

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

IN THE MATTER OF:)	
)	OAH No. 04-0032-CSS
M. W. S., JR.)	CSSD NO. 001123631
_____)	DOR NO. 040412

DECISION AND ORDER

I. Introduction

This case involves the Obligor M. W. S., Jr.'s appeal of an Amended Administrative Child Support and Medical Support Order that the Child Support Services Division (CSSD) issued on April 30, 2004. The Obligee children are T., DOB 00/00/98, and L., DOB 00/00/02.

The formal hearing was held on August 3, 2004. Mr. S. appeared in person with his attorney, G. R. Eschbacher. The Custodian of record, J. A. S., also appeared in person. David Peltier, Child Support Specialist, represented CSSD. The hearing was tape-recorded. The record closed on September 10, 2004.

Kay L. Howard, Administrative Law Judge for the Alaska Office of Administrative Hearings, was appointed to hear this appeal by the Chief Administrative Law Judge, Terry L. Thurbon. Having reviewed the record in this case and after due deliberation, I have concluded Mr. S.'s appeal should be granted and his child support should be calculated from his actual 2003 and 2004 income, not the income he earned in 2002 from trucking.

II. Facts

A. History

On January 31, 2004, CSSD served an Administrative Child and Medical Support Order on Mr. S.¹ He requested an administrative review and provided income information.² Following the review, CSSD issued an Amended Administrative Child and Medical Support Order on April 30, 2004, that set ongoing support at \$1072 per month, with arrears of \$11,702 for the period from July 2003 through May 2004.³ Mr. S. filed an appeal on May 21, 2004.⁴

¹ Exh. 4.

² Exhs. 5-8.

³ Exh. 9.

⁴ Exh. 10.

At the formal hearing, Mr. S. claimed his child support order is too high because it is based on his former income as a long haul truck driver. Mr. S. said he no longer earns that income amount because he had to sell his truck and shut down his business.

Mr. S. testified he formerly was a long haul truck driver from Fairbanks to Prudhoe Bay and occasionally into Canada. He stated he owned a semi trailer truck, but he had to sell it in December 2003 in order to pay off old bills. Mr. S. said he then worked occasionally for B. B. Trucking as a driver, but he only worked part-time and was not guaranteed any hours. He said he was paid \$20 per hour driving for B. B.

Mr. S. said he then began working at a dance studio as an instructor beginning on February 16, 2004. He stated he worked 40 hours per week and was paid \$10 per hour, but stopped working there on June 21, 2004 because his work schedule did not coincide with the parties' custody schedule. Mr. S. said he was not currently working at the time of the hearing, but he planned to go back to work for B. B. Trucking within about a week. He said he would once again earn \$20 per hour, but he would have to buy his own food while driving. Mr. S. said he would be working only three days per week and one evening every other week when he started back to work for B. B., the reason being that he has to be available for his shared custody periods.

Mr. S. testified he made direct support payments to Ms. S. after they separated. He said he paid his and Ms. S.'s IRS levy of \$2,585.72, of which one half was Ms. S.'s obligation.⁵ In addition to the levy, Mr. S. testified he had paychecks sent to Ms. S. while he was working in Georgia temporarily. He provided copies of paychecks issued to him by S. Door Installation in Georgia and a letter that states two checks totaling \$3223 were either wired to or deposited in Ms. S.'s bank account.⁶

Mr. S. further testified that as of July 1, 2004, he and Ms. S. had been exercising shared custody of T. and L. pursuant to the court's order in their divorce proceedings. Mr. S. filed unsigned copies of the parties' divorce decree and related documents.⁷ After the hearing, Mr. S. filed copies of the Divorce Decree and Findings of Facts and Conclusions of Law that were

⁵ Obligor's Exh. 1.

⁶ Obligor's Exh. 6.

⁷ Exh. 11 at pgs. 3-9.

signed by the court on November 1, 2004.⁸ He also filed a document entitled “Calculation of Time,” in which he estimated his portion of shared custody of the children would equal 33.42% of the time for 2004 and 36.9% for 2005.⁹

Ms. S. also presented testimony at the hearing. She confirmed the parties had been exercising shared custody of the children since July 1, 2004, pursuant to their settlement agreement. As to Mr. S.’s testimony that he had to work part-time in order to exercise his portion of shared custody, Ms. S. said their custody schedule would change in September so that Mr. S. would have the children on weekends. Ms. S. said she thought that as a result, Mr. S. should be able to put in a normal five day work week driving truck.

Regarding the direct payments, Ms. S. said the checks sent to her from S. Door Installation were deposited into her and Mr. S.’s joint account, from which she paid bills for the parties’ household in Fairbanks. However, Ms. S. said she was living in Anchorage with her mother at the time she paid the bills.

