

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

IN THE MATTER OF)	
S D)	OAH No. 04-0326-CSS
)	CSSD No. 001098066
_____)	DOR No. 020118

Child Support Decision and Order on Remand from Court

I. Introduction

This case is on remand from the superior court in case number 3AN-00-0000 CI. The case is the appeal of an administrative order establishing the child support obligation of S D (Obligor) for the support of his child, K (Obligee).

Having reviewed the record in this case and after due deliberation, I again concluded that Mr. D's child support arrears and ongoing child support should be set at the maximum monthly amount based on his income. Because the court vacated my first order, I am issuing a new order that includes my original findings in this decision. I have made additional findings requested by the court, as well as additional conclusions of law, and have supplemented the discussion section of the decision.

II. Facts

A. History

This is an appeal of a Child Support Enforcement (CSED)¹ order establishing child support for a child who received public assistance.

Paternity is not now in dispute. At the first hearing, Mr. D indicated that he was considering contesting paternity, but he later chose not to pursue an appeal of the administrative order that established his paternity of the Obligee. Two genetic tests showed a 99.98% and a 99.99% probability that he was the Obligee's father.

CSED issued an Administrative Child and Medical Support Order on August 13, 2001. Mr. D requested a review of this order, and provided some income information.

¹ This agency is now known as the Child Support Services Division.

CSED issued an Amended Administrative Child and Medical Support Order on December 26, 2001. CSED set ongoing child support at \$1212 per month beginning January 1, 2002. CSED set arrears totaling \$43,916.64 for the period of October 1998 through December 2002. Mr. D's 2002 and ongoing child support were calculated based on CSED's estimates of Mr. D's self-employment, rental and wage income from the information he provided.

Mr. D requested a formal hearing. Mr. D argued that the income used by CSED was too high. Over time he provided more tax and business records.

FINDINGS OF FACT

Based on the evidence in the record, I conclude that it is more likely than not that:

1. Mr. D is the father of the Obligee. Ex. 7 & 15.
2. Mr. D has under-reported his income and was engaged in a scheme of concealing and shielding assets and earnings from CSED. Tape of Hearing, Ex. 5, K, M & N.
3. Mr. D's earnings and business activities since 1997 have produced at least \$84,000 per year in income and the increase of his net worth. Tape of Hearings, Ex. A-N.
4. Mr. D is in the business of purchasing, renting, renovating and selling commercial and residential real estate.
5. Mr. D gave most of his assets to his wife and adult sons by transferring the property to No Name Corporation, which he created and is president of, but which his wife and sons own. Tape of Hearing.
6. Mr. D created No Name in order to shield assets from CSED and the Custodian. Tape of Hearing.
7. Mr. D treats No Name property as if it were all his own personal property, and treats his income and assets as if it were No Name property. Mr. D created, controls and commingles his assets and income with No Name. Tape of Hearing & Ex. A-N.
8. Mr. D's earnings and his business activities and the property he transferred to No Name produce more than \$84,000 in net income and realized and unrealized capital gains. Mr. D could draw more than \$84,000 from No Name and his earnings every year without a decrease in his and No Name's net worth. Tape of Hearing & Ex. A-N.

9. \$84,000 of imputed annual income results in child support calculated under Civil Rule 90.3(c)(B)(2) & Civil Rule 90.3(a)(2)(A), of \$1400 per month. Ex. 18.

SUPPLEMENTAL FINDINGS OF FACT

Based on the evidence in the record, I conclude that it is more likely than not that:

1. On a loan application that Mr. D signed and dated December 27, 2001, he claimed under penalty of federal prosecution that his “Gross Month[s] Salary” was \$1500.²
2. On a loan application that Mr. D signed and dated December 27, 2001, he claimed under penalty of federal prosecution that his **Net** Monthly Real Estate Income was \$13,500.³
3. On a loan application that Mr. D signed and dated December 27, 2001, he claimed under penalty of federal prosecution that his monthly income “Other Income” was \$2,550.⁴
4. On a loan application that Mr. D signed and dated December 27, 2001, he claimed under penalty of federal prosecution that his monthly income “Total” was \$17,550; this amount of monthly income equals an annual income, excluding capital gains, of \$210,600.⁵

² Mr. D apparently crossed out the last two letters “ly” in “Monthly” and hand wrote in the letter “s” below the letters that he had crossed out. This indicates that Mr. D read the application carefully and was willing to amend the form to make his answers more accurate. *See* page number 35 of record on appeal, which is the last page of Mr. D’s National Bank of Anchorage loan application.

