

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

In the Matter of	)	
J W. M	)	OAH No. 05-0693-CSS
_____	)	CSSD No. 001136487

**CHILD SUPPORT DECISION & ORDER**

**I. Introduction**

This is J W. M's appeal of the Child Support Services Division's July 27, 2005 administrative review decision and the associated Amended Administrative Child and Medical Support Order of the same date concerning support for his child, J W W M (DOB 00/00/05). A telephonic hearing was held on September 29, 2005. Mr. M and his attorney, Kathleen C. Barron, and the division's representative, Andrew Rawls, participated by telephone. The custodian, M R. B, could not be reached at her telephone number of record.

Mr. M's appeal disputes the division's calculation of his monthly child support obligation, asserting that the income used was too high. During the hearing, he also requested that support be set based on shared custody, which he expected to commence after the child's first birthday under what was then a proposed interim custody order. For the reasons below, Mr. M's support obligation for April 2005, June-December 2005, and January 2006 will be set at \$716.64 per month and for February 1, 2006, and ongoing it will be set at \$580.48 per month.

**II. Facts**

On May 25, 2005, the division issued an Administrative Child Support and Medical Support Order setting Mr. M's ongoing support obligation at \$940 per month for one child, beginning July 1, 2005, and set arrears for the month of June 2005 at \$940.<sup>1</sup> Mr. M was served with the order May 27, 2005.<sup>2</sup> He requested an administrative review.<sup>3</sup>

Mr. M's request for administrative review asserted that his then-current income was \$48,679 per year, and he requested genetic testing.<sup>4</sup> According to his income tax return, Mr. M's 2004 for wages, unemployment compensation, and the permanent fund dividend (PFD) totaled \$63,228.<sup>5</sup> The division denied Mr. M's request for genetic testing because he had signed an Affidavit of Voluntary Paternity.<sup>6</sup>

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<sup>1</sup> Division's Exhibit 2, p. 1.  
<sup>2</sup> Division's Exhibit 2, p. 7.  
<sup>3</sup> Division's Exhibit 3, pp. 1-2 (June 20, 2005 request).  
<sup>4</sup> Division's Exhibit 3, p. 1.  
<sup>5</sup> Division's Exhibit 3, p. 7.  
<sup>6</sup> Division's Exhibit 4.

In its July 27, 2005 Amended Administrative Child and Medical Support Order, the division retained the \$940 per month ongoing support amount and reset the total arrears at \$3,760 for the months April, June, July and August 2005.<sup>7</sup> The division based the \$940 per month amount on Mr. M's average wages and unemployment compensation for the years 2002, 2003 and 2004.<sup>8</sup> That average, plus the PFD, yielded a gross annual income of \$75,886.18, and an adjusted annual income of \$56,422.30.<sup>9</sup>

At the hearing, Mr. M testified that the income amount the division used is too high because he is not taking out-of-town jobs and overtime work, so that he can remain in the Anchorage/Mat-Su area to exercise his visitation rights, and eventually share custody of the child.<sup>10</sup> He had previously submitted for the record an unsigned Interim Custody Order that called for physical custody to change from primary to shared after the child became one-year old on January 28, 2006.<sup>11</sup> Subsequent to the hearing, on November 14, 2005, a signed copy of the Interim Custody Order was submitted.<sup>12</sup> The signed order provides, in paragraph 4, as follows:

After the child's first birthday, Plaintiff [Mr. M] shall have custody of the minor child from Thursday evening at 8:00 p.m. until Sunday evening at 8:00 p.m. each week and Defendant [Ms. B] shall have custody of the minor child from Sunday evening at 8:00 p.m. until Thursday evening at 8:00 p.m. each week.

During the hearing, Mr. M testified that he typically earns \$38 per hour when working as a foreman in a supervisory position. Based on his earnings then to date, he projected that he would not earn more than \$50,000 for 2005. At the time of the hearing, he was in laid-off status and said he had no definite work lined up for the rest of the year. Mr. M also testified that he pays union dues and makes retirement contributions through his union. He asked that his child support obligation be based on a projected income of no more than \$50,000 per year.