At the close of testimony, CSSD requested permission to revise the child support calculations after having heard the parties’ testimony and reviewed their tax returns. CSSD’s request was granted. CSSD subsequently filed a Post Hearing Brief with the revised calculations. CSSD averaged the shared custody ratio between the parties for 2004 and 2005 in an effort to keep the ratios consistent from one year to the next. The result was 35% shared custody for Mr. S. for both 2004 and 2005, and 65% shared custody for Ms. S. for the same time period.¹⁰

For the period from July 2003, when this obligation began, through December 2003, CSSD calculated Mr. S.’s child support at \$528 per month for two children, based on the income reflected in Mr. S.’s 2003 tax return, with one exception.¹¹ CSSD disallowed a depreciation expense of \$4700 that Mr. S. reported on his 2003 tax return and added the amount to his income for the year.¹² CSSD obtained this information from the documents regarding the S.s’ property

⁸ Letter from Mr. S.’s attorney dated November 2, 2004.

⁹ Exh. 11 at pgs. 1-2.

¹⁰ Post Hearing Brief at pg. 1.

¹¹ Exh. 12 at pg. 1.

¹² Post Hearing Brief at pg. 1.

division, and said it added the \$4700 figure to Mr. S.'s income because he retained the assets from the sale of the two trucks after he dissolved his business in December 2003.¹³

For the period from January 2004 through June 2004, CSSD calculated Mr. S.'s child support at \$415 per month for two children.¹⁴ CSSD estimated Mr. S.'s earnings at \$20,800 per year, based on his testimony that he was earning \$10 per hour as a dance instructor during that period of time.

Both parties testified they began exercising shared custody of T. and L. in July 2004. CSSD applied the 65/35 shared custody calculation, which resulted in a child support amount for Mr. S. of \$532 per month for two children, effective July 1, 2004.¹⁵ CSSD calculated this amount using projected income for both parties. CSSD estimated Mr. S.'s income at \$41,600 annually, based on his August 2004 return to work at B. B. Trucking, where he made \$20 per hour. CSSD estimated Mr. S. would work full-time or 2080 work hours per year.¹⁶ CSSD estimated Ms. S.'s 2004 earnings at \$19,959.36 by multiplying her first quarter 2004 wages of \$4989.84 times four quarters.¹⁷

B. Findings

Based on the evidence in the record and after due consideration, I hereby find:

1. As required by 15 AAC 05.030(h), Mr. S. met his burden of proving by a preponderance of the evidence that CSSD's Amended Administrative Child Support and Medical Support Order is incorrect;
2. Mr. S.'s child support should not be calculated from his former income as a long haul truck driver because he no longer works in that capacity and has dissolved his business;
3. Mr. S.'s 2003 income was \$19,339, plus the PFD, for total income of \$20,446.56;
4. CSSD correctly calculated Mr. S.'s 2003 child support obligation at \$528 per month for two children;
5. The best estimate of Mr. S.'s annual income for the period of time from January 2004 through June 2004 is \$20,800, plus the PFD, which results in total annual income for child support purposes of \$21,907.56;

¹³ Exh. 11 at pg. 9.

¹⁴ Exh. 12 at pg. 2.

¹⁵ Exh. 12 at pg. 3.

¹⁶ Exh. 13.

¹⁷ Exh. 13.

6. CSSD correctly calculated Mr. S.'s child support obligation for the period of time from January 2004 through June 2004 at \$415 per month for two children;

7. Mr. S. began exercising 33.42% shared physical custody of T. and L. in July 2004, which increased to 36.9% shared physical custody in 2005;

8. CSSD's method of averaging Mr. S.'s 2004 and 2005 shared physical custody percentages to 35% for both 2004 and 2005 was a reasonable approach;

9. The best estimate of Mr. S.'s annual income to be applied to the period of time from July 2004 through December 2004 is \$41,600, plus the PFD, which results in total annual income for child support purposes of \$42,707.56;

10. CSSD correctly calculated Mr. S.'s child support obligation for the period of time from July 2004 through December 2004 at \$532 per month for two children;

11. Mr. S. is not entitled to a credit against his child support obligation for the tax levy he paid or for the checks he had sent to Ms. S. from Georgia.

III. Analysis

A. Voluntary Underemployment

A parent is obligated both by statute and at common law to support his or her children.¹⁸ 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." Alaska law allows CSSD to use a parent's "potential income" if a finding is made that the parent is voluntarily and unreasonably unemployed or underemployed.¹⁹ 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."²⁰ CSSD found Mr. S. voluntarily and unreasonably underemployed in its Administrative Review Decision, then calculated his child support obligation using his 2002 long haul trucker income as the "potential income" figure.²¹

At the end of the hearing, CSSD withdrew its argument that Mr. S. is voluntarily and unreasonably underemployed. CSSD requested permission to revise Mr. S.'s child support calculations based on his actual income for 2003 and CSSD's best estimate of his 2004 income, as derived from his hearing testimony. CSSD's request was granted and the agency recalculated

¹⁸ *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

¹⁹ Civil Rule 90.3(a)(4).

²⁰ Civil Rule 90.3, Commentary III.C.

²¹ Exh. 9 at pgs. 7 & 11.

