

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

In the Matter of:)
)
A. W.) OAH No. 10-0636-CSS
) CSSD No. 001134271
_____)

DECISION AND ORDER

I. Introduction

The obligor, A. W., has appealed a replacement Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued in his case on December 21, 2010. The obligee child is M., age 6. The other party is J. R. R.

The formal hearing was held on March 3, 2011. Both parties appeared by telephone. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded.

Based on the record as a whole and after careful consideration, CSSD's replacement Administrative Child Support and Medical Support Order dated December 21, 2010, is affirmed.

II. Facts

A. Procedural History

CSSD served Mr. W. with a Notice of Paternity and Financial Responsibility on March 5, 2005.¹ His paternity was established by genetic testing² and CSSD issued an Administrative Child Support and Medical Support Order on June 9, 2005.³ That order was served on his roommate at the time.⁴ Mr. W. did not appeal that order, but on January 23, 2006, he filed a Motion to Vacate Default Order.⁵ CSSD stopped the default review seven months later because Mr. W. had not submitted any financial information with his request for a default review. Mr. W. submitted another motion for a default review on March 25, 2010 and filed the necessary information on June 9, 2010.⁶ CSSD granted the motion and issued a replacement

¹ Exh. 1.
² Exh. 3.
³ Exh. 4.
⁴ Exh. 4 at pg. 9.
⁵ Exh. 5.
⁶ Exhs. 9-10.

Administrative Child Support and Medical Support Order dated December 21, 2010.⁷ The revised order set Mr. W.'s ongoing child support at \$266 per month for one child, with arrears of \$9,987.40 for the period from November 2004 through December 2010.⁸ On December 27, 2010, Mr. W. filed an appeal and requested a formal hearing.⁹

B. Material Facts

Mr. W. and Ms. R. are the parents of M., 6 years of age. Ms. R. currently has custody, but Mr. W. had custody of the child from January 2006 through May 2007 which Ms. R. was incarcerated. He is not liable for support for that period of time.

Prior to M.'s birth, Mr. W. was incarcerated for two extended periods of time, from 1992-1996 and 1996-1999. Since her birth he has been back in jail seven other times, but for most of them, just one or two days. The two exceptions are January 2010, when he was incarcerated for one week and January 2011, when he was in jail for one month.¹⁰

Mr. W. is married; he and his wife, N.-E. have two children, age 4 & 5, for whom Mr. W. provides the child care. He last worked in 1999 as a laborer earning the minimum wage and in 2006, when he earned \$184 from a local security agency.¹¹ Other than that Mr. W. has not had a substantial job outside the home for many years. He and two other friends started a detail shop recently, but it was open for only about one month because his business partners were incarcerated. He also thought about a welding apprenticeship but it required a driver's license which he did not have after CSSD initiated a licensing action in 2006. Finally, Mr. W. testified that he has looked for work in the past but not recently. He could not list any employers with whom he had applied for work.

Mr. W. claims that he is currently disabled. Mr. W. testified that he was injured on January 29th and now cannot walk for three months, after which he has to complete three to four months of rehabilitation. Mr. W. did not document his claimed incapacitation.

III. Discussion

The person who filed the appeal, in this case, Mr. W., has the burden of proving by a preponderance of the evidence that the agency's new Administrative Child Support and Medical

⁷ Exh. 6.
⁸ Exh. 13 at pgs. 3-4.
⁹ Exh. 14.
¹⁰ Post-Hearing Brief at pg. 1.
¹¹ *Id.*

Support Order is incorrect.¹² It is undisputed that Mr. W. is not liable for support from January 2006 through May 2007 while he had custody of M. For the other time periods, Mr. W.'s chief argument is that his child support should be set in the statutory minimum amount of \$50 per month because his income has not exceeded the poverty level since the child support action was initiated against him.

