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

In the Matter of	)	
T. P. O.	)	OAH No. 07-0459-CSS
_____	)	CSSD No. 001138202

CHILD SUPPORT DECISION & ORDER

I. Introduction

T. P. O. appealed the Child Support Services Division's July 26, 2006 Administrative Review Decision and resulting Amended Administrative Child and Medical Support Order of the same date for his child, A. T. F. (DOB 00/00/05). A telephonic hearing was held on September 11, 2007. Mr. O. and the division's representative, Andrew Rawls, participated by telephone in the brief hearing, which concluded when Mr. O. refused to participate further. The custodian, C. S. L., could not be reached at her telephone number of record and thus did not participate in the hearing.

Mr. O. disputed the division's calculation of his arrears (not ongoing support), asserting that the division did not properly credit deductions against his earnings from self employment based on his 2005 and 2006 tax returns.[1] During the brief hearing, he said that the calculation was "no longer even an issue" and "that is not the issue," but he did not give a direct answer when asked whether he wanted to dismiss his appeal.[2] Accordingly, Mr. O. was informed that if he refused to participate further, his appeal would be decided on the record available.[3] The proposed decision recommended that the June 26, 2007 order be affirmed and that Mr. O.'s child support arrears obligation for the support of A. for the period July 1, 2005-June 30, 2007, remain as set by the division at $12,870.

In response to a proposal for action filed by Mr. O., the Commissioner of Revenue's delegee returned the matter to the administrative law judge under AS 44.64.060(e)(2) with instructions to make additional findings about the amount of depreciation that should be used to

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1 Division Ex. 11 at 1.

2 Recording of September 11, 2007 Hearing. Mr. O. insisted that the hearing could not go forward until his counterclaims in admiralty had been answered by a number of government officials against whom he sought to assert such counterclaims. When Mr. O. was informed that the only matter to be addressed in this case is his child support obligation and that he is free to pursue other matters in appropriate courts, he disagreed and demanded that his counterclaims be answered. After several attempts were made to get Mr. O. to focus on his opportunity to address the child support matter, he refused to proceed and hung up.

3 Under 2 AAC 64.320(a), Mr. O.'s failure to participate in a meaningful way could have resulted in dismissal of his appeal, and thus in affirmation of the child support order. Because Mr. O. appeared (telephonically) for the hearing and participated, however briefly, and prior to the hearing had provided a letter and marked up copies of tax returns showing his concerns, the undersigned administrative law judge exercised discretion under that regulation not to dismiss the appeal and instead to decide it on the record available.

reduce Mr. O.'s income for child support calculation purposes.[4] The parties were afforded an opportunity to state their positions on this depreciation issue. Mr. O. and the division filed documents; Ms. L. did not. After due consideration of the parties' filings, this revised decision and order reduces Mr. O.'s arrears for the period July 1, 2005-June 30, 2007, from $12,870 to $6,414,[5] to reflect the reduction in income for 2005 and 2006 attributable to fishing gear he purchased in those tax years as further described below, a small amount of child support paid for an older child in 2006, and exclusion of Permanent Fund Dividend (PFD) income. In addition, Mr. O. owes arrears totaling $900 for July 1-December 31, 2008,[6] and is obligated to pay ongoing support for A. in the amount of $50 per month beginning January 1, 2009, until this order is modified.

II. Facts

By order dated March 8, 2007, based on genetic testing, T. P. O. was established as the legal father of A. T. F..[7] Mr. O.'s hearing request does not dispute paternity.[8]

A week later, the division issued an Administrative Child Support and Medical Support Order, setting ongoing support at the $50 per month minimum (because Mr. O. was expected to remain incarcerated for more than six months in 2007) and calculating total support (arrears) at $15,330.00 for the July 1, 2005-March 31, 2007 period.[9] To calculate the arrears for 2005 and 2006, the division initially used earnings data obtained from records associated with Mr. O.'s commercial fishing license, plus the PFD amounts for the two years.[10] For 2005, the division calculated a monthly support obligation of $608.[11] For 2006, the division calculated a monthly support obligation of $961.[12] Mr. O. requested an administrative review, asserting that his adjusted income for 2005 and 2006 was less than the figures the division used because the

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4 November 17, 2008 Order.

5 This arrears figure reflects the six months of 2005 (July-December) for which the division has recalculated Mr. O.'s monthly support amount at $183, the twelve months of 2006 for which the division has recalculated Mr. O.'s monthly support amount at $418, and the six months of 2007 (January-June) for which the a minimum $50 monthly amount has been used because of Mr. O.'s incarceration.

