

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

IN THE MATTER OF:)

N. T. C.)

) OAH No. 11-0038-CSS

) CSSD No. 001164456

DECISION AND ORDER

I. Introduction

N. T. C. appeals an Amended Administrative Child and Medical Support Order that the Child Support Services Division (“CSSD”) issued on January 13, 2011. The obligee child is B., who is two years old. The custodian is S. M. M. The formal hearing was held on February 17, 2011. Mr. C. appeared in person; Ms. M. participated by telephone. Erinn Brian, Child Support Specialist, represented CSSD.

Based on the record and after careful consideration, Mr. C.’s child support is set at \$50 per month for July and August 2009; \$188 per month for February through May 2010 and August through December 2010; and \$188 per month, effective January 2011 and ongoing.

II. Facts

A. Procedural History

Ms. M. began receiving public assistance benefits for B. in July 2009.¹ CSSD began the process of establishing Mr. C.’s support obligation by requesting financial information from him and issuing an administrative child support order on August 31, 2010.² He requested an administrative review, after which CSSD issued an Amended Administrative Child and Medical Support Order on January 13, 2011, that set Mr. C.’s ongoing child support at \$201 per month, with arrears of \$2,277 for the period from July 2009 through January 2011.³ Mr. C. appealed on January 24, 2011, asserting he and Ms. M. lived together for part of the time, plus he is currently unemployed.⁴

¹ Pre-Hearing Brief at pg. 1; Exh. 3 at pg. 9.

² Exhs. 1-2.

³ Exh. 3.

⁴ Exh. 4.

A. *Material Facts*

Mr. C. and Ms. M. are the parents of B., age 2. The parents have had an on-again, off-again relationship at times. Both of them testified they lived together from September 2009 through January 2010, and again during June and July of 2010. During the hearing CSSD agreed that child support for those seven months should be removed.

Mr. C. is currently unemployed. He was incarcerated for 3½ weeks in August 2010 but continued working after his release at C. K., where he had been employed as a line cook since February. His last day at C. K. was November 10, 2010. Mr. C. had been having difficulties getting to work on time because he did not have transportation. That day, he was told not to come to work if he was going to be late again, so he did not go back. Mr. C. was then hired at Wendy's but after the orientation he decided it was too far to go for work and he did not return. He also did not notify the employer he had changed his mind about working there.

Mr. C. lives with a friend who pays the rent; he contributes food. He is taking an online class in Social Science with the goal of becoming a Social Worker. He does not have a computer so he does his class work at the library.

In 2009, Mr. C. was unemployed. He did receive unemployment benefits of \$1,288, which yields a child support amount of \$50 per month, the minimum allowed by law.⁵ In 2010, Mr. C. earned \$10,869.25 in wages and received \$1,636 in unemployment benefits, for total income of \$12,505.25.⁶ That income figure results in a monthly child support amount of \$188 per month.⁷ CSSD calculated his 2011 and ongoing support amount at \$201 per month, which is based on the Alaska minimum wage of \$7.75 per hour extrapolated for one full year.⁸

III. Discussion

Mr. C. has appealed his child support order primarily because he is unemployed. As the person who filed the appeal, Mr. C. has the burden of proving by a preponderance of the evidence that the child support order is incorrect.⁹

⁵ Civil Rule 90.3(c)(3).

⁶ See Exh. 5 at pgs. 1-2.

⁷ Attachment A.

⁸ Exh. 3 at pg. 8.

⁹ 15 AAC 05.030(h).

A parent is obligated both by statute and at common law to support his or her children.¹⁰ This obligation begins when the child is born, but by regulation, CSSD only collects support from the date the custodial parent requested child support services, or the date public assistance or foster care was initiated on behalf of the child(ren).¹¹ In this case, Ms. M. began receiving public assistance in July 2009, so that is when Mr. C.'s obligation to pay support through CSSD begins.

Civil Rule 90.3(a)(1) provides that an Obligor's child support is to be calculated based on his or her "total income from all sources," minus mandatory deductions such as taxes and Social Security. CSSD correctly calculated Mr. C.'s 2009 child support at \$50 per month based on his lack of income.¹²

For 2010, CSSD's amended order calculated Mr. C.'s child support for 2010 at \$148 per month.¹³ However, the most recent data provided by the Alaska Department of Labor and Workforce Development indicates that he earned about \$500 more than the figure CSSD had available to it when the amended order was issued.¹⁴ Mr. C.'s child support is now correctly calculated at \$188 per month.

