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

In the Matter of:	)	
	)	OAH No. 14-0349-CSS
K W. F	)	CSSD No. 001016419
	)	

DECISION AND ORDER

I. Introduction

The obligor, K W. F, has appealed an Administrative Review Decision that CSSD issued on November 22, 2013. That decision denied Mr. F's request for a default review of his child support obligation on behalf of U, who was born in 1989, and is now 25 years of age. The custodial parent is U T.

A hearing was held on April 17, 2014. All parties, including Mr. F's counsel, participated by telephone. Andrew Rawls, Child Support Specialist, represented CSSD. Final record closure occurred on June 9, 2014, when CSSD filed a position statement advocating that its latest order be affirmed because Mr. F did not provide information regarding his actual income for the years in question, and that Ms. T had reasonably relied on the original 1990 child support order.

Based on the record as a whole and after careful consideration, Mr. F's request for a default review is granted. CSSD's Administrative Review Decision dated November 22, 2013 is reversed and CSSD is directed to calculate Mr. F's child support based on his actual income for the years at issue.

II. Facts

A. Case History

The following is a summary of the procedural history in this matter:[1] Mr. F's support obligation for U was set at $752 per month in May 1990, based on a default income figure known as the AFDC needs standards, with arrears back to March 1, 1989.[2]

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[1] Two prior decisions have been issued recently by the OAH in Mr. F's case. The first is a remand order issued by the undersigned, *In the Matter of K W. F*, OAH No. 12-0159-CSS (Order Remanding Appeal to CSSD, November 20, 2012). The second is a decision and order issued by Administrative Law Judge Jeffrey A. Friedman, *In the Matter of K W. F*, OAH No. 13-0952-CSS (Commissioner of Revenue 2013). Some of the procedural facts herein have been taken from one or both of those orders.

[2] *In the Matter of K W. F*, OAH No. 13-0952-CSS (Commissioner of Revenue 2013), at pg. 1.

Approximately 16 years later, Mr. F requested a default review. On May 7, 2007, CSSD granted his request and vacated the prior order, setting his arrears at $31,194.51 for the period from March 1, 1989 through April 30, 2007.[3] CSSD's order did not set any ongoing support, presumably because U had turned 18 by that time. Ms. T appealed, after which Administrative Law Judge Dale Whitney issued a decision in October 2007 reversing CSSD's vacate order and reinstating Mr. F's 1990 child support order.

In subsequent conversations with CSSD, Mr. F came to believe he could file another default review, so on February 13, 2012, he requested that CSSD send him the default paperwork to fill out. CSSD did not send him any forms to complete. Instead, on February 15, 2012, CSSD sent him a Response to Inquiry for Default Vacate Review that stated, in essence, that he did not qualify for a default review because his original default order had been reinstated [by ALJ Whitney]. CSSD's response stated Mr. F could appeal its denial to the court.

Mr. F did file an appeal with the Superior Court. On July 16, 2012, the court remanded this matter to CSSD to conduct a "formal administrative hearing pursuant to 15 AAC 125.121(f)." The undersigned administrative law judge, after hearing from the parties, determined that it was premature to hold a hearing because a written request for a default review had not been submitted, CSSD had not considered and acted on that written request, and CSSD had not issued an administrative review decision. Accordingly, on November 20, 2012, this matter was remanded to CSSD to make its default review decision.

After the remand was issued, Mr. F submitted to CSSD a written Motion to Vacate Default Order. CSSD once again granted his motion, and on June 6, 2013, issued an Administrative Review Decision setting his arrears at $31,194.51 for the period March 1, 1989 through April 30, 2007.[4] Ms. T appealed the agency decision and Administrative Law Judge (ALJ) Friedman was assigned to hear the case. After the hearing, he remanded the case to CSSD on August 14, 2013 to determine whether undue hardship or reasonable reliance on the default order had been established, as required by 15 AAC 125.121(e), and, if a vacate order was warranted, to recalculate Mr. F's child support obligation.

With the case once again before CSSD, both parties submitted additional evidence to the agency. Ms. T filed financial information, including copies of bills currently in collection or

[3] There is no copy of this order in the record, but it is not the order on appeal. Both Mr. F and Ms. T have referred to it in their pleadings, and it is mentioned here only for its historical significance.

