

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

IN THE MATTER OF:)	
)	OAH No. 09-0073-CSS
K. L. M.)	CSSD No. 001152372
<hr style="width:50%; margin-left:0;"/>		

DECISION AND ORDER

I. Introduction

This case involves the Obligor K. L. M.'s appeal of an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on January 28, 2009. The Obligee children are L., DOB 00/00/99; K., DOB 00/00/00; and E., DOB 00/00/02.

The formal hearing was held on March 2, 2009, and March 19, 2009. Ms. M. appeared in person for the second session of the hearing; the Custodian, S. O. P., appeared through counsel, Herbert A. Viergutz, who participated by telephone. Erinn Brian, Child Support Specialist, represented CSSD. The hearing was recorded. The record closed on March 19, 2009. Kay L. Howard, Administrative Law Judge, conducted the hearing.

Based on the record as a whole and after careful consideration, Ms. M.'s administrative child support order is set at \$50 per month from October 2008 through December 2008; and \$325 per month, effective January 1, 2009 and ongoing.

II. Facts

A. History

The custodian, Mr. P., applied for child support services on February 4, 2008.¹ On September 3, 2008, CSSD issued an Administrative Child and Medical Support Order to Ms. M.² She requested an administrative review.³ Following the review, CSSD issued an Amended Administrative Child and Medical Support Order on January 28, 2009, that set Ms. M.'s child support at \$412 per month, effective February 1, 2009, with arrears of \$1,402 for the period from

¹ Exh. 1.
² Exh. 3.
³ Exh. 4.

February 2008 through January 2009.⁴ Mr. P. appealed and requested a formal hearing on February 9, 2009.⁵ His stated reason for the appeal is as follows:

There exists a valid and binding Court Order relating to child support. See attached Order. The calculations applied by CSSD are in error. CSSD should and must vacate its Decision as relates to past due child support from December 2007 through January 1, 2009.^[6]

After receiving Mr. P.'s appeal, CSSD filed a Motion to Abate on February 18, 2009, requesting that the administrative child support action be abated pursuant to AS 25.27.135 because the court is addressing child support issues between Ms. M. and Mr. P. in Anchorage Superior Court Case No. 3AN-00-0000CI. During a lengthy discussion in the first session of the hearing, Mr. P. and CSSD consented to a denial of the Motion to Abate. Although the court has issued an order regarding Ms. M.'s child support obligation, it was only a judgment of arrears from December 2007 through September 2008 based on a monthly amount of \$284.87.⁷ There is currently no ongoing child support order in effect. The evidentiary hearing was convened with Ms. M. participating in person on March 19, 2009. The parties agreed that this administrative child support order will be effective October 1, 2008, the first month after the inclusive dates of the court's arrears judgment.⁸

B. Material Facts

Ms. M. and Mr. P. are the parents of L., DOB 00/00/99; K., DOB 00/00/00; E., DOB 00/00/02. Mr. P. has custody of the children. Ms. M. has visitation with the children for three weekends per month, a total of seven overnights per month, plus Wednesday evening visitation for three hours.

Ms. M. is a real estate agent. She chose real estate as a career specifically with her children in mind primarily because of the flexibility it allowed. She attended school in 2004

⁴ Exh. 5.

⁵ Exh. 6.

⁶ *Id.*

⁷ This figure was calculated from an annual income amount of \$11,000, which Ms. M. reported on a Child Support Guidelines Affidavit on December 21, 2007. Exh. 9. Mr. P. used this form to request a child support judgment of arrears from the court. Exh. 8 at pgs. 9-10. The court issued the order on November 3, 2008. Exh. 7 at pg. 4.

⁸ See Exh. 7 at pg. 4.

and in January 2005 became a licensed agent. Ms. M. found it difficult to work on a commission basis; her first few years selling real estate yielded only modest income.

Approximately two years ago, Ms. M. decided to move to Florida to be near her extended family. For reasons she believed were justified, she denied visitation to Mr. P. and as a result lost custody of the children to him. She subsequently returned to Alaska, having been in Florida from July 2007 through December 2007. She reinstated her real estate license in May 2008 and resumed working in that field. Her current employer is K. W.

Ms. M. has had, at best, a marginal income since 2007, particularly as a result of the current economic climate and the difficulties potential buyers have obtaining financing. She has been working very hard, on the average of eight to 12 hours per day, but she did not have any sales or commission income in 2008.

