

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

IN THE MATTER OF)	
D R. X)	OAH No. 13-0069-CSS
)	
_____)	CSSD No. 001187017

DECISION AND ORDER

I. Introduction

This case is D R. X's appeal of an order issued by the Alaska Child Support Services Division (Division). That order established his child support obligation for his children, J and A. On February 6, 2013, a formal hearing was held on Mr. X's appeal.¹ L S. S, the custodial parent, participated in the hearing. Mr. X also participated. Russell L. Crisp, Child Support Specialist, represented the Division. The hearing was audio-recorded. The record closed on February 7, 2013.

Having reviewed the record in this case, and after due deliberation, the Administrative Law Judge concludes that the Division's Amended Administrative Child and Medical Support Order should be adjusted to set child support for 2013 and ongoing by using an average of Mr. X's last three years of annual income in the shared custody calculation. This means that Mr. X's child support obligation for the months September through December of 2012 will remain at \$50 per month, but his child support obligation beginning in 2013 will be reduced from \$337 to \$106.33.

II. Facts

The Division established a child support order for Mr. X's children, J and A because the children began to receive grants of public assistance in September of 2012.² Paternity is not in dispute.³

The Division issued an Administrative Child and Medical Support Order on November 9, 2012.⁴ Mr. X appealed his child support order.⁵

The Division issued an Amended Administrative Child and Medical Support Order on

¹ The hearing was held under Alaska Statute 25.27.170.
² Exhibit 1 & Recording of Hearing.
³ Recording of Hearing.
⁴ Exhibit 2.
⁵ Exhibit 3.

December 7, 2012.⁶ The Division set Mr. X's monthly ongoing child support at \$337 effective January 1, 2013. The order also established monthly arrears in the amount of \$50 going back to September of 2012. These amounts were based on 50/50 shared custody calculations. The calculations for 2012 used the parents' estimated 2012 income. The calculations for 2013 and ongoing used imputed or estimated full-time year-round earnings of \$25 per hour to Mr. X.⁷ Mr. X requested a formal hearing.⁸

Mr. X is a carpenter who works seasonally. He lives in No Name, Alaska, where most construction jobs are seasonal. He does not look for construction jobs away from No Name because he has to care for the children.⁹ Ms. S is working full-time. She earns \$8 per hour.¹⁰

After the hearing the Division filed new calculations, as requested and discussed at the hearing.¹¹

Based on the evidence in the record, it is more likely than not that the Division's latest calculations are correct and that the income amounts used in these calculations are the best estimates of Mr. X's and Ms. S's ongoing annual income.¹² These calculations also use a correct shared custody calculation for 2012 based on Mr. X having 50% custody. These calculations use Mr. X's annual income for 2010, 2011, and 2012. This average is more likely to reflect Mr. X's 2013 annual income than an estimate based on full-time year-round carpenter's wages. Mr. X works seasonally. Mr. X has not been unreasonably underemployed. The Division's calculations result in a monthly support obligation of \$106.33 for 2013 and ongoing.¹³

III. Discussion

Burden of Proof

Mr. X argued that his child support order should be lower than the amount set by the Division. In a child support hearing, the person who filed the appeal, in this case, Mr. X, had the burden of proving by a preponderance of the evidence that the Division's order is incorrect.¹⁴ Mr. X met his burden of showing that his child support order should be adjusted because he is

⁶ Exhibit 4.
⁷ Exhibit 4.
⁸ Exhibit 5.
⁹ Recording of Hearing.
¹⁰ Recording of Hearing.
¹¹ Exhibit 11.
¹² Recording of Hearing & Exhibit 11.
¹³ Exhibit 11.
¹⁴ Alaska Regulation 15 AAC 05.030(h).

only able to work seasonally while living in No Name with the children.

