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

IN THE MATTER OF	)	
	)	
D. S.	)	Case No. OAH-09-0132-CSS
	)	CSSD Case No. 001153939

DECISION & ORDER

I. Introduction

The obligor, D. S., appeals an Amended Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD) on January 20, 2009. A hearing was held on March 25, 2009. The custodian, A. F., appeared by telephone. Andrew Rawls represented CSSD by telephone. The child is C. S. (DOB 00/00/07). Mr. S. did not appear at the hearing or show cause for his failure to appear; this decision is therefore based on the record in accordance with 15 AAC 05.030(j).

The amended administrative order is affirmed as to the amount of child support. The case is remanded to CSSD to conduct genetic testing in accordance with AS 25.27.140 and AS 25.27.165.

II. Facts

The custodian in this case is A. F., formerly known as A. M. Ms. F. has three children: the oldest is B., then C., who is the subject of this case, and a younger child. In March of 2008, Ms. M. and her former husband, P. M., were engaged in a three-day trial in Fairbanks Superior Court as part of their divorce proceedings. The principal issues at trial were custody, visitation, and support of the children, particularly B. There appears to have been significant controversy regarding custody of B.

On March 21, 2008, the third day of the trial, the court opened by inquiring of the attorneys their views of the proper way to disestablish Mr. M.'s paternity of some of the children. At this time, Ms. M. was still pregnant with the youngest child. After discussion of the issue, Mr. S. was called to testify as a witness in the case. The court's log notes reflect the following discussion:

COUNSEL PRESENT
Plaintiff [P. M.]: Mary Spiers
Defendant [A, M.]: Jason Crawford

09:06:00	On record	
09:06:42	Court:	Re: Disestablishing Paternity

09:07:43	Court:	Will take testimony, may not be sufficient, need affidavit of paternity, open to suggestions.
09:08:04	Crawford:	I can ask Mr. S. if he can sign
09:08:37	Court:	Instincts are to have DNA testing on all 3 children to make sure. . . even with regard to C. DNA to establish paternity would be a better record. At the end, would order DNA testing involving C. and Mr. M. that he is not the father . . . with an order disestablishing paternity here.
09:12:40	Spiers:	Suggest and ask court to do that, order DNA to disestablish paternity as to unborn child, cannot be done until after child is born. Ask court to order that Amanda should pay for DNA.

Clerk places phone call to witness

09:19:34 Witness Sworn/Affirmed: D. S.

09:19:52 Direct Examination by Crawford

	Yes, I am the father of C.
09:20:11	He was born and looks just like me. When I was with A., 2005 off and on until 2007.
09:20:42	Yes, would sign affidavit of paternity for C. I was acting as B.'s father the first year of her life, I love the little girl to death.
09:21:18	Up in the air, we have been talking, if she wants too she was talking about coming back to Ohio, we were talking about being a family. Yes, we are still discussing it.

Cross Examination by Spiers

09:21:49	Yes, signed affidavit May 30, 2007. Yes, it was true at the time I signed it.

09:22:05 Court questions witness Re: DNA

Yes, I will give DNA.

09:22:38 Redirect Examination by Crawford

Yes, I consider A. to be a good mother.

09:22:57 Witness excused.

On May 5, 2008, the court issued a Decree of Divorce containing the following language:

> The Defendant is presently pregnant. DNA testing shall be done, after the child's birth to establish/disestablish the paternity of P. M. The Court has determined that P. M. is not the father of defendant's son, C. S. D. S. is the father of C. S. The parties shall share legal custody of their minor child, B. E. M.….[1]

The court then went on for four pages detailing custody, visitation, and support provisions for B., referring to "Father" and "Mother" as "both parties." No further mention was made of C. or of Mr. S. The court's supporting Findings of Fact also state that

> There is one minor child of the marriage, to-wit: B. E. M. (hereafter "B."), born April XX, 2006. The court finds that P. M. is not the father of Defendant's son, C. S., born March XX, 2007 and determines that D. S. is C. S.'s biological father. The Defendant is presently pregnant. DNA testing will be done, after the child's birth to establish/disestablish the paternity of P. M.[2]

The court then goes on for five pages detailing custody, visitation and support for B. only, with no further mention of C. or Mr. S. In its Conclusions of Law the court found that it "has jurisdiction of the parties," by which it appears to refer only to the husband and wife in that divorce action, not Mr. S.[3] The Conclusions state further that "the Child Custody, Visitation, and support provisions provided for above, and in the court's on the record oral findings are hereby incorporated into the Decree of Divorce." Again, there are no custody, visitation or support provisions for C. It appears that the court's mention of Mr. S. was only to explain at the outset why the court was not addressing support for C. in that case. Mr. S. is not named on C.'s birth certificate, nor has he signed an acknowledgment of paternity.[4]

