

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

In the matter of:)
)
D. R. C.) OAH No. 06-0599-CSS
) CSSD No. 001059484
_____)

DECISION AND ORDER

I. Introduction

D. R. C. appealed an Administrative Review Decision that the Child Support Services Division (CSSD) issued in his case on July 12, 2006, denying his Motion to Vacate Default Order. The obligee child is T. C., born 00/00/89. J. A. S. has court-ordered primary physical custody of T. although, as discussed below, T. now resides with her father.

Mr. C. and Ms. S. both participated in person in the formal hearing, held on September 11, 2006. David Peltier, Child Support Specialist, appeared for CSSD. The hearing was recorded.

II. Facts

Mr. C.'s child support obligation for T. dates back to 1996.¹ The support amount was set at \$148 per month for many years. Ms. S. had primary physical custody of T. from the outset, formalized in a Superior Court order in 1999.²

In July of 2003 CSSD entertained a petition for modification from one of the parents; the record does not identify the petitioner.³ On September 12, 2003, CSSD issued a Modified Administrative Child Support and Medical Support Order, changing the support amount to \$540 per month effective August 1, 2003.⁴

The 2003 order was a check-the-box order. Under "Findings of Fact – Income Determination," a box was checked next to the following finding:

After considering relevant circumstances, including education, training, occupation, health, employment opportunities and the extent to which you

¹ Exhibit 1 (Notice and Finding of Financial Responsibility).
² Exhibit 2.
³ Exhibit 3 (Notice of Petition for Modification of Administrative Support Order).
⁴ Exhibit 4.

are participating in looking for work, we find you are voluntarily unemployed or underemployed.

Below the check boxes was a blank preceded by the phrase, "We find that your monthly child support obligation is based on:" In the blank was entered:

WAGES BASED ON MEAN WAGE AS A LABORER @ \$19.11 PER HOUR X 2080 HOURS AND AK PFD. THE OBLIGOR'S GROSS INCOME WAS DETERMINED TO BE \$40,870.00 AND THE ANNUAL ADJUSTED INCOME WAS DETERMINED TO BE \$32,393.73 WHICH RESULTS IN A MONTHLY CHILD SUPPORT OBLIGATION OF \$540.00 FOR ONE CHILD. THIS REPRESENTS A 265% INCREASE TO THE CURRENT SUPPORT ORDER OF \$148.00.

Mr. C. fell substantially in arrears while this order was in effect. As of late 2005, his arrears were about \$16,000.

On July 11, 2006, Mr. C. submitted a Motion to Vacate Default Order using CSSD form 04-1919D, attaching tax returns from 2003 and 2004.⁵ CSSD denied the motion the following day.⁶ Mr. C. appealed on two bases: that he currently has physical custody of T., and that the income and support amounts are too high.

At the hearing, CSSD and the two parents came to agreement regarding physical custody. Although the court order has not been modified, Mr. C. has had actual physical custody of T. since December, 2005. Ms. S. recently filed a Notice of Request for Suspension of Ongoing Support. All parties agree that the child support obligation should be suspended beginning December 1, 2005.

Regarding income, Mr. C. was initially uncooperative in exploring his earning capacity. He claimed that he made only \$1150 in 2004, even though his tax return showed wages of \$9650 for that year. He declined to explain the discrepancy. He said that his low income was a result of having his driver's license suspended by CSSD, because he cannot drive to job sites to do the construction work for which he is qualified. However, his license was not suspended until June of 2005, and its suspension cannot explain his low income in 2004. When asked how he had lived over the last few years without significant income, he said that he had lived on savings and on proceeds of selling assets. Of course, if he had sufficient savings and assets to support himself for several years, he could have made payments against his child support obligation, which he apparently has not done.

⁵ Exhibit 5.

⁶ Exhibit 6 (Administrative Review Decision).

Later in the hearing, Mr. C. became less evasive. He testified that in 2002 he earned \$18 per hour as a self-employed house framer. Weather and job availability issues caused some gaps between periods of employment. He estimated that he was able to work 36-40 weeks in the year. His testimony on this portion of his work history, in contrast to his other testimony, was credible. Taking the middle figure of 38 weeks per year, this would produce annual earnings of \$27,360.

I find that as of July of 2003, when the modification order was entered, Mr. C.'s actual earnings and earning capacity were \$27,360 per year, plus PFD. In 2003, Mr. C. attempted to start his own business and was unsuccessful; this may have depressed his earnings somewhat in that year and in 2004. However, Mr. C. provided too little credible testimony about those years and about 2005 to determine a different actual rate of income, including both under-the-table and above-the-table sources. The 2002 figure remains the best evidence of his earnings and earning capacity for the succeeding years.

III. Discussion

A. Suspension of support after custody change

All parties agree that support should be suspended as of December 1, 2005.

B. Authority to vacate the prior order

At the hearing, CSSD's representative contended that the Department could be beyond its authority to vacate the prior support order. Alaska Statute 25.27.195(b) permits obligors to move, at any time, to vacate a prior support order "that was based on a default amount rather than the obligor's actual ability to pay." The underlying legal question in this case is whether the order in this case was such an order.