The record was left open after the hearing for Mr. M to provide information on his union dues and retirement contributions, and for the division to provide three-year and five-year

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<sup>7</sup> Division's Exhibit 7, pp. 1-2 & 8. The month of May 2005 was covered by a temporary court order requiring payment of \$500. See Division's Exhibit 1, p. 4.

<sup>8</sup> Division's Exhibit 7, p. 6.

<sup>9</sup> Division's Exhibit 7, p. 9.

<sup>10</sup> Recording of September 29, 2005 Hearing. Unless otherwise indicated, references in this decision to the testimony or other statements of the parties or their counsel are to the September 29<sup>th</sup> recording.

<sup>11</sup> See Unsigned Interim Custody Order accompanying September 20, 2005 Entry of Appearance (filed by Mr. M's counsel).

<sup>12</sup> October 31, 2005 Interim Custody Order signed by Judge Cutler.

average income calculations for primary custody and shared custody scenarios. The division's October 20, 2005 Post-hearing Brief reported the following:

- Three-year average wages and unemployment compensation for years 2002-2004 (1) \$74,974.61 for Mr. M and (2) \$16,538.99 for Ms. B;
- Five-year average wages and unemployment compensation for years 2000-2004 (1) \$68,222.49 for Mr. M and (2) \$11,626.43 for Ms. B.

The division calculated Mr. M's support obligation under the various scenarios as follows:

- \$871 per month for primary custody based on three years' income data;
- \$801 per month for primacy custody based on five years' income data;
- \$712 per month for shared custody based on three years' income data;
- \$653 per month for shared custody based on five years' income data.<sup>13</sup>

Through his counsel, Mr. M submitted an objection to the division's calculations, arguing essentially that even the five-year average income calculation over estimates Mr. M's future earnings.<sup>14</sup> He offered an alternate calculation based on total estimated 2005 income (wages, unemployment compensation and the PFD) of \$59,295.63, which yields a primary custody support amount of \$716.64 per month and a shared custody support amount of \$580.48 per month (using \$50 per month as Ms. B's minimum required share).<sup>15</sup> Mr. M's alternate calculation was reported in the objection document signed by his attorney and in court system forms (a Child Support Guidelines Affidavit and an unsigned Shared Custody Child Support Calculation) attached to the objection. Also attached to the objection document was a pay stub showing Mr. M's then-year-to-date gross wages through October 30, 2005 from his employment with Z Construction as \$53,738.63.

### **III. Discussion**

When one parent has primary custody of a child, the other parent's child support obligation is "calculated as an amount equal to the adjusted annual income of the non-custodial parent multiplied by a percentage specified in [Civil Rule 90.3](a)(2)."<sup>16</sup> By "adjusted annual income" the rule means "the parent's total income from all sources minus mandatory deductions

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<sup>13</sup> Division's Exhibits 10, 11, 15 & 16.

<sup>14</sup> November 4, 2005 Objection to CSSD Calculation at p. 2.

<sup>15</sup> *Id.* at p. 3 & attachments thereto. The amounts given in the objection and attachments were \$716.63 and \$580.47; they have been restated here as \$716.64 and \$580.48 to correct an apparent rounding error.

<sup>16</sup> See Alaska R. Civ. P. 90.3(a).

...” which include some taxes and retirement contributions, among other things.<sup>17</sup> For one child, Civil Rule 90.3(a)(2)(A) requires the non-custodial parent to pay 20 percent of that parent’s adjusted income.

