

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

IN THE MATTER OF: )

J. S. Y. )

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) OAH No. 04-0177-CSS

) CSSD NO. 001104074

) DOR NO. 040779

**DECISION AND ORDER**

**I. Introduction**

This case involves the Obligor J. S. Y.' appeal of an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on October 12, 2004. The Obligee child is J., DOB 00/00/99.

The formal hearing was held on January 13, 2005. Mr. Y. appeared in person; the Custodian of record, M. D. M., did not participate. Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded. The record closed on January 13, 2005.

Kay L. Howard, Administrative Law Judge for the Alaska Office of Administrative Hearings, was appointed to hear this appeal by the Chief Administrative Law Judge, Terry L. Thurbon. Having reviewed the record in this case and after due deliberation, I have concluded Mr. Y.' appeal should be denied. CSSD correctly calculated his support obligation.

**II. Facts**

**A. History**

On September 12, 2003, CSSD served a Notice and Finding of Financial Responsibility on Mr. Y.<sup>1</sup> Mr. Y. initially denied paternity, but he signed a paternity acknowledgment on October 31, 2003.<sup>2</sup> CSSD issued a paternity order on November 6, 2003.<sup>3</sup>

On May 31, 2004, CSSD served an Administrative Child and Medical Support Order on Mr. Y.<sup>4</sup> He requested an administrative review on June 28, 2004.<sup>5</sup> Following the review, CSSD issued an Amended Administrative Child and Medical Support Order on October 12, 2004, that

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<sup>1</sup> Exh. 2.

<sup>2</sup> Exhs. 3-4.

<sup>3</sup> Exh. 5.

<sup>4</sup> Exh. 6.

<sup>5</sup> Exh. 7.

set ongoing support at \$232 per month, with arrears of \$8016 for the period from November 2000 through October 2004.<sup>6</sup> Mr. Y. appealed on October 29, 2004.<sup>7</sup>

At the formal hearing, CSSD was asked why the agency is charging Mr. Y. support as of November 2000, even though he was not served with notice of the paternity action until September 12, 2003. CSSD explained that Ms. M. applied for child support services in November 2000, after which CSSD made at least three attempts to serve Mr. Y. at the post office box that was, and still is, his correct address. CSSD said all the notices were returned unclaimed by the U.S. Postal Service, so CSSD had to serve Mr. Y. personally.

Mr. Y. testified he did not know the Obligee J. was his child until he was served with notice of the paternity action in 2003. Mr. Y. acknowledged he knew Ms. M. was pregnant with J., but he said she did not tell him the baby was his child. Mr. Y. said he gave Ms. M. a ride to the hospital to get an abortion, but he did not know he was the child's father, and he did not ask her if he was the father. He said they had not had any contact since then.

Mr. Y. testified he has not worked much since 1999 for several reasons. He said he was having problems with alcohol in 1999 in that he drank excessively and blacked out frequently. Mr. Y. said he did not work in the year 2000 because he had to have hernia surgery in June of that year, and his recuperation took over four months. He said he got sober in 2001 through the ASAP, the Alcohol Safety Action Program, then in January 2002 he began attending Charter College, where he majored in computers and information technology.

Mr. Y. said he finished all of his course work at Charter College, but he has not graduated, nor has he taken his computer certification exams. He said he financed his education with the help of grants and loans, but now has a \$26,000 education debt that he cannot pay.

Regarding his attempts to obtain employment since finishing Charter College, Mr. Y. said he submitted resumes to H&R Block, Charter College and the Alaska Railroad, but he did not have any results. He said he also looked for work at the Job Service office, but he did not have success there, either. Mr. Y. said he is working now, however. About three months before the hearing he applied for and obtained employment at a business called G. P., where he earns \$8.50 per hour for 38-39 hours per week.

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<sup>6</sup> Exh. 13. The calculations were \$196 per month for 2000, \$195 per month for 2001, \$116 per month for 2002, \$131 per month for 2003, and \$232 per month for 2004 and ongoing.

<sup>7</sup> Exhs. 14 - 17.

Mr. Y. said health problems other than his hernia operation interfered with his ability to obtain any work other than temporary or part-time employment such as a bell-ringer for the Salvation Army during the holidays. He said he suffers from Post Traumatic Stress Disorder (PTSD) as a result of witnessing his father die when he was young, and he has had problems with his rotator cuff and arm, his back, and he also suffers from gastro intestinal reflux disorder.

Finally, Mr. Y. testified Ms. M. has interfered with his ability to keep employment. He said she stalked him at work in either 2002 or 2003, when he worked at a pizza parlor, and at one point the manager had to call the police. Mr. Y. said he was fired because of the problems Ms. M. created.

