

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

IN THE MATTER OF)
)
 R. K.) Case No. OAH-07-0428-CSS
) CSSD Case No. 001127321

DECISION & ORDER

I. Introduction

The obligor, R. K., appeals an Amended Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD) on June 7, 2007. Administrative Law Judge Dale Whitney of the Office of Administrative Hearings heard the appeal on August 14, 2007. Mr. K. appeared by telephone, as did the custodian of record, K. S.. Andrew Rawls represented CSSD. The child is C. K. (DOB 00/00/98). The administrative law judge issues a support order based on imputed income.

II. Facts

Mr. K. is now 36 years old. He began attending college when he was eighteen, and attended school off and on for a number of years. In 2004 Mr. K. graduated with a bachelor's degree in biological sciences and a minor in French. Mr. K. also has a teaching certificate. In 2005 Mr. K. took a year off school and taught English in France for about five months, and he also worked for the Department of Fish and Game that year. Mr. K. then began working on a master's degree in education. He is currently about half way to obtaining that degree, and anticipates that it will be another two years before he completes it.

Mr. K. currently lives what might be described as the lifestyle of a self-sufficient innovator. Mr. K. lives with his girlfriend in a house that he is building on property his mother owns. The house is not connected to any utilities. Mr. K. hauls water and cuts his own wood. He meets most of his household needs through recycling and reusing abandoned or discarded items. His monthly expenses consist mostly of about \$500 for food, \$300 for the payment on his mother's land, and \$300 for gasoline and maintenance on a 1998 Kia that his mother gave him and a 1996 Honda Shadow motorcycle that he and his girlfriend share. His stepfather pays for his \$20-per-month cell phone bill, and Mr. K. spends about \$20 per month on tobacco. His girlfriend earns about \$10,000 per year; neither supports any other children.

Mr. K. has a number of debts, none of which he is currently paying. He has medical bills of about \$7,000, credit card bills of about \$15,000 that are in collection, and student loans of about \$40,000.

In 2006 Mr. K. received approximately \$20,000 in student loans. He spent \$10,000 on tuition, books, and school-related expenses, and the remainder went mostly to buy building materials for the work on his house. Mr. K. worked a temporary job during Christmas vacation and earned about \$2,000, and he received a PFD.

Mr. K. has been working on developing an operation for pressing biodiesel from canola seeds grown in Alaska. In 2006 he won a \$20,000 prize in a business ideas competition for his plan to manufacture biodiesel in Delta Junction. According to the press release, the money was to “help assemble and test a pilot biodiesel manufacturing plant” that would process canola seed for human consumption, animal feed supplements, and biodiesel. Mr. K. testified that there were no formal restrictions on how the money could be used, but he spent \$12,000 on a seed press, \$2,500 on generators, \$2,800 on a conex, and the rest for canola seed and miscellaneous expenses related to the seed pressing operation. Mr. K. testified that he hopes to press 3,000-4,000 gallons of oil this year, but he is still learning the process for getting the oil certified for use as fuel. Mr. K. testified that he regards the enterprise as a weekend project, and does not foresee it being profitable in the immediate future, despite the long-term potential in Alaska for this emerging industry.

Although he is attending school full-time, Mr. K. does not expect to earn his master’s degree for another two years. Mr. K. does not attend school in the summertime, when he works on building his house and also does work on his parents’ farm. Mr. K. testified that with his master’s degree he could earn about \$35,000 as a teacher, but with his current credentials he could earn around \$32,000 per year. Mr. K. currently receives about \$20,000 per year in student loans. He uses half of this amount for tuition and living expenses and the other half for work on the house.

In 2006 C. stayed with Mr. K. for one period of extended visitation running from about July 15 until September 2.

III. Discussion

Child support in a primary custody case is calculated in Alaska under a formula contained in Civil Rule 90.3(a). Under this rule, support for one child is set at twenty percent of the obligor’s adjusted annual income, which is income from all sources minus certain deductions for items such as tax, retirement contributions, and support paid to older children. The rule provides that

The court may calculate child support based on a determination of the potential income of a parent who voluntarily and unreasonably is unemployed or underemployed. A determination of potential income may not be made for a parent who is physically or mentally incapacitated, or who is caring for a child under two years of age to whom the parents owe a joint legal responsibility. Potential income will be based upon the parent's work history, qualifications, and job opportunities.

The Commentary to Civil Rule 90.3 expands somewhat on the provision for imputing income:

The court may calculate child support based on a determination of the potential income of a parent who voluntarily and unreasonably is unemployed or underemployed. A determination of potential income may not be made for a parent who is physically or mentally incapacitated, or who is caring for a child under two years of age to whom the parents owe a joint legal responsibility. Potential income will be based upon the parent's work history, qualifications and job opportunities. The court shall consider the totality of the circumstances in deciding whether to impute income. When a parent makes a career change, this consideration should include the extent to which the children will ultimately benefit from the change.

