

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

IN THE MATTER OF)	OAH No. 11-0258-CSS
R C. R)	CSSD No. 001107533
_____)	

DECISION AND ORDER

I. Introduction

This case is R C. R's appeal of an order issued by the Child Support Services Division (Division), which denied his request to lower his monthly child support obligation. The order being appealed is the Division's Denial of Modification of Administrative Support Order, which denied Mr. R's petition for a downward modification of his ongoing child support order for his child, R. This order was issued on June 13, 2011.

On July 19, 2011, a hearing was held to consider Mr. R's appeal. R M, the custodial parent in this case, participated. Mr. R also participated. The Child Support Services Division (Division) was represented by Erinn Brian, Child Support Services Specialist.

Having reviewed the record in this case and after due deliberation, I conclude that the Division's order should be upheld. Mr. R's ongoing child support obligation for R should remain at \$386.43 per month, because there has not yet been a change in the parties' circumstances that would justify a modification of child support. Mr. R failed to meet his burden to show that his current income or earning capacity is less than the amount used to set his current monthly ongoing child support obligation. There is evidence in the record of Mr. R's unreasonable underemployment and under-reporting of income.

II. Facts

This case is a modification action.¹ The Division denied Mr. R's request for modification review because the Division determined that there would not be a 15% change in Mr. R's ongoing child support amount based on Mr. R's earning capacity. Mr. R's current ongoing child support was set based on annual earnings of \$25,508 plus a PFD, which was Mr.

R's income in 2001.²

After the Division denied his request for a downward modification, Mr. R requested a formal hearing.³

At the hearing, Mr. R testified that he had not worked since he was released from prison in June of 2010. Mr. R has had problems with alcoholism. Mr. R is qualified as a mechanic, insulator, carpenter and scaffold builder. Mr. R lives with his mother and one of his children. Mr. R is receiving food stamps. Mr. R testified that he has had no earnings and no income and has been trying to start up a business.⁴

After the hearing as ordered, Mr. R provided copies of his bank records from his business, Legends. These records begin in January of 2011. In that month, \$1,270 was deposited, and \$1,856 was withdrawn from that account. In February of 2011, \$3,690.04 was deposited, and \$3,649.52 was withdrawn from that account. In March of 2011, \$205 was deposited, and \$245.52 was withdrawn from that account. In April and May of 2011 there was no balance and no deposits or withdrawals from that account. In June of 2011, \$1,600.01 was deposited, and \$1,590.49 was withdrawn from that account. Some of the deposits are cash deposits from income earned. Most are from G M, a business Mr. R indicated is owned by his mother.⁵

III. Discussion

In a child support hearing, the person who filed the appeal, in this case Mr. R, has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.⁶ At the hearing, Mr. R did not show that the Division's determination that there had not been a material change in circumstance that would justify a modification of ongoing child support was incorrect.⁷ Mr. R is not entitled to a reduction in his ongoing child support obligation for R.

Mr. R is the appealing party in this case, and he has failed to provide accurate income

¹ Alaska Civil Rule 90.3(h) governs modification actions.

² Recording of Hearing & Exhibit 1.

³ Exhibits 5.

⁴ Recording of Hearing-Testimony of Mr. R.

⁵ Exhibits A.

⁶ Alaska Regulation 15 AAC 05.030(h).

⁷ Recording of Hearing & Exhibit A.

information. Mr. R's bank records show that he has been receiving significant income from his mother's business and from cash payments for unreported work. These records only record the income that Mr. R chose to run through this account. There could be more income that Mr. R received as cash that he did not deposit in this account.

Business accounts are generally used to pay tax deductible expenses of the business and are generally not used to pay the personal expenses of the business owner or the owner's family members. While Mr. R does not apparently follow this rule with his business account, it can be inferred from the deposits from G M, Mr. R mother's business, that Mr. R has probably been receiving compensation from that business in exchange for services rendered to that business.

Mr. R is not the first Alaskan parent who has failed to be forthcoming with accurate income information in a child support dispute.⁸ When a parent with a child support obligation makes an accurate determination of his or her income impossible, income must be imputed to calculate the child support obligation. The criteria used to estimate the proper amount of income to impute are the same as those used in a case where the noncustodial parent is voluntarily and unreasonably unemployed or underemployed. Rather than determining the parent's actual income, the parent's earning capacity is used to estimate the parent's potential income.⁹

Income can also be imputed to an obligor in cases of unreasonable voluntary underemployment.¹⁰ The Alaska Supreme Court has recognized that an obligor parent should not be locked into a particular job or field, nor prevented from seeking personal or professional advancement.¹¹ On the other hand, a noncustodial parent who voluntarily reduces his or her income should not automatically receive a corresponding reduction in his or her child support obligation.¹²

Obligor parents should not always have to pay support based on their maximum earning capacity when they choose to earn less than they could.¹³ The custodial parent and the children should not, however, be forced to finance the noncustodial parent's lifestyle choice if that choice

⁸ *Benson v. Benson*, 977 P.2d 88 (Alaska 1999); *Laybourn v. Powell*, 55 P.3d 745 (Alaska 2002).

⁹ *Laybourn v. Powell*, 55 P.3d 745, 747 (Alaska 2002).

¹⁰ Alaska Civil Rule 90.3(a)(4).

¹¹ *See Pattee v. Pattee*, 744 P.2d 659 (Alaska 1987).

¹² *Pattee v. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

¹³ *See Pattee v. Pattee*, 744 P.2d 659 (Alaska 1987).

is unreasonable given the duty to provide child support.¹⁴ The Alaska Supreme Court has indicated that the circumstances surrounding an obligor's failure to maximize earnings should be carefully considered, and then a determination made about whether, under all the circumstances in the case, income should be imputed.¹⁵

In this case it is appropriate to impute income. The evidence in the record shows that it is more likely than not that Mr. R is unreasonably and voluntarily underemployed and under-reporting his income.¹⁶ Mr. R failed to show either that it is more likely than not that he is not or could not earn an annual income equal to the amount used to set his current ongoing child support order, \$25,508, which is less than full-time earnings of \$13 per hour. Mr. R has skills that make him capable of earning at least this much despite his criminal record.

IV. Conclusion

I conclude that the Division correctly denied Mr. R's request for a downward modification of his ongoing child support.

V. Child Support Order

The Division's Notice of Denial of Modification Review issued on June 13, 2011, is affirmed.

DATED this 16th day of August 2011.

By: Signed
Mark T. Handley
Administrative Law Judge

¹⁴ *Olmstead v. Ziegler*, 42 P3d 1102 (Alaska 1987).

¹⁵ *See Pattee v. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

¹⁶ Recording of Hearing & Exhibit A.

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 2nd day of September, 2011

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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