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

In the Matter of	)	
	)	
K. X. T.	)	OAH No. 23-0656-CSS
	)	

DECISION AND ORDER

I. Introduction

This case involves the establishment of K. X. T.'s child support obligation for his daughter, D. B. T. Mr. T. appeals an Amended Administrative Child Support Order that the Child Support Services Division (CSSD/Division) issued on October 16, 2023. The order set his monthly support obligation for D. at $1,751.00.[1] It also set preorder arrears at $8,755 for the period of June 1, 2023 through October 31, 2023.[2] Mr. T. asserts that his obligation was calculated in error, as the Division did not rely on a historical average of his wages, and applied a primary custody calculation.

A telephonic hearing was held in this matter on November 9, 2023. Mr. T. failed to demonstrate by a preponderance of the evidence that the Division's calculation of his ongoing obligation and child support arrears was based on incomplete or inaccurate information. Accordingly, the Amended Administrative Support Order issued on October 16, 2023 is affirmed, and Mr. T.'s ongoing monthly support obligation remains as set at $1,751.00 for one child based on a primary custody calculation, beginning November 1, 2023, and onward. His preorder arrears, from June 1, 2023 to October 31, 2023, also remain at $8,755.

II. Facts

A. Material Facts[3]

Mr. T. and Ms. Q. E. S. are the parents of D., who is four years old. Mr. T. was named as the father on D.'s birth certificate, and he signed an affidavit of paternity.[4] Mr. T. and Ms. Q. E. S. were never married, and for all the relevant dates of this order have lived in separate states.

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1 Ex. 7.
2 *Id*.
3 Material facts are based on the documents admitted into the record, as well as all testimony offered by Mr. T., Ms. Q. E. S., and Mr. Phang at the November 9, 2023 hearing.
4 Ex. 1.

Mr. T. lives in City A., Alaska. He is employed in the construction industry as an operating engineer, and while he works during all four financial quarters, he works different jobs depending on the season. In the winter of 2023, Mr. T. worked on the north slope, and in the summer, he worked on a project at the Alaskan border. He is in good standing with the union. His income from the last four quarters, the Alaska Permanent Fund Dividend, and unemployment insurance benefits, totals $163,383.26. After deductions for federal taxes, union dues, child support for a prior child, Social Security, and Medicare, his adjusted annual income is $105,037.94.

Ms. Q. E. S. is active-duty military. In August 2022, when D. was three, Ms. Q. E. S. received a permanent change of duty station to Oklahoma. She relocated to City B., Oklahoma, where she currently resides with D. On July 5, 2023, Ms. Q. E. S. submitted an application for child support enforcement services from the Division.[5]

B. Procedural History

In response to Ms. Q. E. S.'s application, the Division solicited financial information from both parties. Mr. T. provided eight pay stubs, his 2022 federal income tax filings, and documentation of his union dues.[6] The Division also received responses from two of Mr. T. employers, verifying he was employed from November, 2022 through, at least, June 19, 2023.[7] As the Division was not provided complete income information for 2023, it calculated his ongoing obligation based by estimating a projected income stemming from the records Mr. T. provided.[8] The Division issued a support order on July 24, 2023, setting a monthly support obligation of $2,100.00 for one child. Mr. T. appealed and provided additional income information.

After considering the supplemental income details submitted by Mr. T., CSSD issued an amended Administrative Support Order setting a monthly support obligation of $1,751,00 for one child October 16, 2023.[9] The amended Administrative Support Order was based on Mr. T. actual income, from the last four quarters of wages as reported to the Alaska Department of Labor and Workforce Development (DOL), his Unemployment Insurance

5 Ex. 1.
6 Ex. 3.
7 Ex. 4.
8 Ex. 5, p. 4.
9 Ex. 7.

Benefits, and the Alaska Permanent Fund Dividend.[10] Mr. T. was given the requisite deductions for federal taxes, Social Security and Medicare, child support obligations ordered for a prior child, unemployment insurance, and union dues, resulting in an adjusted annual income of $105,037.94.[11] Pursuant to Civil Rule 90.3 the Division calculated Mr. T.'s ongoing obligation by taking twenty percent of his adjusted income, and dividing it equally across twelve months, resulting in an ongoing monthly support obligation of $1,751.00 based on primary custody. Arrears from June 1, 2023 through October 31, 2023 were calculated by multiplying the obligation, $1,751, by five months, totaling $8,755.00.[12] Mr. T. appealed the Amended Administrative Order and the case was referred to this tribunal.[13]

