

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

IN THE MATTER OF	)	OAH No. 06-0557-CSS
G. W. M.	)	CSSD No. 001067948
	)	
_____	)	

**CORRECTED<sup>1</sup> DECISION AND ORDER ON REMAND**

**I. Introduction**

This case is G. W. M.’s appeal of the Division’s order denying his request to modify his child support obligation. The custodian of record in this case is S. P. S.. Mr. M. and Ms. S. now exercise divided custody of the children, T. and T.

Formal hearings were held to consider Mr. M.’s appeal. Ms. S. participated. Mr. M. appeared and was represented by his attorney, Peter Mysing. Andrew Rawls, Child Support Services Specialist, represented the Child Support Services Division (Division).

After the hearings, a proposed decision was issued. If adopted by the Commissioner, the proposed decision would have affirmed the Division’s denial of Mr. M.s request for a downward modification of his ongoing child support obligation. The proposed decision concluded that because Mr. M. did not provide an adequate explanation for the discrepancies in the income information that he provided, which indicated that he may be receiving income far in excess of the amount he reported on his tax returns, Mr. M. had failed to meet his burden of proof to show that the Division’s Notice of Denial of Modification Review was incorrect. Under the proposed decision, Mr. M.’s ongoing child support would have remained at \$736 per month.

Mr. M. filed a proposal for action asking that the Commissioner reject the proposed decision and arguing that Mr. M. had shown that he was entitled to a modification lowering his child support based on the evidence he presented on his income and the change in custody.

Instead, the Commissioner returned the case to the administrative law judge under AS

44.64.060(e)(2) with the following instruction:

Take additional evidence about obligor's income and custody.<sup>[2]</sup>

Additional hearings were held. Mr. M. was ordered to provide additional documentation relevant to his claims regarding his income. Additional briefing was filed. After taking this additional evidence on the custody situation and Mr. M.'s income, the evidence still shows that the parties have equally divided custody of the children. The evidence in the record now shows that Mr. M. may have accurately estimated his monthly income at \$10,000 per month on his loan application, but the best estimate of his income and his earning capacity for the purposes of calculating his ongoing modified child support obligation is \$77,460, which is based on statistical earnings data. The annual income from these earnings plus a PFD results in a monthly ongoing child support obligation of \$902 per month based on a divided custody calculation.

## **II. Facts**

This case is a modification action.<sup>3</sup> Mr. M.'s existing child support for his children, T. and T., was previously set at \$736 per month.<sup>4</sup> The Division initiated the modification process because Ms. S. had requested the Division's services to collect on her existing administrative child support order.

The Division issued notice of the petition for modification on July 28, 2005.<sup>5</sup> Mr. M. later filed his own petition.<sup>6</sup> The Division made several requests for financial information.<sup>7</sup> The parties responded to these requests.<sup>8</sup> The Division issued a Notice of Denial of

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<sup>1</sup> In the Matter of G. W. M. Proposed Child Support Decision and Order on Remand was adopted and distributed to the parties. The Division filed a motion to correct a typographical error on page 10. The effective date of the modification in the order was suppose to be August 1, 2005, not August 1, 2008. The motion was unopposed. Therefore, this corrected decision is issued in place of the original. It is identical to the original, with the exception of the correction, which appears in bold italic type. This corrected decision is issued under the authority of 2 AAC 64.350.

<sup>2</sup> April 9, 2007 Order.

<sup>3</sup> Alaska Civil Rule 90.3(h).

<sup>4</sup> The Division's Pre Hearing Brief.

<sup>5</sup> Ex. 2.

<sup>6</sup> Ex. 3.

<sup>7</sup> Ex. 4, 5, & 8.

<sup>8</sup> Ex. 6, 7, & 9.

Modification Review on July 26, 2006.<sup>9</sup> Mr. M. requested a formal hearing.