Shared Custody Calculation

Mr. X and Ms. S share custody of the children equally. When calculating child support, a parent is entitled to a reduction on the monthly obligation if the parent is exercising shared custody. Shared custody exists when a child resides with a parent at least 30, but no more than 70, percent of the overnights.¹⁵ Under the shared custody formula, the annual amount each parent would pay to the other parent if that parent had sole custody is calculated. That support amount is then multiplied for each parent by the percentage of time the other parent will have physical custody of the child. The parent with the larger amount under this calculation is the obligor parent. The annual award from the obligor parent to the other parent is equal to the difference between the two figures multiplied by 1.5.¹⁶

Estimated Income

As discussed at the hearing, this order is based on a 50/50 shared custody calculation using the best estimate of the parents' current annual income. In Mr. X's case, that estimate is an average of his past three years income, which includes his earnings, his unemployment benefits, and a PFD. In Ms. S's case, that estimate is her current hourly wage annualized, plus a PFD. Child support should be set based on the income earned when the child support will be paid.¹⁷ The Division's orders correctly set Mr. X's month child support obligation for 2012 on the income that the parents earned that year. For 2013, however, the Division based monthly support on calculations that used income for Mr. X that is more than twice what he normally earns in a year. Ongoing child support should be calculated based on Mr. X's estimated future income unless good cause exists to raise child support above, or reduce it below, the amounts calculated using the income formula in Civil Rule 90.3(a). Mr. X works seasonally in a profession where he lives with the children of this order.

No Underemployment

Child support may be based on the potential income of a person who is voluntarily and unreasonably unemployed or underemployed.¹⁸ A parent who voluntarily reduces his or her income should not automatically receive a corresponding reduction in his or her child support

¹⁵ Alaska Civil Rule 90.3(f).

¹⁶ Alaska Civil Rule 90.3(f).

¹⁷ Alaska Civil Rule 90.3, Commentary III.E.

¹⁸ Civil Rule 90.3 Commentary, Part III-C.

obligation.¹⁹ Mr. X has not reduced his income or asked for a reduction from his 2012 child support. Mr. X agreed to use an average of his last three years of income, which results in an increase in the monthly amount. The circumstances surrounding a parent's failure to maximize earnings should be carefully considered, and then a determination made about whether, under all the circumstances in the case, income should be imputed when child support is calculated.²⁰ Under the circumstances of this case, it is not appropriate to impute income to Mr. X. Mr. X works seasonally in a profession where he lives with the children of this order.

Averaging Income

The nature of Mr. X's employment, construction, makes his annual income rise and fall erratically. When past annual income is erratic, as it is in this case, it is appropriate to average past income to estimate future income.²¹ There is a regulatory presumption that the most accurate estimate using income averaging is achieved by averaging the last three years of income.²² The three-year average annual income that the Division used in its latest calculations reflects Mr. X's reported earnings for the past several years, as well as being close to Mr. X's estimate of likely earnings in 2013 at the hearing.

IV. Conclusion

I conclude that monthly amounts for 2013 and ongoing in the Division's order should be adjusted to use Mr. X's average income for the past three years. The child support amount in this order was calculated using the shared custody formula in Alaska Civil Rule 90.3(b).

V. Child Support Order

1. Mr. X's ongoing child support for J and A is \$106.33 per month effective February 1, 2013.
2. Mr. X is liable for child support arrears for J and A in the monthly amounts of \$50 for the months of September 2012 through December 2012; and \$106.33 per month for the month of January 2013.
3. The Division should give the parties the appropriate debit or credit for their out-of-pocket expenses for providing health insurance coverage for J and A.

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

²⁰ *See Pattee vs. Pattee*, 744 P.2d 659, 662 (Alaska 2002).

²¹ Alaska Civil Rule 90.3, Commentary III.E.

²² Alaska Regulation 15 AAC 125.030(d).

4. All other provisions of the Administrative Review Decision and the Administrative Child and Medical Support Order dated December 3, 2012 remain in effect.

DATED this 8th day of February 2013.

By: Signed
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 5th day of March, 2013.

By: Signed
Signature
Mark T. Handley
Name
Administrative Law Judge
Title

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