³ The bold and underline on the word “**Net**” is added. This emphasis is added because in the third paragraph of page 10 of its decision the court mistakenly characterized what Mr. D “lists” as “his gross income from his job as well as the real estate properties” as \$17,550. In fact, on the loan application, under penalty of federal prosecution for misrepresentation, Mr. D claimed that his “Gross Months Salary” was \$1500, his “Net Monthly Real Estate Income” was \$13,500 and his “Other Income” was \$2,550. Mr. D put \$17,550 below these figures in the box titled “Total.” It is quite clear on the application that the word “Net” not the word “Gross” precedes and modifies the words “Monthly Real Estate Income” which Mr. D claimed was \$13,500. *See* page number 35 of record on appeal, which is the last page of Mr. D’s National Bank of Anchorage loan application.

⁴ That this “Other Income” figure is intended to be monthly is implicit in the way the application questions are structured rather than being explicitly identified either by the application or Mr. D as being his monthly “Other Income.” I have therefore found that Mr. D intentionally claimed on the application what his claim would be most reasonably read as conveying; that he received \$2,550 in other income every month. *See* page number 35 of record on appeal.

⁵ That this “Total” figure is intended to be Mr. D’s total monthly income is implicit in the way the application questions and Mr. D’s answers are structured rather than being explicitly identified either by the application or Mr. D as being his monthly “Total Income.” I have therefore found that Mr. D intentionally claimed on the application what his claim would be most reasonably be read as conveying; that he received \$17,550 in total income every month, and that part of that total monthly income is gross salary, and part is net real estate income and other income. *See* page number 35 of record on appeal. I find that this figure probably does not include Mr. D’s capital gains from real estate, as the application asks merely for Mr. D’s net monthly income from real estate, that is, that portion of his rent receipts which is profit and would therefore be available to make monthly payments on the loan he is applying for. The application solicits information on capital gains by asking for Mr. D’s net worth. The bank could estimate future capital gains as a potential source of loan repayment by estimating a conservative rate of capital gains to the value of the assets claimed.

5. On a loan application that Mr. D signed and dated December 27, 2001, he claimed under penalty of federal prosecution that his “Total Liabilities (Total Owing)” were \$720,000.⁶
6. On a loan application that Mr. D signed and dated December 27, 2001, he claimed under penalty of federal prosecution that his “Net Worth (Total Assets – Total Liabilities)” was \$1,169,000.⁷
7. On a loan application that Mr. D signed and dated December 27, 2001, he claimed under penalty of federal prosecution that his “Total liabilities + Net Worth” was \$1,889,000.⁸
8. Mr. D claimed that his family living expenses are \$7,752 per month, which is \$93,024 per year.⁹
9. Mr. D’s tax records are not a reliable source of information regarding his income or business expenses for the purpose of calculating child support.¹⁰
10. Mr. D made it impossible to calculate his actual earnings accurately.¹¹
11. Mr. D’s average yearly increase in net worth was approximately \$77,933 from 1985 to 2002.¹²
12. Mr. D’s claimed annual household expenses plus his average annual increase in net worth is \$170,957.¹³

A lender would probably not allow a loan applicant to include his own speculative estimates on the rate his real estate holdings will increase in value in either the net monthly income, or other monthly income entries on the application.

⁶ See page number 35 of record on appeal, which is the last page of Mr. D’s National Bank of Anchorage loan application.

⁷ See page number 35 of record on appeal.

⁸ See page number 35 of record on appeal.

⁹ Ex. K.

¹⁰ There are three major considerations that support this finding: 1) The evidence in the record demonstrates that Mr. D is willing to lie under oath and manufacture false information regarding his income when he perceives that it will be in his financial interest. 2) Even if the tax records were accurate, Mr. D is allowed to take depreciation deductions on real estate, which is an appreciating asset. 3) Mr. D’s income tax records do not show his unrealized capital gains because only realized capital gains are reportable.

