

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

GARLAND C. PERRY,

Appellant,

vs.

CHILD SUPPORT SERVICES  
DIVISION, STATE OF ALASKA,

Appellee.

Case No. 3AN-11-05894CI

**ORDER ON APPEAL**

**INTRODUCTION**

Before the court is Mr. Perry's Appeal from the Office of Administrative Hearing's ("OAH") October 6, 2010 Decision and Order, which was adopted by the Commissioner of Revenue on November 1, 2010 as the final administrative determination in the matter. In that Decision and Order, the OAH affirmed CSSD's Notice of Denial of Modification Review requested by Mr. Perry. On appeal, Mr. Perry disputes CSSD's calculation of child support for his child, Isiah Perry.

**FACTS**

This case arises out of Mr. Perry's request for a downward modification of CSSD's determination of child support payments for his child, Isiah I. Perry. There is substantial confusion because Mr. Perry has another child and a separate child support order.

Mr. Perry currently pays child support for two children: his daughter Tyler Kearney, born August 10, 1994, and his son Isiah Perry, born April 18, 1999. In 1996, the Anchorage Superior Court set Mr. Perry's child support payments for Tyler at \$487.00 per month. On March 6, 2001, CSSD set child support payments for Isiah in the amount of \$294.00 per month. In 2010, Mr. Perry requested a modification review in both cases. Given that one review was judicial and one was administrative, they were processed by different CSSD caseworkers and the reviews proceeded independently of one another.

Modification Review Involving Payments for Tyler

In November 2010, there was a judicial modification hearing involving Tyler. Case No. 3AN-96-2711CI. In that case, Judge Aarseth modified Mr. Perry's support order, and, based on calculations prepared by CSSD, reduced his monthly support payment to \$156.00. When CSSD calculated Tyler's child support, CSSD excluded the amount paid by Mr. Perry to his former spouse. CSSD set Mr. Perry's adjusted annual income at \$9340.80. In accordance with Judge Aarseth's decision, CSSD sent Mr. Perry a Notice of Modification Adjustment on December 28, 2010, informing him that his monthly child support obligation for Tyler had been reduced from \$487.00 to \$156.00, effective July 1, 2010.

However, according to CSSD, when it had recalculated Tyler's child support, it mistakenly deducted monthly Social Security/Medicare taxes of \$65.47 and State Unemployment Tax of \$4.28 from Mr. Perry's gross income.

CSSD maintains that it did not discover this mistake until Mr. Perry brought the current appeal with respect to modifying child support payments for Isiah.<sup>1</sup>

Modification Review Involving Payments for Isiah

On May 20, 2010, Mr. Perry filed a request to modify the 2001 child support order for Isiah. CSSD issued a Notice of Denial of Modification Review on August 26, 2010, based on a determination that there would not be a 15% change in Isiah's ongoing child support amount.

Mr. Perry appealed CSSD's initial denial on September 13, 2010, on the basis that CSSD had used the wrong gross income. CSSD had included military retirement benefits automatically garnished and paid to a former spouse. This is the opposite of what CSSD did in Tyler's case. A hearing was held before the OAH on October 6, 2010. Ketina Poe (custodian on record for Isiah), Mr. Perry, and CSSD (represented by Erinn Brian) all participated at the hearing.

The Administrative Law Judge who heard the case issued a Decision and Order affirming CSSD's denial of Modification of Administrative Support Order. Mr. Perry's request for a downward modification of Isiah's child support order was denied. The issue of whether Mr. Perry's adjusted income should not have included the separate property of his former spouse was never discussed or raised at the administrative hearing.

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<sup>1</sup> CSSD acknowledges that it has yet to correct the judicial order with respect to Mr. Perry's child support payments for Tyler. Once so corrected, CSSD maintains that Mr. Perry's child support payment should be slightly higher than the \$156.00 it is now.

On November 1, 2010, the Commissioner of Revenue adopted the OAH's Decision and Order as the final administrative decision in the matter.

On February 28, 2011, Mr. Perry appealed the OHA's final determination of Isiah's child support. Mr. Perry initially argued that CSSD erred by not ruling that Mr. Perry's gross income was \$10,269.84, and that CSSD erred by disbursing child support payments to his younger child Isiah before disbursing child support payments to his older child Tyler.

On May 23, 2011, CSSD filed a Motion for Remand, moving this court to remand the case to CSSD to reconsider its calculation of child support payments for Isiah. This court granted the Motion for Remand on June 8, 2011, but retained jurisdiction, remanding the case for 60 days in order for a new decision to be issued.

