

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

IN THE MATTER OF	)	OAH No. 08-0503-CSS
G. J.	)	CSSD No. 001124720
	)	
_____	)	

**DECISION AND ORDER**

**I. Introduction**

On October 7, 2008, a hearing was held to consider a Motion for Summary Adjudication of this appeal. This motion was filed by the Child Support Services Division (Division). G. J., the obligor in this case, did not participate. B. S., the custodian, participated in the hearing. The child covered by this order is G. The Division was represented by David Peltier, Child Support Services Specialist. The Division's Motion for Summary Adjudication was denied in an order dated October 8, 2008, and the case was scheduled for a formal hearing.

On October 30, 2008, the formal hearing was held. Mr. J. participated in the hearing. Ms. S. also participated. Mr. Peltier again represented the Division. The hearing was audio-recorded. The record closed on December 30, 2008.

This case is Mr. J.'s appeal of the Division's order adjusting all of his arrears and ongoing child support to \$50 per month. Because neither Mr. J. nor the Division was able to produce a reliable estimate of Mr. J.'s income during the period between G.'s birth and Mr. J.'s incarceration, the arrears for that period should not be adjusted and should remain at \$496 per month, which was based on average Alaska Wages for a retail sales manager. Mr. J.'s ongoing child support and arrears since his imprisonment should be set at the minimum of \$50 per month.

**II. Facts**

Mr. J. has been incarcerated since July 30, 2004.<sup>1</sup> Mr. J. asked the Division to adjust his 2005 child support order. That order set arrears and ongoing child support at \$497 per

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<sup>1</sup> Ms. S.'s letter dated September 30, 2008.

month, which was based on average Alaska Wages for a retail sales manager. The arrears went back to July 00, 2003, the date of G.'s birth.<sup>2</sup>

The Division granted this request. The Division first vacated Mr. J.'s 2005 child support order. The Division then issued a Revised Administrative Child and Medical Support Order on July 29, 2008.<sup>3</sup> This new order covered arrears beginning in July 00, 2003. All the arrears were set at \$50 per month.<sup>4</sup> The new order also set ongoing child support at \$50 per month.<sup>5</sup> The Division had determined that it was able to adjust Mr. J.'s 2005 child support order retroactively because the 2005 order had not been based on actual income information.<sup>6</sup>

After the hearing, the Division filed a Post Hearing Brief in which the Division made a very diligent attempt to provide information that would indicate how much Mr. J. was earning from August of 2003 to August of 2004 from drug dealing.<sup>7</sup>

Mr. J. filed a timely response a to the Division's Post Hearing Brief. Mr. J. argued the evidence that the Division provided regarding his illegal earnings was not credible. Mr. J. also asserted that while he is in prison, he earns only \$12 per month.<sup>8</sup>

### **III. Discussion**

#### *Relief under AS 25.27.195(b)*

This case is Mr. J.'s appeal of the Division's order granting relief under Alaska Statute 25.27.195(b).<sup>9</sup> This law gives CSSD limited authority to vacate administrative support orders and retroactively modify child support. It gives CSSD authority to retroactively adjust support during periods of time when the amount of monthly child support was based on a default income figure rather than actual income. A default income figure is an amount arrived at in the

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<sup>2</sup> Ex. 1-3

<sup>3</sup> Ex. 7.

<sup>4</sup> Ex. 7.

<sup>5</sup> Ex. 5.

<sup>6</sup> Ex. 6.

<sup>7</sup> Ex. 10.

<sup>8</sup> Mr. J.'s Post Hearing Brief, dated December 24, 2008.

<sup>9</sup> See Alaska Statute 25.27.195(b) & Alaska Regulation 15 AAC 125.121(a).

absence of any specific information about an obligor's income and earning ability during the relevant time frames.<sup>10</sup>

*Minimum Child Support Allowed is \$50 Per Month*

In this case, the Division reduced all of Mr. J.'s arrears and his ongoing child support to \$50 per month, based on Mr. J.'s lack of reported income and his present incarceration. In his request for a formal hearing, Mr. J. explained that he cannot earn enough in jail to pay \$50 per month.<sup>11</sup>

The Division correctly set Mr. J.'s child support during his incarceration at no lower than the minimum amount of \$50 per month.<sup>12</sup> The law requires that child support be set at no less than \$50 per month.<sup>13</sup>

*Arrears Prior to Incarceration*

At the hearing, the Division and Ms. S. argued that it would not be appropriate to reduce Mr. J.'s child support arrears for the period between G.'s birth and Mr. J.'s incarceration to \$50 per month because the evidence indicates that Mr. J. was earning significant amounts of money selling illegal drugs during this period of time.

