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

In the Matter of	)	
B T. L	)	OAH No. 05-0712-CSS
_____	)	CSSD No. 001131290

CHILD SUPPORT DECISION & ORDER

I. Introduction

B T. L requested a hearing on the Child Support Services Division's January 19, 2005 Amended Child and Medical Support Order concerning support for his daughter, M. The division moved to dismiss, arguing that Mr. L' challenge to the order was untimely. The motion was denied and an evidentiary hearing was scheduled.[1] A telephonic hearing was held on November 15, 2005. Mr. L, the custodial parent, C L (now D[2]), and the division's representative, Andrew Rawls, participated by telephone. Mr. L' child support obligation for will be set at $213 per month for June-December 2004 and $304 per month for January-June 2005.

II. Facts

M was born 00/00/87. She is Mr. L' daughter by adoption.[3] She turned 18 years old in 00/00/05, a little more than one month after the division issued the amended order being challenged by Mr. L. She did not graduate early from high school in December 2004, as originally planned, but continued attending high school until June 2005.[4] She did not graduate in June 2005 because she still needed one-half credit.[5]

The division first issued an Administrative Child Support and Medical Support Order in October 2004.[6] That order set Mr. L' support obligation for M at $873 per month.[7] It set total arrears of $4,365 for the months June 2004 through October 2004.[8]

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1 See October 19, 2005 Order Denying Motion for Dismissal and Scheduling Evidentiary Hearing.

2 At the time of the hearing, the L' divorce was not yet final. A Divorce Decree and Judgment was issued by the Superior Court on November 29, 2005. See Division's Exhibit 13. Ms. L' prior name, C A D, was restored to her in the decree. Id. at p. 5. Unless the context otherwise requires, this decision will refer to her as Ms. D.

3 November 15, 2005 Testimony of B T. L. Unless otherwise indicated, a reference in this decision to testimony of a party or witness is to testimony recorded at the November 15, 2005 hearing.

4 Testimony of C D. At the November 15, 2005 hearing, Mr. L testified that M had graduated in December 2004. Later during the hearing, Ms. D explained that though that had been the original plan, M had not been able to graduate early and that she was then in the process of completing the remaining one-half credit requirement by correspondence. As the parent with whom M lived, Ms. D was in a better position to know when M stopped attending high school. I find, therefore, that M attended high school until June 2005.

5 Id.

6 Division's Exhibit 1.

7 Id. at p. 1.

8 Id. at p. 2; Division's Exhibit 2, p. 1.

In November 2004, Mr. L requested an administrative review of the October 2004 order.[9] Among the twelve points he included in the request, Mr. L questioned whether the division's order was correct in stating that it had considered actual income data in setting the support amount.[10] He also expressed the view that "tax returns are a much more accurate way to establish income."[11]

On December 9, 2004, the division issued a Request for Information to Complete Administrative Review.[12] Among other things, it requested that Mr. L provide copies of federal tax returns, W-2 statements and 1099 statements for 2003 through 2004.[13] The request also states that self-employed persons need to submit "[a] profit and loss statement for each year requested," along with other specified documents.[14]

On January 19, 2005, the division issued an Amended Administrative Child and Medical Support Order, setting Mr. L' support obligation for M at $880 per month, effective February 1, 2005, with arrears totaling $7,040 for June 2004 through January 2005.[15] In the accompanying Administrative Review Decision, the division stated that it based the calculation on "Alaska's Occupational Employment Statistics for a full-time Construction Supervisor of $33.54 per hour and the Alaska Permanent Fund Dividend [PFD]."[16] This yielded a gross wages estimate of $69,763.20 per year.[17] The Administrative Review Decision explained that the division had not used tax information Mr. L provided "because the documentation was incomplete, [i.e.] it was missing the front page and all schedules and work sheets pertaining to [his] business."[18]

In his August 16, 2005 hearing request, Mr. L indicated he was then submitting the tax returns the division requested and suggested that the division could now "do the math."[19] Mr. L

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9 See Division's Exhibit 4.

10 See Division's Exhibit 4, p. 4 (stating the following: "Under Findings of Fact on page 4, you state that you considered my income from all sources based on actual income. I'm asking you to show cause, and show all evidence to back up your claims").