At the formal hearings and in his briefing, Mr. M. argued that the custody arrangement was hybrid custody rather than divided custody, asserting that in addition to exercising primary custody of T., Mr. M. has T. living with him 37% of the time.<sup>10</sup> The evidence in the record shows that more likely than not, the parties exercise divided custody, with Mr. M. exercising primary custody of T., and Ms. S. exercising primary custody of T.. The parties allow liberal visitation, but neither child spends more than 30% of the overnights per year with the noncustodial parent. Mr. M.'s testimony and the calendar he provided were not credible evidence in support of his position that T. has been living with him 37% of the time.<sup>11</sup> The calendar Mr. M. submitted appears to have been created recently in preparation for the hearing, rather than contemporaneously with the visits. Both Mr. M.'s calendar and his testimony were contradicted by Ms. S.'s testimony, which was more credible than Mr. M.'s.<sup>12</sup> The additional hearing and evidence provided after the case was sent back did not show that this finding should be altered.

Throughout this appeal Mr. M. has provided conflicting evidence regarding his income. Although ably represented by his attorney, Mr. M. did not provide credible evidence of his earnings. The best that can be achieved based on the evidence provided is a rough estimate of Mr. M.'s earnings and his earning capacity.

Mr. M. owns a dry-wall business as a sole proprietorship.<sup>13</sup> Although he sometimes has employees, including his son, he apparently does most of the work himself.<sup>14</sup>

On his 2004 federal income tax Profit or Loss From Business statement for his business, Mr. M. reported \$80,653 in Gross Receipts or Sales.<sup>15</sup> His reported net profit for 2004 for the business was only \$8,005.<sup>16</sup> On his personal income tax return for 2004, Mr. M. claimed a loss of \$14,179 for the year. His bank statements for his business account, however, show that he

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<sup>9</sup> Ex. 11.

<sup>10</sup> Recording of Hearing.

<sup>11</sup> Recording of Hearing.

<sup>12</sup> Recording of Hearing.

<sup>13</sup> See Mr. M.'s tax records at Ex. 3, 7 & 9.

<sup>14</sup> See Mr. M.'s tax records at Ex. 3 & 7.

<sup>15</sup> See Mr. M.'s tax records at Ex. 3 page 6.

<sup>16</sup> Mr. M.'s tax records at Ex. 3, page 4.

made \$130,950.09 in deposits to that account that year.<sup>17</sup>

On his 2005 federal income tax Profit or Loss From Business statement for his dry wall business, Mr. M. reported \$88,315 in Gross Receipts or Sales.<sup>18</sup> His reported net profit for 2005 for the business was \$21,351.<sup>19</sup> On his personal income tax return for 2005, he claimed taxable income of \$1,233 for the year.<sup>20</sup> His bank statements for his business account show, however, that he made \$154,327.21 in deposits into that account during just the first eleven months of that year.<sup>21</sup>

At the first hearing, Ms. S. pointed out the discrepancy between the amounts of money being deposited in Mr. M.'s business bank accounts and the amounts of gross receipts that Mr. M. was reporting on his Profit or Loss From Business statements in his income tax returns.<sup>22</sup> Ms. S. argued that this indicated Mr. M. was under-reporting his income. Ms. S. asserted that although the annual income that she and Mr. M. are reporting for child support purposes are close, their lifestyles indicate that Mr. M.'s income is much higher than her own.<sup>23</sup> Ms. S. explained that Mr. M. had admitted that he had recently made purchases that indicate an income that is significantly higher than \$30,000 per year.<sup>24</sup> Ms. S. testified that Mr. M. had recently purchased a 2006 26-foot Hewescraft boat worth an estimated \$72,000, a 2004 Dodge Stratus, and a classic 1969 Camaro that he was having \$15,000 in restoration work done on.<sup>25</sup> Mr. M. did not deny that he had made these recent purchases.<sup>26</sup>

When questioned at first the hearing, Mr. M. stated that he could not explain the discrepancy between the amounts of money being deposited in his business bank account and the amounts of

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<sup>17</sup> Mr. M.'s bank records at Ex. 9.

<sup>18</sup> Mr. M.'s tax records at Ex. 7, page 5.

<sup>19</sup> Mr. M.'s tax records at Ex. 7, page 5.

<sup>20</sup> Mr. M.'s tax records at Ex. 7, page 2.

<sup>21</sup> Mr. M.'s bank records at Ex. 9. These records only show only the amounts Mr. M. ran through his business account, not any amounts he may have deposited in other accounts or cash payments he may have received.

<sup>22</sup> Recording of Hearing.

<sup>23</sup> Recording of Hearing.

<sup>24</sup> Recording of Hearing.

<sup>25</sup> Recording of Hearing.

