

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

In the Matter of)	
)	
T M)	OAH No. 15-1038-CSS
<hr style="width:40%; margin-left:0"/>)	Agency No. 001208305

REVISED DECISION AND ORDER

I. Introduction

In June 2015, the Child Support Services Division (CSSD) issued an Administrative Child Support and Medical Support Order establishing T M’s monthly child support obligation for his two daughters at \$727 per month. After Mr. M requested an administrative review of that order, CSSD issued an Amended Administrative Child Support and Medical Support Order setting Mr. M’s monthly child support obligation at \$944 per month for two children. Based on the record and after careful consideration, this decision concludes that Mr. M has met his burden of proving that the July 2015 order was incorrect, and, further, that Mr. M’s correct monthly child support obligation for two children is \$730 per month for all times at issue in that Order.¹

II. Facts

T M and R N are the parents of six-year-old L and seven-year-old K, both of whom live with Ms. N in No Name. Mr. M lives in Anchorage.

Mr. M is bright, resourceful, and artistically talented. However, he also has a lengthy criminal history of “drug-related issues,” and, by his account, spent more than twenty-five years incarcerated. Mr. M testified that he does not have a steady work history, and had difficulty finding employment when he left prison.

Mr. M worked as a baker while in prison, and has recently been able to parlay this work experience into a food service job at a remote camp on the No Name Area. Mr. M began working for No Name Agency in January 2015. The position is seasonal. While the exact start and end of the season are weather-dependent, the job generally begins in

¹ This revised decision and order replaces a proposed decision and order issued October 20, 2015, which included calculations erroneously based on the pre-2015 minimum wage (\$7.75). Because the Alaska minimum wage is now \$8.75, the October 20, 2015 proposed decision and order is withdrawn and this revised decision and order issued in its place to correct this error.

November and runs through April. During that time, Mr. M works twelve hours a day, seven days a week, for four weeks at a time, followed by two weeks off. He earns \$18 per hour, and is paid overtime for each day he works more than eight hours.² In the first two quarters of 2015, Mr. M earned \$18,270 through his position at No Name Agency.³

In addition to his food service employment, Mr. M is a self-taught artist who creates and installs custom artistic no names.⁴ Mr. M denies that he has income associated with this work.⁵ He indicated that he has installed several no names at local businesses and charities in order to publicize and grow his business, but states that he has not made money from these installations.⁶

In April 2015, Ms. N submitted an Application for Child Support Services.⁷ Ms. N's application indicated that Mr. M worked as a baker on the No Name Area, and also owned a no name business.⁸ In May 2015, CSSD issued an order requiring both parents to provide financial information. Mr. M did not provide any financial information in response to the order. Accordingly, CSSD set his child support obligation based on information it had received from his employer, No Name Agency.

In June 2015, CSSD issued an Administrative Child Support and Medical Support Order establishing Mr. M's monthly child support obligation at \$727 per month, effective July 1, 2015, with \$2,181 in arrears for the period of April through June 2015.⁹ Mr. M requested an administrative review of the June 2015 order because he believed that it overstated the income from his seasonal position with No Name Agency.¹⁰ On July 17,

² Testimony of Mr. M.

³ Ex. 11.

⁴ Testimony of Mr. M and Ex. 8.

⁵ Testimony of Mr. M.

⁶ Testimony of Mr. M.

⁷ Ex. 1.

⁸ Ex. 1, p. 2. Ms. N's application also stated that Mr. M "owns a nail salon with his fiancée who also lives with him." At the hearing, Mr. M denied owning a nail salon and being engaged. He testified that he had helped an ex-girlfriend with her salon business, but that they had since broken up and that he owned no share of the business. Mr. M testified that he provided help in this endeavor ranging from helping draft a business plan, to helping negotiate a purchase contract, to doing physical labor on the shop. Ex. 1, p. 2; Testimony of Mr. M.

⁹ Ex. 3, pp. 1-2. This amount represents three months at the same \$727 monthly support amount. Ex. 3, pp. 2, 9.

¹⁰ Ex. 5. Because No Name Agency had reported that Mr. M was earning \$18 per hour, CSSD calculated an annual income based on 52 weeks of full-time work at that rate of pay, and set a support obligation based on that amount of income. Ex. 3, p. 5.

