

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

IN THE MATTER OF:)	
)	OAH No. 08-0536-CSS
C. G. F.)	CSSD No. 001093001
_____)	

DECISION AND ORDER

I. Introduction

The custodian, T. M. F., appealed a Notice of Denial of Modification Review that the Child Support Services Division (“CSSD”) issued in Mr. F.’s case on September 11, 2008. The Obligee child is J., DOB 00/00/97.

The hearing was held on October 20, 2008. Ms. F. appeared in person; Mr. F. did not participate.¹ Andrew Rawls, Child Support Specialist, represented CSSD. The hearing was recorded. Record closure was scheduled for November 24, 2008, but Ms. F. had a family emergency so on her behalf, CSSD requested an extension of time, which was granted. CSSD submitted a Post Hearing Brief, and thus the record closed, on December 17, 2008.

Based on the record and after careful consideration, the Notice of Denial of Modification Review is vacated and Mr. F.’s child support is modified to \$338 per month for one child, effective July 1, 2008, and ongoing.

II. Facts

A. Procedural history

Mr. F.’s child support obligation for J. was set at \$121 per month in October 1998.² The obligor requested a modification on May 19, 2008.³ On May 30, 2008, CSSD sent the parties a Notice of Petition for Modification of Administrative Support Order.⁴ Mr. F. did not provide financial information as requested by CSSD.⁵ On September 11, 2008, CSSD issued a Notice of

¹ The notices of assignment and hearing sent by certified mail to Mr. F. at his Florida address were both returned to the OAH marked “Vacant – Unable to Forward.”

² Exh. 1.

³ Exh. 2.

⁴ Exh. 3.

⁵ Pre-hearing brief at pg. 1.

Denial of Modification Review for the reason that Mr. F. had not provided his income information.⁶ Ms. F. appealed on September 24, 2008.⁷

B. Material facts

Mr. F. and Ms. F. are the parents of J., DOB 00/00/97. J. lives with Ms. F. in Alaska; Mr. F. lives out of state but his specific whereabouts are currently unknown.

Mr. F. is a tattoo artist by trade, as is Ms. F. Both have worked in the tattoo business for several years. Mr. F. entered into his first employment contract in 1999 with A. K., DBA AAA American Tattoo. The contract shows Mr. F. would receive on-the-job training from Mr. K., valued at \$12,000. To pay for his training, Mr. F. would work for his employer for five years, receiving 50% of the hourly shop rate during the first year, with an increase of 5% each year until he reached 70% of the hourly rate.⁸

Over the years, Mr. F. has worked at other tattoo businesses in the Anchorage area, such as Ultimate Body Piercing and Tattooing, and Inkspot Tattoo, where he was a co-owner with T. U.⁹ Mr. F.'s most recent verified employment was at Feel Good Ink Tattoo & Piercing in Spokane, Washington. His employer, D. Foutz, said in a letter dated May 13, 2008, that Mr. F. had recently completed an apprenticeship there and had earned about \$500 since May 1st and he could be expected to earn from \$800 to \$1,200 per month, depending on his productivity.¹⁰ However, after the hearing Mr. Foutz reported that Mr. F. worked for him only until May 22, 2008, and apparently had then relocated to Florida.¹¹ Mr. Foutz also said after the hearing that his artists earn between \$1,000 – \$5,000 per month, and average about \$2,000 per month.¹²

III. Discussion

Ms. F.'s appeal challenges the modification denial that CSSD issued in Mr. F.'s case. She asserts Mr. F. under-reported his income to CSSD because he has worked in the tattoo industry for longer than he indicated and he is not a beginner tattoo artist.

⁶ Exh. 4.

⁷ Exh. 5.

⁸ Exh. 8.

⁹ Exh. 10.

¹⁰ Exh. 6 at pg. 2.

¹¹ CSSD Post hearing brief at pg. 1.