Unfortunately, the information provided by the Division is not very helpful in trying to make an accurate estimate of Mr. J.'s earnings during this time frame. The Division's information includes estimates of as much as \$32,450 per month based on admissions by Mr. J. about how much cocaine he said that he bought and the price he paid for it. However, this estimate is a broad extrapolation from Mr. J.'s statements and fails to factor in that he did not explain how long or how consistently he made purchases in this amount. The statement appears to relate to a period that began shortly before Mr. J.'s incarceration, but that is not entirely clear. The estimate also does not account for cocaine that Mr. J. and his associate used themselves, rather than selling, or money that he had to share with his associate or others. The Division's

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<sup>10</sup> See AS 25.27.195(b): "Upon the motion of an obligor, the agency may, at any time, vacate an administrative support order issued by the agency under AS 25.27.160 that was based on a default amount rather than on the obligor's actual ability to pay."

<sup>11</sup> Ex.8.

<sup>12</sup> *Bendixen v. Bendixen*, 962 P.2d 170 (Alaska 1998) & *Douglas v. State, Department of Revenue* 880 P.2d 113 (Alaska 1994).

<sup>13</sup> *Wright v. Gregorio*, 855 P.2d 772 (Alaska 1993) & Alaska Civil Rule 90.3(c)(1)(B).

estimates conflict with evidence that Mr. J. was facing financial difficulties and owed money when he left Alaska in April of 2004. Mr. J. did not believe that he consistently earned \$5000 per month, which is what the Division estimated at the hearing he might have earned.<sup>14</sup>

At this time, there is simply not enough reliable information on Mr. J.'s actual income to make an adjustment to his arrears for this period. At the hearing, Ms. S. indicated that she favored basing Mr. J.'s arrears prior to his incarceration on statistical wage data, based on what he could have earned legally, rather than attempting to estimate his illegal earnings. There is evidence that the default amount used by the Division is a reasonable estimate of Mr. J.'s earning capacity. Mr. J. owned a significant interest in a retail clothing store during this period. When there is insufficient reliable evidence of actual income, child support may be set based on earning capacity, rather than on an estimate of actual income.<sup>15</sup>

#### **IV. CONCLUSION**

Mr. J.'s ongoing child support and arrears since his imprisonment should be set at the minimum of \$50 per month. Mr. J.'s arrears for the period between G.'s birth and Mr. J.'s incarceration should remain at \$496 per month, which was based on average Alaska Wages for a retail sales manager, because this is a reasonable estimate of his earning capacity and a reliable estimate of Mr. J.'s actual income during the period between G.'s birth and Mr. J.'s incarceration is not available.

#### **V. CHILD SUPPORT ORDER**

The Division's Revised Administrative Child and Medical Support Order issued on July 29, 2008 is amended as follows, but all other provisions of that order remain in effect:

1. Mr. J.'s ongoing child support for G. is set in the monthly amount of \$50, effective January 1, 2009.

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<sup>14</sup> At the hearing, both Mr. J. and Ms. S. testified about Mr. J.'s financial difficulties in early 2004. Mr. J. explained that he could not estimate how much he was making during that time because of his own drug use and because of several practical considerations, which made his income from drug sales sporadic and inconsistent.

<sup>15</sup> See for example *Laybourn v. Powell*, 55 P.3d 745, 747 (Alaska 2002). When a parent with a child support obligation makes an accurate determination of his or her income impossible, income must be imputed to calculate the child support obligation. The criteria used to estimate the proper amount of income to impute are the same as those used in a case where the noncustodial parent is voluntarily and unreasonably unemployed or underemployed. Rather than determining the parent's actual income, the parent's earning capacity is used to estimate the parent's potential income.

2. Mr. J.'s child support arrears for G. are set in the monthly amount of \$497 for August through December of 2003; \$497 for January through July of 2004; \$50 for August through December of 2004; and \$50 for all of 2005, 2006, 2007 and 2008.

DATED this 8th day of January, 2009.

By: Signed  
Mark T. Handley  
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 and Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 26th day of January, 2009.

By: Signed  
Signature  
Mark T. Handley  
Name  
Administrative Law Judge  
Title

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