

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

IN THE MATTER OF: )

K. C. W. )

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) OAH No. 05-0855-CSS

) CSSD No. 001019975

**DECISION AND ORDER**

**I. Introduction**

This matter involves the Obligor K. C. W.'s appeal of an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on August 30, 2005. The Custodian is J. J.; the Obligee child is D., DOB 00/00/89.

The formal hearing was held on November 28, 2005, and January 9, 2006. Neither party participated in the first hearing; both appeared in person at the second hearing. Andrew Rawls, Child Support Specialist, represented CSSD. The record closed on January 9, 2006.

Kay L. Howard, Administrative Law Judge in the Alaska Office of Administrative Hearings, conducted the hearing and prepared this decision. Having reviewed the record in this case and after due deliberation, I have concluded Mr. W.'s appeal should be denied and his child support should remain at \$238 per month, as calculated by CSSD.

**II. Facts**

**A. History**

Ms. J. began receiving public assistance benefits for D. in April 2005.<sup>1</sup> On July 13, 2005, CSSD served an Administrative Child and Medical Support Order on Mr. W.<sup>2</sup> He requested an administrative review.<sup>3</sup> Following the review, CSSD issued an Amended Administrative Child Support and Medical Support Order on August 30, 2005, that set Mr. W.'s ongoing child support at \$238 per month, with arrears of \$1190 for the period from October April 2005 through August 2005.<sup>4</sup> On October 27, 2005, Mr. W. filed an appeal and requested a formal hearing. He asserted primarily that he cannot work because of a medical condition.<sup>5</sup>

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<sup>1</sup> CSSD Pre-Hearing Brief at pg. 1.

<sup>2</sup> Exh. 4.

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

<sup>4</sup> Exh. 8.

<sup>5</sup> Exh. 10.

## **B. Material Facts**

Mr. W. and Ms. J. are the parents of D., DOB 00/00/89. The parties were together from 1985 through 2000. After they separated, Mr. W. had custody of D. for a period of time and received public assistance benefits on her behalf; Ms. J. paid support. Ms. J. currently has custody and began receiving public assistance benefits on D.'s behalf in April 2005.

Mr. W. is not currently working, nor does it appear he has had a regular job for many years.<sup>6</sup> In 2003, he received a journalism degree in public relations and advertising, and in 2004 he completed one year of post-graduate work. In 2005, Mr. W. and another man formed a partnership to open and operate two bed and breakfast facilities in an upper-scale neighborhood in Anchorage. Mr. W. lived in one of the homes and his partner paid the rent and other expenses. They did not have many tenants and the partnership dissolved under less than favorable conditions in July 2005. Over and above the free rent he received at the bed and breakfast, Mr. W. obtained about \$5,960 in 2005 with which to support himself from the sale of artwork and other small pieces of personal property. In addition he received dividends from his Native corporation and approximately \$2000 in child support when he had custody of D.

After the partnership dissolved, Mr. W. spent three months in negotiations with a Las Vegas casino trying to develop a project in which he would produce a national tournament and television show. He stayed in Las Vegas during the negotiations and returned to Anchorage at the end of October 2005. The project did not go forward.

Mr. W. has had advanced periodontal disease for many years. Several years ago, he had custody of D. and was receiving public assistance benefits at the time. In 2001, the state paid for a dental exam and cleaning, and estimated it would take \$1500 to fix Mr. W.'s problem. Another estimate of \$3000 was done in 2004, and in 2005, Mr. W. obtained an estimate from a local dentist that indicated it would cost in excess of \$13,000 to fix his teeth. Mr. W. is one-eighth Athabascan Indian, so he qualifies for dental care at the Alaska Native Medical Center. However, Mr. W. refuses to have injections at the Native hospital because he claims that in 1988, his mother died from hepatitis B while participating in a hepatitis study there.

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<sup>6</sup> Alaska Department of Labor and Workforce Development wage report. Exh. 13.

### III. Discussion

This appeal raises the question whether CSSD used the correct income figures for Mr. W.'s child support calculation. Mr. W. argues he cannot work because of his periodontal disease.

#### A. Mr. W.'s Disability

A parent is obligated both by statute and at common law to support his or her children.<sup>7</sup> By regulation, CSSD collects support from the date the custodial parent requested child support services, or the date public assistance or foster care was initiated on behalf of the child(ren).<sup>8</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>9</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>10</sup>

Mr. W. testified his periodontal disease prevents him from working, especially since his journalism degree would require him to have close contact with individuals or to be in a public speaking capacity. Mr. W.'s evidence does not support the claim that his medical condition prevents him from working. His dentist, Todd S. Christensen, D.D.S., confirmed that Mr. W. has periodontal disease, but the doctor refused to write a letter stating that the Obligor cannot work.<sup>11</sup> Also, as recently as late 2005, Mr. W. spent close to three months in Las Vegas in "verbal negotiations" with casino representatives while pitching a production deal for him to produce a national card tournament and television show. Clearly, Mr. W.'s periodontal disease does not prevent him from working, as evidenced by the fact that he spent several weeks in Las Vegas taking part in face-to-face negotiations, activities that Mr. W. testified he cannot do because they involve close personal contact.