Civil Rule 90.3(a)(1) provides that an obligor's child support amount is to be calculated based on his or her "total income from all sources." Under Alaska law, an obligor parent may request that CSSD vacate and reissue a child support order previously calculated from a default income amount, not the person's actual income and ability to pay.¹³ The obligor has the burden of proving his or her earning capacity.¹⁴

In this case, after Mr. W. requested a default review and provided income information, CSSD recalculated his child support obligation and issued a new administrative order to replace the child support order issued in 2005.¹⁵ CSSD claims that Mr. W. is voluntarily underemployed and that its original Administrative Child Support and Medical Support Order should be reinstated or, in the alternative, that the replacement order issued in December 2010 should be affirmed.¹⁶ If a parent is found to be voluntarily and unreasonably unemployed or underemployed, his or her child support amount may be calculated from that parent's "potential income," which should be based on his or her "work history, qualifications and job opportunities."¹⁷

In cases in which CSSD is claiming voluntary unemployment or underemployment, the court or administrative law judge must determine whether the parent has engaged in voluntary conduct "for the purpose of becoming or remaining unemployed."¹⁸ It is also necessary to determine whether the parent's unemployment or underemployment is unreasonable. An integral part of the analysis is whether the parent's lack of employment is a result of "economic factors," as in being laid off, or of "purely personal choices."¹⁹ It is not necessary to prove the individual

¹² 15 AAC 05.030(h).

¹³ AS 25.27.195(b).

¹⁴ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

¹⁵ Exh. 13.

¹⁶ Exh. 6 at pg. 4.

¹⁷ Civil Rule 90.3(a)(4).

¹⁸ *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

¹⁹ *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

was purposefully avoiding a support obligation, or acting in bad faith, in order to impute income to a noncustodial parent.²⁰

The Alaska Supreme Court further explained the essence of the analysis in *Beaudoin v. Beaudoin*²¹ by stating that “the relevant inquiry under Civil Rule 90.3 is . . . whether a parent’s current situation and earnings reflect a voluntary and unreasonable decision to earn less than the parent is capable of earning.” An obligor parent is free to change jobs and careers, but the custodial parent and child should not have to finance the obligor parent’s employment and lifestyle choices.²² The commentary to Civil Rule 90.3 directs that tribunals adjudicating child support “shall consider the totality of the circumstances in deciding whether to impute income.”²³

Based on the totality of the circumstances, CSSD’s replacement Administrative Child Support and Medical Support Order is correct. Mr. W. is voluntarily and unreasonably unemployed, primarily from his own choice. Officially, he has been aware of his obligation to support M. since his paternity of her was established in 2005, yet he has not made any significant attempt to find employment since then. Granted, it must be difficult for the obligor to find employment when he has a criminal record, but he has not even been trying to locate work. Rather, he has chosen instead to place his available energies into providing child care services for his subsequent children. On the one hand this is to be commended, but in Alaska his duty to support M. takes priority over other debts, obligations and lifestyle decisions, including subsequent children.²⁴ The minimum wage is the appropriate income amount to use because Mr. W. is not a skilled laborer such that other figures such as the average wage should be used.

Finally, an obligor who claims he or she cannot work or pay child support because of a disability or similar impairment, must provide sufficient proof of the medical condition such as testimony or other evidence from a physician.²⁵ Mr. W. testified that he is disabled from an injury he received on January 29th. He did not provide any evidence of that alleged disability, so the child support amount set by CSSD should continue on into 2011.

²⁰ *Kowalski*, 806 P.2d at 1371.

²¹ 24 P.3d 523 (Alaska 2001).

²² *Olmstead v. Ziegler*, 42 P.3d 1102, 1105 (Alaska 2002).

²³ Civil Rule 90.3, Commentary III.C.

²⁴ *See Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

²⁵ *Kowalski* at 1371.

IV. Conclusion

Mr. W. did not meet his burden of proving CSSD’s December 21, 2010, replacement Administrative Child Support and Medical Support Order is incorrect. Mr. W. is voluntarily and unreasonably unemployed, and as a result, his child support obligation as set forth by CSSD in the default review is correct. CSSD has calculated his child support based on the minimum wage and the agency’s determination should be affirmed.

V. Child Support Order

- CSSD’s replacement Administrative Child Support and Medical Support Order dated December 21, 2010, is affirmed.

DATED this 4th day of April, 2011.

By: Signed
 Kay L. Howard
 Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Under AS 25.27.062 and AS 25.27.250, the obligor’s income and property are subject to withholding. Without further notice, a withholding order may be served on any person, political subdivision, department of the State, or other entity.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 25.27.210 and Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 22nd day of April, 2011.

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

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