After it had recalculated Isiah's child support, CSSD filed a Motion to Dismiss Mr. Perry's Appeal, arguing that the case was moot because it had recalculated Mr. Perry's child support payments based on his annual income of \$10,269.84, and had reduced Mr. Perry's monthly child support payments for Isiah to \$146.00. Mr. Perry filed an Opposition on July 8, 2011, maintaining that CSSD had still erred in its calculations and that his monthly child support payments should be \$125.00. This court denied CSSD's Motion to Dismiss on July 14, 2011 to allow the appeal to proceed.

## DISCUSSION

### Standard of Review

A party may obtain “judicial review by the superior court of a final administrative decision...establishing or modifying...amounts of support due ...by filing a notice of appeal...within 30 days after the decision.” AS 25.27.210(a).<sup>2</sup> On appeal, the court is statutorily authorized to “exercise its independent judgment on the evidence.” AS 23.27.220(c). By statute, the scope of inquiry on appeal is limited to three questions: “(1) whether the agency has proceeded without or in excess of jurisdiction; (2) whether there was a fair hearing; and (3) whether there was a prejudicial abuse of discretion.” AS 23.27.220(b).

An “[a]buse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” *Id.* If an appellant claims that the findings are not supported by the evidence, an abuse of discretion is also established if the court determines that the findings are not supported by either “the weight of the evidence” or “substantial evidence in light of the whole record.” AS 23.27.220(c)(1).

### Issues on Appeal

As a result of the procedural history described above, the issues on appeal have shifted. In his original Appellant’s Brief, filed April 14, 2011, Mr.

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<sup>2</sup> This court notes that, although Mr. Perry filed his original appeal on February 28, 2011, more than 30 days after the final administrative decision was issued on November 1, 2010, CSSD never objected on those grounds. Accordingly, CSSD has waived any objection on those grounds.

Perry argued that CSSD erred both in its calculation of his gross income and in the order in which it disbursed child support payments.

However, on remand, CSSD recalculated Mr. Perry's child support monthly payment for Isiah based on a gross income of \$10,269.84, the same income used by Judge Aarseth to modify Mr. Perry's monthly payments for Tyler. Since Mr. Perry and CSSD now agree that Mr. Perry's gross income is \$10,269.84, that issue is moot.

Nevertheless, Mr. Perry argues in his Reply that CSSD has again erred in its calculations of Isiah's child support. According to Mr. Perry, his monthly child support payment for Isiah should now be \$125.00, not \$146.00. Mr. Perry also appears not to dispute CSSD's disclosure of an additional mistake with respect to its calculation of monthly child support payments for Tyler (i.e. that it incorrectly deducted Social Security, Medicare, and State Unemployment Taxes from Mr. Perry's gross income). In fact, in his Reply, Mr. Perry acknowledges the mistake and speculates that once CSSD's error is corrected, his monthly payment for Tyler will increase to \$171.00 and his monthly payment for Isiah will increase to \$136.00. Despite his apparent acquiescence to the contrary, Mr. Perry clearly arrived at a monthly payment amount of \$125.00 by relying on figures that include deductions for Social Security, Medicare, and State Unemployment taxes.

Mr. Perry also disputes CSSD's determination that he only paid \$119.81 in actual monthly child support payments for Tyler in 2010.

Although Mr. Perry raises the issue of CSSD's disbursement of funds in his Brief, this issue was not raised either in Mr. Perry's initial request for modification or at the October 6 hearing before the Administrative Law Judge. Because CSSD has never had an opportunity to consider the issue, it is outside the scope of the current appeal and the court will not consider it. See *Preblich v. Zorea*, 996 P.2d 730, 736 n. 17 (Alaska 2000)(quoting *Padgett v. Theus*, 484 P.2d 697, 700 (Alaska 1971)) ("Ordinarily an issue which was not raised in the trial court will not be treated on appeal."). *Preblich v. Zorea*, 996 P.2d 730, 736 n. 17 (Alaska 2000)(quoting *Padgett v. Theus*, 484 P.2d 697, 700 (Alaska 1971)). Even though the court generally relaxes procedural requirements for *pro se* litigants like Mr. Perry, see *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987), it will not do so in this case. Not only is Mr. Perry's issue regarding the disbursement of child support subject to an administrative exhaustion requirement, it is an issue best addressed by CSSD in the first instance, as it is an issue involving agency expertise.

Thus, there are only two issues before this court on appeal: 1) whether Civil Rule 90.3 allows Mr. Perry to deduct from his gross income FICA taxes and State unemployment tax when these amounts are not withheld from his retirement pay and 2) whether CSSD miscalculated the amount of child support Mr. Perry paid for Tyler.