Ms. M. has been supporting herself for the last year from the proceeds of selling her Anchorage house. She listed it for sale prior to leaving the state in 2007 and in February 2008, closed the sale and received \$59,000 in equity. At the time of the hearing, Ms. M. indicated she had “a few thousand” dollars left. Because she lived out of state during part of 2007, the qualifying year for the 2008 permanent fund dividend (PFD), Ms. M. would not have been eligible for a PFD.⁹ Knowing that, she did not apply for a PFD in 2008.

In January 2009 Ms. M. received a \$2,000 commission and in March 2009 she had a sale close but will share the commission with another real estate agent. The amount of the commission was unknown at the time of the hearing. Using her sales so far in 2009 as a guide – one every other month – it is estimated Ms. M. will have six sales totaling \$12,000. Because her second sale involves a shared commission, one-half of the \$2,000 or, \$1,000, should be subtracted. These very rough calculations result in estimated income in 2009 of \$11,000 for Ms. M.

Nothing is known of Mr. P.’s situation, other than he has custody of the parties’ children. He was represented by counsel at the hearing but did not personally appear or present any testimony.

⁹ See AS 43.23.005(a)(3); 15 AAC 23.993(a)(11).

III. Discussion

A. Motion to Abate

Alaska Statute (“AS”) 25.27.135 allows a party or CSSD to request that a court or administrative law judge “abate” or, terminate, a pending child support action under certain circumstances:

If the same causes of action concerning a duty of child support are pending concurrently in court and before the agency, the second action filed may be abated upon the motion of a party or the agency.

Mr. P.’s appeal claimed CSSD’s administrative child support action must be abated because child support as between the parties is being addressed by the court. At the first hearing, it was learned that the court had issued a child support judgment against Ms. M. for arrears for the period from December 2007 through September 2008, but not for ongoing support.

The provisions of AS 25.27.135 are not mandatory. The statute states that a duplicative child support action “may” be abated if a party or CSSD files a motion requesting it, but there is no language in the statute requiring dismissal of one of the actions. For this reason, and because the court in the parties’ litigation has not issued an ongoing child support order, the parties were informed that the motion to abate would be denied and that a substantive hearing regarding Ms. M.’s child support obligation would be held at the administrative level. Both CSSD and Mr. P. agreed during the first session of the hearing and Ms. M. appeared and presented testimony at the second hearing session.

B. Controlling law

CSSD calculated Ms. M.’s child support at \$412 per month for three children.¹⁰ CSSD based the calculation on imputed annual income of \$14,872, which CSSD determined from full-time work based on the Alaska minimum wage.¹¹ CSSD initially used imputed income for Ms. M.’s child support calculation because she did not provide income information after the administrative order was issued and there were no recent earnings reported for her in the Alaska Department of Labor and Workforce Development database.¹² After the hearing, CSSD

¹⁰ Exh. 5 at pg. 7.

¹¹ *Id.*

¹² *See* Motion to Vacate at pg. 1; Exh. 5 at pg. 4.

confirmed it is still requesting a child support order in the amount of \$412 per month, effective October 1, 2008.¹³

Civil Rule 90.3(a)(1) provides that a noncustodial parent's child support obligation is to be calculated from his or her "total income from all sources." The obligor has the burden of proving his or her earning capacity.¹⁴ If CSSD finds a parent to be voluntarily and unreasonably unemployed or underemployed, it may calculate the child support amount from the parent's "potential income," which should be based on his or her "work history, qualifications and job opportunities."¹⁵

The prerequisite for imputing income to an obligor is that CSSD must first make a finding that the parent is voluntarily and unreasonably unemployed or underemployed.¹⁶ CSSD's order did not include such a finding, but using figures not tied to her actual income suggests an implicit finding of voluntary unemployment. Also, CSSD requested after the hearing that the Amended Administrative Child Support and Medical Support Order be affirmed, so obviously CSSD did not abandon that implicit finding.

In cases in which CSSD is claiming voluntary unemployment, the court or administrative law judge must determine whether the parent has engaged in voluntary conduct "for the purpose of becoming or remaining unemployed."¹⁷ If the parent is voluntarily unemployed or underemployed, it is also necessary to determine whether the parent's unemployment is unreasonable. An integral part of the analysis is whether the parent's lack of employment is a result of "economic factors," as in being laid off, or of "purely personal choices."¹⁸ It is not necessary to prove the individual was purposefully avoiding a support obligation, or acting in bad faith, in order to impute income to a noncustodial parent.¹⁹

¹³ CSSD originally calculated Ms. M.'s 2008 child support at \$90 per month for three children, based on her only income – the 2008 PFD and energy rebate. Exh. 5 at pg. 6. CSSD abandoned that 2008 calculation after the hearing and is requesting a child support amount of \$412 per month be ordered for both 2008 and 2009. *See* Post-hearing brief at pg. 1.

