

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

IN THE MATTER OF:)
)
L. P. C.)
)
_____) OAH No. 08-0628-CSS
CSSD Case No. 001035190

REVISED DECISION AND ORDER

I. Introduction

This case concerns the obligation of L. P. C. for the support of V. C. (DOB 00/00/92) and S. C. (DOB 00/00/93). The custodian of record is C. S.

The Child Support Services Division (Division) established Mr. C.'s support obligation in 1995 and issued a child support order. In 2003, the Division denied Mr. C.'s request to modify the order, which had been set at \$354 per month.¹ Mr. C. again requested modification in June, 2008. Because Mr. C. did not submit income information, the Division declined to proceed with modification review.² Mr. C. submitted income information and filed an appeal.³

The assigned administrative law judge conducted a telephonic hearing on December 11, 2008. Mr. C. participated and David Peltier represented the Division. Ms. S.'s telephone number of record was called and was found to be disconnected; she did not participate in the hearing.

The administrative law judge issued a proposed decision. Ms. S. notified the Division that she had not received notice of the hearing, and asked that she be heard. The commissioner returned the case to the administrative law judge for a supplemental hearing, which was conducted on March 5, 2009. Both Mr. C. and Ms. S. participated. The administrative law judge issued a revised decision based on the additional testimony at the hearing.

Because Mr. C. is not voluntarily and unreasonably unemployed, the request for modification is granted, and modified child support is set at the minimum amount.

¹ In Re C., Department of Revenue Caseload No. 030593 (December 15, 2003).

² Ex. 4, p. 2.

³ Ex. 5.

II. Facts

L. C. is 46. At the time his support order was established in 1995, Mr. C. was working as a licensed personal home health care attendant.⁴ Mr. C. moved from Alaska to Ohio due to personal problems in about 2001, and was unable to find work at the wages he had previously earned in Alaska.⁵ In 2003, the Division denied his request to modify his support order, on the ground that the reduction in income appeared to be the result of temporary and unreasonable underemployment.⁶ In 2005, an Ohio court found Mr. C. in contempt of court for willful failure to pay child support, and entered judgment against him for \$30,411.14 in past due child support.⁷

Mr. C. moved back to Alaska in 2005. He found work at B. D.'s F. U., where in 2006 he earned \$8 per hour and had total wages of \$9,728.⁸ In 2007, Mr. C. was diagnosed with diabetes neuropathy, a condition that affects his walking and causes nerve pain in his hands, feet and shoulders.⁹ Mr. C. has been prescribed a variety of medications for his condition, but because he lacks insurance, he does not have access to all of the medications that would relieve his pain.¹⁰ Mr. C. has applied for Social Security disability payments; his claim was initially denied but has not been finally resolved.¹¹

Mr. C. lost his job at B. D.'s F. U. due to nonattendance. For the last year he has been unable to support himself. He is homeless and has stayed at a shelter, with friends, on the street, or in the woods. His only regular income is Adult Public Assistance payments of \$280 per month; he also receives food stamps. During the day, he visits with acquaintances, including his former employer at B. D.'s F. U., where he helps out as able. He has, on occasion, driven a limousine, but he lacks a chauffeur's license and is not regularly employed in that capacity.

⁴ L. C. testimony.

⁵ In Re C. at 2. The nature of Mr. C.'s personal problems is not described in the decision.

⁶ In Re C. at 2.

⁷ Ex. 7, pp. 3-7 (Schuyler v. C., No. 03-DR-016, Henry County, Ohio, Family Court).

⁸ Ex. 6, p. 4. Mr. C. testified that he was paid \$8 per hour.

⁹ Ex. 6, p. 3 (Statement of T. H., Anchorage Neighborhood Health Center, 12/8/2008). Mr. C. testified that T. H. is a doctor and is his treating physician.

¹⁰ Ex. 6, p. 3; L. C. testimony.

III. Discussion

For two children, a parent's presumptive support obligation is 27% of that parent's adjusted annual income.¹² Where the parent is voluntarily unemployed or underemployed, the parent's presumptive support obligation is based upon potential income.¹³ The division imputes potential income to a voluntarily unemployed non-custodial parent based on the parent's work history, skills, qualifications, job history, and job opportunities in the area of residence.¹⁴ An individual's imputed potential income is based upon what the individual can reasonably be expected earn under the current circumstances, not on prior earnings that may or may not be available in the future.¹⁵

