IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT KENAI

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| SHAWN D. RICE,<br><br>Appellant,<br><br>vs.<br><br>STATE OF ALASKA, DEPARTMENT OF REVENUE, CHILD SUPPORT SERVICES DIVISION, and ERICA WILLIAMSON,<br><br>Appellees. | ) | RECEIVED LAW AGO ANC<br>DEC 20 2013 PM 02:45<br><br>CASE NO. 3KN-11-946 CI |

## DECISION ON APPEAL

This case is an appeal by Shawn Rice ("father" or "appellant") from a decision by the Alaska Department of Revenue, Child Support Services Division ("CSSD," "appellee," or "agency"), and Erica Williamson ("mother"). An administrative decision was issued June 13, 2011, by Administrative Law Judge ("ALJ") Jeffrey Friedman, and adopted by Department of Revenue Deputy Commissioner Jerry Burnett on July 7, 2011. The dispute is over the proper amount of the father's child support obligation for the parties' one child. The ALJ determined that the father intentionally violated his felony conditions of probation to purposefully decrease his child support obligation and therefore found in favor of the mother. The father appealed.

The mother was largely unaware of the father's challenge to the ALJ's decision due to lack of service. CSSD brought the service issue to the court's attention, and the court invited the mother to submit a position statement. The mother filed a position statement in which she

mostly reiterated how she did not receive service of filed documents in regards to the case. Basically the mother believes CSSD represents her best interests and supports its position.

The parents have one child in common, B[redacted], born [redacted], 1994. The father had been incarcerated arising from Case No. 3KN-S04-1094 CR. The father's sentence included a term of probation. During the father's incarceration, his child support obligation was $50 a month, the minimum amount for an obligor under Civil Rule 90.3. The $50 monthly obligation lasted from May 2006 to October 2011, even though the father was out of prison and earned good wages as a foreman pipefitter in the Kenai oilfields as of 2010. Even though the father only had the minimum monthly child support obligation, his arrearage totaled almost $8,000 by 2011.

After the father's incarceration, he was subject to felony probation. The conditions included a prohibition against travel outside his Department of Corrections assigned area without a travel pass and once-weekly sex-offender treatment. On October 13, 2011, CSSD raised the father's child support obligation from $50 a month to $565 a month because he was no longer incarcerated and was earning an income on which the higher child support amount was calculated.

CSSD and the mother contend that the father then intentionally violated his conditions of probation in order to avoid the newly-raised child support obligation. The following events give rise to the dispute at issue in this case. On February 7, 2011, the father requested CSSD to lower his support obligation. He listed his inmate identification number as well as a projected incarceration date and projected release date. The projected release date was sixteen months later—the amount of suspended time remaining on his sentence. Additionally, on March 4,

2011, the father executed two separate sworn financial affidavits, both stating that he was currently incarcerated.

Notably, the father was not actually incarcerated in February 2011, nor had any probation violation occurred yet. CSSD asserts that the father's misrepresentation regarding his incarceration prior to an actual violation shows that the father intended to violate and go back to jail, and was getting a head start on the process by requesting reduced child support on the basis of incarceration prior to a violation.

On March 10, 2011, the father hitchhiked to Kenai without obtaining a travel pass. According to the petition to revoke probation on the issue, the father's wife called the father's probation officer and stated that the father hitchhiked to Kenai with the intention to remand himself at the Kenai courthouse. The probation officer called and verified the father's presence in the Kenai area and told the father to remand himself to Wildwood, which the father did.

On April 1, 2011, CSSD approved the father's request to lower his obligation to $50 a month. The mother appealed arguing that the father was voluntarily incarcerated and underemployed.[1] Based on the above facts, ALJ Jeffrey Friedman concluded the father intentionally violated his conditions of probation to lower his child support obligation. The Deputy Commissioner agreed with the ALJ's decision. The ALJ decision notes the father misrepresented himself as incarcerated prior to any violation or incarceration on three separate occasions including his request to lower his child support and on two financial affidavits. The ALJ also cited that the father's new wife reported to the probation office that he intended to remand himself at the Kenai courthouse once he arrived in Kenai.

[1] The father works in the kitchen at Wildwood making about $90 a month.

The father claims that he did not become voluntarily incarcerated. Rather, he asserts that his probation officer directed him to turn himself in. Although the father asserts that he did not intentionally violate to get incarcerated again, he stated in his opening brief: "[I] felt that by getting [my] incarceration out of the way, instead of doing the parole, [I] would be able to work more, which is exactly what happened." Essentially, it appears that the father wanted to flat time and not to deal with the geographic restrictions or weekly required sex-offender counseling as a professional burden.