<sup>26</sup> Recording of Hearing.

gross receipts that he was reporting on his income tax return.<sup>27</sup> Although Mr. M. admitted that he does his own billing and pays his borough sales tax on a monthly basis, he claimed that he had “no idea” why his deposits are almost double his reported gross receipts.<sup>28</sup> When questioned about his record keeping, Mr. M.’s responses were hesitant and general.<sup>29</sup>

At the hearing following the case being sent back for further evidence, Mr. M. asserted that the apparent excess deposits in his bank accounts were the result of loans that he deposited in his account. Mr. M. admitted that he had already managed to pay these loans off, despite his low reported income. In addition, over the past few years Mr. M. built himself a house without borrowing any money for construction costs. Mr. M. testified that his house was recently assessed at over \$300,000 in value. In addition to the issue of where he obtained the money to pay for construction materials, this new house raises the issue of whether Mr. M. could have earned more if he was not spending time building his own home, and what he will be able to make now that his own home is almost complete.

After the case was sent back, Mr. M. was ordered to produce his bank loan application, dated January 26, 2005, with the First National Bank Alaska for \$50,000 for a motor home. On this application, Mr. M. claimed that his “gross monthly salary” was \$10,000. Mr. M. did not list any other sources of income on this application. On the bottom of the application, Mr. M. indicated that his total monthly income was \$10,000. Next to this total, Mr. M. wrote the word “estimate,” and emphasized this word by drawing a circle around it. On this application Mr. M. listed assets worth \$406,000 and debts of \$5,180. Mr. M. signed this application verifying: “Everything that I stated on this application is correct to the best of my knowledge.”<sup>30</sup>

Mr. M. was also ordered to produce his bank loan application with AlaskaUSA Federal Credit Union, dated May 17, 2006. On this application Mr. M., listed his “Monthly Gross Salary” as \$10,000. This application was for the 2006 26-foot Hewescraft boat, which had a purchase price of \$71,750. The retail sales contract shows that Mr. M. made a \$12,500 down payment. Mr. M. signed this application verifying: “I/We certify that all statements are true and

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<sup>27</sup> Recording of Hearing.

<sup>28</sup> Recording of Hearing.

<sup>29</sup> Recording of Hearing.

<sup>30</sup> Mr. M.’s Notice of Filing dated August 3, 2007.

complete, and are submitted for the purpose of obtaining credit.”<sup>31</sup>

At the last hearing, Mr. M. very reluctantly admitted that he received \$1,650 in tips and gasoline for taking people on fishing trips with his boat. Mr. M.’s testimony was evasive and somewhat contradictory.<sup>32</sup>

Based on the evidence in the record, more likely than not Mr. M. is under-reporting his income on his tax returns, to the Division, and at the hearings for his child support appeal, and has not yet provided accurate income information on his annual income for the purpose of calculating his child support.<sup>33</sup> The evidence indicates that Mr. M. accurately reports his business expenses, but under-reports his business earnings.<sup>34</sup> As a result, Mr. M. paid almost no federal income tax in 2004 and 2005.<sup>35</sup> More likely than not Mr. M. either does earn or could earn at least \$77, 460 per year, that is, the Occupational Employment and Wage Estimates for Alaska mean annual wage estimate for first-line supervisor/managers. More likely than not Mr. M. pays little or no federal income tax on the money he earns and will earn.

Basing Mr. M.’s income on these earnings of \$77, 460, plus a PFD and using the resulting annual income, \$78,305.76, without deductions for federal income tax, and Ms. S.’s income in a divided custody calculation results in a monthly ongoing child support obligation of \$902 for Mr. M..<sup>36</sup>

### **III. Discussion**

In a child support hearing, the person who filed the appeal, in this case, Mr. M., has the burden of proving by a preponderance of the evidence that the Division's order is incorrect.<sup>37</sup> The Division has the authority to decline to complete its review of a request for modification when the party requesting the modification review does not provide all of the required income

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<sup>31</sup> See the bank loan applications & retail sales contracts in Mr. M.’s Notice of Filing dated August 17, 2007 & Mr. M.’s Notice of Filing dated August 3, 2007.

<sup>32</sup> Recording of Hearing.