¹¹ Mr. D not only engaged in a scheme of concealing and shielding assets and earnings, he provided so much conflicting testimony and documentation about his income that it is impossible to determine his income with any certainty, and it is very doubtful that further inquiry would produce more accurate results. Tape of Hearing & pages 2-9 of Court’s Memorandum of Decision.

¹² For the purposes of these findings, I have included no name income as Mr. D’s. This figure was arrived at by dividing Mr. D’s claimed net worth at the end of 2001 by the 15 years he claimed that he had been building his net worth by trading in real estate.

¹³ I calculated this figure as an indicator of Mr. D’s income. It appears that he lives below his means because he has accumulated a great deal of wealth, yet his claimed annual household expenses exceed \$84,000, the maximum income

13. Mr. D's capital gains were approximately \$120,407 in 2001.¹⁴
14. Mr. D's capital gains, excluding capital gains on his family house, were approximately \$68,907 in 2001.¹⁵
15. Mr. D's income, including realized and unrealized capital gains, was approximately \$330,407 in 2001.¹⁶
16. Mr. D's income, including realized and unrealized capital gains, other than gains on his family home, was approximately \$278,907 in 2001.¹⁷
17. The best estimate of Mr. D's average adjusted annual income from 1997 to the present, for the purpose of calculating child support, is \$224,932.¹⁸
18. Mr. D did not pay significant tax on his income.¹⁹

CONCLUSIONS OF LAW

1. No name corporate income, retained income, and realized and unrealized capital gains should be taken into account in setting Mr. D's child support.
2. Mr. D's ongoing child support and arrears should be set at the maximum under Civil Rule 90.3(c)(B)(2).
3. Mr. D's ongoing child support and arrears should be set based on \$84,000 of annual imputed income.

level for calculating child support.

¹⁴ This figure was arrived at by calculating 10.3% of the net worth Mr. D claimed on his loan application. The record indicates that most of Mr. D's net worth is real estate, Anchorage residential real estate increased in value 10.3% in 2001 according to *the 2001 Anchorage Real Estate Market Review and 2002 Market Forecasts* By Niel Thomas, ABR, CCIM, CRS.

¹⁵ This figure was arrived at calculating 10.3% of the net worth Mr. D claimed on his loan application after first deducting a generous \$500,000 as an estimate of his equity in his family home in 2001.

¹⁶ This figure was arrived at by adding the annualized income amount Mr. D claimed on his loan application to the estimate of the increase in value of his real estate holdings in 2001 at Supplemental Findings of Fact number 14.

¹⁷ This figure was arrived at adding the annualized income amount Mr. D claimed on his loan application to my estimate of the increase in value of his real estate holdings in 2001.

¹⁸ This amount, \$224,932, was arrived at by averaging Mr. D's average increase in net worth plus annual expenses, \$170,957, and his 2001 income, excluding capital gains on his family residence, \$278,907. The year 2001 is about the midpoint between 1997 and the present. The evidence indicates that Mr. D's income has probably increased steadily since 1997, so his 2001 income is probably close to the average for those years.

¹⁹ *See for example*, page number 132 of record on appeal. For 2001, the year he filed a loan application in December swearing to \$210,600 in annual income, Mr. D claimed that his adjusted gross income for 2001 was -\$29 on his federal income tax return.

SUPPLEMENTAL CONCLUSIONS OF LAW

1. An annual income of \$224,932 should be imputed to Mr. D for the years 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005 and ongoing, based on the best estimated that can be made of Mr. D and no name's average adjusted income, given the fact that Mr. D's under-reported his income and was engaged in a scheme of concealing and shielding assets and earnings from CSED.²⁰
2. Mr. D's ongoing child support and arrears after April 15, 2005 in this order should not be set based on an adjusted annual income of \$100,000 despite the fact that his imputed annual adjusted income exceeds this amount and the cap on child support has been raised.²¹

DISCUSSION

Mr. D had the burden of showing that CSED's estimate of his income was incorrect.²² I concluded that he did not meet that burden. I found that the evidence in the record showed that CSED under-estimated the wealth created by Mr. D's business activities and should have imputed an annual income of \$84,000. I did not make a specific finding of what Mr. D's income was. As the court noted in its decision, Mr. D gave conflicting stories at different times during the appeals process about his income.

