

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

IN THE MATTER OF:)
)
B W. F)
)
) OAH No. 05-0368-CSS
) CSSD CASE No. 001133972
_____)

DECISION AND ORDER

I. Introduction

This case concerns the obligation of B W. F for the support of K M. E (DOB 00/00/04). The custodian of record is J J. E.

The Child Support Services Division issued a notice of paternity and financial responsibility on December 12, 2004.¹ As ordered by the division,² Mr. F submitted financial information on January 5, 2005, including his personal federal income tax returns for 2002 and 2003.³ The division issued an administrative child support order on January 31, 2005,⁴ establishing a support obligation in the amount of \$365 per month based on Mr. F's 2004 wage and tax statement.⁵ Mr. F filed a request for an administrative review,⁶ asserting that the division had erred with respect to the credit due for support of a child from a prior relationship.⁷ Ms. E filed a response to the request.⁸ The division issued an amended administrative child support and medical support order on March 24, 2005, establishing Mr. F's child support obligation in the amount of \$320 per month based on actual earnings in 2004 as reported to the Department of Labor,⁹ and a medical support order in the amount of \$169 per month.¹⁰ Mr. F filed an appeal and

¹ AS 25.27.020, 15 AAC 125.100; AS 25.27.165, 15 AAC 125.216.

² Ex. 2, page 3. *See* AS 25.27.020, 15 AAC 125.100.

³ Ex. 6.

⁴ AS 25.27.160, 15 AAC 125.100.

⁵ Exhibit 7, page 4; Exhibit 6, page 6.

⁶ 15 AAC 125.118.

⁷ Ex. 8, page 4. *See* Civil Rule 90.3(a)(1)(B), (C). In an attached statement, Mr. F raised a number of questions concerning credits for work related day care, direct payments and health care coverage, and advance payments of child support. Ex. 8, page 1-2.

⁸ Ex. 9.

⁹ Ex. 10, pages 5 & 11.

¹⁰ Ex. 10, page 3. *See* AS 25.27.063, AS 25.27.020, AS 25.27.060, 15 AAC 125.085.

requested a hearing, raising two issues: (1) the credit due for support of a child from a prior relationship, and (2) the amount of the debit for health care coverage.¹¹

The division filed a prehearing brief in which it concurred that a credit for a child of a prior relationship was owed. The division noted that the medical support order would be administratively adjusted to reflect any changes in the cost of coverage provided by the custodial parent. It asked that Mr. F provide copies of his 2004 tax return, as well as copies of his corporate tax returns (with all schedules) for both 2003 and 2004. Mr. F submitted the requested information prior to the hearing, along with a child support affidavit that he had prepared with the assistance of counsel for use in a custody case that was by then pending in the superior court.¹² The affidavit, based on a two-year average of income for 2003 and 2004, and applying straight-line depreciation for corporate property, showed anticipated total income in 2005 of \$35,908, adjusted income of \$28,573,¹³ and a support obligation of \$475.50.

The administrative law judge conducted a telephonic hearing on June 6, 2005. At the administrative hearing, Mr. F participated telephonically on his own behalf. Ms. E was represented by J Wagner, attorney at law, her attorney in the pending court action. A.J. Rawls, Child Support Specialist, appeared on behalf of the division.¹⁴ The division and Ms. E asked that the scope of the hearing be expanded from the issues raised by Mr. F, to include determination of his total income for purposes of child support. Following the hearing, the administrative law judge issued an order granting Ms. E the right to request an evidentiary hearing concerning Mr. F's income, and establishing the methodology to be used for determining the amount of the credit for Mr. F's prior child.¹⁵ Ms. E requested an evidentiary hearing and a discovery order. The administrative law judge denied the request for a discovery order on November 28, 2005, and the evidentiary hearing was scheduled for December 28, 2005.

¹¹ Ex. 11, page 2. Mr. F also asserted that the division had not properly calculated his credits for prior payments. *Id.* That is an issue outside the scope of this hearing, to be addressed administratively.

¹² Ex. A.

¹³ The affidavit includes the standard deduction under Civil Rule 90.3(a)(1)(B) for child support being paid for the prior child, but no deduction for the cost of a prior child in the home under Civil Rule 90.3(a)(1)(C).

¹⁴ 15 AAC 125.815.

¹⁵ Memorandum and Interim Order, September 21, 2005.