<sup>33</sup> Mr. M.’s Notice of Filing dated August 17, 2007 & Mr. M.’s Notice of Filing dated August 3, 2007, Mr. M.’s bank records at Ex. 9, Mr. M.’s tax records at Ex. 3 & 7 and Recording of Hearings.

<sup>34</sup> Mr. M.’s tax records at Ex. 3 & 7 and Recording of Hearings.

<sup>35</sup> Ex. 3 & 7.

<sup>36</sup> Ex. 24.

<sup>37</sup> Alaska Regulation 15 AAC 05.030(h).

information.<sup>38</sup>

Civil Rule 90.3 allows a child support amount to be modified if a material change of circumstances has occurred.<sup>39</sup> A change in custody would generally be a change of circumstance that would justify a modification.<sup>40</sup> Because Mr. M. is the appealing party in this case, and because he has failed to provide accurate income information, the Division's order in this case was initially upheld.<sup>41</sup> The Division has the authority to decline a request for modification when, the party requesting the hearing does not show that there has been a change in circumstances that would justify a modification. Mr. M. failed to meet his burden of proof to show that the Division's order declining his request for modification was incorrect.<sup>42</sup>

Before the case was sent back, the record indicated that the parties exercised divided custody, but that due to the apparent disparity of income between the parties, and the fact that Mr. M. was under-reporting his income, based on the evidence, the current order appeared as likely to be too low as it was to be too high.

Since the case was sent back, however, all the parties appear to agree that Mr. M.'s ongoing child support should be modified to account for the present custody arrangement and the parties' current incomes. The issues are what income should be used and what the custody situation is. Having determined that there is equally divided custody and Ms. S.'s income not being in dispute, the only outstanding issue is what income to use for Mr. M. in calculating his child support obligation.

Mr. M. is not the first Alaskan parent who has failed to be forthcoming with accurate income information in a child support dispute.<sup>43</sup> When a parent with a child support obligation makes an accurate determination of his or her income impossible, income must be imputed to calculate the child support obligation. The criteria used to estimate the proper amount of income to impute are the same as those used in a case where the noncustodial parent is voluntarily and

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<sup>38</sup> Alaska Regulation 15 AAC 125.316(e).

<sup>39</sup> Alaska Civil Rule 90.3(h)(1).

<sup>40</sup> 15 AAC 125.340(c).

<sup>41</sup> *Benson v. Benson*, 977 P.2d 88, 92 (Alaska 1999); *Laybourn v. Powell*, 55 P.3d 745, 747 (Alaska 2002).

<sup>42</sup> Recording of Hearing & Alaska Regulation 15 AAC 125.316(e).

<sup>43</sup> *Benson v. Benson*, 977 P.2d 88 (Alaska 1999); *Laybourn v. Powell*, 55 P.3d 745 (Alaska 2002).

unreasonably unemployed or underemployed. Rather than determining the parent's actual income, the parent's earning capacity is used to estimate the parent's potential income.<sup>44</sup>

Since Mr. M. has made it impossible to calculate his actual income accurately, and he has recently been partially employed building his own home rather than earning income, Mr. M.'s situation is the functionally equivalent to voluntary underemployment.<sup>45</sup> Evidence in the record showing Mr. M.'s past income, skills, work history, and education, and the job opportunities should be used to estimate Mr. M.'s potential income.<sup>46</sup>

This evidence shows that the Occupational Employment and Wage Estimates Alaska mean annual wage estimate for construction workers first-line supervisor/managers provides the best estimate for Mr. M.'s of potential income. The mean annual earnings for this group, \$77,460, would be a conservative estimate of Mr. M.'s earnings in recent past years, based on the lifestyle he supports, including his purchases, his out-of-pocket home construction and the loans that he has been able to pay off. Mr. M. is self employed, and employs other workers. In contrast to a dry-waller who works for someone else, Mr. M. probably receives profit in excess the wages of the employees he supervises for the work they perform, as well as on what would be his own wages. The occupational group for first-line supervisor/managers, therefore, appears to be a better fit than that of dry-wall workers, the group suggested by the Division, as most dry-wall workers are probably employed by others. Furthermore, Mr. M. has recently completed constructing his own house by himself which indicates that his construction skills are broader than mere dry-walling.