#### Deductions

Alaska Civil Rule 90.3 governs child support calculations. *Marine v. Marine*, 957 P.2d 314, 316 (Alaska 1998). Support payments are calculated as

a percentage of an obligor's adjusted annual income, which is determined by reducing an obligor's total gross income by various statutorily-permitted deductions. R.Civ.P. 90.3(a)(1)(A). Allowable deductions include mandatory deductions such as federal, state, and local income tax, Social Security Tax, Medicare Tax, and mandatory contributions to a retirement or pension plan. R.Civ.P. 90.3(a)(1)(A). In the context of calculating child support payments, the Alaska Supreme Court has recognized that the amount of taxes withheld is not always reflective of a taxpayer's actual tax liability. See *Bergstrom v. Lindback*, 779 P.2d 1235, 1236 (Alaska 1989). In those situations, the Court has made it clear that Civil Rule 90.3 authorizes the court to reduce an obligor's total gross income by the amount of actual tax liability, which the court can determine by relying on the taxpayer's "history of actual tax payments." *Miller v. Clough*, 165 P.3d 594, 602 (Alaska 2007) (citing *Bergstrom v. Lindback*, 779 P.2d at 1235).

Deductions are also allowed for "child support and alimony payments arising from prior relationships which are required by other court or administrative proceedings and actually paid." R.Civ.P. 90.3(a)(1)(C). Support for one child is calculated as 20% of an obligor's adjusted annual income. R.Civ.P. 90.3(a)(2)(A).

In Alaska, the State Unemployment Tax is paid by both employers and employees and is based on a percentage of the employee's wages. See AS 23.20.165; AS 23.20.170. According to AS 23.20.530(a) and (b)(1)(A), retirement income is specifically excluded from the category of "wages."



Similarly, taxes under the Federal Insurance Contributions Act (FICA), which includes both Social Security and Medicare taxes, are imposed on wages, which do not include retirement income. See 26 U.S.C. 3101(a) and (b); *Brown v. U.S. Steel Corp.*, 2010 WL 4388075, \*6 (W.D.Pa.) Although retirement income (e.g. pension distributions) may constitute taxable income, it is not subject to FICA taxes. *Id.*

The parties do not dispute that Mr. Perry's only income is his military retirement. They dispute whether it is subject to FICA or State Unemployment taxes. Mr. Perry provides no support or authority for his position that FICA and State Unemployment Taxes should be deducted from his income pursuant to Civil Rule 90.3, nor does he provide any proof that he has actually been paying these taxes. Thus, CSSD did not err by not deducting those tax amounts from Mr. Perry's income.

Mr. Perry also argues that CSSD erred in calculating Isiah's child support. According to the Child Support Guidelines Worksheet, CSSD calculated Mr. Perry's total monthly deduction at \$127.48 (\$119.81/month in child support and \$7.67 in Federal Income Tax). Annual deductions amount to \$1529.76 ( $\$127.48 \times 12$ ). This makes Mr. Perry's annual adjusted income \$8740.08 ( $\$10,269.84 - \$1529.76$ ). Twenty percent (20%) of \$8740.08 equals \$1748.02 in annual child support due. Thus, Mr. Perry's monthly payment for Isiah equals \$146.00 ( $\$1748.00 / 12$ ).

Although Mr. Perry starts from the same total gross income of \$10,269.84, he uses the monthly deductions calculated by CSSD with respect to child support for his older child, Tyler (\$77.42/month, \$929.04/year). Based on CSSD's earlier calculations, Mr. Perry maintains that his adjusted annual income (before deduction for child support) is \$9340.8 (\$10,269.84 - \$929.04). Mr. Perry then calculates the child support paid for Tyler by multiplying his current monthly payment established by CSSD (\$156.00) by twelve, equaling an annual deduction of \$1872.00. According to Mr. Perry, his total deductions, including child support for Tyler, equal \$2801.00 per year. Based on this, Mr. Perry's adjusted annual income, minus all deductions, would be \$7,468.80 or \$7469.00 (\$10,269.84 - \$2801.04).<sup>3</sup> Twenty percent (20%) of \$7469.00 equals \$1493.8 or \$1494. Taking \$1494.00 and dividing it by twelve, Mr. Perry arrives at a monthly child support payment of \$124.5 or, rounding up, \$125.00.

As is clear from Mr. Perry's calculations, he relies upon CSSD's prior calculations in Tyler's case, which are incorrect. As Mr. Perry's military retirement income is not subject to either FICA or State Unemployment, these taxes should not be deducted from Mr. Perry's income. Accordingly, this court finds that Mr. Perry's figure of \$125.00 is wrong.