Prior to the scheduled evidentiary hearing, Mr. F submitted a letter with attachments.¹⁶ At the scheduled hearing, the letter and attachments 1-3 were added to the record and Mr. F was directed to provide certain business records.¹⁷ On January 18, 2006, Mr. F submitted another letter, accompanied by additional business records (not the ones he had been directed to provide).¹⁸ In response, Ms. E submitted a letter.¹⁹ Her attorney filed a copy of the superior court judgment and oral proceedings in the child custody case.²⁰

The case was rescheduled for a hearing on March 23, 2006. Prior to the rescheduled hearing, the division submitted a revised calculation of child support at the rate of \$527 per month, providing a credit for the prior child in accordance with the interim order, and basing child support on the income shown on Mr. F's 2004 tax return.²¹ Mr. F submitted a letter and attachments prior to the evidentiary hearing.²² Prior to the hearing, Ms. E withdrew her request for an evidentiary hearing. Thereafter, the parties orally agreed to a determination of support on the basis of the written evidentiary record²³ and the testimony at the initial hearing on June 6, 2005.

Based on the preponderance of the evidence in the record and the testimony at the hearing June 6, 2005, Mr. F's ongoing child support obligation is set at \$418 per month.

II. Facts

A. Income

B F operates a wholesale/retail seafood business in no name city, Alaska, operating as an S-corporation, no name business, Inc. He owns 94.5% of the business and his minor son D owns the remaining 5.5%. The corporation pays Mr. F a salary out of its gross income, and he also receives a 94.5% share of the net income or losses of the corporation.

¹⁶ Ex. B.
¹⁷ Memorandum and Order, January 9, 2006.
¹⁸ Ex. 15.
¹⁹ Ex. C.
²⁰ Ex. D.
²¹ Ex. 16.
²² Ex. E.
²³ Exhibits 1-16, A-E.

In 2002 Mr. F earned a salary of \$27,000 and had taxable income from the corporation of \$59,120,²⁴ together with an Alaska Permanent Fund Dividend of \$1,541, for total income for child support purposes of \$87,685. [Ex. 6, p. 2, 20, 23]

In 2003 Mr. F earned a salary of \$28,500 and had a net taxable loss from the corporation of \$585,²⁵ and an Alaska Permanent Fund dividend of \$1,108. [Ex. 6, p. 2] Adjusted to reflect straight line depreciation, his self-employment income from the corporation for child support purposes was \$6,097.²⁶ His total income for child support purposes in 2003 was \$35,705.

In 2004 Mr. F earned a salary of \$25,500 and had taxable income from the corporation of \$16,231 and an Alaska Permanent Fund dividend, Exxon Valdez settlements funds, and interest totaling \$1,094, for taxable income of \$42,825. Adjusted to reflect straight line depreciation, his self-employment income in 2004 for child support purposes was \$10,061,²⁷ and his total income for child support purposes was \$36,655.

B. Prior Child

D F was born in 1994. His mother is Mr. F's former wife, H (F) B. Under an agreement incorporated into their divorce decree in 1997, Mr. F and Ms. B have shared custody of D, each having custody 50% of the time, and child support is due "pursuant to Civil Rule 90.3" Currently, Mr. F pays \$227 per month to Ms. B as child support pursuant to the divorce decree. [Ex. 8, p. 12]

²⁴ The corporation's non-passive income of \$81,545 was reduced by \$19,719 in depreciation deducted pursuant to Section 179 [Ex. 6, p. 34] and \$2,696 deducted as a non-passive loss. [Ex. 6, p.27]

²⁵ The corporation had ordinary business income in 2003 of \$28,958. Mr. F claimed Section 179 depreciation deductions totaling \$29,937, carrying forward \$979 to 2004 and offsetting the entire ordinary business income with the remainder. Ex. A (2003 corporate return, Form 4562, line 6). The Section 179 deduction was primarily for the cost of three phase power, fish tables, and new scales, each of which was included in the straight line depreciation adjustment. *Id.* (2003 corporate return, page 11, Statement 9; Depreciation Table, lines 35-37).

²⁶ The adjustment for straight line depreciation is set out in Mr. F's submission in tabular form in Exhibit A. Supporting details, also in Exhibit A, include identification of the specific property for which straight adjustments were made and the complete depreciation schedules for 2003 and 2004.

²⁷ The figure used for self-employment income for child support purposes (\$10,061) reflects the adjustment for straight line depreciation as set out in the table in Exhibit A.

Mr. F's share of the total accelerated depreciation as shown on his 2004 tax return (\$18,192) was \$6,170 less than straight line depreciation (\$24,362). An increase in depreciation, for purposes of the child support income determination, results in an equal decrease in the amount of income.