11 Id.

12 Division's Exhibit 5.

13 Id. at p. 1.

14 Id. at p. 2.

15 Division's Exhibit 7, pp. 1-2.

16 Id. at p. 7.

17 Division's Exhibit 8, p. 2.

18 Id. at p. 8.

19 See August 16, 2005 Appeal of Administrative Review Decision form. Though the form was dated (and received by the division) several months after the 30-day appeal period had run, the hearing request is considered timely for the reasons stated in the October 19, 2005 Order Denying Motion for Dismissal and Scheduling Evidentiary Hearing, and that order is hereby incorporated in this Decision and Order.

submitted tax documents for three years: 2000, 2001 and 2002.[20] He submitted no tax documents for 2003 or 2004.[21] The documents he did submit for 2000-2002 are the Form 1040s he filed jointly with Ms. D.[22] They included the Schedule C "Profit or Loss from Business" forms for a construction service business named "X Construction."[23] The Department of Commerce, Community and Economic Development's on-line business license database shows a sole proprietor business by the name "401 K Construction" owned by Mr. L, for which the "original issue" date of the business license was February 19, 2002.[24] The license expired December 31, 2005.[25]

The tax documents report the following income information for the L family for the three years covered:

- In 2000, Ms. D earned $25,437 in wages; the family received $4,492 in Permanent Fund Dividends (PFDs) and "other income"; the business had gross receipts of $18,758 and a net loss of $9,433.[26]
- In 2001, Ms. D earned $48,589 in wages; the family received $3,700 in PFDs; the business had gross receipts of $63,796 and a net loss of $5,245.[27]
- In 2002, Ms. D earned $23,588 in wages; the family received $3,082 in PFDs; the business had $83,659 in gross receipts and a net profit of $979.[28]

Two weeks before the scheduled evidentiary hearing, the division filed a Motion for Reconsideration of the October 19, 2005 order determining that Mr. L' hearing request was timely.[29] In addition to expressing disagreement with the timeliness determination, the division's motion stated the following:

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20 See Division's Exhibit 9, pp. 2-30.

21 During the November 15, 2005 hearing, Mr. L said that he did not file a 2004 income tax return because he made no money that year, and that for 2003 he did not file either but that Ms. D filed separately that year.

22 Division's Exhibit 9, pp. 2-30.

23 Id. at pp. 4, 14 & 23.

24 See Attachment 1 (print out of license detail for 401 K Construction).

25 Id.

26 Division's Exhibit 9, pp. 21, 23 & 30.

27 Division's Exhibit 9, pp. 12, 14 & 20.

28 Division's Exhibit 9, pp. 2, 4 & 11.

29 See generally October 26, 2005 Motion for Reconsideration at p. 1. (Though it is dated October 26th, the motion was not received until November 1, 2005—two weeks before the hearing.) The Motion for Reconsideration was rejected because reconsideration by the Revenue Commissioner of an interim order issued by the administrative law judge is not available. Instead, under AS 44.64.060, once the administrative law judge has issued a proposed decision in the case as a whole, the parties are entitled to propose that the Revenue Commissioner enter a final decision in the case that is different from what the administrative law judge's decision proposes.

> Case parties can seek relief from administrative orders after the appeal deadline by filing a written request with [the division's] director in accordance with 15 AAC 125.125. Obligors may also seek relief from administrative orders based on default income figures by filing a motion to vacate default order with [the division] in accordance with 15 AAC 125.121. Mr. L has already filed a motion to vacate default order in accordance with 15 AAC 125.121 and [the division] is working on that motion. Mr. L will have an opportunity to file an appeal and request a formal hearing if he is dissatisfied with the outcome of his default review. ***[The division] is in the process of granting the very same relief that Mr. L is seeking in his untimely appeal.*** Proceeding to formal hearing in a case that [the division] is reviewing is a duplication of effort and can only cause confusion.[30]

The author of the division's motion apparently was misinformed. When ordered to submit a copy of Mr. L' motion to vacate the default order and related correspondence, the division responded with a "Submission to Record" showing that the division had sent Mr. L a default review packet and motion form on September 28, 2005.[31] The submission explained that a division representative had discussed the case with Mr. L' friend, A K, and "determined the order is 'default eligible'."[32] At the hearing, Ms. K confirmed that she had discussed the default review option with a division represented but recollected that the representative told her it was not necessary to request a default review since Mr. L was already appealing the order.