Mr. S.'s child support at \$528 per month for July 2003 through December 2003, \$415 per month for January 2004 through June 2004, and \$532 per month from July 2004 forward.²²

The commentary to Civil Rule 90.3 states the “the totality of the circumstances” should be considered when deciding whether to impute income to the Obligor parent.²³ After having considered the “totality of the circumstances” in this case, I find CSSD was correct to withdraw its argument that Mr. S. was voluntarily and unreasonably underemployed. The Alaska Supreme Court made the following statement regarding voluntary unemployment:

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.^[24]

Such is not the situation here. Mr. S. did not work every month after he dissolved his business, but he worked consistently throughout the year. In addition, Mr. S. testified he was returning to work for Bob Benson Trucking in September 2004. He may have been in the position of working outside his usual job for a short period of time earlier in the year, but the evidence does not support a finding that Mr. S. was voluntarily and unreasonably underemployed.

B. Mr. S.'s Income

In its administrative review, CSSD found Mr. S. voluntarily underemployed and imputed income to him in the amount of \$62,058, plus the PFD, based on his 2002 income.²⁵ When CSSD revised Mr. S.'s child support after the hearing, it used his actual 2003 income for the 2003 calculation. Then, because of the split in 2004 created by shared custody beginning in July 2004, CSSD used two separate income figures to calculate Mr. S.'s support amounts for the first and second halves of 2004.

For the first half of 2004, CSSD used Mr. S.'s income of \$10 per hour from the dance studio to estimate what his income would be based on that hourly wage. For the second half of

²² Exhs. 12 & 13.

²³ Civil Rule 90.3, Commentary III.C.

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

²⁵ Exh. 9 at pg. 12.

2004, CSSD used Mr. S.'s truck driving wage of \$20 per hour to estimate an income figure. CSSD's calculations were reasonable, given Mr. S.'s different employment situations and the parties' change to shared physical custody of the children. Even though Mr. S. testified he was working only three days per week and one evening every other week, he stated it was because of the custody schedule. Mr. S. did not object to Ms. S.'s testimony that he could work a normal week after the custody change because as of September 2004, he would have custody of T. and L. on the weekends. CSSD's calculations, therefore, are adopted.

B. Credit for Direct Payments

Mr. S. requested credit against his support obligation for the parties' tax levy he paid and for the paychecks he had sent to Ms. S. when he was in Georgia. Mr. S. is not entitled to a credit for the tax levy he paid because it was a marital debt that was resolved in the parties' property settlement aspect of their divorce.²⁶

Mr. S. also is not entitled to a credit for the paychecks he had sent to Ms. S. when he was working in Georgia. Ms. S. testified the funds were deposited in their joint account, and the evidence does not establish that Ms. S. had sole spending control from that account. Moreover, Ms. S. testified she used the funds to pay bills for their Fairbanks household after she moved to Anchorage to live with her mother. This would constitute payment of past marital debt, which is not child support. Finally, both Mr. S. and Ms. S. claimed the other person was responsible for draining funds out of their joint account, so it is not possible to determine, with the evidence presented, whether one or both parties utilized the funds from the account. Mr. S. did not prove by a preponderance of the evidence that the checks he had sent to Ms. S. were child support payments, so he is not entitled to a credit for them against his child support obligation.

IV. Conclusion

Mr. S. met his burden of proving by a preponderance of the evidence that his child support obligation should be calculated from his actual income, and that he and Ms. S. began exercising shared physical custody of the children beginning in July 2004. CSSD correctly determined Mr. S.'s child support obligation in the revised calculation submitted after the hearing, and those calculations should be adopted. Accordingly, I issue the following child support order:

²⁶ Exh. 11 at pg. 9.

V. Child Support Order

1. Mr. S. is liable for child support in the amount of \$528 per month for two children from July 2003 through December 2003;
2. Mr. S. is liable for child support of \$415 per month for two children from January 2004 through June 2004;
3. Mr. S. is liable for child support of \$532 per month from July 2004 through April 2005, and ongoing.

DATED this 14th day of April, 2005.

By: Signed_____

Kay L. Howard
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. I, Terry L. Thurbon, Chief Administrative Law Judge, on behalf of the Commissioner of Revenue, order that this decision and order concerning the child support obligation of M. W. S., Jr. be adopted as of this date and entered in his file as the final administrative determination in this appeal.

Under AS 25.27.062 and AS 25.27.250 the Obligor's income and property are subject to an order to withhold. Without further notice, a withholding order may be served on any person, political subdivision, department of the State or other entity.

Reconsideration of this decision may be obtained by filing a written motion for reconsideration within 10 days after the adoption of this decision, pursuant to 15 AAC 05.035(a). The motion must state specific grounds for relief, and, if mailed, be addressed: Commissioner's Office Appeals (Reconsideration), Alaska Department of Revenue, P.O. Box 110400, Juneau, Alaska 99811-0400.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 25.27.210 within 30 days of the date of this decision.

DATED this 14th day of April, 2005.

By: Signed_____

Terry L. Thurbon
Chief Administrative Law Judge

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