

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

IN THE MATTER OF:)

A. J. B.)

) OAH No. 09-0385-CSS

) CSSD No. 001124549

DECISION AND ORDER

I. Introduction

The Custodian, M. M., appeals a Modified Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on July 9, 2009 reducing Mr. B.'s monthly child support obligation by 24% from \$384 to \$291. The Obligee child is K. B., born 00/00/01.

The formal hearing was held on August 11, 2009. Ms. M. appeared in person; Mr. B. did not participate.¹ Erinn Brian, Child Support Specialist, represented CSSD. The record closed at the hearing's conclusion.

II. Overview

Ms. M. requested Modification of Mr. B.'s support obligation.² When Mr. B. failed to provide current income information CSSD imputed income using what it believed was Mr. B.'s most recent Alaska Department of Labor information.³ After Ms. M. appealed noting that Mr. B. had voluntarily terminated his employment and remained unemployed, CSSD realized it had based its calculation on incorrect information. CSSD requests that the July 2009 Modified Administrative Child Support Order be vacated and the prior order be reinstated thereby returning Mr. B.'s child support obligation to \$384 per month. The request should be granted because when calculated correctly, the change in the amount of child support does not exceed 15% and the evidence does not indicate a material change in circumstance that would warrant modification.

¹ Mr. B. was called at the phone numbers contained in the record. One number was answered by an unidentified voice mail and the other was answered by a person who indicated it was a "wrong number." A message was left on the unidentified voice mail for Mr. B.

² Exhibit 2 (Request for Modification).

³ Exhibit 4 at 4.

III. Facts

CSSD issued an Administrative Child Support and Medical Support order in June 2004 ordering setting Mr. B.'s child support payment at \$384 per month effective July 1, 2004, and arrears from August 2003 to June 2004 in the amount of \$4,244.⁴ On December 30, 2008, Ms. M. requested Modification of Mr. B.'s support obligation.⁵ CSSD sent a Notice of Petition for Modification and requested Mr. B. provide current income information. When Mr. B. did not respond, CSSD issued a Modified Administrative Child Support and Medical Support Order dated July 9, 2009.⁶

This order reduced Mr. B.'s child support obligation to \$291 per month effective February 1, 2009 and ongoing. CSSD imputed income to Mr. B. based on what was later determined to be outdated Department of Labor data.⁷ Ms. M. appealed.⁸

At hearing the uncontradicted evidence established that Mr. B. voluntarily terminated his employment with No Name meat department in June 2008.⁹ At the time of termination he was earning \$10.64 per hour. His reported income for the third and fourth quarters of 2007 as well as the first and second quarters of 2008 totaled \$20,660.28. He also received weekly unemployment benefits at the rate of \$124 per week from February 2009 through June 2009. Finally, Department of Labor records reflect that Mr. B. is working with a temporary employment agency and has recently earned reported income at the rate of \$10 per hour.

IV. Discussion

A parent is obligated both by statute and at common law to support his or her children.¹⁰ 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." Because child support is calculated based on annual income, temporary periods of unemployment do not negate the support obligation. Also, child support may be based on the potential income of a person who is voluntarily and unreasonably unemployed or underemployed.¹¹ On the other hand, it is important to bear in mind that child

⁴ Exhibit 1. (June 7, 2004, Administrative Child and Medical Support Order).

⁵ Exhibit 2 (Request for Modification).

⁶ Exhibit 4 (July 9, 2009 Modified Administrative Child Support and Medical Support Order).

⁷ *Id.* at 4, 5.

⁸ Exhibit 5 (Request of Appeal of Modification dated July 17, 2009).

⁹ Testimony of Erinn Brian regarding of Department of Labor records for Mr. B.

¹⁰ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹¹ Civil Rule 90.3 Commentary, Part III-C.

support is calculated based on “the income which will be earned when the support is to be paid”—that is, actual or potential *future* income.¹² The obligor has the burden of proving his or her earning capacity.¹³

In this case, the best estimate of future income is based on what Mr. B. was earning at the time he terminated employment, \$10.64 per hour. This is corroborated by his hourly rate when temporarily employed.