The order rejecting the division's reconsideration request informed Mr. L that he could elect to voluntarily dismiss his appeal, so that he could pursue the default review process with the division.[33] At the November 15, 2005 hearing, Mr. L declined, deciding instead to have his support obligation set as a result of the appeal process, based on the hearing record.

During the hearing, Mr. L testified that after he and Ms. D separated, M continued living with Ms. D. He said that they separated near the end of 2003 or early in 2004. Ms. D testified that the separation date was January 31, 2004, and that Mr. L and his mother moved out on February 1st.

Mr. L testified that he fell ill about that time and developed pneumonia and double pneumonia that persisted throughout February, March, April and May 2004. He said that in June

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30 October 26, 2005 Motion for Reconsideration at p. 1 (emphasis added).

31 See Division's November 9, 2005 Submission to Record and Exhibits 10 & 11 attached to it.

32 Division's November 9, 2005 Submission to Record.

33 November 2, 2005 Order Regarding Division's Motion for Reconsideration at p. 2.

2004 he was finally able to walk but could not work a full day. Ms. K also testified that Mr. L was ill during this period, adding that he developed bronchitis as well.

In response to life-style analysis questions the division asked,[34] Mr. L testified that after he separated from Ms. D, he lived with his mother and that her income took care of the expenses for the residence in which they lived and their utilities. He testified that his mother purchased most of the food and other supplies, and that he did not spend more than $100 per month himself. He testified that beginning in June 2004, he tried to work but had very little income ("a dollar here, a dollar there"), in part because he had trouble collecting from a company—Heartland Z—for which he had done some work. He said that he paid some of his living expenses in 2004 with his half of a $9,566.36 profit from the sale of a piece of property he and Ms. D sold in late 2003.[35]

In his testimony, Mr. L confirmed not only that M remained with Ms. D after the separation but specifically that M did not live with him at any point after June 1, 2004. He said that he left one of his two Yamaha all-terrain vehicles with M for her use and that the other one now belongs to his mother. He said that he had access to a Dodge vehicle but his mother paid the expenses for it, including money for gas and for new tires costing between $300 and $400. He testified that he does not drink alcohol or use tobacco and has no entertainment expenses; that Ms. K provides his haircuts and personal care items, and insures his vehicles; that he has unpaid medical bills in an amount he could not recall; and that he owes approximately $1,800 in unpaid credit card debt.

When asked about whether he owns any vehicles or construction equipment, Mr. L testified that in 2003 he turned most everything he had over to his mother to repay money borrowed from her previously. Regarding 2003 income, at first Mr. L testified that he had some income that year but it was probably less than $10,000. Later, he clarified that he had "ended up in a negative situation" that year because of Y Z' failure to pay him. He said that he qualified for the PFDs in 2003 and 2004 but did not receive the money from them because a veterinarian who had treated M's dog had garnished them.

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[34] The division explained that the purpose of the life-style analysis questions was to elicit information needed to set the support amount for someone who is self-employed.

[35] Testimony of L & D. Mr. L testified to his use of the funds and to the fact of the sale; Ms. D's testimony confirmed the sale and the amount of the profit, provided the timeframe for the sale, and verified that they had split the profit remaining after payment of a mortgage.

Regarding his work history and skills, Mr. L testified that he has worked as a general contractor since moving to Alaska and that he also worked as a general contractor (specializing in residential remodels) prior to that, when he lived in Texas. He said he is skilled as a carpenter but not as a plumber or electrician. Ms. D also testified that Mr. L has worked as a general contractor. Mr. L added that he is 58 years old and has difficulty getting employment in the valley, even at a $10-12 per hour job such as superintendent of a construction site.

Mr. L was asked to estimate how much he would have spent to support M if she had been in his custody, living with him and his mother. He estimated $15-20 per day. Fifteen to twenty dollars per day is approximately $450 to $600 per month.

