

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

IN THE MATTER OF)	
)	
S. F.)	Case No. OAH-08-0319-CSS
_____)	CSSD Case No. 001068863

DECISION & ORDER¹

I. Introduction

The custodian of record, K.W., appeals a Modified Administrative Child Support and Medical Support Order issued by the Child Support Services Division (CSSD) on June 12, 2008. Administrative Law Judge Dale Whitney of the Office of Administrative Hearings heard the appeal on July 16, 2008. Ms. W. appeared by telephone, as did the obligor, S. F. Andrew Rawls represented CSSD. The child is C. W. (DOB 00/00/98). Support is properly set at \$477 per month for one child.

II. Facts

A Revenue hearing examiner set the current support amount at \$211 per month for one child in 1999. On December 31, 2007, the Fairbanks Superior Court issued a custody decree that adopted a parenting that the parties had entered into. This parenting plan has the parties sharing custody, with Ms. W. exercising custody 57 percent of the time and Mr. F. having custody the remaining 43 percent of the time. The parties testified that in spite of the fact that they prepared the parenting agreement and the judge approved as part of a decree, they have not followed the order. The parties offered somewhat contradictory testimony as to what the custody arrangement has been.

Mr. F. testified that he does construction work, and that his income is seasonal and tends to fluctuate. Mr. F. had a very good year in 2007, but he testified that the amount of work he has had in 2008 is down substantially with the year half over.

CSSD has prepared tables showing income from wages and unemployment insurance benefits for both Mr. F. and Ms. W., as follows:

¹ The original proposed Decision and Order issued on August 5, 2008, contained a typographical error: the support amount indicated in the Introduction was incorrect and different from the amount in the Discussion and Conclusion sections. On August 28, 2008, the commissioner returned the decision with instructions to correct the error. Other than the correction on the first paragraph of this page, this footnote and the signature date, this Decision and Order is identical to the original proposed decision.

Mr. F.'s income			
	Wages	UIB	Total
2005	\$53,131.95	\$4,624.00	\$57,755.95
2006	\$63,785.82	\$248.00	\$64,033.82
2007	\$70,404.33	\$0	\$70,404.33
Total	\$187,322.10	\$4,872.00	\$192,194.10
Average	\$62,440.70	\$1,624.00	\$64,064.70

Ms. W.'s income			
	Wages	UIB	Total
2005	\$21,107.65	\$0	\$21,107.65
2006	\$19,865.67	\$0	\$19,865.67
2007	\$3,893.00	\$4,608.00	\$8,501.00
Total	\$44,866.32	\$4,608.00	\$49,474.32
Average	\$14,955.44	\$1,536.00	\$16,491.44

Mr. F. contributes eight percent of his income to a retirement fund.

III. Discussion

The parties testified at some length as to the amount of time each of them has exercised actual custody. They agree, however, that the court's custody order, which adopted their parenting plan, is still in effect. In *Turinsky v. Long*² the Supreme Court stated that "child support awards should be based on a custody and visitation order. If the parties do not follow the custody order, they should ask the court to enforce the custody order or should move to modify the child support order." The *Turinsky* holding applies directly to this case. The custody order awards Ms. W. custody 57 percent of the time, and support must be calculated accordingly. If the parties wish to adjust their parenting plan and have support calculated accordingly, they should petition the court to make the changes. CSSD does not have the authority to modify custody orders, and it correctly asserts that it is required to calculate support in accordance with the court's custody order. Until such time as the court changes the custody order, support must be calculated using a shared custody calculation based on a 57/43 percent split.

Mr. F. requests that his support obligation be based on an average of his last three years' income. Mr. F. asserts that the nature of his employment in the construction industry makes a single year of income a poor predictor of future income, particularly in light of this year's shortage of work.

² *Turinsky v. Long*, 910 P.2d 590 (Alaska 1996).
OAH No. 08-0319-CSS

In determining an obligor's income, CSSD must use the best available information, which may include the parent's income from the previous calendar year; but if the obligor's income is erratic, information from prior years may be used.³ From looking at Mr. F.'s income information for the period 2005 – 2007, it would seem difficult to characterize his income as erratic. This time period shows a steadily increasing level of income, and might even support projection of a higher level of income for 2008 and future years. Mr. F.'s testimony, however, suggests that because of a current downturn in the housing market and construction industry, he will earn far less in 2008 than he has been earning in previous years. This fact indicates that Mr. F.'s income is in fact subject to fluctuation, and that CSSD and Mr. F. are correct in their aligned positions that an average of income from the years 2005 through 2007 is the most reliable indicator of Mr. F.'s future earnings.

The record does not contain extensive information about Ms. W.'s income. CSSD's reported wage and unemployment benefits data shows that in 2007 Ms. W.'s wages declined dramatically, while she drew a substantial amount of income from unemployment insurance for the first time in this same three-year period. Ms. W. did testify that recently she has been taking care of C. most of the time. The wage and unemployment data show that Ms. W.'s income is as much subject to fluctuation as Mr. F.'s. CSSD is correct that projected income for both parents should be based on the average of income for the last three years.

Mr. F. testified that he contributes to a retirement fund, and he claims a corresponding deduction. Mr. F.'s payroll stub shows that he contributes 8 percent of his income to this fund. Civil Rule 90.3(a)(1) allows a deduction from gross income for voluntary contributions to retirement plans, but only up to 7.5 percent of the parent's gross wages and self-employment income.

In Exhibit 11, CSSD has prepared a support calculation that takes into account all of the above factors and correctly concludes that Mr. F. is obligated to pay Ms. W. is \$477 per month. The calculation is a shared custody calculation under Civil Rule 90.3(b), with Ms. W. having custody 57% of the time. Income is based on a three-year average for each party for the years from 2005 through 2007, with Mr. F. receiving a retirement contribution credit of 7.5%.

IV. Conclusion

³ 15 AAC 125.050(c).
OAH No. 08-0319-CSS

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 October, 2008.

By: Signed
Jerry Burnett
Director, Administrative Services

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