¹⁴ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

¹⁵ Civil Rule 90.3(a)(4).

¹⁶ The agency's form orders allow a caseworker to check a box in the section for findings of fact, as in its Amended Administrative Child Support and Medical Support Order. *See* Exhibit 5 at pg. 4.

¹⁷ *Bendixen v. Bendixen*, 962 P.2d 170, 172 (Alaska 1998).

¹⁸ *Vokacek v. Vokacek*, 933 P.2d 544, 549 (Alaska 1997).

¹⁹ *Kowalski*, 806 P.2d at 1371.

The Alaska Supreme Court further explained the essence of the analysis in *Beaudoin v. Beaudoin*²⁰ by stating that “the relevant inquiry under Civil Rule 90.3 is . . . whether a parent's current situation and earnings reflect a voluntary and unreasonable decision to earn less than the parent is capable of earning.” At the same time, however, the court thought it important to point out that:

. . . Rule 90.3(a)(4) does not rigorously command pursuit of maximum earnings. The rule's more modest objective is to give courts broad discretion to impute income based on realistic estimates of earning potential in cases of voluntary and *unreasonable* unemployment or underemployment.^[21]

The commentary to Civil Rule 90.3 directs that tribunals adjudicating child support “shall consider the totality of the circumstances in deciding whether to impute income.”²²

C. Analysis

Based on the “totality of the circumstances,” the evidence in this appeal does not support a finding that Ms. M. is voluntarily and unreasonably unemployed or underemployed. After returning to Alaska from Florida, Ms. M. reactivated her real estate license in May 2008. Unfortunately, in spite of working full-time, sometimes up to 12 hours per day, Ms. M. did not have any sales or commission income in 2008. But a lack of income does not necessarily mean that a parent is voluntarily unemployed or underemployed. The lack of employment must be conduct undertaken voluntarily “for the purpose of becoming or remaining unemployed.”²³ Such is not the case here. Rather, Ms. M.’s lack of income is primarily a result of “economic factors” related to the current economic downturn.²⁴ Many people in Alaska and elsewhere in the country have had a similar loss of income. Thus, because she is not voluntarily and unreasonably unemployed or underemployed, income based on the minimum wage may not be imputed to Ms. M.

²⁰ 24 P.3d 523 (Alaska 2001).

²¹ *Beaudoin*, 24 P.3d at 528 (emphasis in original).

²² Civil Rule 90.3, Commentary III.C.

²³ *See Bendixon*, 962 P.2d at 172.

²⁴ *See Vokacek*, 933 P.2d at 549. It should be noted, however, that this decision does not address the issue whether Ms. M. would still be considered voluntarily and unreasonably unemployed or underemployed after a contracted period of nonexistent sales and zero commission income. That question would have to be addressed at some point in the future.

Ms. M. did not have any income in 2008. CSSD attributed a 2008 PFD to her, but as discussed above, she would not have been eligible and testified she did not receive the 2008 dividend. Because of her lack of income in 2008, Ms. M.'s child support should be set at \$50 per month for the period from October 2008 through December 2008.

At the hearing, Ms. M. reported two sales had closed so far in 2009. She received a commission of \$2,000 for the first one in January 2009, and in March 2009 she had a second sale but did not yet know the amount of the commission. Ms. M.'s sales thus far in 2009 were used to estimate her total annual income at \$11,000 for 2009.²⁵ Granted, these are very rough estimates, but they are based on the best income information available and also on the finding that Ms. M. is not voluntarily and unreasonably unemployed at this time.

Inserting this figure into CSSD's online child support calculator results in a child support amount of \$325 per month for three children for 2009 and ongoing.²⁶

IV. Conclusion

Ms. M. is not voluntarily and unreasonably unemployed or underemployed at this time. Ms. M.'s child support obligation should thus be set at \$50 per month for October 2008 through December 2008, and \$325 per month for 2009 and ongoing.

V. Child Support Order

- CSSD's February 18, 2009, Motion to Abate is DENIED;
- Ms. M. is liable for child support of \$50 per month for October 2008 through December 2008, and \$325 per month, effective January 2009 and ongoing;
- All other provisions of the January 28, 2009, Amended Administrative Child Support and Medical Support Order remain in full force and effect.

DATED this 19th day of May, 2009.

By: Signed
Kay L. Howard
Administrative Law Judge

²⁵ Estimating a parent's income is not the same as imputing income pursuant to Civil Rule 90.3(a)(4). The former involves extrapolating a party's actual earnings received thus far to estimate his or her total annual income.

²⁶ See Attachment A.

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 5th day of June, 2009.

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

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