To the extent that Mr. W.'s periodontal disease interferes with his ability to earn income, the cause, at this point in Mr. W.'s life, is his peculiar refusal to have the condition treated. He

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<sup>7</sup> *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

<sup>8</sup> 15 AAC 125.105(a)(1)-(2).

<sup>9</sup> *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

<sup>10</sup> *Id.* at 1371.

qualifies for dental care at the Alaska Native Medical Center, but he refuses to be treated at the Native hospital because his mother died there while participating in a hepatitis study 18 years ago.

It should be noted that Mr. W. appeared in person at the hearing. He is a normal looking man with no obvious facial defects, and, although he occasionally slurred a few words, his speech and communication were clear.

Accordingly, based on the evidence as a whole, I find Mr. W. is not disabled from working because of his periodontal disease. Since he could have worked, and did not, it is necessary to determine whether Mr. W.'s unemployment was voluntary.

### **B. Voluntary Unemployment**

CSSD did not specifically find Mr. W. to be voluntarily unemployed, but the agency imputed the minimum wage to him, which suggests an implicit finding of voluntary unemployment.<sup>12</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>13</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>14</sup> The Alaska Supreme Court has upheld lower court decisions finding noncustodial parents were not making their best efforts to obtain employment or remain employed. 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>15</sup> In Nass v. Seaton, 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 even have a listed telephone number, did not operate a large piece of equipment that could have earned more money, and did

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<sup>11</sup> Exh. A at pgs. 3 & 5.

<sup>12</sup> Exh. 35.

<sup>13</sup> Civil Rule 90.3(a)(4).

<sup>14</sup> *Kowalski* at 1371.

<sup>15</sup> *Id.* at 1370.

not hire additional employees to keep his shop busy, so the court considered him not to be earning his “optimal” income, and stated he could be considered voluntarily underemployed.<sup>16</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>17</sup> The use of “potential income” in a child support obligation is not to punish the Obligor parent; rather, it is to insure that the children and the other parent are not “forced to finance” the Obligor parent's lifestyle.<sup>18</sup> The commentary states the court should consider “the totality of the circumstances” when deciding whether to impute income to the obligor parent.<sup>19</sup> A primary goal of imputing income, according to the Alaska Supreme Court, is to compel the parent to find full-time employment:

An important reason -- if not the chief reason -- for imputing income to a voluntarily underemployed parent is to goad the parent into full employment by attaching an unpleasant consequence (a mounting child support debt or, in certain cases of shared custody, a reduced child support payment) to continued inaction. Indeed, in primary and shared custody situations alike, an order imputing income often yields no tangible benefits to the children unless and until it impels the underemployed parent to find a job.<sup>[20]</sup>

After having considered the “totality of the circumstances,” I find that Mr. W. did not meet his burden of proving by a preponderance of the evidence that CSSD’s Amended Administrative Child Support and Medical Support Order is incorrect. Mr. W. testified that periodontal disease prevents him from working, but his testimony was not persuasive. His medical problem does not prevent him from working. Since he could work, and does not, Mr. W.’s unemployment is therefore voluntary and unreasonable.

Thus, CSSD reasonably imputed income to Mr. W. based on the minimum wage of \$7.15 per hour. Based on the record as a whole, I conclude CSSD’s Amended Administrative Child Support and Medical Support Order should be affirmed.

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<sup>16</sup> *Nass v. Seaton*, 904 P.2d 412, 418 (Alaska 1995).

<sup>17</sup> Civil Rule 90.3, Commentary III.C.

<sup>18</sup> *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

<sup>19</sup> Civil Rule 90.3, Commentary III.C.

<sup>20</sup> *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).

**IV. Conclusion**

Mr. W. did not meet his burden of proving by a preponderance of the evidence that CSSD’s Amended Administrative Child Support and Medical Support Order was incorrect. Mr. W. is not disabled; rather, he is voluntarily and unreasonably unemployed or underemployed. Therefore, I conclude that CSSD’s order should be affirmed.

**V. Child Support Order**

- Mr. W. is liable for child support in the amount of \$238 per month for the period from April 2005 through May 2006, and ongoing.

DATED this 3<sup>rd</sup> day of May, 2006.

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. 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 24<sup>th</sup> day of May, 2006.

By: Signed \_\_\_\_\_  
 Signature  
Tom Boutin \_\_\_\_\_  
 Name  
Deputy Commissioner \_\_\_\_\_  
 Title

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