2015, CSSD issued an Amended Administrative Child Support and Medical Support Order setting Mr. M's monthly support obligation for two children at \$944 per month.¹¹

CSSD calculated this amended support amount based on a mix of actual and estimated income.¹² The July 2015 order combined Mr. M's actual reported income for January 22, 2015 through April 14, 2015, with an additional nine months of income based on an assumed additional income as an "interior designer"—presumably, based on the work Mr. M did with his no name business.¹³

Mr. M appealed, arguing that his no name business was not income-generating, and that CSSD should have based his support obligation on his actual income as reported by his employer.¹⁴ A hearing was held on September 21, 2015. CSSD was represented by Child Support Specialist Joseph West. Mr. M and Ms. N both participated in the hearing, and both testified.¹⁵

Mr. M testified that his current lifestyle is fairly sparse and economical, and that he is devoted to creating a sustainable, law-abiding career path. He lives alone in an apartment and pays \$700 per month in rent, and owns two vehicles – a Ford Escort and a 1972 Lincoln – outright. During the winter months, he works on the No Name Area, and during the summer months he works on growing his no name business while living off money he has saved from the No Name Area work.

Ms. N testified that Mr. M is "very bright" and "very resourceful" and "has been able to do very well for himself." Ms. N believes Mr. M is likely making more money than he claims, although she could not identify how. Ms. N testified that when she and Mr. M were romantically involved, Mr. M appeared to have large amounts of money available for investing. When the girls were younger and living in Anchorage, Mr. M paid between \$800 and \$1,200 monthly to their daycare provider. This pattern continued through as recently as two years ago with payments for afterschool care. Ms. N also testified she has known Mr. M to spend money lavishly, including buying jewelry and a car for his girlfriend and, recently, coming to visit the girls in a new motorhome.

¹¹ Ex. 9, p. 1. The Amended Order likewise increased Mr. M's arrears for the period of April through July 2015 to \$3,776. Ex. 9, p. 2.

¹² Ex. 9, p. 4.

¹³ Ex. 9, p. 5.

¹⁴ Ex. 10.

¹⁵ Mr. West and Mr. M appeared in person at the hearing; Ms. N participated telephonically.

After the hearing, the record was held open for several weeks to allow either parent to submit evidence relating to Mr. M's current ability to pay child support, and for CSSD to either submit a revised proposed support calculation or set forth its current position about the July 2015 calculation. Mr. M submitted two emails arguing that he does not have the ability to pay the support amount in the July 2015 order, and documentation indicating that CSSD has now asserted liens against him. CSSD submitted municipal property records appearing to indicate that Mr. M owns property which he recently redeemed from foreclosure.¹⁶ CSSD also submitted written argument asserting that the July 2015 Amended Order should be affirmed because Mr. M is likely capable of earning the amount of income attributed to him therein.¹⁷ The record closed without further submissions from either party.

III. Discussion

A. Applicable Law

A parent is obligated both by statute and at common law to support his or her children.¹⁸ Child support obligations are determined under Alaska Civil Rule 90.3. "The primary purpose of Rule 90.3 is to ensure that child support orders are adequate to meet the needs of children, subject to the ability of parents to pay."¹⁹

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."²⁰ The regulations implementing this rule direct that a parent's ongoing support obligation be based on "the total annual income the parent is likely to earn or receive when the child support is to be paid."²¹ Mr. M, as the parent challenging a child support calculation under Rule 90.3, has the burden of proving by a preponderance of the evidence that the support calculation is incorrect.²²

An obligor parent also has the burden of proving his or her earning capacity. Where an obligor does not provide information about his or her income, CSSD may base the support obligation on an "expected annual income" based on sources such as the parent's

¹⁶ Exhibit 14.

¹⁷ October 5, 2015 Submission to Record.

¹⁸ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁹ Civil Rule 90.3, Commentary I.B.

²⁰ See 15 AAC 125.010 (adopting Civil Rule 90.3 by reference).

²¹ 15 AAC 125.050 (c).

