

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

IN THE MATTER OF	)	OAH No. 08-0666-CSS
J. J. C.	)	CSSD No. 001126796
	)	
_____	)	

**REVISED DECISION AND ORDER**

**I. Introduction**

This case is A. M. C.'s appeal of the Division's order reducing J. J. C.'s arrears and ongoing child support. On January 13, 2009 and February 10, 2009, hearings were held to consider the appeal. Mr. C., the obligor in this case participated in the hearing on January 13, 2009, but not on February 10, 2009.<sup>1</sup> Ms. C., the custodial parent, participated in both hearings. The children covered by this order are J. and O. The Division was represented by Andrew Rawls, Child Support Services Specialist. The record closed on February 20, 2009.

A proposed decision and order was issued and distributed to the parties. Because Mr. C. did not provide a reliable estimate of his income during the period covered by this order, and because the limited evidence in the record indicated that the default income amounts that the Division originally used to set Mr. C. child support amounts were the best estimates of his income and earning capacity in the record, the Division's order reducing Mr. C.'s arrears and ongoing child support was overturned in the proposed decision and order. If adopted, the proposed decision would have caused Mr. C.'s arrears and ongoing child support to remain in the monthly amounts established in the original child support order issued March 10, 2006.

Mr. C. timely filed a proposal for action before the proposed order was adopted. Because Mr. C.'s proposal for action did not arrive in the mail until after the proposed order

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<sup>1</sup> Mr. C. did not appear or provide a phone number as directed by the notice sent to him at his addresses of record for either hearing, but the ALJ was able to contact him for January 13, 2009 hearing, at which time he agreed to the time set for the February 10, 2009 hearing. Mr. C. later called and left a message with OAH the day before the February 10, 2009 hearing and indicated that he had a conflict with that time. At the time set for that hearing, the ALJ called both Mr. C.'s phone numbers of record, and his cell phone number, which Ms. C. provided. There was no answer. The ALJ left a message at Mr. C.'s cell phone number with instructions on filing a written request to reschedule the hearing, including the deadline for filing such a request. The record was held open for ten days so that Mr. C. could file a request to reschedule the hearing. No request was filed. Mr. C. had also agreed at the January 13, 2009 hearing to provide the Division with evidence responsive to the evidence provided by Ms. C., and documentation of his medical condition, prior to the February 10, 2009 hearing, Mr. C. did not file anything with the Division prior to the January 13, 2009 hearing.

was adopted, the adoption was rescinded and the proposed order and Mr. C.'s proposal for action were forwarded to the Commissioner of Revenue for consideration.

On, March 24, 2009, the final decisionmaker, the Deputy Commissioner of Revenue, remanded Ms. C.'s appeal back to take additional evidence on Mr. C.'s income. On April 24, 2009, Ms. C. filed a motion to withdraw from the hearing, which was also signed by Mr. C. A supplemental hearing had already been scheduled for April 30, 2009. Because a proposed decision had already been issued, the case could only be voluntarily dismissed with the consent of all the parties and the final decisionmaker.<sup>2</sup>

The Division had not consented to Ms. C.'s request to withdraw. An order was issued giving the Division until May 15, 2009 to file a written consent or a written opposition to Ms. C.'s request to withdraw. The hearing scheduled for April 30, 2009 was cancelled. The Division timely filed an opposition to Ms. C.'s request to withdraw, explaining that public assistance had been paid for some of the periods covered by the order and that the Division's position was that the amounts set in the proposed order were correct.

An additional hearing was held on June 23, 2009. Mr. C. participated. Ms. C. did not participate. The record closed on July 21, 2009. Mr. C. provided additional documentation relevant to his claims regarding his income.

Additional briefing was filed. Mr. C.'s position is that his arrears and ongoing child support should be based on his reported income as set in the Division's Administrative Review Decision and new Administrative Child and Medical Support Order issued on November 7, 2008, which Ms. C. appealed. The Division position is that the proposed order should be adopted.

Because the evidence in the record still shows that Mr. C. has not provided reliable information about his actual earnings during the periods covered by this order, the Administrative Child and Medical Support Order issued on March 10, 2006, will remain in effect. The court's interim child support order issued in the C.s' Decree of Dissolution Marriage will supersede this administrative child support order during the period that the court order is in effect.

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<sup>2</sup> Alaska Regulation 64.230(a) & (b).

## **II. Facts**

Mr. C. asked the Division to adjust his 2006 child support order. That 2006 order set ongoing child support at \$848 per month, which was based on mean hourly wages plus a PFD.<sup>3</sup> The arrears went back to September 1, 2003, the month that an application for public assistance was filed for J. and O.<sup>4</sup>

The Division granted Mr. C.'s request. The Division first vacated Mr. C.'s 2006 child support order.<sup>5</sup> The Division then issued a new Administrative Child and Medical Support Order on November 7, 2008.<sup>6</sup> This new order covered arrears beginning in September 1, 2003. All the arrears were reduced.<sup>7</sup> The new order also set ongoing child support at \$70 per month.<sup>8</sup> These new amounts were based primarily on income information provided by Mr. C., who reported that he had earned less than \$10,000 per year for most of the period covered by this order.<sup>9</sup> The Division had determined that it was able to adjust Mr. C.'s 2006 child support order retroactively because the 2006 order had not been based on actual income information.<sup>10</sup>

Prior to the January 13, 2009 hearing, Ms. C. provided extensive documentation which indicated that the information provided by Mr. C. to the Division and the IRS was not accurate and grossly understated both his actual income and his earning capacity.<sup>11</sup>

At the January 13, 2009 hearing, Mr. C. was given an opportunity to respond to the evidence submitted by Ms. C. and submit additional evidence regarding his income and earning capacity prior to the continued hearing, which was set for February 10, 2009.<sup>12</sup> Mr. C. did not make any additional filings, did not participate in the February 10, 2009 hearing, and did not timely file a written request that the hearing be rescheduled.