III. Discussion

A. Total Income

For one child, a parent's basic support obligation is 20% of that parent's adjusted annual income,²⁸ that is, total income from all sources,²⁹ after allowable deductions specified in Civil Rule 90.3.³⁰

The division establishes an ongoing child support order based on the total income the obligor is expected to receive during the period the award will be in effect.³¹

Amounts accruing before a final order is entered are calculated based on actual income (absent a finding of voluntary unemployment or underemployment), determined or estimated according to the best information available.³²

In this case, arrears have accrued from November 1, 2004. The record includes complete personal and corporate income tax returns for 2003 and 2004, but no income tax records or other written documentation concerning income during 2005. Because there is no evidence of Mr. F's actual income in 2005, arrears for 2005 must be based on his estimated income. His arrears and ongoing support obligation for 2006 are based on his anticipated income in 2006.

Throughout 2002-2005, and continuing into 2006, no name business, Inc., was Mr. F's primary source of income and there was no material change in his employment or sources of income. However, the 2002-2004 personal income tax returns and the 2003-2004 corporate returns, as well as Mr. F's submissions to the record, indicate that his income has varied substantially from year to year, which is not unusual in the fishing industry. Where income varies substantially from year to year, use of income averaging may be appropriate.³³ In this case, the record supports the use of income averaging as an appropriate means of estimating both Mr. F's actual income in 2005 for purposes of arrears, and his estimated income in 2006 for purposes of his 2006 arrears and ongoing support obligation.

²⁸ 15 AAC 125.070(a); Civil Rule 90.3(a)(2)(A).

²⁹ 15 AAC 125.030; Civil Rule 90.3(a)(1).

³⁰ 15 AAC 125.065(a).

³¹ 15 AAC 125.030(a).

³² 15 AAC 125.050(b). See Duffus v. Duffus, 72 P.3rd 313, 321 (Alaska 2003); Spott v. Spott, 17 P.3rd 52, 56 (Alaska 2001); Crayton v. Crayton, 944 P.2d 487, 490 (Alaska 1997).

³³ 15 AAC 125.030(d).

Mr. F's child support affidavit uses a two-year average, disregarding his income in 2002. Mr. F's income from his corporation in 2002 was unusually high as compared with 2003 and 2004, and Mr. F testified that the corporation was less successful in 2005 than in prior years. On the current record, averaging the 2003 and 2004 income is a reasonable approach to estimating Mr. F's actual income for 2005 and his anticipated earnings in 2006.

Ms. E's undated letter submitted on February 22, 2006, asserts that during her relationship with Mr. F he paid substantial personal expenses through the business, including vacation and travel expenses, and that in February, 2003, Mr. F had stated his income (presumably in 2002) was in excess of \$150,000. Ms. E suggests that Mr. F's tax returns are not a reliable means of estimating his total income for child support purposes. But she did not show that Mr. F's 2003 reference to total income in excess of \$150,000 was inconsistent with his 2002 personal tax return, which shows taxable income of \$87,685, since his personal taxable income omits cash flow generated by the corporation that would not be reported as personal income, including depreciation. Furthermore, the cash deductions claimed on the corporate tax returns for 2003 and 2004 reflect expenses that would reasonably be expected to occur during the ordinary course of business.³⁴ Mr. F did not dispute that in 2002 he earned a substantial income, but the issue in this case is whether in 2005 and 2006 he had continued financial success. Ms. E has little or no first hand knowledge of Mr. F's business circumstances in 2005 and 2006, since their relationship terminated prior to 2005.

The deductions from total income shown on Mr. F's child support affidavit reflect the actual amounts (averaged for 2003-2004) as shown on the tax returns. The personal and corporate tax returns were prepared by a third party and submitted under penalty of perjury. Both Mr. F and the third party preparer are subject to substantial civil penalties, and potential criminal liability, in the event that the returns are significantly in error or

³⁴ In 2004, no name business, Inc., generated gross receipts of \$456,529. Ordinary and necessary expenses in the amount of \$10,000 or more totaled \$350,756 including the purchase of raw materials (\$125,158), bait, freight and ice (\$19,183), Mr. F's compensation (\$25,500), salaries and wages to others (\$65,369), repairs and maintenance (\$13,524), non-employee services (\$18,184), city fees (\$72,409), and insurance (\$11,429). Other ordinary and necessary expenses (primarily including forklift operations, boat expenses, professional fees, offices expenses, and current liabilities) totaled \$66,787. After deducting these expenses, interest and depreciation from the gross receipts, Mr. F's 94.5% ownership of the corporation yielded \$16,231 in taxable personal income.

fraudulent. In the absence of specific testimony or evidence contesting those returns, they are sufficient to establish the facts they assert. Ms. E did not examine Mr. F concerning the veracity of the returns, her own allegations that he derived substantial unreported personal income from the corporation, or his assertions regarding the corporation's finances in 2005. Similarly, Mr. F did not submit any documentation to establish the corporation's 2005 finances. Accordingly, the preponderance of the evidence in the record supports adoption of the amounts shown on the child support affidavit and accompanying documentation as Mr. F's estimated total income in 2005, as well as for his anticipated income in 2006.