6 The $900 figure is calculated using the $50 minimum support amount for the 18 month period in question.

7 *See* Division Ex. 2 (Order Establishing Paternity); *also compare* Division Ex. 1 (reporting results from genetic testing and concluding that a 99.99% probability exists that Mr. O. is A.'s biological father).

8 Division Ex. 11 at 1-2.

9 Division Ex. 3 at 1-2 & 4.

10 Division Ex. 3 at 4-5.

11 Division Ex. 4 at 2.

12 Division Ex. 4 at 3.

division did not consider his deductions for the expenses of operating a commercial fishing vessel.[13]

On May 9, 2007, the division requested information, including tax returns, from Mr. O. to complete the administrative review.[14] About a month later, Mr. O. provided copies of tax returns for 2005 and 2006, accompanied by child support guidelines affidavits.[15] Shortly thereafter, the division issued the Amended Administrative Child and Medical Support Order which is the subject of this appeal.[16] That amended order reduced the total arrears to $12,870.00 and extended the period covered to include April through June 2007, in addition to the arrears period covered by the initial order.[17] For 2005 and 2006, using the tax returns information, the division calculated monthly support amounts as $547 and $774, respectively.[18] The ongoing support remained at $50 per month.[19] The division explained its methodology as follows:

> The calculation for 2005 is based on your 2005 Income Tax Return data. The calculation for 2006 is based on your 2006 Income Tax Return data. Deductions allowable for the IRS are not always allowable when determining a child support obligation. In each calculation, no deductions were allowed for your meals/entertainment and depreciation. All other deductions were allowed. Due to your incarceration, no income was assessed for 2007. The calculations for 2006 and 2007 reflect deductions for the child support you paid for your child from a prior relationship.[20]

On July 17, 2007, Mr. O. filed his appeal of the June 26, 2007 Administrative Review Decision and related order.[21] He wrote:

> I am appealing the Administrative Review Desision [sic] based on the fact that CSSD's calculations of my 05 & 06 tax returns used to establish a support order were way off. I understand that my CSSD allowable deductable [sic] income is different than my allowable IRS deductable [sic] income. However my out of pocket gear & vessel expenses were calculated in with my depretiation [sic] expense to come up with an outragious [sic] amount of depreciation. CSSD is way off. Part of my 05 income on my amended return was calculated twice while part of my out of pocket expense IRS did not use cause I didn't need the writeoff it wasn't used with CSSD & with CSSD not allowing depreciation as a

13 Division Ex. 6.
14 Division Ex. 7.
15 Division Ex. Ex. 8.
16 Division Ex. 9 (June 26, 2007 order).
17 Division Ex. 9 at 2 (establishing arrears for the period 07/01/05 to 06/30/07).
18 Division Ex. 10 at 2 & 3.
19 Division Ex. 9 at 1.
20 Division Ex. 9 at 4.
21 Division Ex. 11.

> deductable, [sic] I will use all of my 05 out of pocket expense in calculating my allowable deductable [sic] income. Explanation on how to do these calculations, along with supporting dockuments [sic] to help CSSD establish a valid support order are following this appeal by mail.[22]

A few days later, the division received from Mr. O. a three-page typewritten letter and unsigned copies of his 2005 and 2006 tax returns, with some pages marked "amended" and some annotated with Post-it notes apparently meant to explain his view of how depreciation and out-of-pocket expenses reflected on the tax returns should be treated for child support purposes.[23]

The letter purports to include "a very simple to follow, straight forward explanation of calculation of [Mr. O.'s] 05 & 06 income tax returns & amended 05 tax return."[24] The letter also identifies Mr. O.'s accountant and invites the division to call the accountant.[25] In his letter, Mr. O. acknowledges that the division cannot credit a deduction for meals and entertainment (the IRS Form 1040, Schedule C, line 24b deduction) when calculating income for child support purposes. From the letter, it appears that Mr. O. takes exception to two things the division did in calculating his income:

(1) Excluding the total amount of depreciation;

(2) Including an amount for the PFD.

Regarding the first, his position seems to be that only a portion of the amounts listed on the two tax returns as depreciation is really depreciation, and the rest is for out-of-pocket expenses. Because the letter does not constitute a sworn statement and Mr. O. refused to participate in the hearing once his demand for an answer to "counterclaims in admiralty" was rejected, and he did not call the accountant as a witness, Mr. O. provided no testimony supporting the facts asserted in his letter or through the Post-it note annotations to the tax returns.