Ms. D testified that in April 2004 she signed up for a grant for schooling that triggered the state medical assistance provided to M, which in turn led to the request for the division's child support enforcement services in June 2004. She testified that Mr. L had transferred title to all of his equipment and vehicles into someone else's name prior to September 2003 but that she believed he still had possession of his tools and trailers. She testified that while they were still together, she paid the rent and utilities for their home and that Mr. L "put his money back into his business." She testified that she is currently employed and is paid by commission, and that her 2004 income was in the twenty thousands of dollars. She estimated the cost of providing M and herself with housing, utilities, food, clothing and hygiene products to be about $1,200 per month.[36]

Earlier during the hearing, Mr. L had asserted that the couple made a deal allowing Ms. D to keep tax refund money in lieu of child support. Ms. D testified that she kept the federal tax refunds resulting from their joint tax returns for 2000-2002 because the taxes had been withheld from her wages.

At the conclusion of the hearing, the record was held open for post-hearing submittals. Ms. D was supposed to submit her income data. She submitted nothing. Mr. L had offered to submit verification that Y Z had failed to pay him for work. He submitted copies of mechanic's liens totaling $5,600, recorded in May 2004 on behalf of his business, X Construction. He also submitted a copy of the divorce complaint, dated June 23, 2005, filed by Ms. D (then still L) in the Palmer Superior Court, and a copy of the default application for divorce filed September 26,

[36] Ms. D pays $600 per month for her portion of the rent on a home she and M share with her sister and the sister's children, about $200 for her portion of the shared utilities, about $200 for food, and about $100-150 for hygiene products and other necessities.

2005, along with a few other documents from the Palmer court divorce action. Mr. L submitted these documents under cover of a November 25, 2005 letter that made two arguments.

Mr. L' first argument (contained in numbered points 3-5) is that the division cannot collect support for M from him because Ms. D indicated in the divorce complaint that it was a divorce "without minor children." He implies that Ms. D must have been untruthful, either with the court or in this appeal. He asked "HOW CAN CSSD ORDER CHILD SUPPORT FOR A CHILD C D L STATES IN A COURT OF LAW DOES NOT EXIST?"[37] This argument fails to grasp the following, undisputed facts:

- M was born in 00/00/87.
- She turned 18 in ***00/00/05***.
- Ms. D filed the divorce complaint in ***June 2005***.
- M was no longer a minor child when Ms. D filed the divorce complaint.

The papers Mr. L submitted provide no evidence whatsoever to support his position that Ms. D has been untruthful about M's status as a minor child or about the point at which M became an adult relative to the divorce filing.

Mr. L' second argument essentially is that it costs $600 per month to support M and that he should be credited for having paid his share of that amount because Ms. D received his share of a tax refund in April 2004.[38] Previously, he had submitted to the division, with his administrative review request, a copy of a tax refund check dated March 26, 2004, in the amount of $4,929.[39] The check was made payable to "B T & C D L."[40] Based on the evidence in the record, this tax refund more likely than not was a marital asset that should have been addressed by the property distribution in the divorce action.[41]

III. Discussion

Mr. L' appeal raises a single question: how much child support does he owe for M? That question has two parts: (1) how much should the monthly support amount be and (2) for what period of months must he pay support? After this two-part question has been answered, this decision will address Mr. L' question about the availability of credit for prepaid child support.

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37 November 25, 2005 Letter from L at point 5.
38 November 25, 2005 Letter from L at point 7.
39 See Division's Exhibit 4, p. 5.
40 Id.

A. Calculating the Support Amount

The Department of Revenue regulations adopt Civil Rule 90.3 of the Alaska Rules of Court as the division's guidelines for calculating child support amounts.[42] Under Civil Rule 90.3(c)(3), the lowest amount a parent can be charged for child support when the other parent has custody of the child is $50 per month. At a minimum, therefore, Mr. L' support obligation must be set at $50 for each month in the period covered. That minimum, however, is not where the calculation starts.