When physical custody is shared, however, the support obligation is a product of both parents’ incomes, and it is calculated based on the percentage of time each parent has physical custody.<sup>18</sup>

A parent has shared physical custody (or shared custody) of children ... if the children reside with that parent for a period specified in writing in the custody order of at least 30, but no more than 70, percent of the year, regardless of the status of legal custody.<sup>[19]</sup>

Under the Interim Custody Order issued by the court on October 31, 2005, Mr. M and Ms. B were to share custody on a 43/57 percent basis beginning after the child reached one year of age (i.e., after January 28, 2006).

Accordingly, Mr. M’s support obligation will be calculated using a primary custody calculation through January 2006 and a shared custody calculation from February 2006 and onward, until a change in the custody order occurs.<sup>20</sup> In any event, the key question here is what income figures should be used for the calculations.

The income used to calculate a child support obligation is a parent’s total income from all sources, adjusted as described above.<sup>21</sup> For arrears, the calculation is based on the actual income for the arrears period (unless the parent was voluntarily underemployed or unemployed).<sup>22</sup> For ongoing support, it is necessary to determine “the total annual income that the parent is likely to earn or receive when the child support is to be paid.”<sup>23</sup> To estimate expected future income, the parent’s current income, as well as the parent’s income during the immediately preceding year, is considered.<sup>24</sup> “[I]f the parent’s income is erratic or information is not available for the

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<sup>17</sup> Alaska R. Civ. P. 90.3(a)(1).

<sup>18</sup> See Alaska R. Civ. P. 90.3(b)(1).

<sup>19</sup> Alaska R. Civ. P. 90.3(f)(1).

<sup>20</sup> The current custody order that is in effect governs whether support is calculated under a primary custody or a shared custody formula. See 15 AAC 125.070(c). If the final order differs from the October 31, 2005 Interim Custody Order, a modification might be in order.

<sup>21</sup> Alaska R. Civ. P. 90.3(a)(1).

<sup>22</sup> 15 AAC 125.050(b).

<sup>23</sup> See 15 AAC 125.050(c).

<sup>24</sup> 15 AAC 125.050(c).

immediately preceding calendar year, the parent's actual income during prior calendar years" can be considered.<sup>25</sup>

The division will average income over more than one year "[i]f the parent has experienced a wide variation in total income from year to year[.]"<sup>26</sup> Typically, it will not average more than the last three years.<sup>27</sup> But there is nothing magical about a three-year average. The Alaska Supreme Court has found no abuse of discretion in the lower court using a four-year average in appropriate circumstances.<sup>28</sup> More to the point, with a parent for whom income information is available, averaging over multiple years comes into play only if the parent's income is erratic. Thus, the question here is whether Mr. M's income should be considered erratic in light of his testimony that changed circumstances account for his reduced earning capacity.

Mr. M has shared custody of an infant. He testified that to exercise his custody rights, he will be unavailable to work the kind of overtime he worked and take the type of out-of-town jobs he took that accounted for two years of high wages. Mr. M's wages exceeded \$80,000 in both 2002 and 2003. In 2004, his wages totaled only \$59,084.19.<sup>29</sup> As of October 30, 2005, he had earned just \$53,738.63 from his job with Z Construction. This was more than the total \$50,000 for the year he projected at the hearing as his likely maximum for the whole year, but it was quite short of his closest high year (\$62,248.20 in 2001) other than the exceptional years of 2002 and 2003.

Even assuming that Mr. M's projection of little to no work for the rest of 2005 proved too pessimistic, it is unlikely that his 2005 wages could have exceeded \$65,000. Based on the year-to-date October 30<sup>th</sup> gross earnings, Mr. M averaged about \$5,374 per month gross wages in 2005. Since he testified to periods of lay off in which he collected modest unemployment compensation, it is unlikely that he earned wages in excess of \$5,300 each and every month of the year. Instead, Mr. M's estimate of total income (wages, unemployment compensation and PFD) of \$59,295.63 submitted with his objection to the division's Post-hearing Brief calculations provide the best estimate of his 2005 income.

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<sup>25</sup> 15 AAC 125.050(c)(2).

<sup>26</sup> 15 AAC 125.040(d).