C. Hearing

A telephonic hearing was held on November 9, 2023. Mr. T. and Ms. Q. E. S. represented themselves. The Division was represented by Child Support Specialist II Mark Phang. At the start of the hearing, Mr. T. was advised that an administrative order issued in this matter would be superseded by any order issued in his parallel child custody case currently being litigated before the City A. Superior Court. As the fourth quarter of 2023 has not yet closed, and the Division relied on income from the fourth quarter of 2022, Mr. T. was also advised that he could request to reschedule the hearing, allowing him an opportunity to submit additional income information for the fourth quarter of 2023. Mr. T. chose to proceed despite the pending Superior Court case and did not want to postpone the hearing to submit additional evidence.

Mr. T. argued that the Division's calculations do not accurately reflect his earnings because they are based on his last four quarters of earned income. As Mr. T. works multiple jobs in the construction field which change depending on the season, he argued that as a seasonal worker his income should be calculated based on an average of his earnings across five years. Further, he asserted that he and Ms. Q. E. S. exercise shared custody of D., and the Division erred in applying a primary custody calculation.

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[10] Ex. 7.
[11] *Id.*
[12] *Id.*
[13] Ex. 8.

III. Discussion

As the person who filed the appeal in this case, Mr. T. bears the burden of proof. As to the support amount calculated under the Civil Rule 90.3(a) primary custody formula and applied in the Amended Administrative Support Order, his burden is to show by a preponderance of the evidence that the calculation is incorrect.[14]

A. CSSD's calculation of Mr. T.'s income under Civil Rule 90.3(a) is correct

Parents are obligated both by statute and at common law to support their children.[15] Civil Rule 90.3(a)(1) provides that an obligor's child support amount is to be calculated based on an individual's "total income from all sources" minus mandatory deductions. Income includes any benefits that would have been available to the family unit should it have remained intact.[16] Determining an obligor's annual income for purposes of calculating ongoing child support is "necessarily … speculative because the relevant income figure is expected future income."[17]

Mr. T. asserts that the Division erred in relying on the last four quarters of his wages to calculate his support obligation. He urges that a more accurate assessment of his earning capacity is an average of the last five years of wages, which reflect the fluctuations of his income. He describes himself as a "seasonal worker," as he works on different construction sites depending on the season. While historical wage information indicates that generally Mr. T. does earn more during the first and third quarters each year, and slightly less income during the second and fourth quarters, his annual income since 2019 has fluctuated very little.[18]

Civil Rule 90.3 permits the determination of an obligor's wages by relying on an average of several prior years of historical income data.[19] Generally, this approach is used to estimate for obligators whose earnings are erratic and show no clear trend.[20] This provides a fair and just way to tally the average income of obligors that experience significant income fluctuations, often owing to the nature of their trades. For example, commercial fishermen can have an exceptionally lucrative year due to large catches, or a high market price for their product,

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[14] 15 AAC 05.030(h).

[15] *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) & AS 25.20.030.

[16] *See* Civil Rule 90.3 Commentary, III. Defining Income.

[17] See Civil Rule 90.3, Commentary III.E

[18] For example, Mr. T. total earnings for 2019 were only 2.3% higher than his 2022 total earnings. (His total 2019 earnings were $119,240.71. His total 2022 earnings were 122,024.23. An increase of $ 2,784.22, or 2.3%). *See* Ex. 9.

[19] Civil Rule 90.3, Commentary VI.E.

[20] See, *In re P.B.J. OAH 13-0392-CSS (Commissioner of Revenue 2013)(Published at https://aws.state.ak.us/OAH/Decision/Display?rec=1539)*

followed by a year of paltry wages when a population of fish, crab or other sea animal collapses. Construction workers can be assigned a single project that pays high Davis-Bacon one year, followed by a year or more of a series of smaller, lower paid jobs. It is in these situations that a wage look back is used, as it results in a calculation of a support obligation that is neither artificially high, nor unfairly low.