Initially, the record closed at the end of the brief hearing, shortly after Mr. O. hung up and without further information or argument being provided by the division. Two weeks later, the record was reopened and the division was ordered to file a supplemental brief explaining how it used the tax returns and other income information to calculate the arrears, and to respond to the points in Mr. O.'s typewritten letter.[26] The order afforded Mr. O. and Ms. L. an opportunity to respond to the supplemental brief the division had been ordered to file.

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22 Division Ex. 11.
23 *See generally* Division Ex. 12.
24 Division Ex. 12 at 1.
25 Division Ex. 12 at 1, 2 & 3.
26 September 24, 2007 Order Denying Stay and Reopening Record at 2-3.

After an extension of the deadlines for the supplemental brief and responses, the division filed its brief on October 31, 2007.[27] The brief explained that depreciation was excluded because the division can allow only straight-line depreciation, not the accelerated depreciation reflected in the tax returns, but invited Mr. O. to provide an itemization with straight-line depreciation amounts. As to the PFD, the brief implies that absent an explanation for why Mr. O. did not receive the 2005 and 2006 PFDs, the division would continue to include those amounts in the income calculation. Neither Mr. O. nor Ms. L. filed a response.[28]

On October 14, 2008, a proposed decision and order document was issued to the parties. Mr. O. timely filed a proposal for action asking that the Commissioner of Revenue take several actions.[29] By order dated November 17, 2008, the commissioner's delegee returned the case to the administrative law judge with directions to take one of Mr. O.'s requested actions: to make additional findings about depreciation. Specifically, the instruction was to "make additional findings about what portion of section 179 deduction should be used to reduce income for child support purposes."[30]

In response to an order allowing the parties to address the depreciation issue, which stated that Mr. O. "should identify each item of property for which he seeks depreciation, indicate when each item was acquired and at what cost, and set out his understanding of the appropriate period of time over which he believes each item should be depreciated[,]" Mr. O. filed a supplemental brief and affidavit, accompanied by copies of purchase invoices, bank account statement excerpts, and City of Sitka Harbor Department charges.[31] Mr. O. described in his brief and affidavit document some of the difficulties he had obtaining information to comply with the order's direction. He did not state his view on the appropriate period over which property listed on his section 179 deduction form should be depreciated. Instead, he raised additional issues concerning the PFD and his support of an older child.[32]

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[27] *See* October 24, 2007 CSSD's Supplemental Brief (receive stamped October 31, 2007).

[28] Documents sent by certified mail to Ms. L.'s last known address of record generally were returned as unclaimed, but the same was not true as to documents sent to Mr. O.. Thus, there is no reason to believe he did not receive the order to supplement the record or the division's supplemental brief.

[29] October 20, 2008 Proposal for Action (asking that additional evidence be taken on "the manner in which [the division] established support order" and that the administrative order be vacated, as well as asking for "additional findings about straight line depreciation").

[30] November 17, 2008 Order.

[31] *See* November 29, 2008 Supplemental Brief and Sworn Affidavit and attachments.

[32] November 29, 2008 Supplemental Brief and Sworn Affidavit at 1. The matter of Mr. O.'s support obligation for his older child is not part of this appeal. The order challenged in this appeal pertains only to support for A. T. F.. Support paid for an older child can be taken into account in setting the support amount for a younger

The division's response detailed the figures, including depreciation, it proposes be allowed as deductions for 2005 and 2006, based on Mr. O.'s tax returns, and provided new support calculations reflecting those deductions as well as child support paid for an older child and exclusion of PFD income.[33] The division took the position that the deduction Mr. O. had taken "as Section 179 depreciation expenses were for common consumable supplies for a fishing business" and thus "should be deducted in full in the year purchased."[34] For the "additional vessel" listed on Mr. O.'s 2006 return at $7,000, the division appears to have treated it as seven-year property, deducting $1,000 as depreciation for it that year.[35]

Using the 2005 amended tax return, the division proposed a total of $32,900 in deductions against Mr. O.'s gross income of $45,468, including depreciation for Mr. O.'s primary vessel and $7,500 for fishing gear.[36] After adjusting Mr. O.'s gross income to exclude the PFD and to allow a monthly deduction for federal income taxes, but not for payment of child support for an older child, the division calculated Mr. O.'s support obligation for A. in 2005 at $183 per month.[37]

Using the 2006 tax return, the division proposed a total of $50,118 in deductions against Mr. O.'s gross income of $76,557, including depreciation for Mr. O.'s primary and additional vessels and $14,969 for fishing gear.[38] After adjusting Mr. O.'s gross income to exclude the PFD and to allow a monthly deduction for federal income taxes and for the support he had paid that year for his older child, the division calculated Mr. O.'s support obligation for A. in 2006 at $418 per month.[39]

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

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one from a different relationship (as the division has done in its 2006 recalculation at Ex. 14, p. 4), but this is not the proper proceeding in which to attempt to set or modify Mr. O.'s support obligation for the older child.