The original order in this case was established in 1995 and provided for arrears beginning in 1992, based on 1992 wages of \$17,740.¹⁶ There is no evidence that Mr. C. has ever made any attempt to provide support for his children or to comply with the terms of the support order. In 2005, an Ohio court issued a formal contempt order, finding that Mr. C. had willfully failed to pay support owed under that order and entering judgment for arrears in the amount of \$30,411.14. Mr. C. moved back to Alaska and continued to ignore his responsibilities. Mr. C.'s arrears as of December, 2008, totaled \$54,288.95.¹⁷

At the supplemental hearing, Ms. S. testified that she had observed Mr. C., on Halloween, 2007, driving a limousine, and that in June, 2008, he had taken their daughter to Girdwood in a limousine. She added that she had observed Mr. C. at B. D.'s F. U. on two occasions just prior to the supplemental hearing, and that on one day he appeared to be taking messages on the office telephone and on the other he appeared to be working on a vehicle. Mr. C. testified that he had been visiting his former employer, but that he was not employed there; he stated that he had never been employed as a limousine driver and

¹¹ Ex. 6, pp. 1-2.

¹² 15 AAC 125.070(a). See Civil Rule 90.3(a)(2)(B).

¹³ 15 AAC 125.020(b). See Civil Rule 90.3(a)(4) (“voluntarily and unreasonably...unemployed or underemployed”) [emphasis added].

¹⁴ 15 AAC 125.060(a); 15 AAC 125.020(b).

¹⁵ See, e.g., Nass v. Seaton, 904 P.2d 412 (Alaska 1995). Anticipated future earnings, by contrast with potential income in cases of voluntary unemployment, are determined based on prior income, to the extent income information is available. 15 AAC 125.050(c); -.100. As our supreme court has recognized, these are distinct inquiries. See Koller v. Reft, 71 P.3rd 800, 806 at n. 13 (Alaska 2003).

¹⁶ Mr. Peltier provided this information at the initial hearing.

¹⁷ Post Hearing Brief at 1 (12/16/2008).

denied that he had been driving a limousine on Halloween night of 2007, or that he had driven his daughter to Girdwood.

Ms. S. argues that Mr. C.'s assertion that his medical condition is the reason for his unemployment is untrue, and that the real reason for his unemployment is that he is trying to avoid his child support obligation, just as he has throughout his children's lives. It is likely true that Mr. C. would not be working and providing support for his children even if he was fully able to do so, and that Mr. C. has on occasion received cash payments for work performed as a limousine driver or at B. D. F. U.; the record establishes that Mr. C. has continuously avoided his responsibilities to his children, and Mr. C.'s testimony contradicting Ms. S.'s personal observations was not credible. Nonetheless, it is Mr. C.'s present medical condition and his actual income that govern this case. That Mr. C. in the past has willfully disregarded his support obligation does not mean that his present physical condition may be ignored; that Mr. C. would not be working even if he could does not mean that he is presently able to work. And that Mr. C. may occasionally be paid under the table does mean that he has sufficient actual income to provide for himself, much less for his children. At bottom this case is not about hidden income, it is about Mr. C.'s medical condition.

On that issue, the undisputed medical evidence is that in June, 2008, Mr. C. had a disabling medical condition, which was first diagnosed in 2007. The Department of Health and Social Services, Division of Public Assistance, has determined that Mr. C. is qualified for Adult Public Assistance payments due to a physical disability, and Mr. C. has filed a claim for Social Security disability benefits that remains unresolved. His primary treating physician has provided a statement indicating that Mr. C. is unable to work. This evidence has not been challenged; Ms. S. was advised to contact the division to request assistance in obtaining additional evidence or testimony from Mr. C.'s physician, but she did not do so.¹⁸

¹⁸ Submission to Record (3/17/2009). Ms. S. states that she "could not finish my investigation," but did not request additional time or seek assistance from the division. Letter, S. S. (3/26/2009).

Mr. C. submitted additional evidence under seal, marked as confidential. Because any evidence submitted for consideration by the administrative law judge must be provided to the opposing party, the administrative law judge has disregarded the evidence submitted under seal.

IV. Conclusion

The preponderance of the evidence is that since the date of his request for modification, Mr. C. has been disabled and that since that time he has not been voluntarily and unreasonably unemployed. His presumptive child support obligation must therefore be based on his actual income, rather than his potential income; his actual income for child support purposes, so far as is known, is zero. A minimum support order is appropriate.

CHILD SUPPORT ORDER

1. The request for modification is **GRANTED**.
2. Modified ongoing support is set at \$50 per month, effective July 1, 2008.

DATED: June 19, 2009

Signed

Andrew M. Hemenway
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 23rd day of June 2009.

By: *Signed*

Signature
Jerry Burnett

Name
Deputy Commissioner

Title

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