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<sup>3</sup> Although Mr. Perry uses the same amounts for gross income and total deductions, he miscalculates what his adjusted annual income would be with those figures. He maintains that his adjusted annual income would be \$7474.64, but, using the same figures, this court calculates that his adjusted annual income would be \$7469.00. Nevertheless, he arrives at the same yearly child support: \$1494.00.

Although this court finds that CSSD's figures are correct with respect to tax-related deductions, there remains an issue regarding CSSD's determination of the amount of prior child support payments that should be deducted from Mr. Perry's total gross income, pursuant to Civil Rule 90.3.

Calculation of Actual Child Support Paid

The parties dispute the amount that should be deducted from Mr. Perry's gross income for the amount Mr. Perry pays in child support for Tyler. The parties do not dispute that deductions for child support payments are only allowed for those payments that are required by court proceedings and that are actually paid. The parties dispute how much Mr. Perry actually paid in child support.

The OAH Administrative Law Judge did not make any findings with respect to this issue in the October 6, 2010 Decision and Order, and the record on appeal indicates that this was not discussed at the hearing. Nevertheless, in its Brief, CSSD asserts that it "determined that [Mr. Perry] paid \$119.81 per month for the prior child Tyler in 2010, not the full court-ordered amount of \$156.00 per month."

The Record on Appeal includes pages 000001-000115.<sup>4</sup> Within the record are two different Child Support Guidelines Worksheets in Case #001097098. The first one (page 000039), dated August 26, 2010, applies to the tax year "2010A." According to that worksheet, Mr. Perry was entitled to a

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<sup>4</sup> Originally, the record on appeal only included pages 000001-000099. On October 26, 2011, this court granted CSSD's Motion to Supplement the Record by adding pages 000100-000115.  
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deduction for "child support or alimony in prior relationship" payments in the amount of \$212.79/month. The other worksheet (page 000110), dated June 14, 2011,<sup>5</sup> applies to tax year "2011A" and indicates that Mr. Perry was only entitled to a deduction for "child support or alimony in prior relationship" in the amount of \$119.81. Although CSSD states that it based its calculation of child support payments for Isiah in part on its determination that Mr. Perry was only actually paying \$119.81 in child support for Tyler in 2010, there is no evidence in the record indicating how CSSD determined that amount.

Mr. Perry has submitted documents with his Reply brief that indicate that roughly \$256.00 is being garnished regularly from his retirement income. It is unclear how much is being garnished for arrearages and how the money is being allocated to Tyler. Although these documents are not part of the record on appeal, this court is authorized by AS 25.27.220 to "augment the agency record in whole or in part..." *See also* R.App.P. 609(b). Because this court finds the documents relevant to the amount of child support actually paid by Mr. Perry, it will consider them on appeal for a limited purpose only, to refute CSSD's claim that \$119.81 is the actual amount paid.

Mr. Perry has also submitted print-outs of his payment history from the CSSD website, none of which include the amount \$119.81. Thus, it is unclear to the court how CSSD determined that Mr. Perry's actual child support payments for Tyler were \$119.81. It would appear that Mr. Perry is taking the

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<sup>5</sup> It is unclear from the document, which is clearly a copy of the original, whether the date is June 11 or June 14.

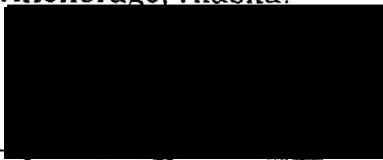
position that he is paying the full amount ordered by Judge Aarseth, which is \$156.00.

Without such clarity, this court cannot conclude that CSSD has or has not abused its discretion in this case. Given the factual discrepancies between the monthly amount garnished from Mr. Perry's retirement income and the amount that CSSD states was being paid to Tyler, this court should remand the case back to CSSD to make further factual findings. However, to bring this matter to conclusion, this court will hold a hearing *de novo* on the issue of actual child support paid to Tyler. A separate scheduling order will issue.

#### CONCLUSION

Civil Rule 90.3 does not allow Mr. Perry to deduct taxes he does not pay. Accordingly, CSSD correctly determined that FICA and State Unemployment Taxes should not be deducted from Mr. Perry's total gross income. However, since it is unclear how CSSD determined how much child support Mr. Perry actually paid for Tyler, this court will hold a *de novo* hearing so that proper child support can be set for Isiah.

DATED this 10 day of May 2012 at Anchorage, Alaska.

  
Sen K. Tan  
Superior Court Judge

I certify that on 5-11-12 a copy of the above  
Was mailed to each of the following: G. Perry/K. Poe/K. Ince-AGO

M. Lucas  
Judicial Assistant