[4] This order was essentially identical to CSSD's 2007 order vacating Mr. F's default arrears.

seriously past due; a history of the Medicaid and public assistance benefits she had received over the years; copies of Mr. F's account statements; and documents regarding her current wages.[5] Mr. F submitted Formal Hearings Expense Worksheets for each year at issue.[6]

On November 22, 2013, CSSD issued an Administrative Review Decision that reversed its June 6, 2013 vacate order and once again denied Mr. F's request for relief of a default administrative child support order.[7] CSSD denied the request for the following reason:

> Mr. F did not provide his income information from his illegal drug sales. Mr. F also did not provide information regarding his business F No Name ENT and K F II. Ms. T provided clear and convincing evidence that she relied on her child support every month and that the default would would [sic] cause a hardship to her household.

A staff member at Mr. F's attorney's office contacted CSSD to inquire about filing an appeal of CSSD's Administrative Review Decision. The staff member was told to file the appeal with the OAH, which Mr. F did on December 20, 2013.[8] After CSSD learned that Mr. F had filed an appeal with the OAH, the agency's Formal Hearing Manager contacted the obligor and directed him to file the appeal with CSSD, which he did on February 26, 2014.[9] On March 26, 2014, the agency referred the appeal to the OAH, along with a Motion for Dismissal that asserted Mr. F's appeal was untimely. Because CSSD directed Mr. F's counsel to file the appeal with the OAH instead of CSSD, as required by 2 AAC 64.110, the agency's Motion to Dismiss was denied. Following a continuance to accommodate Mr. F's counsel, the hearing was held on April 17, 2014.

B. Material Facts

a. Mr. F

As the result of a traffic stop in his wife's car on March 1, 2004, Mr. F was charged with DWLR, driving with a revoked license.[10] Marijuana was discovered in the vehicle, so he was also charged with MICS 5, misconduct involving a controlled substance in the fifth degree. The misconduct charge was subsequently dismissed – Mr. F had forfeited the marijuana – and he was

5 Exh. 2.
6 Exh. 3.
7 Exh. 4.
8 Mr. F's Opposition to Motion for Dismissal, Exh. A attached thereto.
9 Exh. 5.
10 Obligor's Exh. A.

convicted and incarcerated for the driving offense, not the misdemeanor drug charge.[11] Mr. F testified that the marijuana belonged to his father-in-law, who had a medical marijuana card, and who had been using Mrs. F's car earlier that day. There is no evidence in the record that Mr. F sold illicit drugs or that he had any income from the sale of drugs.

In 2002, Mr. F obtained a sole proprietorship business license in the name of F No Name Enterprises, which operated as an Alaska dealer for No Name Boats. Mr. F would drive to the Lower 48 to pick up the boats and bring them back to Alaska for sale.[12] However, Mr. F lost money on the business. F No Name Enterprises "went under" and his business license expired one year later, at the end of 2003.[13]

Mr. F is hampered by significant health issues that began in 1992, when he was injured while working on the North Slope.[14] Mr. F's chiropractor wrote on February 25, 2014 that since 1992, the obligor has had "chronic low back pain which is intermittently incapacitating[,]"[15] and that since then his MRI shows "extreme damage" to his cervical spine.[16] As the result of his physical condition, Mr. F was approved on February 27, 2014 for cash assistance by the Washington State Department of Social & Health Services.[17]

Mr. F is married. He and his wife have children other than U, but it appears they are all younger than he is. Mr. F's wife is employed and has helped support the No Name financially. One of her side endeavors is F No Name Gifts, a small business in which she sells products as seen in television advertising at places such as carnivals and similar types of events. F No Name Gifts is not Mr. F's business.

b. Ms. T

Ms. T works in the education field and earns approximately $2,650 per month.[18] She got married to F T in 1995.[19] They separated in late 2010 and were divorced in early 2013. They have three children, 18, 16 and 14 years of age. Ms. T has primary custody of the children and was awarded the marital home and the mortgages on it.[20] In addition to the marital home, the

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11 Exh. A at pgs. 1-2.
12 Obligor's Exh. B.
13 *Id.*
14 Letter from obligor's chiropractor, Exh. C.
15 *Id.*
16 *Id.*
17 Obligor's Exh. D.
18 Motion for Dismissal, Exh. 2 at pg. 9.
19 Custodian's Exh. 2, filed April 22, 2014.
20 *Id.* at pg. 5.