When he first provided income information to CSED, Mr. D claimed that his annual income was zero. At the first hearing, Mr. D at first indicated he was living off what he earns delivering pizzas for his brother. Through the course of several hearings and several hundred pages of documents, Mr. D eventually provided CSED with all the records it requested.

These documents show that Mr. D is a millionaire. On a loan application that Mr. D signed and dated December 27, 2001, he claimed under penalty of federal prosecution that his total assets were \$1,889,000, his net worth was \$1,169,000, his net real estate income was \$13,500 per month, and his total income was \$17,550 per month. There is some confusion on

²⁰ *Benson v. Benson*, 977 P.2d 88, 92 (Alaska 1999), & *Laybourn v. Powell*, 55 P.3d 745, 747 (Alaska 2002).

²¹ An argument could be made that recent changes to Alaska Civil Rule 90.3 should be applied in this order in accordance with the commentary at VI. E.2. and that Mr. D's child support for May 2005 forward should be based on an adjusted annual income of \$100,000. However, this case is on remand from the court, and no such adjustments were ordered. The court may decide to make such an adjustment when the case is back before it. The Custodian could also request a modification based on the rule change.

²² Alaska Regulation 15 AAC 05.030(h).

the form as to whether Mr. D was claiming that this income and these assets were his or if they belong to no name, but this confusion is typical of Mr. D's business records. It appears that Mr. D uses the assertion of the separate corporate entity he created to shield his business from CSED when it suits his purposes and ignores it when it does not.

This detailed loan application was completed by Mr. D only a few months before his first hearing. At this hearing he was vague and evasive, and pretended that he had no real understanding of his financial situation.

Mr. D has admitted that shortly after he was served with the paternity action in this case he transferred almost all his income producing assets to no name, held by his sons and wife, for no consideration. He has been in the business of purchasing, renting and selling commercial and residential real estate for some fifteen years. He and his brother trade property back and forth between each other. It is difficult to tell what Mr. D has owned and when despite the rather voluminous documents he has provided. Capital gains are a regular source of income for Mr. D,²³ but he tends to re-invest his gains in more real estate. He admits that he and his family spend \$7,752 per month, which does not include taxes or child support payments. Mr. D apparently draws only as much as he needs from his business to live well and re-invests the rest or keeps it in his current holdings. Although he is allowed depreciation on his rental properties for tax purposes, his financial history shows that these are appreciating assets, and that he could draw more than \$84,000 from his business every year without a decrease in net worth.²⁴

Mr. D apparently owns No Name Corporation for all practical purposes, but would prefer it be treated as a separate entity that he has no interest in for the purposes of calculating his child support. No Name should be treated as Mr. D's for the purpose of calculating child support. The formation of the No Name Corporation was merely an attempt to protect Mr. D's assets from CSED. Mr. D cannot reduce his child support obligation by such a maneuver. Transferring income producing assets to family members may have unforeseen gift tax consequences for Mr. D, but it will not reduce his child support. Furthermore, since Mr. D appears to be limiting the realization of capital gains in order to lower his tax and child support liability, or for other

²³ See Alaska Civil Rule 90.3 Commentary III.A.16.

²⁴ See *Hilderbrand v. Hilderbrand* 962 P2d 887 (Alaska 1998). It is not a categorical rule that depreciation expenses must be included in calculating child support.

reasons, it is appropriate to look at the total amount of wealth Mr. D is generating, on an annual basis, and impute it as income in calculating Mr. D's child support.²⁵

Mr. D was not a credible witness. He is however a very successful businessman. The Obligee in this case is entitled to 20% of what Mr. D, and the wealth he has created, produces annually. Since this amount clearly exceeds the \$84,000 cap in Civil Rule 90.3(c)(B)(2), Mr. D's child support should be set at \$1400 per month. Mr. D can easily afford this. While the Obligee has been dependent on public assistance, Mr. D has supported his own household very well and has managed to accumulate a net worth of over \$1 million.

SUPPLEMENTAL DISCUSSION

In attempting to follow the instructions of the court on remand I have provided more specific findings about Mr. D's income and explanations regarding how I arrived at those income amounts. When I first issued an order in this case, I did not wish to be unnecessarily hard on Mr. D. My job was simply to set child support, and I wished to limit potentially offensive observations regarding Mr. D's credibility as much as I could. I therefore made only the general finding that his income for the relevant years far exceeded the maximum for the purposes of calculating child support and explained how the record clearly supports that finding.