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.¹⁴ The Alaska Supreme Court has upheld lower court decisions finding noncustodial parents voluntarily unemployed or underemployed who were not making their best efforts to obtain or retain employment.¹⁵ For example, the obligor in *Kowalski* claimed the construction industry, his health, and the season 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.¹⁶ In another case, the Alaska Supreme Court upheld a lower court’s finding that the obligor parent was voluntarily underemployed because the obligor deliberately kept a low profile in his business. He 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, and did not hire 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.¹⁷

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.”¹⁸ Here, the best evidence of Mr. B.’s “potential income” is what he was earning at the time he voluntarily left the workforce. The use of “potential income”

¹² Civil Rule 90.3 Commentary, Part III-E.

¹³ *Kowalski v. Kowalski*, 806 P.2d 1368, 1372 (Alaska 1991).

¹⁴ *Kowalski*, 806 P.2d at 1371.

¹⁵ *Id.* at 1370.

¹⁶ *Id.* at 1370.

¹⁷ *Nass v. Seaton*, 904 P.2d 412, 418 (Alaska 1995).

¹⁸ Civil Rule 90.3, Commentary III.C.

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.¹⁹

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.²⁰

The unchallenged evidence establishes that Mr. B. is voluntarily and unreasonably unemployed. When he left his employment he was earning \$10.64 per hour. At this rate his total taxable income for 2008 would be \$25,400.20 (\$10.64 per hour x 2080 hours = \$22,131.20 plus the 2008 PFD (\$3,269)). After deducting federal income tax, FICA, and SUI Mr. B.'s annual adjusted gross income for purposes of calculating child support is \$21,606.40²¹ Applying Civil Rule 90.3, this results in a monthly child support payment of \$360. Because the newly calculated child support payment was less than a 15% change from the prior support amount, Child support calculated using this income figure does not result in a material change in circumstances.²² As a result, his child support obligation should remain as established in the June 7, 2004, Administrative Child Support and Medical Support Order.

The commentary states “the totality of the circumstances” should be considered in a decision whether to impute income to the obligor parent.²³ Having considered the “totality of the circumstances,” Ms. M. met her burden of proving by a preponderance of the evidence that CSSD's revised Modified Administrative Child Support and Medical Support Order reducing Mr. B.'s child support obligation is incorrect.

¹⁹ *Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 1987).

²⁰ *Beaudoin v. Beaudoin*, 24 P.3d 523 (Alaska 2001).

²¹ \$21,606.40 = \$22,131.20 + PFD in the amount of \$3,269 – \$1,990.08 Annual Estimated Federal Income Tax – \$1,693.08 Annual Estimated FICA – \$110.64 Annual Estimated SUI. (Calculated using CSSD's online Child Support Guideline Calculator. A printout of the calculation is attached)

²² “A material change in circumstances will be presumed if support as calculated under this rule is more than 15 percent greater or less than the outstanding support order.” Civil Rule 90.3(h)(1).

²³ Civil Rule 90.3, Commentary III.C.

V. Conclusion

Ms. M. met her burden of proving CSSD's Modified Administrative Child Support and Medical Support Order was incorrect. Therefore, CSSD's Modified Administrative Child Support and Medical Support Order should be vacated and the June 7, 2004 Administrative Child Support and Medical Support Order should remain in full force and effect.

VI. Child Support Order

1. CSSD's July 9, 2009 Modified Administrative Child Support and Medical Support Order is vacated;
2. CSSD's June 7, 2004 Administrative Child Support and Medical Support Order, remains in full force and effect.

DATED this 13th day of August, 2009.

By: Signed _____
Rebecca L. Pauli
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 31st day of August, 2009.

By: Signed _____
Signature
Christopher Kennedy _____
Name
Deputy Chief Administrative Law Judge _____
Title

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