ☐ Yes ☐ No


If so, list each person's name and address and what the person claims: _____

I swear or affirm under penalty of perjury that my statements in this affidavit are true to the best of my knowledge and belief.


Signature

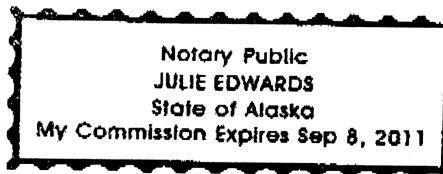
Subscribed and sworn to or affirmed before me at Anchorage, Alaska,
on Feb 5, 2010.
Date

(SEAL)


Clerk of Court, Notary Public or other
person authorized to administer oaths.
My Commission Expires: Sept 8, 2011

I certify that on _____
a copy of this affidavit was mailed to
the other party in this case (list name):

Signature: _____



Note: Each party has a continuing duty to inform the court of any other court proceeding in this state or any other state concerning any of the children listed above.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT PALMER

BRISTOL PALIN

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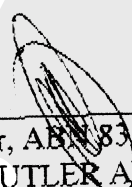
Respondent.

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) **NOTICE OF FILING UNDER SEAL**
) **RELATING TO RESPONDENT'S**
) **PARTIAL OPPOSITION**
) **TO MOTION FOR INTERIM**
) **CHILD SUPPORT**
)
)

Case No. 3PA-S09-2261 CI

COMES NOW the Respondent, Levi Johnston, and, pursuant to an agreement with the Petitioner, hereby gives Notice of Filing Johnston's financial data (90.3 Affidavit) under Seal.

DATED this 5th day of February 2010.



Rex Lamont Butler, ABN 8310105
REX LAMONT BUTLER AND ASSOCIATES, INC., P.C.
Counsel for Levi Johnston

BRISTOL PALIN

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LEVI JOHNSTON,

Respondent.

CERTIFICATE OF SERVICE

Case No. 3PA-S09-2261 CI

I hereby certify that a true and correct copy of the following were served by United States Mail on February 5, 2010 upon Thomas Van Flein, Attorney for the Petitioner:

1. Partial Opposition to Motion for Interim Child Support;
2. Affidavit of Levi Johnston in Support of Partial Opposition to Motion for Interim Child Support;
3. UCCJA Affidavit;
4. Preliminary 90.3 worksheet/affidavit; and,
5. Notice of filing financial data under seal.

DATED this 5th day of February 2010.

Rex L. Butler