The court remanded the case because this lack of specific findings made it difficult for the court to determine if the imputation of \$84,000 in income was justified.

In making my original and supplemental findings, I found the evidence of Mr. D's admissions on his loan application to be the most reliable indicator of his income. I also relied on evidence of his admission regarding his household expenses and the evidence of the increase in Mr. D's net worth to draw the inference that his monthly income significantly exceeds the \$7,752 per month he claims as his household expenses. Given the upward trend of Anchorage real estate since the original decision was issued, my findings may significantly understate Mr. D's current income.

I based my reliance on the evidence of the admissions on the loan application and the household expenses, and my conclusion that I should give little or no weight to Mr. D's

²⁵ See *Benson v. Benson*, 977 P.2d 88, 92 (Alaska 1999) and *Laybourn v. Powell*, 55 P.3d 745 (Alaska 2002).

representations to CSSD and the IRS about his income and the documentation he provided to support those claims, on my assessment of Mr. D's credibility. I concluded that not only did Mr. D repeatedly lie under oath about his income and business activities, but that his income tax returns and child support affidavits and supporting documents were the product of a type of dishonest reverse engineering, manufactured with no regard to the truth, and surprisingly little regard for plausibility, for the purpose of supporting his efforts to pay little or no tax or child support.

My assessment is that Mr. D would make, and attempt to document, any assertion about his income or business activities if he thought it was in his best interest. Given how frequently Mr. D contradicted himself under oath, the collected manner in which Mr. D would brazen out being repeatedly caught in lies during the hearing, and his obvious intelligence, I also concluded that Mr. D has an unusually low fear of being held accountable for criminal acts of dishonesty.

After careful consideration, however, I concluded that Mr. D probably attempted to provide accurate information on his loan application and household expense list because he would be concerned that it would be fairly easy to check the veracity of the claims made on these documents, and it was too likely that the parties to whom they were addressed would do so. Unlike a tax return, with little chance for an audit, and the difficulty of proving the under-reporting of cash rent receipts and the over reporting of expenses, or tracking transactions between siblings designed to evade tax liability, Mr. D would probably assume that it would not be difficult for the bank to determine what Mr. D actually owned, its value, the **net** income those properties produced, and his other income. Mr. D would also probably assume that the bank would be diligent in investigating his claims before it made a substantial loan to him.

This case is unusual. Due to Mr. D's dishonesty, obstruction and the nature of his business activities, a very rough estimate of his income is the best that can be achieved. The information upon which that estimate is based was only obtained after the dedication of an unusually large investment of resources by all the parties to what should have been the relatively simple job of setting Mr. D's child support at \$1400 per month as required by the Alaska Civil Rule.²⁶

²⁶ After all, at the time that these child support proceedings were still in the early stages, back in December of 2001, Mr.

When I originally issued the order in this case, I was comforted by the consideration that even if I was wrong, and Mr. D grossly overstated his net real estate income, gross monthly earnings, other income, and net worth on his loan application, there was very little chance that Mr. D's income did not far exceed the maximum for calculating child support. The loan application income amount did not even include capital gains that are a regular part of Mr. D's income. In making the more specific findings in this new order, in addition to these considerations, I have confidence that the value of Mr. D's Anchorage real estate holdings and his rent receipts have not decreased since he applied for a loan in December of 2001.

CHILD SUPPORT ORDER

1. Mr. D owes child support arrears in the amount of \$1400 per month for the months of October through December 1998, \$1400 per month for all of 1999, 2000, 2001 and 2002, and \$1400 per month for the months of January through May 2003.
2. Mr. D's ongoing child support is set at \$1400 per month, effective June 1, 2003.

DATED this 26th day of August, 2005.

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. I, Tom Boutin, on behalf of the Commissioner of Revenue, order that this decision and order concerning the child support obligation of S D 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.

D apparently had no difficulty establishing that he had a reliable annual income far in excess of \$84,000 for the purpose of obtaining a large bank loan.

Reconsideration of this decision may be obtained by filing a written motion for reconsideration within 10 days after the adoption of the written decision of the hearing officer, 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 26th day of August, 2005.

By: *Signed* _____
Tom Boutin

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