

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

In the Matter of:)	
)	
L. M. E. aka)	OAH No. 08-0277-CSS
L. L. and L. P.)	CSSD No. 001115342
_____)	

DECISION AND ORDER

I. Introduction

L. M. E., who has also been known by the names L. L. and L. P., appealed a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on December 12, 2007 and served on Ms. E. on May 12, 2008. The order added a child to the prior support order, calculating arrears for the addition and establishing an ongoing support obligation of \$309 per month for three children. The obligee children, all of whom are in foster care, are: R. E., born 00/00/97; R. E., born 00/00/01, and C. E., born 00/00/05.

The formal hearing was convened on June 26, 2008, but Ms. E. did not appear and could not be reached by telephone. Because Ms. E.'s input was important, the administrative law judge, with CSSD's concurrence, gave Ms. E. an opportunity to request a new hearing. She did so, and the new hearing convened with advance notice to both parties on July 30, 2008. Ms. E. did not appear or call in for the second hearing, but the administrative law judge reached her by telephone as she was doing her grocery shopping. After she completed her shopping and went through the checkout line, Ms. E. participated in the hearing. David Peltier, Child Support Specialist, represented CSSD in the July 30 session. Both hearing sessions were recorded. The record was held open for Ms. E. to submit evidence in support of her claim of disability by August 15, 2008. She made a late submission in connection with that claim on August 26, 2008.

Because Ms. E. has not met her burden of showing that CSSD's December 12 order was erroneous, the order will be affirmed.

II. Facts

L. E. is a former resident of Alaska who moved out of the state on June 11, 2007.¹ She now resides in Lassen County, California, where she lives rent-free in a motor home. She has no daily living expenses.² She is taking courses toward an A.A. degree at a college in Susanville, California.³

Ms. E. has been employed from time to time. In 2006 she worked for the Alaska Club, Arby's, and Cal Worthington, although the periods of employment appear to have been brief. In 2008, she worked for a time for In-Home Services; she reports that she grossed \$300 per month in that position.⁴

Ms. E. reports that she has been bipolar since 2003.⁵ A letter from her health care provider confirms that she has been under treatment for this condition at least since May of 2008.⁶

In 2003, CSSD set a child support obligation of \$343 per month for L. E.'s support of the two children she had at that time.⁷ Late in 2007 the agency began a review of Ms. E.'s case for potential modification of the obligation to add C. E. to the support order.⁸ This review led to the Modified Administrative Child Support and Medical Support Order under appeal.

The modified order set child support arrearages going back to April of 2006 for the addition of C. to the order,⁹ but these adjustments have not been challenged in the present appeal. The focus of this appeal is the calculation of an ongoing support amount based on Ms. E.'s 2007 income.

CSSD calculated the 2007 and ongoing support amount by imputing income to Ms. E. as though she were working full-time at minimum wage, using the Alaska minimum wage for the

¹ Cross-examination of Ms. E.. The exact moving date is provided in Ms. E.'s appeal notice, found at Exhibit 4, p. 1.

² Cross-examination of Ms. E..

³ *Id.*

⁴ *Id.*

⁵ Direct testimony of Ms. E..

⁶ Letter faxed to OAH from Jodi Krumm, Northeastern Health Center, Susanville, California, Aug. 26, 2008.

⁷ Exhibit 1.

⁸ Exhibit 2.

⁹ Exhibit 3, p. 8.

first half of 2007 and the federal minimum wage for the second half.¹⁰ The federal minimum wage figure used was the one in effect on July 1, 2007, \$5.15 per hour; the state wage used was \$7.15 per hour. The calculation assumed that Ms. E. would receive no permanent fund dividend.¹¹

In this appeal, Ms. E. has contended that she cannot hold a job. At the hearing on July 30, 2008 and in an order issued immediately afterward, the administrative law judge gave Ms. E. “until August 15, 2008 to submit documentation from her medical provider(s) of her diagnosis, treatment plan, and their assessment of her ability to work.” Ms. E. submitted nothing by August 15, but on August 26, 2008 her health care provider in Susanville, California submitted the letter mentioned above that confirmed her treatment for bipolar disorder. The letter stated that Ms. E. “has been seen here” for “Bipolar disorder and related issues.” It indicated that she “is on several medications to treat this disorder.” It made no remarks about her treatment plan nor any about her ability to work.

Because Ms. E., despite multiple opportunities, has not provided documentation to support her claim that she cannot work, the administrative law judge finds that that Ms. E. is able to work at or close to full-time but has voluntarily decided not to do so.

III. Discussion

A parent is obligated both by statute and at common law to support his or her children.¹² 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).¹³ 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."