²² 15 AAC 05.030(h); 2 AAC 64.290(e).

income to date, prior income history, job skills, and “the average wage or salary available to a person in the person’s particular profession or occupation.”²³

B. The July 2015 Amended Administrative Child Support and Medical Support Order is Incorrect

Mr. M met his burden of proving that the July 2015 Amended Order was not correct. The order is based on an expected annual income that assumes that, when he is not on the No Name Area Mr. M will earn \$23 per hour, working full-time as an “interior designer.” Mr. M designs and installs no names, which is not equivalent to being an “interior designer.” Other than CSSD’s unsupported assertion that Mr. M’s “profession or occupation” is that of an “interior designer,” there is nothing in the record to support that characterization, and certainly nothing to indicate that the amounts used by CSSD are representative of his expected actual income. Accordingly, the July 2015 order is not based on Mr. M’s expected annual income under 15 AAC 125.050(c). The support amount must therefore be recalculated.

C. Mr. M is Voluntarily and Unreasonably Underemployed

Having established that the support order is incorrect, the question presented is determining the correct amount of support. Based on the evidence in the record, a support calculation based on 15 AAC 125.050(c) does not appropriately capture Mr. M’s “expected annual income” because Mr. M is not earning money during the summer months. But Mr. M did not prove that he lacks the capacity to earn income during the summer months. Rather, he has chosen to spend those months working on his no name business. While Mr. M is clearly a talented artist, he did not prove that focusing on his art is a reasonable plan in light of his obligations to L and K.

CSSD argues that because “Mr. M appears to be intelligent and creative” and earns \$30,000 during the six months he works on the No Name Area, “it does not seem that he would be incapable” of earning another \$24,000 during the summer months.²⁴ Implicit in this argument is a conclusion of voluntary and unreasonable underemployment. While 15 AAC 125.050(c) income calculations are based on a parent’s “expected annual income,” CSSD’s argument turns on Mr. M’s potential income. Because Mr. M is “capable” of

²³ 15 AAC 125.050(c)(3).

²⁴ CSSD October 5, 2015 Submission to Record.

earning more, CSSD reasons, his support amount should be set at an amount that reflects those capabilities – that is, it should be set based on his potential income.

In cases in which voluntary unemployment is raised, the court or administrative law judge must determine whether the parent has engaged in voluntary conduct “for the purpose of becoming or remaining unemployed.”²⁵ In addition to the question whether the parent’s lack of work is voluntary, it is also necessary to determine whether the parent’s unemployment 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.”²⁶ 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 parent.²⁷ 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 to a party based on voluntary unemployment.”²⁸

Here, in light of the totality of the circumstances, including Mr. M’s varied job skills and the unchallenged testimony attesting to his resourcefulness and intelligence, it is more likely than not that Mr. M is voluntarily and unreasonably unemployed during the six months of the year that he does not work on the No Name Area. Mr. M has chosen to forego earning income during the summer in order to focus on his art. This is an unreasonable choice given the needs of his children and their entitlement to his support.

It is a well-established principle of law in Alaska that a parent’s duty to support his or her children takes priority over lifestyle decisions such as choosing not to seek employment.²⁹ Children to whom support is owed cannot be required to subsidize their parents’ lifestyle choices. It is unreasonable, therefore, to require Mr. M’s daughters to subsidize his artistic aspirations or his chosen lifestyle of spending half of the year living off of earnings from the other half of the year.³⁰ Accordingly, it is determined that Mr. M is

²⁵ *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

²⁶ *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

²⁷ *Kowalski*, 806 P.2d at 1371.

²⁸ Civil Rule 90.3, Commentary III.C.

²⁹ *See Dunn v. Dunn*, 952 P.2d 268, 271 (Alaska 1998).

³⁰ Mr. M also described considerable work he has apparently done for free – for example, helping his ex-girlfriend with her nail salon business, and installing and maintaining no name fixtures for various businesses and nonprofits. This testimony likewise supports the conclusion that Mr. M’s underemployment during the summer months is both voluntary and, when viewed in light of his overriding obligation to support his children,

voluntarily and unreasonably underemployed during the part of the year not covered by his arrangement with No Name Agency, during which time he is available to work and has not established that work is not available. For the purpose of calculating Mr. M's monthly child support obligation, income should be imputed to him for this period of time.