In contrast, Mr. T. income has never truly been erratic. The Division relied on Mr. T.'s actual income for the first three quarters of 2023. As the first three quarters reflect Mr. T. actual income as reported to the DOL, they represent the best, most accurate calculation of Mr. T. income for those quarters. As the Division does not have complete fourth quarter income for 2023, it relied on Mr. T.'s fourth quarter income from 2022 to estimate his earnings for the fourth quarter of this year.

Mr. T.'s fourth quarter income in 2022 was only .5% higher than his historical average for that quarter.[21] Further, Mr. T. has been steadily employed in the construction trade for at least the last four years, and by working at different construction sites in different seasons, he has been able to earn income across all four financial quarters since.[22] Since 2019, Mr. T. has consistently earned yearly income exceeding $100,000, with his earning potential increasing after joining the operating engineers union in November of 2021. In fact, Mr. T. conceded that as currently there is a shortage of skilled operators in his field, in 2023 he has been able to pick up additional work, resulting in his earning higher wages than he did in 2022. Mr. T. presented no evidence that this high demand for his labor will decrease in the future.

As Mr. T.'s historical wages do not indicate notable erratic fluctuations, the Division appropriately relied on his most recent income information to calculate his ongoing support obligation.

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[21] Mr. T.'s fourth quarter earnings were, $22,199.14 in 2019, $31,565.11 in 2020, $11,862.20 in 2021, and $22,034 in 2022. When averaged across those four years, his 4th quarter income would be $21,915.12. The average results in a decrease of $118.89, or .05%, from his 2022 income. This does not qualify as "very erratic income" as contemplated in Civil Rule 90.3, Commentary VI.E.

[22] Ex. 9.

B. The parties do not exercise shared custody

Civil Rule 90.3 provides the formula for calculating child support awards under different custody arrangements, including shared or primary. In general, a non-custodial parent's support obligation calculated under a primary custody arrangement is higher than the monthly support a parent owes in a shared custody situation.

Civil Rule 90.3(f)(1) defines shared custody as follows:

> A parent has shared physical custody (or shared custody) of children for purposes of this rule if the children reside with that parent for a period specified in writing in the custody order of at least 30, but not more than 70, percent of the year, regardless of the status of legal custody.

Accordingly, the parent asserting that shared custody exists must establish, by a preponderance of the evidence, that the child spent a minimum of 110 overnights a year with the parent.[23]

After the elements of shared custody were discussed, Mr. T. conceded that since the effective start date of this order – June 1, 2023 – through the date of the hearing, D. had not spent 110 overnights with him. Both parents agreed that D. has lived continuously with her mother in Oklahoma, and that Ms. Q. E. S. exercises primary custody.[24]

IV. Conclusion

Mr. T. did not meet his burden of proving by a preponderance of the evidence that CSSD erred in basing the calculation of his support obligation on the last four quarters of his wages. Furthermore, the calculation appropriately reflects a primary custody situation. Accordingly, CSSD's Amended Administrative Support Order dated October 16, 2023 correctly sets Mr. T.'s child support for one child at $1,751 per month pursuant to Civil Rule 90.3.

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[23] 365 x .30 = 109.5 (rounded to 110). *See also* Civil Rule 90.3, Commentary V.A.

[24] Mr. T. contends that the series of texts between himself and Ms. Q. E. S. in exhibit 8, constitutes a written agreement for shared custody. Even if the string of texts were a legally binding agreement the custody described in the text messages does not meet the minimum number of overnights to qualify under the 90.3 definition of shared custody, and therefore is not an agreement for shared custody. Further, Ms. Q. E. S. testified she only agreed to the text agreement as Mr. T. refused to allow D. to return to Oklahoma until she did.

V. Child Support Order

1. K. X. T. is liable for child support in the amount of 1,751.00 per month for one child effective November 1, 2023, and ongoing, based on a primary custody calculation.
2. Mr. T. is liable for pre-order arrears for D. in the amount of $8,755.00 for the period of June 1, 2023 through October 31, 2023.
3. All other terms of the Amended Administrative Child Order dated October 16, 2023 remain in full force and effect.

Dated: November 28, 2023

Signed

Eric M. Salinger
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 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 within 30 days after the date of this decision.

DATED this 13th day of December, 2023.

By: *Signed*
Eric M. Salinger
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]