¹² *Id.*

A parent is obligated both by statute and at common law to support his or her children.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." Modification of child support orders may be made upon a showing of "good cause and material change in circumstances."¹⁴ If the newly calculated child support amount is more than a 15% change from the previous order, Civil Rule 90.3(h) assumes a material change in circumstances has occurred.

It is not known why Mr. F. left his employment at Feel Good Ink Tattoo & Piercing in Spokane immediately after filing his request for modification on May 19, 2008. Because Ms. F. claims he misrepresented his income and that he has been working in the tattoo business for ten years, it is necessary to consider whether Mr. F. is voluntarily unemployed.

The Obligor has the burden of proving his or her earning capacity.¹⁵ 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.¹⁶

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.¹⁷ 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 the *Kowalski* case claimed the construction industry, his health, and the varied work seasons 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.¹⁸

In *Nass v. Seaton*, the Alaska Supreme Court upheld a lower court's finding that the obligor parent was voluntarily underemployed because he deliberately kept a low profile in his business. The obligor 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 for him, and did not hire

¹³ *Mathews v. Mathews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁴ AS 25.27.190(e).

¹⁵ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

¹⁶ Civil Rule 90.3(a)(4).

¹⁷ *Kowalski* at 1371.

¹⁸ *Id.* at 1370.

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.¹⁹

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.”²⁰ 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.²¹ The commentary states the court should consider “the totality of the circumstances” when deciding whether to impute income to the obligor parent.²² 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.^[23]

Based on the “totality of the circumstances,” Ms. F. met her burden of proving by a preponderance of the evidence that Mr. F. is voluntarily unemployed or underemployed. Given Ms. F.’s evidence that Mr. F. has been a tattoo artist since 1999, his attempt to establish that he is still an apprentice is not credible. It is possible, of course, that at Feel Good Ink Tattoo & Piercing in Spokane, the term “apprentice” simply could be referring to a new employee and not a beginning tattoo artist, but that was not clear from the evidence. Moreover, the Feel Good owner stated his tattoo artists averaged \$2,000 per month in income. Even if Mr. F. was just getting started there, his experience more likely than not would bring him much more money than \$800 – \$1,200 in a short period of time. Finally, since he did not explain the reason for leaving his job, moving out of state and remaining out of contact, Mr. F.’s unemployment is therefore voluntary and unreasonable.

¹⁹ *Nass v. Seaton*, 904 P.2d 412, 418 (Alaska 1995).

²⁰ Civil Rule 90.3, Commentary III.C.

²¹ *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

²² Civil Rule 90.3, Commentary III.C.

²³ *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).

After speaking to Mr. F.'s last employer and learning that the tattoo artists at Feel Good Ink Tattoo & Piercing average \$2,000 per month income, CSSD imputed income to Mr. F. in that amount. This totals annual income of \$24,000, which results in a child support amount of \$338 per month.²⁴

IV. Conclusion

Ms. F. met her burden of proving that CSSD's September 11, 2008; Notice of Denial of Modification Review was incorrect. Mr. F. is voluntarily and unreasonably unemployed or underemployed. Based on the average earnings for a tattoo artist at his last place of employment, income should be imputed to Mr. F. in the amount of \$2,000 per month, or \$24,000 per year. When inserted into CSSD's online child support calculator, that income amount results in a child support calculation of \$338 per month. This figure should be adopted, effective July 1, 2008.²⁵

V. Child Support Order

- Mr. F. is liable for modified child support in the amount of \$338 per month, effective July 1, 2008, and ongoing.

DATED this 17th day of March, 2009.

By: Signed
Kay L. Howard
Administrative Law Judge

²⁴ Exh. 11.

²⁵ The effective date of a modification is the first month after CSSD issues the notice that a petition for modification has been filed. 15 AAC 125.321(d). However, in this case, the notice was issued on May 30, 2008. Exh. 3. Because it was the last day of the month, the effective date of the modification should be extended to July 1, 2008.

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 6th day of April, 2009.

By: Signed
Signature
Kay L. Howard
Name
Administrative Law Judge
Title

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