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)."[43] By "adjusted annual income" the rule means "the parent's total income from all sources minus mandatory deductions …" which include some taxes and retirement contributions, among other things.[44] For one child, Civil Rule 90.3(a)(2)(A) requires the non-custodial parent to pay child support equal to 20 percent of that parent's adjusted income. For arrears, the calculation is based on the actual income for the arrears period, ***unless the parent was voluntarily underemployed or unemployed***.[45] If the parent was voluntarily ***and unreasonably*** unemployed or underemployed, the income that the parent potentially could have earned may be used to set the support amount.[46] Potential income is based on "work history, qualifications, and job opportunities."[47] Potential income also can imputed for non-income or low-income producing assets.[48]

If only limited information is available on the parent's actual income, an income estimate based on "earnings in prior or subsequent years, job skills, training, work history, and education, and the employment available in the area" can be used.[49] When no income information is available, by regulation, the division is supposed to base the support calculation on Department

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41 The same can be said for other personal or real property. For further on this, and on Mr. L' related request at the hearing that this decision address the "law stating that prepaid child support is a gift," refer to subpart C of the Discussion section of this decision.

42 15 AAC 125.010.

43 Alaska R. Civ. P. 90.3(a).

44 Alaska R. Civ. P. 90.3(a)(1).

45 15 AAC 125.050(b).

46 See Alaska R. Civ. P. 90.3(a)(4); also 15 AAC 125.020(b) & 15 AAC 125.060(a).

47 Alaska R. Civ. P. 90.3(a)(4); also 15 AAC 125.020(b) (elaborating that the division considers "based on available information, the parent's past income, skills, work history, and education, and the job opportunities in the area where the parent physically resides").

48 Alaska R. Civ. P. 90.3(a)(4).

49 15 AAC 125.050(b)(2).

of Labor and Workforce Development average wage income data or on the federal minimum wage, or set a minimum $50 per month order.[50]

Under the law as described above, the division was not wrong to set Mr. L' support obligation based on an imputed wage rate of $33.54 per hour for a full-time Construction Supervisor at the time it did that. At that time, Mr. L had failed to submit complete tax returns. The division, therefore, could not use Mr. L' actual income data.

Now, after the evidentiary hearing, which included submittal of documents and testimony on income and other pertinent facts, a great deal more information is available on which to base the support calculation. Specifically, the hearing process brought not only information on Mr. L' income but also on whether potential income should be imputed to him.

Mr. L' testimony established that in the year (2003) immediately preceding the separation, which gave rise to his obligation to make support payments, he had some income (less than $10,000) but operated at a loss that year. Since then, he testified, he has had very little income—"a dollar here, a dollar there"—and has depended on his mother and his friend, Ms. K. His answers to the life-style analysis questions asked by the division are consistent with his assertion of very low income. His testimony shows he spends very little, so little that it is quite plausible that his modest expenses not covered by his mother and Ms. K likely were covered with a portion of his share of the profits from the one-time sale of a piece of property late in 2003 as he testified. Accordingly, with such a tiny actual income, a minimum $50 per support month order might be appropriate, if Mr. L has not been voluntarily and unreasonably underemployed.

Certainly, during the four months of 2004 (February-May) in which Mr. L was very ill with pneumonia, he was not voluntarily and unreasonably staying home from work. His testimony also shows that in the month immediately following the illness (June 2004), more likely than not, he would have been unable to work more than half-time. For the other months of 2004, and for 2005, however, the same cannot be said, for the following reasons:

- Mr. L is an experience general contractor, personally skilled as a carpenter;
- The Y Z liens were recorded in May 2004 and each recites that it is for work completed around February 15, 2004, indicating that the work for this non-paying

[50] See 15 AAC 125.050(b)(3).

customer was completed before Mr. L fell ill[51] and not during his healthier months later in 2004;

- Mr. L testified that it is hard (not impossible) to get a $10-12 per hour job such as superintendent of a construction site;
- From before the separation, until December 31, 2005, Mr. L held a business license to operate X Construction;
- Mr. L testified generally that he had too little money to maintain his bond and insurance for his company, but he did not indicate how much it would have cost to do so or whether that cost would have exceeded his profit from the 2003 sale of the property after payment of other expenses[52];
- Prior to 2004, Mr. L had transferred assets, including equipment, to his mother;
- The record contains no evidence that Mr. L' mother sold or otherwise got rid of the transferred assets, and Mr. L, by his own testimony, had access to at least one vehicle (the Dodge) owned by his mother.