Ts' divorce agreement provides that they would each receive their own separate debt and that they would split the marital debt.[21] Also, their divorce agreement provides that:

> Each party *shall* file for Chapter 7 bankruptcy discharge of all debts on which the parties are jointly liable, to be filed within 18 months from the date these Amended Findings are approved and entered by the Court.[22]

After ALJ Friedman issued the remand order directing CSSD to consider the issue of undue hardship or reasonable reliance on the default order, Ms. T provided evidence of her financial circumstances, including copies of bills in collection or seriously past due.[23] There are six bills that total approximately $26,133. They are owed to AlaskaUSA FCU (Pacifica balance) ($3,054); AlaskaUSA FCU ($8,762); Discover Financial Services ($5,747); Barclay's Bank of Delaware ($1,375); Midland Funding ($6,010); and LVNV Funding ($1,185). The first four bills listed, which total $18,938, are identified as marital debt in Ms. T's divorce agreement, and thus appear to be a portion of the marital debt Ms. T and her ex-husband agreed they would discharge in Chapter 7 bankruptcy proceedings.

III. Discussion

As the person who filed the appeal, Mr. F has the burden of proving by a preponderance of the evidence that CSSD's Administrative Review Decision denying his request to vacate a default order is incorrect.[24]

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.[25] The applicable regulation states, in part,

> The agency will grant the request to vacate the support order if the agency finds that the support order was based on a default income figure and that granting the request will not cause undue hardship to a party because of the party's reasonable reliance on the support order.[26]

A default income amount is one that was based on the former AFDC needs standards; gender-based average annual wage statistics or other group wage statistics; or the federal or state

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21 *Id*. at pgs. 5-6.

22 *Id.* at pg. 6 (emphasis added). According to the date of the divorce agreement, the 18-month period would expire in August 2014.

23 Exh. 2 at pgs. 2-8.

24 15 AAC 05.030(h).

25 AS 25.27.195(b).

26 15 AAC 125.121(e).

minimum wage in effect at the time.[27] A calculation is *not* based on a default income amount if it is based on the obligor's actual income information; an estimated or projected income based on the obligor's actual but incomplete information; or imputed potential income based on a finding of voluntary unemployment or underemployment.[28]

In this case, CSSD calculated Mr. F's child support in May 1990 at $752 per month. From the time that Mr. F first initiated default review proceedings, CSSD has vacated the order twice and has refused to vacate the order on two other occasions. In spite of both of the denials, there is no dispute that the May 1990 support amount was taken from the AFDC needs standards in effect in 1990.[29] Thus, under 15 AAC 125.121(j)(1), a calculation based on the former AFDC needs standards is, by definition, a default income amount, so Mr. F has met the requirement in the first part of the regulation.

However, 15 AAC 125.121(e) has a second piece – CSSD must also determine "that granting the request will not cause undue hardship to a party because of the party's reasonable reliance on the support order." As noted by Judge Friedman, the hardship addressed in the regulation is not the financial difficulties that would be created by a noncustodial parent's failure to pay child support.[30] Rather, it is the

> hardship that may have resulted from Ms. T's reasonable reliance on the existence of the 1990 NFFR and any arrears that accrued because of that order. For example, she may have incurred expenses or debt based on an expectation of receiving the amount of accrued arrears.[31]

In essence, Ms. T must have taken some action to her financial detriment based on her expectation that she would receive the arrears that had accrued in Mr. F's case. An example would be making a purchase or incurring a debt in which repayment is planned on and made possible because of the regular child support payments being received. Reliance requires action by the party and, based on the plain language in the regulation, that action must be reasonable. The party's action must be based on a reasonable expectation of regular and continuing child support payments that make taking on additional debt possible.