Mr. F argued he entered into his child custody agreement, which imposes upon him onerous financial burdens with respect to the costs of visitation, with the understanding that child support would be paid at the level initially calculated by the division, adjusted downward to reflect an additional deduction for the cost of his prior child in the home, as well as to account for savings in the cost of health care coverage. In that light, he argues, an increase in the amount of support from the amended support order would be unfair. But the increase in the amount of child support occasioned by this decision as compared with the amended support order is relatively small, less than \$100 per month, in comparison to the travel costs that Mr. F willingly undertook in the child custody agreement. Furthermore, allocation of the cost of travel for purposes of visitation under a custody order is within the jurisdiction of the superior court, rather than a topic for consideration in the context of an administrative support order.

B. Prior Child

As previously determined shared custody of a prior child as an unusual circumstance within the meaning of Civil Rule 90.3(a)(1), and under the facts of this case, it is appropriate to provide a credit equal to 100% of the amount determined under Civil Rule 90.3(a)(1)(B) plus 50% of the amount determined under Civil Rule 90.3(a)(1)(C). In this case, given Mr. F's total income of \$35,908, the full credit under Civil Rule 90.3(a)(1)(C) for the cost of a prior child in the home is \$514 in 2005 and \$515 in 2006, as shown on Appendix A, and the credit applied is therefore \$257 in 2005 and \$258 in 2006.

C. Medical Support Order

The amended medical support order entered in this case provides that Mr. F is entitled to a credit against his child support obligation for one-half of the amount he pays for health insurance coverage for K, and that he is liable for one-half of the amount she pays for health insurance coverage for K.³⁵ Mr. F contends that the division has miscalculated his credits and debits under the order.

It is up to the parties to keep the division informed and current as to the existence and cost to each of any health insurance coverage provided. The division has authority at any time, including retroactively, to adjust the amount due from one party to the other to reflect changes in the existence or cost of coverage, or errors due to incorrect information. The division should recalculate the credits and debits, consistently with the amended medical support order and the information provided by the parties.

IV. **Conclusion**

The preponderance of the evidence in the record establishes that Mr. F's total actual income in 2005 and his anticipated total income in 2006 is \$35,908. Standard deductions should be provided for both years, with an additional credit equal to 50% of the standard credit for the support of a prior child in the home. His arrears for 2005 should be set at \$417 per month and arrears and ongoing support for 2006 at \$418 per month, as shown on Appendix B.³⁶

CHILD SUPPORT ORDER

1. Mr. F's ongoing child support obligation is set at the rate of \$418 per month effective June 1, 2006.
2. Mr. F is liable for any arrears accrued beginning November 1, 2004, through December 31, 2005, at the rate of \$417 per month, and beginning January 1, 2006, through May 31, 2006, at the rate of \$418 per month.
3. The Child Support Services Division shall recalculate and provide credit or debits due to or owed by Mr. F for the cost of medical insurance and shall adjust credits

³⁵ Ex. 10, p. 3-4.

³⁶ The amount differs from that shown on Mr. F's child support affidavit primarily because the affidavit did not include the additional deduction for the support of the prior child in the home. It differs from the division's Exhibit 16 because the division used only 2004 income (rather than averaging 2003 and 2004) and did not adjust 2004 depreciation to reflect straight line amounts.

or debit against his child support obligation to reflect changes in the existence or cost of coverage.

DATED: May 22, 2006

Signed _____
Andrew M. Hemenway
Administrative Law Judge

ADOPTION

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. I, Andrew M. Hemenway, Administrative Law Judge, on behalf of the Commissioner of Revenue, order that this decision and order concerning the child support obligation of B W. F 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 ten (10) days after 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, must be addressed to: 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 thirty (30) days of the date of this decision.

DATED this 22nd day of May, 2006.

By: *Signed* _____
Andrew M. Hemenway
Administrative Law Judge

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