<sup>27</sup> See id. (providing for averaging over more than three years only in "unusual circumstance").

<sup>28</sup> See Keturi v. Keturi, 84 P.3d 408, 412-13 (Alaska 2004) (observing that the commentary to Civil Rule 90.3 supports averaging income over several years).

<sup>29</sup> See Division's October 20, 2005 Post-hearing Brief at p. 1.

That estimate for 2005, together with the income data the division provided in its post-hearing brief, shows that Mr. M's income (from wages, unemployment compensation and the PFD) has been consistently in the approximately 60 to 65 thousand dollars per year range since 2001, except for the two large spikes in 2002 and 2003 for the years with substantial out-of-town/overtime work. These two explained spikes do not make Mr. M's income erratic, especially for purposes of considering income for arrears in 2005 and ongoing support thereafter. Rather, the fact that Mr. M's 2004 actual and 2005 estimated annual incomes are just slightly more than \$2,000 apart (ranging from a little more than \$62,000 to just under \$60,000) suggests that his income has settled at a somewhat predictable level since he stopped taking the out-of-town assignments and working so much overtime. For these reasons, and because of the change in circumstances due to the shared custody arrangement, Mr. M's 2005 estimated income is a better indicator of his future income than the three-year average the division used, which included the two years in which his wages were exceptionally high. Consisting of ten-months' actual wages, actual/estimated unemployment compensation, and the PFD, the 2005 estimated income also is the best available indicator of Mr. M's actual income for the arrears period commencing in April 2005.

The 2005 income and deductions figures in the Child Support Guidelines Affidavit form submitted by Mr. M with the November 4, 2005 objection document are hereby adopted as the basis for setting monthly arrears and ongoing support. During the arrears period, Ms. B was primary physical custodian. Using a primary custody calculation, Mr. M's child support amount for that period is \$716.64 per month.

As of February 1, 2006, the first month after the shared custody order took effect, Mr. M's child support obligation is reduced to reflect his custody of the child 43 percent of the time and Ms. B's presumptive contribution of the minimum child support amount of \$50 per month, or \$600 for the year.<sup>30</sup> The shared custody calculation submitted by Mr. M is hereby adopted, except insofar as the figures have been adjusted to correct rounding errors. From February 1, 2006 and ongoing, Mr. M's support obligation will be set at \$580.48.

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<sup>30</sup> Mr. M's Shared Custody Child Support Calculation form, submitted with the November 4, 2005 objection, assumes the minimum (\$600 per) child support contribution for Ms. B, and thereby concedes the division's point at page 2 of its Post-hearing Brief that it would be improper under Civil Rule 90.3(a)(4) to impute income to Ms. B until the child is two years old.

#### **IV. Conclusion**

Mr. M's appeal is granted. His support obligation for his child, J, will be based on 2005 actual and estimated income, not on a three-year average of income for 2002-2004 that swept in two exceptional years not likely to recur while he is caring for his child. Further, effective February 1, 2006, Mr. M's support obligation will be based on a shared custody calculation unless and until a change in the custody arrangement order occurs.

#### **V. Order**

It is ordered that

- (1) Mr. M's arrears for the months of April 2005, June-December 2005, and January 2006 are set at the monthly amount of \$716.64;
- (2) Mr. M's arrears for the month of February 2006 are \$580.48;
- (3) Mr. M's ongoing child support for J Wiley W M is set at \$580.48 per month, effective March 1, 2006.

Nothing in this order precludes a party from seeking a modification if circumstances change such that the custody arrangement is altered or the income (actual or imputed) of one or both parents changes.

DATED this 17<sup>th</sup> day of February, 2006.

By: Signed \_\_\_\_\_  
Terry L. Thurbon  
Chief 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 notices, 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 6<sup>th</sup> day of March, 2006.

By: Signed  
Signature  
Terry L. Thurbon  
Name  
Chief Administrative Law Judge  
Title

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