In support of his testimony regarding his health issues, Mr. Y. provided copies of medical records from the Alaska Native Medical Center that span the years 1999 through 2004.<sup>8</sup>

Mr. Y.' friend, P. T., also presented testimony. She stated she has been acquainted with Mr. Y. since 1999, and she helped him get sober. She said he has been using her post office box as his address for several years, but she could not remember him getting certified mail there. Ms. T. also said she was present at Mr. Y.' job at the pizza parlor when Ms. M. was there. Ms. T. confirmed Mr. Y. was fired because of the problems Ms. M.'s appearance created.

## **B. Findings**

Based on the evidence in the record and after due consideration, I hereby find:

1. Mr. Y. did not meet his burden of proving by a preponderance of the evidence that CSSD's calculation of his child support obligation was incorrect, as required by 15 AAC 05.030(h);
2. Ms. M. informed Mr. Y. she was pregnant with his child prior to J.'s birth<sup>9</sup>;
3. Mr. Y. did not claim certified letters sent to his correct address from CSSD at least three times prior to being personally served;
4. Mr. Y. is not disabled for child support purposes;
5. Mr. Y. was voluntarily unemployed or underemployed prior to beginning his full-time job in late 2004;
6. CSSD correctly calculated Mr. Y.' child support arrears from 2000 through 2004 based on the Alaska minimum wage;

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<sup>8</sup> Exh. 16 at pgs. 1-68.

<sup>9</sup> Ms. M. did not appear for the hearing, but she completed a paternity affidavit on January 4, 2001, that states she had previously informed Mr. Y. he was the child's father. Exh. 2 at pg. 15.

7. Mr. Y. is currently earning \$8.50 per hour for 38 hours of work per week;

8. Based on his current wage, Mr. Y.' earnings for 2005 are estimated at \$16,796, which results in annual income of \$17,715.84, and a child support calculation of \$254 per month for 2005 and ongoing.

### **III. Analysis**

#### **A. Obligor's Disability**

A parent is obligated both by statute and at common law to support his or her children.<sup>10</sup> Civil 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."

The Obligor has the burden of proving his or her earning capacity.<sup>11</sup> An Obligor who claims he or she cannot work, or pay child support, because of a disability, or similar impairment, must provide sufficient proof of the medical condition such as testimony or other evidence from a physician.<sup>12</sup>

Mr. Y. testified his medical problems have prevented him from working, but the evidence does not support his claim. He provided medical records from the Alaska Native Medical Center. They indicate Mr. Y. consulted doctors there on several occasions from 1999 through 2004, but other than a June 7, 2000, hernia surgery, all of his health problems appear to have been relatively normal.<sup>13</sup> For example, he went to the medical center during this five-year period of time for problems such as a toothache, gastro-intestinal distress, back pain, and coughing.<sup>14</sup> Mr. Y. was released from work on October 6, 1999, for problems with his wrist, but only until a follow-up visit the next week.<sup>15</sup> Also, Mr. Y. claims his hernia recovery took over four months, but his medical records do not indicate he was seen for any hernia-related problems after July 17, 2000.<sup>16</sup> Finally, Mr. Y. told his medical care provider during a visit regarding a sore back on August 31, 2001, that he was working as a day laborer, "using pick & shovel/digging."<sup>17</sup> Thus,

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

<sup>11</sup> *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

<sup>12</sup> *Id.* at 1371.

<sup>13</sup> *See* Exh. 16.

<sup>14</sup> *See* Exh. 16.

<sup>15</sup> Exh. 16 at pg. 42.

<sup>16</sup> Exh. 16 at pg. 38.

<sup>17</sup> Exh. 16 at pg. 29.

there is no indication in Mr. Y.' medical records that Mr. Y. is or was disabled, or that he could not work.

## **B. Voluntary Unemployment**

CSSD found Mr. Y. voluntarily unemployed or underemployed.<sup>18</sup> Alaska law allows CSSD to use a parent's "potential income" if a finding is made that the parent is voluntarily and unreasonably unemployed or underemployed.<sup>19</sup>

It is not necessary to prove the parent was purposefully avoiding a support obligation, or acting in bad faith, in order to find voluntary unemployment or underemployment.<sup>20</sup> The Alaska Supreme Court has upheld lower court decisions finding noncustodial parents voluntarily unemployed or underemployed who were not making their best efforts to obtain or retain employment. For example, the Obligor in Kowalski claimed the construction industry, his health, and the season had contributed to his erratic work history. On appeal, the court affirmed the trial court's finding that the Obligor was voluntarily unemployed because he had not made "any major effort to remain employed" after the parties' marriage.<sup>21</sup>

In another case, the Alaska Supreme Court upheld a lower court's finding that the Obligor parent was voluntarily underemployed because the Obligor deliberately kept a low profile in his business. He did not market his services or have a listed telephone number, he did not operate a large piece of equipment that could have earned more money, and he did not hire additional employees to keep his shop busy. As a result, the court considered him not to be earning his "optimal" income, and stated he could be considered voluntarily underemployed.<sup>22</sup>

If a parent is found to be voluntarily unemployed or underemployed, the child support is calculated using his or her "potential income," which is based on the parent's "work history, qualifications and job opportunities."<sup>23</sup> The use of "potential income" in calculating a child support obligation is not to punish the Obligor parent; rather, it is to ensure that the children and the other parent are not "forced to finance" the Obligor parent's lifestyle.<sup>24</sup> The commentary

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<sup>18</sup> Exh. 13 at pg. 7.