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."¹⁵ There are three parts to this analysis – first, whether the parent has engaged in voluntary conduct "for the purpose of becoming or remaining unemployed."¹⁶ The second is 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."¹⁷

¹⁰ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹¹ 15 AAC 125.105(a)(1)-(2).

¹² It appears that Mr. C.'s lack of income may have been due to him being incarcerated at that time, which would result in a \$50 per month support order. This issue was not discussed at the hearing, but an examination of the record indicates that CSSD did not insert the PFD into any of its calculations for Mr. C. Typically the PFD is always included for Alaska residents unless they have been incarcerated.

¹³ Exh. 3 at pg. 7.

¹⁴ See Exh. 5 & Exh. 3 at pg. 7.

¹⁵ Civil Rule 90.3(a)(4).

¹⁶ *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

¹⁷ *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

It is not necessary to prove the individual was purposefully avoiding a support obligation, or acting in bad faith, in order to impute income to a noncustodial parent.¹⁸ The Alaska Supreme Court explained the essence of the analysis in the case of *Beaudoin v. Beaudoin*, in which it said 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.”¹⁹ 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.²⁰

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.”²¹

Based on the totality of the circumstances, Mr. C. is voluntarily and unreasonably unemployed, primarily as a result of his own choices. His transportation problems and employer’s warning leant his failure to return to C. K. some legitimacy. As a result, the evidence is not sufficient to find him voluntarily and unreasonably unemployed from that job. The circumstances surrounding his failure to work at Wendy’s are much clearer. Mr. C. testified it was just too far to go to work, so he did not return to Wendy’s after the orientation, nor did he call Wendy’s to inform the company that he would not be returning.

This is a classic case of voluntary and unreasonable unemployment. Voluntary because Mr. C. simply chose not to go back to a place of employment where he had been hired; unreasonable because merely being inconvenienced in his ability to get to his workplace is not a sufficient reason for his failure to return. Mr. C. has a duty to support B., and this duty takes priority.²²

If the parent is found to be voluntarily and unreasonably unemployed, the third part of the analysis is to determine his or her potential income. In Mr. C.’s case, that would be his 2010 income from C. K. It was not based on full-time work, but his earnings at Wendy’s most likely would not be, either. CSSD used full-time earnings paid at the minimum wage,²³ but Mr. C. does not have a history of earning anywhere near that amount. In fact, his income from C. K., at

18 *Kowalski*, 806 P.2d at 1371.

19 24 P.3d 523, 528 (Alaska 2001).

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

21 Civil Rule 90.3, Commentary III.C.

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

23 Exh. 3 at pg. 8.

\$10,869.25, was the highest figure shown in the data reported by the Alaska Department of Labor and Workforce Development going back to 2007.²⁴ Thus, Mr. C.'s potential income is best measured by this 2010 income, a figure that yields a child support amount of \$188 per month.

IV. Conclusion

Mr. C.'s request for a reduction in child support because he is unemployed cannot be granted. He is voluntarily and unreasonably unemployed, so his ongoing child support as of January 2011 should be calculated based on his 2010 income, which yields a child support figure of \$188 per month. His arrears should be \$50 per month in 2009 and \$188 per month in 2010. Mr. C. is not liable for support for the months he and Ms. M. and B. were together: September 2009 through January 2010 and June through July 2010. These figures should be adopted.

V. Child Support Order

- Mr. C. is liable for child support for B. in the amount of \$50 per month for July and August 2009; \$188 per month for February through May 2010 and August through December 2010; and \$188 per month, effective January 2011 and ongoing;
- Mr. C. is not liable for support for September 2009 through January 2010 and June through July 2010 because he and the custodian and child were living together;
- All other provisions of the Amended Administrative Child and Medical Support Order dated January 13, 2011, remain in full force and effect.

DATED this 6th day of April, 2011.

By: Signed
Kay L. Howard
Administrative Law Judge

²⁴ See Exh. 5 at pg. 1.

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 25th 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.]