In light of these facts, it is more likely than not that Mr. L could have continued operating his business with some level of income, or if he could not successfully operate the business, that he could have found employment using his carpentry skills or business experience. He, therefore, was voluntarily and unreasonably underemployed in 2004 and 2005, except during his early-2004 illness and recuperation.

Accordingly, income will be imputed to Mr. L for purposes of calculating his support obligation to M. Based on the evidence provided by Mr. L at the hearing, however, it is more likely than not that the $33.54 wage rate used by the division is not a realistic rate in Mr. L' locality, under the circumstances that existed for him in 2004 and early 2005. The $10 per hour low-end-of-range rate for the difficult (not impossible) to get jobs like construction superintendent will be used instead. This is more consistent with his degree of experience and skills than the alternative of using the lower federal minimum wage rate.

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[51] This is consistent with Mr. L' testimony that part of the reason he fell ill is that he had been working hard in difficult weather conditions to get the jobs done.

[52] Mr. L' half of the $9,566.36 profit would have been $4,783.18. Mr. L testified that he spent only about $100 per month himself (not including what his mother spent to provide a home, gas and tires for the vehicle and such, or what Ms. K provided in the form of insurance and haircuts). The sale occurred late in 2003. At the rate of $100 per month in expenditures, Mr. L' half of the property sale profit would not have been exhausted until as much as two years after the business license expired at the end of 2005. The record, however, contains insufficient information to conclude whether Mr. L could have paid his bond and insurance premiums throughout this period.

Using the $10 per hour rate and 1,360 hours for 2004 (standard 2,080 hours for full-time work, minus four months of no work due to illness and one month at half-time for recuperation), plus a PFD,[53] yields an imputed adjusted annual income of $12,754.40 and a monthly support amount of $213 for any months in 2004 for which support must be paid under the division's order.[54] Using the same rate and the standard 2,080 hours for full-time work for 2005, plus a PFD, yields an imputed adjusted annual income of $18,261.16 and a monthly support amount of $304.[55]

B. Period of the Support Payments

The Legislature has recognized that the division (or a court) can order child support to be paid, not just for the period the child is a minor, but also for the period in which an 18-year-old is completing high school.[56] Though she turned 18 in 00/00/05, M had not completed high school then. She was still working (by correspondence) on the final requirement to receive her high school diploma at the time of the November 2005 hearing. She last attended high school in June 2005. That will be the last month for which Mr. L will be required by this decision to pay support. Even though Mr. L and Ms. D separated in February 2004, child support services from the division were not requested until June 2004. Accordingly, Mr. L will be required to pay support for M for the months of June-December 2004 and January-June 2005.

C. Credit for Prepaid Child Support

At the hearing, Mr. L very specifically asked that this decision address the law on credit for prepaid child support. He did not argue in any detail that he is entitled to such credit, but his position that he has, in effect, paid his share of support for M by allowing Ms. D to retain 100 percent of one or more income tax refunds goes far enough to raise the prepayment issue. Mr. L, however, has not met his burden of proving that he is entitled to such credit, as will be explained below.

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53 Even though Mr. L did not receive the proceeds of his PFD because the veterinarian garnished it, the PFD still counts as part of the income, just as it would have if he had received the proceeds and used them to directly pay debts or otherwise spent them.

54 Attachment 2 (printout from Department of Revenue on-line child support calculator).

55 Attachment 3 (printout from Department of Revenue on-line child support calculator).

56 See AS 25.27.061 (allowing an order issued by a court or state agency that "provides for child support to be paid for the care of an unmarried 18-year-old child who is actively pursuing a high school diploma … while living as a dependent with a parent" to provide for direct payment of the support to the child under terms and conditions the court or agency considers appropriate); *also Weber v. State*, 2004 WL 2486271, *5 (Alaska Supreme Court 2004) (stating that "AS 25.27.061 clearly contemplates that CSED [the division] has the authority to make administrative orders for post-majority support").

The law allows credit for prepayment of child support under some circumstances. For instance, the Alaska Supreme Court addressed an issue concerning reimbursement for prepayment of child support in a 2004 case in which the parents had made a specific agreement for one parent to advance the other a large lump sum of money in lieu of monthly support payments.[57] That case stands for the proposition that a parent may be entitled to reimbursement of prepaid child support if a subsequent modification of the support obligation due to a change in the custody arrangement causes that prepayment to become an overpayment. Indirectly, it also indicates that an agreement to prepay child support can be enforced.