CSSD calculated Mr. K.'s gross income to be \$21,771.63, including \$20,331.00 as income from self-employment. This money is mainly the prize money Mr. K. won for development of his canola enterprise. No business deductions were accounted for. In his written appeal, Mr. K. points out that "in 2006 I received a \$20,000 award from a business plan competition which I entered. \$14,000 of that money went to buy equipment for the business. The business is not yet generating income." He asserts that his "income for the past two years and the next two years is limited to student loans."

For purposes of calculating support, "income" includes almost any source of money. The Commentary specifically lists prizes and awards as sources of income. In this case, however, the \$20,000 should not be counted as income. Although the money did not have legal limitations on its use, it was awarded with the understanding that it would be used for the promotion and development of a speculative new industry that would not be expected to return immediate profit. The grantor's purpose was not to benefit Mr. K., but to spur development of an innovative new business. Should the business become profitable, naturally any profit would be properly regarded as income for purposes of calculating child support, but it is likely to be some time before that occurs. It is also notable that the business does not consume a substantial amount of Mr. K.'s time or impair his ability to otherwise earn a living. It is, as Mr. K. testified, a weekend project. At this point the business is income neutral, and it should not be considered when calculating support.

The question that arises in this case is whether Mr. K. is voluntarily and unreasonably underemployed. From his own perspective, Mr. K. is probably not unreasonably underemployed. In the long run, pursuit of his master's degree and construction of his house will have economic benefits while allowing him to presently engage in the lifestyle he enjoys. But the case must also be viewed from the perspective of the child, whose needs are immediate. C. is already nine years old, and many of the benefits Mr. K. will enjoy will accrue after this child emancipates, when Mr. K. will no longer have any legal obligation to support the child.

From C.'s perspective, an increase in Mr. K.'s annual income of \$3000 per year does not begin to justify two years of minimal support at a critical age. During the period of childhood, Mr. K.'s master's degree will do C. very little good from a financial perspective. Parents are obligated to support their children; children are not required to sacrifice the support they are legally entitled to in order to finance their parents' educational pursuits or lifestyle choices. Mr. K. is capable of earning a very good income now, when his child needs support. This does not mean that Mr. K. must change his lifestyle, but his support obligation should be calculated in accordance with his earning ability.

Mr. K. testified that with his current credentials he could expect to earn about \$32,000 per year as a teacher. This amount, when combined with an annual permanent fund dividend, results in a child support obligation of \$462 per month.¹

While imputing income is appropriate for ongoing support, arrears for the period before the establishment of this order should be based on actual earnings. The wages from the temporary Christmas job and Mr. K.'s PFD income of \$1106.96 are clearly income, but they make up only a small percentage of the resources Mr. K. actually had available. Student loans were the principal source of income for Mr. K. in 2006. Half of the student loans were spent on school, and as it was necessary to attend school in order to receive the loans that portion should not be regarded as income. The remaining \$10,000 Mr. K. opted to spend on building materials, but this money was available for Mr. K. to spend on living expenses, and it is money that would have been available to support C.'s household if the family had been intact. Thus, Mr. K.'s gross annual income for 2006 was \$13,106.96. This amount of income results in a child support obligation of \$194 per month for one child during the period for pre-order arrears.²

¹ See Appendix A.

² See Appendix B.

Mr. K. requested visitation credit for time that C. stays with him. The parties agree that in 2006 C. stayed with Mr. K. for six to seven weeks during part of July, all of August, and two days of September. Civil Rule 90.3(a) provides:

The court may allow the obligor parent to reduce child support payments by up to 75% for any period in which the obligor parent has extended visitation of over 27 consecutive days. The order must specify the amount of the reduction which is allowable if the extended visitation is exercised.

Mr. K. should be allowed a reduction of seventy-five percent for any calendar month in which C. is with him for more than 27 consecutive days, including August of 2006.

IV. Conclusion

Based on actual income, arrears in this case should be set at \$194 per month. For purposes of calculating ongoing child support, Mr. K. is voluntarily and unreasonably underemployed. Mr. K. is capable of earning \$32,000 per year in addition to PFD income, and his support obligation should be set accordingly at \$462 per month, with a reduction of 75% for any month in which Mr. K. exercises more than 27 days of visitation, including August of 2006.

V. Order

IT IS HEREBY ORDERED that child support arrears be set at \$194 per month for one child for the period from February 1, 2006 through December 31, 2007. For the period from January 1, 2008 and ongoing, support shall be set at \$462 per month for one child. Mr. K. is entitled to a seventy-five percent reduction for any month in which he exercises more than 27 days of visitation, including August of 2006.

DATED this 6th day of December, 2007.

By: Signed
DALE WHITNEY
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 notices, 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 26th day of December, 2007.

By: Signed
Jerry Burnett
Director, Administrative Services

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