[33] December 17, 2008 Notice of Filing; Division Ex. 14, pp. 2-5.

[34] December 17, 2008 Notice of Filing, fourth para.

[35] Division Ex. 14 at p. 5. Mr. O.'s 2006 Asset Detail Report for his section 179 deduction (Division Ex. 8, p. 11) supports using a seven-year period.

[36] Division Ex. 14, p. 3. Because it was allowing deduction of the $7,500 total in 2005, the division did not deduct the smaller amount that would have been deducted if this total had been depreciated over a period of years.

[37] Division Ex. 14, p. 2. The division reported that it had no record of Mr. O. paying support for his older child in 2005.

[38] Division Ex. 14, p. 5.

[39] Division Ex. 14, p. 4. The division reported that its records showed that Mr. O. paid $132.70 in support for his older child during 2006. December 17, 2008 Notice of Filing. Thus, the division credited him with $11.06 in a monthly allowable deduction for "Child Support or Alimony in Prior Relationship." Division Ex. 14, p. 4.

parent multiplied by a percentage specified in [Civil Rule 90.3](a)(2)."[40] 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.[41] For arrears, the calculation is based on the actual income for the arrears period, unless the parent was voluntarily underemployed or unemployed.[42] 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.

Depreciation. Mr. O. took the position that the dollar amounts listed as "depreciation" in his 2005 and 2006 tax returns mostly reflect out-of-pocket expenses he should have been able to deduct from his gross income for purposes of determining adjusted annual income for child support purposes. Civil Rule 90.3, Commentary III.B, states the following regarding depreciation:

> Income from self-employment … includes the gross receipts minus the ordinary and necessary expenses required to produce the income. Ordinary and necessary expenses do not include amounts allowable by the IRS for the accelerated component of depreciated expenses ….

In short, Mr. O.'s income for child support calculation purposes cannot be reduced by accelerated depreciation. The question, therefore, is whether the depreciation amounts he seeks to have deducted are for accelerated depreciation.

The backup for the "depreciation" amounts listed on line 13 of the Profit and Loss from Business form (Schedule C) of Mr. O.'s tax returns is found on Form 4562, which details Depreciation and Amortization of capital assets acquired for his fishing business. Mr. O.'s Post-it note annotated copies of his Schedule C and Form 4562 indicate the following:

- For 2005, Mr. O. asserts that only $5,971 of the $7,965 listed for depreciation is really depreciation, and that the $1,994 amount listed in Part I of Form 4562 as "expensed" Fishing Gear was an out-of-pocket expense that should be deducted from his 2005 income before calculating his support obligation.[43]
- For 2006, Mr. O. asserts that only $6,517 of the $28,486 listed for depreciation is really depreciation, and that the $21,969 amount listed in Part I of Form 4562 as "expensed" Fishing Gear and Additional Vessel was for out-of-pocket expenses

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40 *See* Alaska R. Civ. P. 90.3(a).
41 Alaska R. Civ. P. 90.3(a)(1).
42 15 AAC 125.050(b).
43 Division Ex. 12 at 11-12.

that should be deducted from his 2006 income before calculating his support obligation.[44]

Thus, on the depreciation issue, Mr. O. initially appeared to dispute only the division's decision not to deduct from his income the "expensed" property amounts listed in Form 4562, Part I—the part in which the taxpayer makes an election to "expense" assets under Section 179 of the Internal Revenue Code.

The division initially asserted that "[e]xpensing items under Section 179" of the Internal Revenue Code is a type of accelerated depreciation.[45] Subject to certain limits, Section 179 of the Internal Revenue Code allows federal taxpayers to elect to treat the purchase of some capital assets acquired for their businesses as expensed items in the tax year in which the items are put into service.[46] This means that instead of amortizing the cost of the item over a period of years, and taking a deduction against gross income of only the depreciation calculated for the tax year in question, the taxpayer may be able to deduct as much as the full cost of the item in a single tax year. This, in effect, allows the taxpayer to accelerate the depreciation by taking all of the depreciation in a single year.[47] The division did not err in adding back in the Section 179 expensed fishing gear and vessel amounts as the equivalent of accelerated depreciation and taking the position that it could deduct straight-line depreciation if Mr. O. provided the necessary information.