By the close of the record in this case after it had been remanded to take additional evidence, Mr. C. had provided more information regarding his reported earnings and his documentation about his purchase and the foreclosure on his residential property. At the

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<sup>3</sup> Ex. 2, page 8.

<sup>4</sup> Ex. 2, page 10.

<sup>5</sup> Ex. 13.

<sup>6</sup> Ex. 14.

<sup>7</sup> Ex. 14.

<sup>8</sup> Ex. 14, page 1.

<sup>9</sup> Ex. 6-12.

<sup>10</sup> Ex. 13.

<sup>11</sup> Ms. C.'s exhibits.

supplemental hearing, which was held on June 21, 2009, Mr. C. again testified that he had accurately reported his earnings to the Division, and that he did not earn significant unreported income. Mr. C.'s testimony was not very credible.

Ms. J. O., who is the mother of Mr. C.'s youngest child, testified that she has known Mr. C. since 2005. Ms. O. testified that Mr. C. looked for work but had difficulty finding work because he did not have a drivers' license. Ms. O. testified that she has not been supporting Mr. C. Ms. O. admitted that she only met with him about twice a month in 2005 and 2006. Ms. O. she testified that in 2007, Mr. C. were together very often and they were having a baby together, but Ms. O. could not remember Mr. C. working at all. Ms. O. was not a credible witness. She was evasive, somewhat hostile and defensive. She did not provide an explanation of how Mr. C. was supporting himself.

The evidence in the record shows that it is more likely than not that Mr. C. earned significant amounts of unreported income and that the estimated income that the Division used to set Mr. C.'s child support in its Administrative Child and Medical Support Order would be the best estimate of his earning capacity and actual earnings during the period covered by this order.

### **III. Discussion**

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

This case is Mr. C.'s appeal of the Division's order granting relief under Alaska Statute 25.27.195(b).<sup>13</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 absence of any specific information about an obligor's income and earning ability during the relevant time frames.<sup>14</sup>

At the January 13, 2009 hearing, the Division and Ms. C. argued that it would not be appropriate to reduce Mr. C.'s child support because the evidence indicates that Mr. C. was

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<sup>12</sup> Recording of January 13, 2009 hearing.

<sup>13</sup> See Alaska Statute 25.27.195(b) & Alaska Regulation 15 AAC 125.121(a).

<sup>14</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."

earning significant amounts of money that he did not report to the Division or the IRS. Ms. C. provided letters from several servers at local bars, who wrote that Mr. C. was a regular and generous customer during periods covered by the order, regularly spending \$50 to \$100 on drinks and tips two or more nights per week. Ms. C. provided documentation showing that Mr. C. purchased a house during the period covered by the order and evidence that he received income from contract finish and cement work jobs and received rental income that he did not report to the Division or the IRS.

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> Mr. C. simply did not provide reliable information on actual income. An adjustment to his arrears or ongoing child support is not appropriate. The evidence in the record indicates the default amount used by the Division is the best estimate of Mr. C.'s income and earning capacity that can be made at this time.

The Division's authority to grant the relief that Mr. C. sought is discretionary.<sup>16</sup> By regulation, the Division's reasonable exercise of that discretion is implicitly dependent on an obligor's cooperation with the Division in establishing his or her ability to pay during the period covered by the existing default order, absent other reliable sources of information.<sup>17</sup> In this case, there are no reliable alternative sources of information and Mr. C. has simply not provided the

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<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.

<sup>16</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." (Emphasis added).

<sup>17</sup> See Alaska Regulation 15 AAC 125.121(c): "If the obligor does not provide sufficient information as required in (b) of this section, the agency will notify the obligor that the information provided is insufficient and will state the additional information that the agency needs in order to review the obligor's request for relief under this section. If the obligor fails to provide the additional information, the agency will

(1) cease further action on the obligor's request for relief; or

(2) review and take action upon the obligor's request for relief if the agency can obtain sufficient actual income information for the obligor from other sources, including the Department of Labor and Workforce Development.

requisite level of cooperation. It is more likely than not that Mr. C. lied under oath both about his actual earnings and his earning capacity. He provided no plausible explanation about how he supported himself on his reported income. He was apparently able to recently earn a reasonably high level of income, which casts doubt on his assertion that medical issues prevented him from working.

The Division's current position in this case is that: "Mr. C. did not provide any reliable estimate of his income during the most recent hearing." The evidence in the record shows that the Division's current position is correct. Mr. C. is not entitled to have his arrears adjusted by vacating his child support order and adjusting his arrears and ongoing child support based on his reported income, which do not include all of his actual income, or accurately reflect his earning capacity.

#### **IV. CONCLUSION**

Mr. C.'s ongoing child support and arrears should remain at the amounts set in the original 2006 child support order because those amounts are based on a reasonable estimate of his earning capacity and actual income given the limited evidence in the record and because Mr. C.'s failed to provide reliable evidence of his earning capacity and income.

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

1. The Division's Administrative Review Decision and new Administrative Child and Medical Support Order issued on November 7, 2008 are overturned.
2. The Division's Administrative Child and Medical Support Order issued on March 10, 2006, remains in effect.
3. The court's child support order issued in the C.s' Decree of Dissolution Marriage in case number 3PA-09-010555CI will supersede this administrative child support order during the period that court ordered child support is in effect.

DATED this 11th day of August, 2009.

By: *Signed*

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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 13th day of August, 2009.

By: Signed  
Signature  
Jerry Burnett  
Name  
Deputy Commissioner  
Title

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