Ms. F. requested services from CSSD on June 10, 2008. When CSSD served Mr. S. with an Administrative Child Support and Medical Support Order, Mr. S. responded that "I am not proven to be the father of this child." He checked a box requesting genetic testing because "I have not been proven to be the father of C. V. S."[5] CSSD responded by requesting financial information and stating that, "your Petition regarding genetic testing for the above named child has been denied because there is an existing court order and/or Divorce Decree addressing the child."[6] CSSD referred Mr. S. to the court system to initiate an action to disestablish paternity.[7]

CSSD went on to establish support at $328 per month for one child for May through December of 2008, based on Mr. S.'s actual earning for that year. CSSD calculated support for

[1] Exhibit 1, pages 1-2.
[2] Exhibit 1, pages 6-7.
[3] Exhibit 1, page 12.
[4] Exhibit 2, page 2.
[5] Exhibit 4, page 1.
[6] Exhibits 5-6.
[7] Exhibit 7.

2009 and ongoing at $518 per month for one child. The lower amount for 2008 reflects that Mr. S. was unemployed for part of that year, and his annual income was therefore reduced. CSSD based the 2009 and ongoing amount on assumption that Mr. S. is capable of and willing to work for an income similar to his previous income.

In his appeal, Mr. S. stated that "I live in Ohio and Ohio has a high unemployment rate. Toledo, the city I live in, is the highest in the state. I have been trying to find a job since May of last year with no luck." Mr. S. also suggested that the entire case should be transferred to Ohio and that the amount of support should reflect the child and custodian live a state with a lower cost of living than Alaska. Mr. S. concluded that he "would appreciate this opportunity to express my concerns and thoughts." Mr. S. did not appear at the hearing, nor did he contact the Office of Administrative Hearings to request that his hearing be rescheduled.

III. Discussion

a. CSSD has correctly calculated Mr. S.'s support obligation based on the best available evidence.

Child support for one child is properly set at twenty percent of the obligor's annual income, after adjustments have been made for various deductions such as taxes and retirement contributions. Income includes the obligor's income from all sources. If an obligor is voluntarily and unreasonably unemployed or underemployed, income may be imputed based on the obligor's ability to earn. At a formal hearing, the person who requested the hearing has the burden of proving that CSSD's decision was in error.[8]

CSSD based its support calculation on information provided by the Department of Labor and the Ohio unemployment agency, which showed Mr. S. earning gross annual income of $22,784 in 2008 and, with default adjustment amounts, adjusted annual income of $19,664.48.[9] It is likely that for 2009 Mr. S.'s income will be somewhat different than from 2008, but there is insufficient evidence in the record to know whether will be more or less. It is unknown whether Mr. S. is still unemployed, or if he is now earning more than he was before his recent period of unemployment. Given this lack of information, it is difficult to find that Mr. S. has met his burden of proving that CSSD's decision was in error.

b. CSSD erred by denying Mr. S.'s request for genetic testing.

CSSD asserts that it cannot administratively determine whether Mr. S. is C.'s father because a court has already established paternity. CSSD is correct to observe that there is in fact

[8] 15 AAC 05.030(h).
[9] Exhibit 9, page 6.

a valid order from an Alaska Superior Court that states, "D. S. is the father of C. S." Given these circumstances, CSSD's respect for the court and concern about the possibility of exceeding its own authority are understandable. According to 15 AAC 216(b), CSSD should deny an application for administrative paternity determination if the paternity of the child has already been established by adjudication of the superior court. However, the divorce decree for Ms. F. and her former husband does not constitute an order establishing Mr. S.'s paternity.