Because Mr. O. elected not to participate in the hearing and the Post-it note annotated tax returns and other documents he filed did not provide sufficient information to prepare a straight-line depreciation calculation, he failed to meet his burden of showing how much, if any, of the amounts shown as "depreciation" in his tax returns should have been excluded from his adjusted annual income for child support purposes. Through closer examination of the tax returns, informed by Mr. O.'s brief/affidavit and attachments filed after the matter was returned by the commissioner's delegee, the division has succeeded in developing a position as to what depreciation amounts should be deducted. Though it would be equally defensible to conclude that at least some of the fishing gear should be depreciated over a period of years instead of

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44 Division Ex. 12 at 18-19.

45 October 24, 2007 CSSD's Supplemental Brief at 1.

46 *See* 26 U.S.C. § 179.

47 *Grams v. Grams*, 624 N.W.2d 42, 56 (Neb. App. 2001) (stating that "a Section 179 deduction is, in effect, accelerated depreciation taken in the year property is placed in service" and rejecting parent's argument that machinery costs expensed under Section 179 should not be added back into income for child support purposes).

expensed in a single year, the lack of details sufficient to allocate gear to the consumable-in-one-season category versus has-a-usual-life-of-years category make the division's position reasonable. The division's decision to depreciate the additional vessel over a seven-year period but allow deduction of the total cost of fishing gear acquired in each of the two tax years in question, therefore, is reasonable.

PFDs. Mr. O. asserted that he did not receive the 2005 or 2006 PFD. If that is true, and he did not receive the PFDs because he was ineligible (rather than because, for instance, the PFDs were garnished), the division's inclusion of the PFD amounts in the income calculations for 2005 and 2006 might have been in error. Without more, however, Mr. O.'s unsworn assertion, made in a letter, that he did not receive the PFDs was insufficient to prove that he did not receive, and could not have received, this income for use in supporting his child.

In his brief/affidavit document submitted after this matter was returned for further findings, Mr. O. again asserted that he had not received the 2005 or 2006 PFD. Though the scope of the matter as returned by the commissioner's delegee was limited to the depreciation issue, the division undertook to investigate whether state records show that Mr. O. received those PFDs. Since the division's investigation concluded that he did not,[48] it was reasonable for the division to remove the amounts of the 2005 and 2006 PFDs from Mr. O.'s annual gross income when it prepared the recalculations.

IV. Conclusion

Mr. O. initially failed to meet his burden of proving that the adjusted annual income figures the division used to set his support amount for 2005 and 2006 were in error. Following return of this matter pursuant to AS 44.64.060(e)(2) for additional findings, the division was able to propose deductions which included appropriate depreciation/expense amounts attributable to Mr. O.'s fishing vessels and gear, and was also able to confirm that Mr. O. did not receive the PFD in 2005 and 2006. The division recalculated support amounts of $183 and $418 per month respectively for 2005 and 2006, based on Mr. O.'s adjusted annual income after allowing deductions for depreciation (and for child support paid for the older child in 2006). Those are the amounts that should be used to calculate his arrears for those two years. From January 2007 forward, until this order is modified to reflect Mr. O.'s post-incarceration income or earnings

[48] December 17, 2008 Notice of Filing, second para.; Division Ex. 13.

capacity or other changed circumstances, arrears and ongoing support should be calculated based on the minimum allowed monthly payment of $50.

V. Order

1. T. P. O.'s child support arrears for A. T. F. are set as follows:

   a. $1,098 ($183 per month) for July 1-December 31, 2005;

   b. $5,016 ($418 per month) for January 1-December 31, 2006;

   c. $1,200 ($50 per month) for January 1, 2007-July 1, 2007-December 31, 2008.

   Mr. O.'s arrears total $7,314.

2. T. P. O.'s ongoing child support for A. T. F., effective January 1, 2009, is set in the amount of $50 per month.

In all other respects, the Child Support Services Division's June 26, 2007 Amended Administrative Child and Medical Support Order is AFFIRMED.

DATED this 29th day of December, 2008.

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 2nd day of January, 2009.

By: ___*Signed*_____
Jerry Burnett
Acting Deputy Commissioner

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