Following ALJ Friedman's remand, Ms. T submitted copies of her bills that are currently in collection or seriously past due; a history of the Medicaid and public assistance benefits she

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27 15 AAC 125.121(j)(1).
28 15 AAC 125.121(j)(2).
29 The calculation is not in the record on appeal, but *see, e.g.*, Ms. T's statement in Exh. 2, at pg. 1.
30 *In the Matter of K W. F*, OAH No. 13-0952-CSS (Commissioner of Revenue 2013), at pg. 6.
31 *Id. See* definition of reliance, Black's Law Dictionary 1160 (5th ed. 1979).

received over the years; and documentation of her current income from wages.[32] CSSD based its Administrative Review Decision on the evidence that she has serious financial difficulties, finding, in part, that:

> Ms. T provided clear and convincing evidence that she relied on her child support every month and that the default would would [sic] cause a hardship to her household.[33]

By stating that Ms. T "relied" on her child support every month, CSSD was in essence finding that the custodian *needed* the support payments because of her financial situation. While this statement may well be true factually, it is an erroneous finding under the second part of the test in 15 AAC 125.121(e). Needing the monthly payments from a child support order is not the same as a party's reasonable reliance on the child support order, as stated in the regulation.

There is no evidence in the record that Ms. T took action in reasonable reliance on Mr. F's child support order and the resulting arrears that had accrued in this case. Taking action in reasonable reliance on the support order would seem very risky, especially given the obligor's spotty payment record and resulting inability to make significant inroads in his arrears. Also, this case has been involved in almost constant litigation since 2007, so a consistent arrears amount has never been particularly reliable.

It is fairly clear that Ms. T's financial circumstances are pretty dreadful. She has recently been divorced and several of her bills are in collection. Moreover, the divorce court directed her to file for bankruptcy. However, a close reading of the divorce decree indicates that if Ms. T does declare bankruptcy, it will not have been caused by her reasonable reliance on Mr. F's 1990 child support order. Rather, her requirement to file bankruptcy arises from the settlement in which she and Mr. T agreed to file for bankruptcy as a specific strategy for resolving their joint marital debt. There is no evidence in the record that her future bankruptcy was at all the result of her reasonable reliance on Mr. F's original support order.

Finally, CSSD's latest order denied Mr. F's request for a default order in part because he failed to report his income from "illegal drug sales" and from "his business F No Name ENT and K F II."[34] CSSD's findings are erroneous. The first finding regarding income from drug sales comes from Mr. F's traffic stop in his wife's car on March 1, 2004, and his resulting charge of

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32 Exh. 2.
33 Exh. 4 at pg. 2.
34 Exh. 4 at pg. 1.

misconduct involving a controlled substance in the fifth degree.[35] But, he established during the hearing in this appeal that the misconduct charge was dismissed because the marijuana belonged to his father-in-law, who had a medical marijuana prescription, and that Mr. F served jail time only for driving with a revoked license.

Regarding the second finding, Mr. F also established that he did not have any real profit from F No Name and K F II. Given the short existence of his no name business, Mr. F's testimony was credible. In any event, he has provided income information in the past that has satisfied CSSD to the point that the agency *twice* recalculated his 1990 child support order and set his arrears in the approximate amount of $31,000.[36]

Therefore, based on the record in its entirety, Mr. F has met his burden of proof in this appeal. He established by a preponderance of the evidence that his 1990 child support order was based on a default amount, and that granting his request for a default review will not cause undue hardship to Ms. T because she has not reasonably relied on the 1990 child support order. Thus, Mr. F's request for a default review is granted.

IV. Conclusion

Mr. F met his burden of proving that the Administrative Review Decision dated November 22, 2013 is incorrect. Because CSSD incorrectly denied Mr. F's request for a default review, CSSD is instructed to conduct a default review of Mr. F's case based on his actual income. CSSD apparently is no longer in possession of his income information, so in the absence of actual income information, CSSD may reinstate a previous order granting Mr. F's petition for a default review.

V. Child Support Order

- Mr. F's petition for a default review is granted.
- CSSD is directed to conduct a default review consistent with this order;
- CSSD's subsequent Administrative Review Decision should state that Mr. F has appeal rights from that order.

DATED this 27th day of June, 2014.

Signed

[35] Obligor's Exh. A.
[36] *See* notes 3-4, above.

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 25th day of July, 2014.

By: *Signed*
Signature
Angela M. Rodell
Name
Commissioner
Title

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