<sup>19</sup> Civil Rule 90.3(a)(4).

<sup>20</sup> *Kowalski*, 806 P.2d at 1371.

<sup>21</sup> *Id.* at 1370.

<sup>22</sup> *Nass v. Seaton*, 904 P.2d 412, 418 (Alaska 1995).

<sup>23</sup> Civil Rule 90.3, Commentary III.C.

<sup>24</sup> *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

states the “the totality of the circumstances” should be considered in a decision whether to impute income to the obligor parent.<sup>25</sup>

CSSD found Mr. Y. to be voluntarily and unreasonably unemployed, and as a result, calculated his child support for 2000 – 2004 based on the annual income an Alaskan would receive if earning the minimum wage.<sup>26</sup> For 2002 and 2003, CSSD attributed half-time minimum wage income to Mr. Y. because he was in school.<sup>27</sup>

After having considered the “totality of the circumstances,” I found that Mr. Y. did not meet his burden of proving by a preponderance of the evidence that CSSD’s determination he was voluntarily unemployed or underemployed is incorrect. Mr. Y. testified that various health problems, including alcoholism, prevented him from working, and that he could not work while he was in college.

Mr. Y.’ testimony was not persuasive. His medical problems were not unusual or very serious, and they did not prevent him from finding and keeping employment. Also, Mr. Y.’ Alaska Department of Labor wage report indicates he had consistent, year-round employment in the years prior to this child support action. Since he could have worked, and did not, Mr. Y.’ unemployment was therefore voluntary.

Thus, CSSD’s order finding Mr. Y. voluntarily unemployed or underemployed was reasonable. Based on the record as a whole, I conclude CSSD’s Amended Administrative Child Support and Medical Support Order should be affirmed.

One final issue should be addressed. Mr. Y. testified he began working in late 2004 at a business called G. P. for \$8.50 per hour for 38-39 hours per week. This results in annual income of \$17,715.84, including the PFD, which yields a child support calculation of \$254 per month. Mr. Y.’ child support should be set in this amount for 2005 and ongoing.

#### **IV. Conclusion**

Mr. Y. did not meet his burden of proving the Amended Administrative Child Support and Medical Support Order was incorrect. Thus, CSSD correctly calculated Mr. Y.’ child support obligation based on the agency’s determination that he was voluntarily unemployed or underemployed from 2000 through 2004.

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<sup>25</sup> Civil Rule 90.3, Commentary III.C.

<sup>26</sup> Exh. 13 at pgs. 12, 13 & 16.

<sup>27</sup> Exh. 13 at pgs. 14 – 15.

**V. Child Support Order**

1. Mr. Y. is liable for child support in the amount of \$196 per month from November 2000 through December 2000, \$195 per month for 2001, \$116 per month for 2002, \$131 per month for 2003, and \$232 per month for 2004;
2. Mr. Y. is liable for child support in the amount of \$254 per month from January 2005 through June 2005, and ongoing.

DATED this 8th day of June, 2005.

By: Signed \_\_\_\_\_  
Kay L. Howard  
Administrative Law Judge

**Adoption**

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. I, Terry L. Thurbon, Chief Administrative Law Judge, on behalf of the Commissioner of Revenue, order that this decision and order concerning the child support obligation of J. S. Y. be adopted as of this date and entered in his file as the final administrative determination in this appeal.

Under AS 25.27.062 and AS 25.27.250 the Obligor's income and property are subject to an order to withhold. Without further notice, a withholding order may be served on any person, political subdivision, department of the State or other entity.

Reconsideration of this decision may be obtained by filing a written motion for reconsideration within 10 days after the adoption of this decision, pursuant to 15 AAC 05.035(a). The motion must state specific grounds for relief, and, if mailed, be addressed: Commissioner's Office Appeals (Reconsideration), Alaska Department of Revenue, P.O. Box 110400, Juneau, Alaska 99811-0400.

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 of the date of this decision.

DATED this 8<sup>th</sup> day of June, 2005.

By: Signed \_\_\_\_\_  
Terry L. Thurbon  
Chief Administrative Law Judge

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