In support of its argument CSSD highlights the timing of the father's violation in relation to his remaining sentence. There were 16 months remaining on the father's sentence. The child turned 18 on [redacted], 2012. The father was released July 2, 2012. CSSD asserts that the father timed his intentional violation as close to the child's 18th birthday as possible while still allowing the father time to work during the summer months. CSSD concluded that by intentionally violating in early March knowing he would have to serve sixteen months, the father was attempting to dodge as much child support liability as possible, while trying to ensure he would still qualify for unemployment income.

**Standard of Review**

When the superior court acts as a court of appeal from an administrative decision, the standard for review is one of the following: (1) the "substantial evidence" test is used for questions of fact; (2) the "reasonable basis" test is used for questions of law involving agency expertise; (3) the "substitution of judgment" test is used for questions of law where no expertise

is involved; and (4) the "reasonable and not arbitrary" test is used for review of administrative regulations.[2]

The administrative decision in this case primarily involved a question of fact. The substantial evidence test is therefore employed to determine whether the administrative decision that there were exceptional circumstances to justify a departure from the general rule that incarceration is not the equivalent of voluntary unemployment. More particularly, does substantial evidence support the ALJ finding that the father intentionally violated his conditions of probation knowing that his earning capacity would be reduced. The applicable law is not in dispute. Alaska courts define substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Handley v. State, Dep't of Revenue, 838 P.2d 1231, 1233 (Alaska 1992) (quoting Keiner v. City of Anchorage, 378 P.2d 406, 411 (Alaska 1963)).

When applying the substantial evidence test, the court needs to determine if evidence supporting the agency's decision was presented; the court need not evaluate the strength of the evidence. Oceanview Homeowners Ass'n, Inc. v. Quadrant Const. & Eng'g, 680 P.2d 793, 798 (Alaska 1984). Would reasonable minds would accept the evidence as adequate, not to choose the best of competing inferences. Interior Paint Co. v. Rodgers, 522 P.2d 164, 170 (Alaska 1974). The agency's decision need not be the only possible conclusion, the court only needs to determine that the evidence the agency based its decision on exists. Id.

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2 Handley v. State, Dept. of Revenue, 838 P.2d 1231, 1233 (Alaska 1992).

## Discussion of Issues on Appeal

Appellant Rice raises two primary points on appeal. The first issue is one of due process; namely, that was not given adequate time to prepare for the administrative hearing. The second issue is substantive; namely, the ALJ decision does not follow the general rule that incarceration is not voluntary and the decision is not supported by the evidence.

### A. The Due Process Issue.

The mother appealed a modified CSSD child support order. A hearing was held on May 26, 2011, following a notice of hearing dated May 11. Given the incarceration of the father, it is understandable that he did not actually receive the notice promptly. But he was able to appear telephonically for the hearing, as did the mother. Both testified under oath. CSSD was represented by child support specialist Andrew Rawls. During the hearing the father expressed concern that he did not have the documents to which the mother was referring in her testimony. The documents she referenced included court records regarding the father's violation of probation conditions. However, the father did not substantively challenge the reasons for his current incarceration.

The father testified that he was incarcerated since March 10, 2011, after being ordered by his probation officer to remand himself. He stated he was employed at Wildwood in kitchen work for as much as an inmate can earn. The father asked the ALJ for more time to respond to the CSSD arguments, and was allowed two weeks in which to do so. The ALJ left the record open for two weeks to allow the parties to submit additional documents and written argument, which the father did.

The father has not convinced the court that he was denied due process at the administrative level.

B. The Legal and Fact Issue.

Was the evidence presented by CSSD and the mother to the ALJ adequate to support the ALJ decision in this case? Are the facts sufficient to constitute an exception to the general rule that incarceration does not equal voluntary unemployment. E.g., Bendixen v. Bendixen, 962 P.2d 170, 172 (Alaska 1998) (note, the imprisonment of Bendixen was for commission of a crime, not a probation violation). Here the ALJ found that the father intentionally violated his conditions of probation so as to be incarcerated purposefully for the remainder of his suspended time, 16-months. The advantages of rejecting probation included not being restricted to the region of residence and not having to attend sex-offender therapy once a week in the morning. The argument by the father that those probation conditions restricted his earning capacity and his deployability as a member of Union 341 is credible, and really not disputed by CSSD. The father explained that Union 341 members are subject to being dispatched statewide. The treatment classes he was obliged to attend were at 7 in the morning. His job alternatives were clearly restricted by his probation conditions.