Where a parent is voluntarily and unreasonably unemployed or underemployed, the child support calculation may be based on the parent's *potential* income.¹⁴ A parent who is genuinely

¹⁰ See Exhibit 3, pp. 4 and 7. The income figure for the second half of the year is found under “Other Taxable Income.” The agency assumed 1040 working hours for each half of the year.

¹¹ Because Ms. E. resided in Alaska in 2006 and through the application deadline in 2007, she may have been eligible for a 2007 dividend. She is ineligible for a 2008 dividend.

¹² *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹³ 15 AAC 125.105(a)(1)-(2).

¹⁴ Alaska R. Civ. P. 90.3(a)(4).

disabled will not have potential income imputed to him.¹⁵ However, the disability must be proved. The Alaska Supreme Court elaborated on this requirement in the case of *Kowalski v. Kowalski*:¹⁶

We will not relieve a noncustodial parent from his child support obligations absent an affirmative showing that the obligor parent cannot meet this obligation. [*Houger v. Houger*, 449 P.2d 766 \(Alaska 1969\)](#). In *Houger*, we rejected a trial court's abeyance of an unemployed father's child support obligation. *Id.* at 769-70. The trial court had based its decision on evidence that the father, a carpenter, was medically unfit to work in his profession. We reversed, noting that there was no testimony by a physician regarding the nature or extent of the father's injuries and disability. [“][A father] should not be relieved of [the] obligation [to support his children] except under the most extreme circumstances.... The burden should be placed on [him] to establish justifiable reason for being relieved of his duty to support his children.[”]

Ms. E. has not met the burden outlined above. The only medical evidence she has provided is a letter noting that she is being treated for bipolar disorder and related issues. There is no evidence that any physician or agency has determined her to be disabled. She has not provided any evidence of significant efforts to seek employment. At this time, therefore, I must find that Ms. E. is voluntarily and unreasonably unemployed.¹⁷

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.”¹⁸ 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, or the state in their place, are not “forced to finance” the obligor parent's lifestyle.¹⁹ The commentary states the court should consider “the totality of the circumstances” when deciding whether to impute income to the obligor parent.²⁰ A primary goal of imputing income, according to the Alaska Supreme Court, is to compel the parent to find full-time employment:

¹⁵ *Id.*

¹⁶ 806 P.2d 1368, 1371 (Alaska 1991).

¹⁷ Ms. E apparently has applied for Social Security disability. Exhibit 4, p. 7. If she provides real proof of disability to the Social Security Administration and obtains disability benefits, these benefits could largely or completely offset her child support obligation.

¹⁸ Civil Rule 90.3, Commentary III.C.

¹⁹ *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

²⁰ Civil Rule 90.3, Commentary III.C.

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.²¹

In this case, we know that Ms. E. has held jobs in the past. CSSD imputed to Ms. E. the ability to work at minimum wage in Alaska (\$7.15) in the first half of 2007, and at the federal minimum wage (\$5.15) for the second half of that year. The calculation in the second half of the year was generous to Ms. E., since the actual minimum wage in California was almost 50% higher than that, at \$7.50 per hour.²² Thus Ms. E. could have achieved CSSD's imputed income for 2007 by working only part-time in California.

CSSD's imputed income figure for 2007 also provides a basis to estimate potential 2008 income that is lenient toward Ms. E. The 2007 figure equates to an average wage of \$6.15 per hour (the midpoint between the \$7.15 used for the first half of the year and the \$5.15 used for the second half). In 2008, the average federal minimum wage is about the same as that--\$6.15 per hour (\$5.85 in the first part of this year; \$6.55 in the period after July 24, 2008²³)--but California's minimum wage is much higher, \$8.00 per hour.²⁴ Again, Ms. E. could achieve the imputed income amount by working only part-time in California.

A person requesting an appeal hearing to challenge a child support order "has the burden of proving that the action by the department to which that person objects is incorrect."²⁵ After having considered the totality of the circumstances, I find that Ms. E. did not meet her burden of proving by a preponderance of the evidence that CSSD's Modified Administrative Child Support and Medical Support Order is incorrect.

²¹ *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).

²² California Minimum Wage Order MW-2007. Moreover, the federal minimum wage increased to \$5.85 per hour in late July of 2007.

²³ Section 8102, Public Law 110-28 (2007).

²⁴ California Minimum Wage Order MW-2007.

²⁵ 15 AAC 05.030(h).

IV. Child Support Order

- The Modified Administrative Child Support and Medical Support Order issued on December 12, 2007 is affirmed.

DATED this 27th day of August, 2008.

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 15th day of September 2008.

By: Signed
Christopher Kennedy
Administrative Law Judge

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