In 2005, the Department of Revenue adopted a regulation that effectively seeks to define the quoted phrase. The regulation excludes, from eligibility for motions to vacate under AS 25.27.195(b), support orders based on "an imputed potential income based on a finding of voluntary unemployment or underemployment."⁷ This is the basis for the CSSD representative's concern. It is notable, however, that the same regulation *includes* among the eligible orders ones that were imputed, as Mr. C.'s was, from "group wage statistics."⁸

In this case, the order that is subject to the motion to vacate was a form order with check-boxes. The order pre-dates the new definitional regulation and it may be that, to the person

⁷ 15 AAC 125.121(j)(2)(C).

⁸ 15 AAC 125.121(j)(1)(B).

filling out the form, it did not seem to make a great deal of difference which box was checked. Assuming the box for “voluntarily unemployed or underemployed” was checked deliberately rather than in error, there is nothing in the order or in the broader record to suggest that the finding was made after due deliberation with genuine consideration of the factors that go into such a finding.

Indeed, there is a follow-up finding in the order imputing to Mr. C. the mean wage of a laborer. The order projected that Mr. C. could work as a laborer 52 weeks per year. If this was an imputation on the basis of voluntary unemployment or underemployment, the person entering the order was required by regulation to consider a variety of factors including “job opportunities in the area where the parent physically resides.”⁹ It is unlikely that laborers in Anchorage in 2003 typically had the opportunity to work every week of the year. The projection of 52 weeks of work at average laborer wages indicates that the form order was filled out without evaluation of Mr. C.’s individual circumstances. It was, in the true sense, a default order.

To construe 15 AAC 125.121 to exclude orders such as the one at issue in this case from eligibility for a motion to vacate under AS 25.27.195 would risk putting the regulation at odds with the intent of the statute it seeks to implement. To avoid this potential conflict, I find that the order at issue in this case was a default order based on “group wage statistics,” as that phrase is used in 15 AAC 125.121(j)(1)(B), and was within the class of orders eligible for a motion to vacate under AS 25.27.195 and 15 AAC 125.121(a) and (b).

Under 15 AAC 125.121(a), when a proper motion to vacate default has been made, the agency must vacate the prior order if it determines “that the default income figure is not an accurate reflection of the obligor’s income for purposes of calculating [child support.]” As discussed in Part II, the default income figure of \$40,870 was somewhat higher than Mr. C.’s actual or potential income for the period following the 2003 modification order. The motion to vacate should therefore be granted and a new support amount set for the period at issue.

C. Amount of support effective August 1, 2003 and ongoing

When one parent has primary custody of the children, the other parent’s child support obligation is “calculated as an amount equal to the adjusted annual income of the non-custodial parent multiplied by a percentage specified in [Civil Rule 90.3](a)(2).”¹⁰ By “adjusted annual

⁹ 15 AAC 125.020(b).

¹⁰ See Alaska R. Civ. P. 90.3(a).

income” the rule means “the parent’s total income from all sources minus mandatory deductions . . .” which include basic taxes, union dues, and retirement contributions.¹¹ Child support for one child is calculated at 20% of the resulting figure.¹²

Because child support is calculated based on annual income, temporary periods of unemployment do not negate the support obligation. Also, child support may be based on the potential income of a person who is voluntarily and unreasonably unemployed or underemployed.¹³ Child support is calculated based on “the income which will be earned when the support is to be paid”—in this case, 2003 through 2005.¹⁴

Here, the best estimate of Mr. C.’s actual earnings or earning capacity through this period is his actual 2002 income, as explained above. Using a starting year of 2003 (the date of the modification order that is to be replaced), Mr. C.’s income should be \$27,360 in earnings per annum plus that year’s PFD of \$1,107.56, yielding \$28,467.56. CSSD’s child support calculator program shows allowable deductions of \$414.73 per month for taxes and unemployment insurance, leaving adjusted annual income of \$23,490.80.¹⁵ Twenty percent of this amount is \$4,698.16 per year, which works out to \$392 per month.

IV. Conclusion

The department has authority to grant the July 11, 2006 Motion to Vacate Default Order and should do so under the standard set forth in 15 AAC 125.121(a). The 2003 modified support order should be vacated, and a new support amount set based on actual income information. That amount is \$392 per month, effective August 1, 2003. The obligation should be suspended as of December 1, 2005.

V. Child Support Order

- The Administrative Review Decision entered in this matter on July 12, 2006 is reversed;
- D. R. C.’s Motion to Vacate Default Order, dated July 11, 2006, is granted;
- The Modified Administrative Child Support and Medical Support Order entered in this matter on September 12, 2003 is vacated;

¹¹ Alaska R. Civ. P. 90.3(a)(1).

¹² Alaska R. Civ. P. 90.3(a)(2)(D).

¹³ Civil Rule 90.3 Commentary, Part III-C.

¹⁴ Civil Rule 90.3 Commentary, Part III-E.

¹⁵ A printout of the calculation is attached as Attachment A.

- D. R. C. is liable for ongoing child support in the amount of \$392 per month, effective August 1, 2003;
- D. R. C. does not have an obligation to pay ongoing child support for the months beginning with the month of December 2005 because he has had primary custody of T. since that month.
- D. R. C. will not have an obligation to pay monthly child support as long as he continues to have primary custody of T.

DATED this 13th day of September, 2006.

By: Signed
 Christopher Kennedy
 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 29th day of September, 2006.

By: Signed
 Signature
Christopher Kennedy
 Name
Administrative Law Judge
 Title

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