

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

IN THE MATTER OF)
)
C. P.) Case No. OAH-07-0149-CSS
) CSSD Case No. 0010660990

DECISION & ORDER

I. Introduction

The obligor, C. P., appeals a decision CSSD made on March 6, 2007, to deny Mr. P.'s request for modification. Administrative Law Judge Dale Whitney of the Office of Administrative Hearings heard the appeal on May 10, 2007. Mr. P. appeared by telephone, as did the custodian of record, L. C.. Andrew Rawls represented CSSD. The child is B. C.-P. (DOB 00/00/92). The administrative law judge affirms CSSD's decision.

II. Facts

Mr. P. works as a mortgage broker for The Bank. His wife is a real estate broker with Coldwell Banker. At a hearing in 2004, Mr. P. testified that he earned \$165,000 in 2003, although CSSD presented evidence that he actually earned \$192,000 and Mr. P. did not refute the evidence. Mr. P. testified in that hearing that he earned \$50,000 in the first quarter of 2005 alone. In March of 2004, Mr. P. moved from Anchorage to Las Cruces, New Mexico, where he continued to work for The Bank. Mr. P. asserts that in 2006 he earned only \$65,000, and that "this is do [sic] to a market decrease in the mortgage business of a declining mortgage market."

In support of his position, Mr. P. submitted his 2005 and 2006 income tax returns. Mr. P. files joint returns with his wife. He asserts that all of the income on the returns is attributable to his wife, except for line 7, "wages, salaries, tips, etc." taken from a form W-2, which he claims as his own income from The Bank. In addition to other kinds of income, the returns show line 7 wages of \$100,693 for 2005, and \$61,038 for 2006.

CSSD and the custodian assert that along with his wife, Mr. P. is actively involved in the buying, renting and selling of real property. Mr. P. has redacted significant portions of the returns that he asserts are attributable to his wife only, thus making it difficult to evaluate the nature of all income on the returns. In 2006, the P.'s claimed \$221,621 of adjusted gross income.¹ Mr. P. redacted the amount that his wife reported on the Schedule C for her business, but the couple's Schedule SE shows it to be \$134,397, thus leaving an extra \$26,186 of taxable

¹ Exhibit 13, page 5, line 24.

income to the couple. On the 2006 return, joint Federal Asset Reports lists seven items appearing to be rental property, one of which was acquired in 2001 and the remaining six having been acquired in 2005 or 2006. The total cost bases for these properties come to \$728,501. A joint schedule D shows short-term capital gain for the sale of a property purchased in 2005, with a sales price of \$463,000 and gain of \$29,478. Long-term capital gain is shown on a property purchased in 2001 and sold for \$281,500, although the claim of a Section 121 exclusion shows this may be the sale of the P.s' own residence.

III. Discussion

Child support is calculated based on the obligor's total income from all sources, minus specified deductions.² At a formal hearing, the person requesting the hearing has the burden of proving that the division's decision was in error.³

Mr. P. asserts that he has no other income besides his salary from The Bank. He asserts that all of the income shown on the couple's joint tax return is attributable to his wife's business, and that he had no hand or financial interest in the real estate transactions shown. To prove this assertion, Mr. P. relies on a letter from his accountant reading as follows:

To Whom It May Concern:

I have prepared the 2004 and 2005 and am in the process of preparing the 2006 personal income tax returns for C. and T. P..

The only real estate C. P. owns is his personal residence at [redacted] which is owned jointly with his wife T. P..

The rental properties on the 2004 through 2006 tax returns are owned by T. P.. C. P. receives no income from the rental properties. The rental properties show tax losses on the tax returns.

The accountant's opinion carries no evidentiary value in this matter. While hearsay might be admissible in an administrative hearing, the accountant has no basis for determining whether the claimed ownership arrangement of the various properties is an accurate depiction of Mr. P.'s true interests or merely for tax and financial purposes. The accountant's information was provided by the P.'s, and so long as the matter has no bearing on the couple's tax liability the information has no particular credibility. For tax purposes, it does not appear to matter which spouse owns property, except that as a real estate professional Ms. P. may have a certain advantage for

² Civil Rule 90.3(a).

³ 15 AAC 05.030(h).

reporting purposes. The accountant's statement may reflect the manner in which property and income have been properly claimed and declared in a tax return. As to the question of whether marital assets are properly regarded as belonging to Mr. or Ms. P. for purposes of calculating child support, the accountant's statement does not constitute evidence of the type on which a reasonable person would rely in the conduct of serious affairs.

It is possible that all of the real estate shown was purchased separately by Ms. P. with her own separate funds, but it has not been proved in this case. While real estate is Ms. P.'s line of work, as an experienced mortgage broker Mr. P. clearly has extensive knowledge and skill in real estate and investing. Mr. P. has been earning well over \$100,000 for many years, and it would seem highly probable that he has accumulated funds available to invest with his wife when good opportunities appear. Again, this is not certain, but it is at least as likely a scenario as the one Mr. P. describes, in which his wife invests completely on her own and without any involvement of Mr. P..

Furthermore, the couple's tax return is an unreliable guide to Mr. P.'s income for purposes of calculating child support. While there is no reason to question the correctness of the return for calculating federal income tax, the Supreme Court "has refrained from adopting a bright line test that all expenses recognized by the IRS are similarly recognized under Rule 90.3." Whether it is Mr. P. or his wife, or both of them jointly, someone is clearly in the business of buying, selling and renting real estate. While deductions for depreciation are proper for tax purposes, it is more likely that the property is actually appreciating. The fact that the P.'s elect not to realize gain from a given property in a given year does not mean that they are losing money, or that income from the business is unavailable for child support.

Since the last time Mr. P. had a formal hearing, Civil Rule 90.3(c) has been amended to permit child support calculations based on a top income of \$100,000 per year instead of \$84,000. CSSD therefore asks that Mr. P.'s support obligation be raised from \$1,400 per month to \$1,667 per month. This case arises as an appeal of a denial of modification. The denial was based on the assertion that Mr. P. did not provide adequate information to determine whether there has been a significant change in circumstances. Because it is possible that some or all of the investment income in the P.'s tax return could be properly attributable to Mr. P.'s wife, it is simply not possible to say what Mr. P.'s true income or potential income is at this point. CSSD was correct to deny the modification.

IV. Conclusion

Because there is inadequate evidence to determine whether there has been a material change in circumstances in this case, CSSD's decision to deny the modification request was correct and should be affirmed.

V. Order

IT IS HEREBY ORDERED that the decision of CSSD issued on March 6, 2007, to deny Mr. P.'s request for modification be AFFIRMED.

DATED this 28th day of August, 2007.

By: *Signed* _____
DALE WHITNEY
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 14th day of September, 2007.

By: Signed _____
DALE WHITNEY
Administrative Law Judge

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