D. Corrected Support Obligation Calculation

Because Mr. M has been found to be voluntarily and unreasonably underemployed, his child support obligation may be calculated from his "potential income," which is based on his "work history, qualifications and job opportunities."³¹

For the reasons described above, Mr. M has the ability to pay child support in an amount based on an annual income that combines his six months of known income from his No Name Area job with income for the remaining six months. However, the evidence does not support the income figure used in CSSD's July 2015 order.³² Of note, that order was not based on potential income under 15 AAC 125.050(c), but rather on a finding that this amount fairly estimated Mr. M's actual income as an "interior designer."³³

In its post-hearing submission, CSSD now suggests that the \$24,000 difference between Mr. M's actual No Name Area income and the total income figure used in the July 2015 order should be used because he is probably not "incapable" of earning that amount.³⁴ But the evidence is insufficient at this time to support imputing income in the amount sought by CSSD. However, given Mr. M's varied job skills and resourcefulness, he has the ability, at the very least, to hold a minimum wage job. Accordingly, for the portion of the year that Mr. M is not working on the No Name Area, income will be imputed for thirty hours per week at minimum wage.³⁵ Using the minimum wage of \$8.75, at thirty hours per

unreasonable. The same testimony further supports the conclusion that Mr. M could parlay his considerable and varied skills into additional income.

³¹ Civil Rule 90.3(a)(4).

³² The record is also insufficient to conclude that Mr. M has income-producing assets. *See* Submission to Record, Ex. 14 and 15 AAC 125.060(a).

³³ Ex. 9, pp. 4-5.

³⁴ CSSD Submission to Record.

³⁵ Income is imputed preliminarily at thirty hours per week, rather than forty hours per week, both because minimum wage jobs tend to be less than full-time, and because of Mr. M's lack of steady employment history. Additionally, because Mr. M's no name business may have the potential to benefit his children if he is successful in building this business, calculating Mr. M's non-No Name Area income at less than full-time furthers that goal. *See* 15 AAC 125.060(c).

week (\$262.50 per week), for 26 weeks of the year yields an additional \$6,825 in annual income for purposes of a child support calculation.³⁶

An annual income that combines this amount with Mr. M's six months of No Name Area income (\$30,528) produces a potential gross income of \$37,353. When this amount is entered as gross income into CSSD's online child support calculator, Mr. M's total gross income for support calculations, including the amount of the Permanent Fund Dividend, is \$39,425. After mandatory deductions under Rule 90.3(a)(1)(A), this amount of income yields a monthly child support obligation for two children in the amount of \$730.³⁷ This is Mr. M's monthly support obligation in this matter.

This amount is also the appropriate amount for calculation of Mr. M's pre-order arrears for April, May, and June 2015. 15 AAC 125.050(b) requires that arrears be calculated based on the parent's actual total income for the support period except where, as here, a determination is made that the parent is voluntarily underemployed under 15 AAC 125.060. Because of the findings of voluntary underemployment set forth above, Mr. M's monthly support obligation for two children for April, May and June 2015 is likewise appropriately set at \$730 per month.

IV. Conclusion

Mr. M met his burden of proving that his monthly support obligation was incorrectly set in the July 2015 Amended Administrative Child Support and Medical Support Order. However, because Mr. M is voluntarily and unreasonably underemployed during his six months of non-No Name Area employment, his monthly support obligation is set based on his potential income. Mr. M's monthly support obligation for two children is set at \$730 per month for all times covered by the Amended Administrative Child Support and Medical Support Order.

Nothing in this Decision and Order prevents either parent from seeking to modify this monthly support obligation in the future should a change in circumstances warrant a modification.

³⁶ Mr. M's No Name Area job begins in November and ends in March. Potential income is therefore calculated for the 26 weeks between May 1 and October 31.

³⁷ <https://webapp.state.ak.us/cssd/guidelinecalc> (last visited October 13, 2015).

V. Child Support Order

1. T M is liable for child support in the amount of \$730 per month for two children, effective April 1, 2015 and ongoing.
2. All other terms of the Amended Administrative Child Support and Medical Support Order dated July 17, 2015 remain in full force and effect.

Dated: October 28, 2015

Signed

Cheryl Mandala
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 within 30 days after the date of this decision.

DATED this 27th day of November, 2015.

By: Signed

Signature
Jerry Burnett

Name
Deputy Commissioner

Title

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