According to AS 25.27.140(a), "if a support order has not been established, the agency may establish paternity and a duty of support." CSSD's argument that Mr. S. cannot now contest paternity is essentially one of *res judicata*, that the issue of paternity has already been decided by a court and cannot be reviewed now. In Alaska,

> The doctrine of *res judicata* provides that a final judgment in a prior action bars a subsequent action if the prior judgment was (1) a final judgment on the merits, (2) from a court of competent jurisdiction, (3) in a dispute between the same parties (or their privies) about the same cause of action.[10]

Ms. F.'s divorce action was not a dispute between the same parties as the parties in this case. Mr. S. was not a party to that action. He was merely a witness. The cause of action in that case was not Mr. S.'s paternity. The issue was Mr. M.'s paternity, along with other issues incident to the divorce. Mr. S.'s telephonic testimony, including direct, cross, and redirect examination, lasted for three minutes and twenty-nine seconds. While CSSD correctly asserts that "Mr. S. testified that he signed an affidavit," the log notes suggest that this affidavit was not an acknowledgment of paternity, but rather an affidavit about Mr. S.'s knowledge of facts relevant to that case, possibly relating to which party would be more suitable to have custody of B.[11] The court considered this evidence along with other evidence presented in the three-day trial to determine the relative rights of the parties to that lawsuit only. Although as a basis for its decision in that case the court concluded that Mr. S. was C.'s father, and Mr. S.'s 3.5 minutes on the phone supported the conclusion, that issue could not have been fully litigated without making Mr. S. a party to the action. The decree was a final judgment determining that Mr. M. is not C.'s father. Whether Mr. S. is C.'s father is an issue that was discussed, but not litigated by the party most concerned.

Denying Mr. S.'s request for genetic testing also raises questions of due process. Procedural due process under the Alaska Constitution requires "notice and opportunity for

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[10] *Smith v. CSK Auto, Inc*. 132 P.3d 818 (Alaska 2006).

[11] Exhibit 12, page 29 (discussing custody issues, custody investigator felt Mr. Sturm's affidavit was biased).

hearing appropriate to the nature of the case."[12] In *Wright v. Black*, the husband in a divorce action filed a motion for paternity testing.[13] At a hearing scheduled to address other issues, the master also took evidence and heard argument on the husband's motion. The court found that there was an arguable due process violation merely because the husband had not been notified in advance that his motion would be addressed on that day.

Though he briefly testified on the phone in Ms. F.'s and Mr. M.'s divorce trial, Mr. S. had been given no notice that his own paternity and financial responsibility to support C. would be determined in that case. Though Mr. S. testified that he would be willing to sign an acknowledgment of paternity, there is a significant difference between an expression of willingness made in answer to an unexpected question and an actual signature of the document after reading the explanation on the form, thinking about the matter, and possibly discussing the matter with counsel. Mr. S. testified in Ms. F.'s divorce trial that he would be willing to take a DNA test. He now insists on it, and seems to agree with the trial judge that "with regard to C. DNA to establish paternity would be a better record." It is difficult to imagine that Mr. S.'s right to due process could have been observed in a matter as serious as a paternity determination when Mr. S. was not a party to the action, had not been served with any kind of paperwork related to the case except possibly a subpoena to appear as a witness, and had not been advised that the court would be making a decision regarding his paternity and financial responsibility. While CSSD did give Mr. S. notice appropriate to the nature of a paternity and support case when it served him with an Administrative Child Support and Medical Support Order, it denied Mr. S. an opportunity for a hearing appropriate to the case when it refused to consider Mr. S.'s correct statement that "I have not been proven to be the father of C.." CSSD should have followed the procedure normally used when a putative father checks the box that Mr. S. checked on the appeal form requesting genetic testing.

IV. Conclusion

CSSD has correctly calculated the amount of support Mr. S. would owe for one child based on the best available information regarding Mr. S.'s income. The decree issued in Ms. F.'s divorce action is not a formal determination of Mr. S.'s paternity of the child in this case. No previous court action or administrative proceeding has made a formal determination of Mr. S.'s paternity of C. or established a duty of support. This case should be remanded so that CSSD

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[12] *Aguchak v. Montgomery Ward Co.,* 520 P.2d 1352, 1356 (Alaska 1974).

[13] *Wright v. Black*, 856 P.2d 477 (Alaska 1993)(*overrule*d *on other grounds, B.E.B. v. R.L.B*., 979 P.2d 514 (Alaska 1999).

may conduct genetic testing and determine whether Mr. S. is C.'s father and issue an appropriate administrative order in accordance with AS 25.27.165. Mr. S. should be aware that if he fails to respond to CSSD's efforts to determine paternity, the agency may issue a default order of paternity.

V. Order

IT IS HEREBY ORDERED that CSSD's decision regarding the amount of Mr. S.'s support obligation be AFFIRMED. This case is REMANDED to CSSD for genetic testing and a decision regarding paternity.

DATED this 29th day of May, 2009.

By: *Signed*
DALE WHITNEY
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 notices, 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 16th day of June, 2009.

By: *Signed*
Signature
Dale Whitney
Name
Administrative Law Judge
Title

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