The Alaska Supreme Court also has made it clear that when two parents have separated and one of them makes payments to the other before a child support agreement is reached or an order is entered, the general rule against allowing a parent to claim credit for voluntary payments as child support once an order is issued does not necessarily apply.[58] When the circumstances warrant, payments made by the non-custodial parent to the custodial parent, or to vendors for expenses directly incurred by the child, can be credited against the non-custodial parent's later-established arrears.[59]

The situation in the L case, however, is not like the situation in either of the two court cases.

Custody of M has not changed since the separation. No evidence was presented that Mr. L made direct payments to Ms. D in the period between the separation and the division's establishment of the initial order in October 2004. No evidence was presented of any direct payments by Mr. L to vendors for M's support during that period.[60] No evidence was presented clearly establishing the existence of an agreement between Mr. L and Ms. D that he would prepay child support by relinquishing a claim on tax refunds or through other means.

Mr. L said the couple had made such an agreement. Ms. D countered that this was not so—that she retained the tax refunds because the tax overpayments were withheld from her wages. No written agreement or other evidence was offered to corroborate either party's

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57 See Murphy v. Murphy, 2004 WL 2680926, *1-4.

58 Ogard v. Ogard, 808 P.2d 815, 817 (Alaska 1991).

59 See Jenkins v. King, 2002 WL 31492591, *2.

60 The only thing that even comes close to direct-payment evidence was Mr. L' mention of his 2003 and 2004 PFDs being garnished by a veterinarian who treated M's dog. Without details on the timing of the treatment, its cost and legal ownership of the dog, as well as research and analysis on whether veterinary treatment can be considered "necessities" within the laws on child support, it is impossible to determine whether the vet is even arguably (let alone conclusively) a vendor who provided necessities to M during the post-separation, pre-order period.

position. Whatever understanding the parties may have reached, as the appealing party, Mr. L had the burden of proof on this issue and did not meet it. This is so as to the tax refunds for the tax years for which the couple filed jointly and for the 2003 tax year. For 2003, the testimony established only that Ms. D filed separately and that Mr. L did not file at all. No evidence of an agreement regarding the disposition of that refund, or for the refunds for the earlier years, was provided except for the parties' contradictory statements. This is a situation of conflicting testimony. Neither party's testimony on this point was more or less credible than the other's. Mr. L, therefore, has failed to meet his burden of proof.

When a husband and wife dispute who is entitled to tax refunds, or to other assets such as machinery, equipment, land, construction materials, household goods, angler supplies, or the proceeds from sale of such assets, as Mr. L has done in his administrative review request,[61] that is a matter for the divorce court, not for an administrative proceeding narrowly focused on setting child support. This is not to say that a tax refund can never be credited as payment against a child support obligation. Under some circumstances, credit for direct payment of child support through relinquishment of a tax refund or other cash asset might be appropriate. Where, as here, however, a married couple has undergone a divorce, the Revenue Commissioner (acting through an administrative law judge) cannot, in effect, redistribute those assets by crediting them against the debt arising from a child support obligation.

IV. Conclusion

Mr. L' appeal is granted. The division's order set the monthly support amount too high using labor wage rates. Though he had minimal actual income during the relevant period, income has been imputed to Mr. L because he was voluntarily and unreasonably underemployed except while he was ill and recuperating from that illness. He has not met his burden of proof to show direct prepayment of child support or the existence of an agreement to treat tax refund money as prepaid child support. Accordingly, he will receive no credit for prepayment of child support and must pay support for M as set forth in the order below.

V. Order

It is ordered that

(1) B T. L' arrears for support of M for the months of June-December 2004 are set at the monthly amount of $213;

[61] Division's Exhibit 4, pp. 2-4.

(2) B T. L' arrears for support of M for the months of January-June 2005 are set at the monthly amount of $304;

(3) no ongoing support amount will be set for July 2005 and after because M, who is now an adult, stopped attending high school in June 2005.

DATED this 22nd day of April, 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 22nd day of May, 2006.

By: *Signed*
Signature
Tom Boutin
Name
Deputy Commissioner
Title

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