Mr. M. twice claimed on loan applications that he earned a gross salary of about \$10,000 per month. The evidence in the record regarding Mr. M.'s lifestyle, Mr. M.'s ability to purchase land and build a new \$300,000 home on that land in a few years "out-of-pocket" without incurring any debt, his large purchases of recreational equipment and his ability to quickly pay-off his loans for these purchases all point to a very high income. It is possible that this income exceeds \$77,460 a year. Indeed, the evidence in the record indicates that Mr. M.'s past net

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<sup>44</sup> *Laybourn v. Powell*, 55 P.3d 745, 747 (Alaska 2002).

<sup>45</sup> *Laybourn v. Powell*, 55 P.3d 745, 747 (Alaska 2002).

<sup>46</sup> 15 AAC 125020(b).



income and earning capacity are more likely to exceed \$77,460 per year than fall below that amount. Child support should be set based on imputed income that is the best estimate of Mr. M.'s earning capacity, not at a level calculated to punish Mr. M. for failing to provide credible income information.<sup>47</sup>

Because Mr. M. and Ms. S. now exercise divided custody of the children, T. and T., each parent's income must be used to calculate Mr. M.'s ongoing child support obligation. Divided custody exists when parents each have primary custody of different children. In this case the parents exercise divided custody, with Mr. M. exercising primary custody of T., and Ms. S. exercising primary custody of T..

The commentary to Civil Rule 90.3 explains that setting child support for divided custody situations is a two step process. First, support must be calculated using the formula found in Civil Rule 90.3(b)(6), as the Division did in its Post-Hearing Brief. This formula offsets the amounts each parent would pay the other for the child in the other parent's custody.<sup>48</sup>

The second step in determining divided custody support is to carefully consider whether the support amount should be varied under paragraph (c)(1)(A). Divided custody should be treated as an unusual circumstance under which support will be varied if such a variation is "just and proper."<sup>49</sup>

After the last hearing, the Division recalculated Mr. M.'s child support using divided custody calculations. These calculations are based on the Ms. S.'s actual income and \$77,460 in imputed earnings for Mr. M.. The Division's calculations appear to be correct. These calculations result in a monthly child support obligation of \$902 for Mr. M.. These calculations do not include a deduction for taxes because the evidence shows that Mr. M. is unlikely to pay taxes on his income, this money is therefore available for child support.<sup>50</sup> Setting the amount of monthly child support based on these calculations is just and proper. There is no persuasive evidence in the record that any injustice will occur if Mr. M.'s child support is increased to this

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<sup>47</sup> *Benson v. Benson*, 977 P.2d 88 (Alaska 1999); *Laybourn v. Powell*, 55 P.3d 745 (Alaska 2002).

<sup>48</sup> Alaska Civil Rule 90.3, Commentary V.D.

<sup>49</sup> Alaska Civil Rule 90.3, Commentary V.D.

<sup>50</sup> The general rule is that taxes should be deducted from imputed income. *See Rodvik v. Rodvik* 151 P.3d 338 (Alaska 2006). In this case however, such a deduction would not result in a child support amount that was just and proper because Mr. M. does not pay federal income tax based on his actual tax liability.

amount.

**V. Conclusion**

Mr. M. has made it impossible to calculate his actual income accurately, and he has recently been partially employed building his own home rather than maximizing his earnings. Mr. M.'s situation, is therefore, is the functionally equivalent of voluntary underemployment for the purpose of calculating his child support obligation. The best estimate of Mr. M.'s potential income based on his earning capacity is \$78,305.76. The annual income from these imputed earnings plus a PFD results in a monthly ongoing child support obligation of \$902 per month based on a divided custody calculation.

**CHILD SUPPORT ORDER**

1. The Petition for Modification of Administrative Support Order issued July 28, 2005, is Granted.
2. The Division's Notice of Denial of Modification Review issued on July 26, 2006 is overturned.
3. Mr. M.'s modified ongoing child support is set at \$902 per month for T. and T. based on a divided custody, effective August 1, **2005**.

DATED this 16<sup>th</sup> day of October, 2008.

By: Signed

Mark T. Handley

Administrative Law Judge

**Adoption**

This Corrected Order is issued under the authority of AS 43.05.010 and AS 44.17.010 and 2 AAC 64.350. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Corrected Decision and Order on Remand 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 notice, 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 Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 20<sup>th</sup> day of October, 2008.

By:     Signed      
Jerry Burnett  
Director, Administrative Services

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