However, there is also evidence in the administrative record to support the conclusions reached by the ALJ that the decision by the father to reject probation was essentially voluntary and motivated in part by a desire to minimize his child support.

The father listing himself as incarcerated on two sworn affidavits prior to violating coupled with requesting his child support obligation be lowered on the basis of incarceration—all prior to his violation—point to his intention to violate. The father's wife's statement that he

intended to remand himself to the Kenai courthouse upon his arrival to Kenai suggest that he came to Kenai to establish a probation violation. The timing of the father's violation suggests he intended his remaining 16 months of incarceration to coincide closely with his child's eighteenth birthday but still have enough time to work during the summer to obtain unemployment insurance.

The evidence and reasonable inferences to be drawn from the evidence support the ALJ finding that one of the father's intended benefits of being incarcerated again was to lower his child support obligation. The father complied with his probation conditions, even though they were inconvenient, until his child support obligation was significantly increased. Approximately five months after the father's child support obligation was raised from $50 a month to over $500 a month, he voluntarily chose to violate his conditions of probation by hitchhiking to Kenai. The father had been willing to deal with his conditions of release previously, but was not willing to do so after his child support obligation was increased.

The ALJ was aware of the general rule established in the Bendixen case (Record on Appeal, page 8) and brought the rule to the attention of the Commissioner in writing on July 1, 2011, along with the proposed ALJ ruling against the father.

Other than the general rule in Bendixen, neither side has cited controlling precedent in Alaska on whether incarceration for a probation violation, especially for a technical violation rather than new criminal conduct, may be considered "voluntary" unemployment or underemployment for child support purposes. Other jurisdictions have considered related situations. A reported decision in Idaho referenced the concept of being incarcerated to avoid child support:

> In reaching this conclusion, we noted that Nab's incarceration was not voluntary because it was for an unrelated crime and was not incurred for the purpose of avoiding child support payments. *Id.*

Rodriguez v. Rodriguez, 249 P.3d 413, 416 (Idaho App. 2011). The Oregon Court of Appeals allowed an inmate to modify his child support obligation, but noted an exception if the factual circumstances had suggested the reduction in income was designed to avoid a support obligation.

> "Father sought to modify his support obligation alleging a 'substantial change in economic circumstances.' ORS 107.135(2)(a). He sought a reduction of the support obligation 'based upon a reduction of [his] financial status,' ORS 107.135(3)(b), and mother opposed the motion. Under ORS 107.135(3)(b), the question is whether the reduction of father's financial status [incarceration on a drug possession crime] was a 'voluntary reduction of income or self-imposed curtailment of earning capacity' and, if so, whether that reduction or curtailment 'was not taken in good faith but was for the primary purpose of avoiding the support obligation.' "

Matter of Marriage of Glithero, 934 P.2d 492, 498-99 (Or.App. 1997), quoting Willis and Willis, 840 P.ed 697 .

The idea that an inmate may not be able to pay accruing child support until after being released was addressed in an unreported decision by the Washington Court of Appeals.

> Clearly, the Legislature has foreseen that for any number of reasons, it may not be practical to enforce court-ordered child support for many years after a support order is entered even well into the adulthood of the youngest child served by the order. We conclude that a modification court can, in the appropriate case, elect to allow previously-set child support to accrue during the obligor's incarceration.

In re Marriage of Sharp, 2001 WL 1516937, 8 (Wash.App. Div. 1 2001).

## CONCLUSION

Although the evidence and the inferences to be drawn for the evidence are disputed, the court finds that there was sufficient evidence to support the ALJ decision as adopted by the Deputy Commissioner of the Department of Revenue and therefore affirms the ALJ decision.

Considering all of the circumstances, the accrual of back child support facing the father cannot fairly be described as unconscionable.

Dated at Kenai, Alaska this 16th day of December, 2013.

Carl Bauman
SUPERIOR COURT JUDGE

SEAL OF THE TRIAL COURTS OF THE STATE OF ALASKA THIRD JUDICIAL DISTRICT

CERTIFICATION OF DISTRIBUTION
I certify that a copy of the foregoing was mailed to the following at their addresses of record.
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