

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

IN THE MATTER OF:)
)
R. G. F. II) OAH No. 08-0537-CSS
) CSSD Case No. 001152085
_____)

DECISION AND ORDER

I. Introduction

This case concerns the obligation of R. G. F. II for the support of M. F. (DOB 00/00/92), E. F. (DOB 00/00/01) and K. F. (DOB 00/00/01). The custodian of record is Y. F.

On September 12, 2008, the Child Support Services Division (Division) issued an amended administrative child support order establishing a support obligation in the amount of \$2,750 per month effective October 1, 2008, with arrears in the amount of \$22,000 for the period from February 1, 2008 through September 30, 2008.

Mr. F. filed an appeal and requested an administrative hearing. The Office of Administrative Hearings conducted a telephonic hearing on October 27, 2008. David Peltier represented the division. Mr. F. and Ms. F. participated.

Mr. F. argues that the support order should be adjusted because it is based on deferred income and it does not accurately reflect his contributions to retirement, and it is disproportionate to his children's actual needs. Because the evidence and testimony establish that the amount of the order is consistent with Alaska law, but omits a credit for certain prior payments, the Division's amended order is amended.

II. Discussion

R. G. F. is a retired military officer who is a civilian employee of the Department of Defense. He and his wife, Y. F., had three children. The couple separated in 2006 while the family was living in Germany and in May, 2007, their marriage was dissolved under a Washington court order.¹ In September, 2007, a German court issued an order directing Mr. F. to pay \$620 per month for the cost of child care.² In December, 2007,

¹ Ex. 1, p. 2; Ex. 7, p. 1; Ex. 11.

² See Ex. 7, pp. 31-56. According to the parties' testimony at the hearing, Mr. F. suspended payments after this proceeding was initiated, and at present Ms. F. makes the payments.

Mr. F. was reassigned to Fort Richardson, and in January, 2008, he moved back to Alaska.³ The children have remained in Ms. F.'s custody since that time. Mr. F. ceased making payments for child care in August, 2008 and Ms. F. has covered the cost of child care since then.

Mr. F.'s anticipated 2008 total income is at \$147,538, consisting of gross wages (\$106,198) and military retirement (\$41,340). After deductions for income tax, unemployment insurance, and retirement contributions, his anticipated 2008 adjusted annual income is in excess of \$100,000. Based on that income, Mr. F.'s presumptive monthly child support obligation for 2008 is \$2,750 for three children.

III. Discussion

A. Presumptive Support Obligation

The Division establishes a child support obligation based upon "the expected actual annual income that the parent will earn or receive when the child support award is to be paid."⁴ When adequate information is available, arrearages may be based on the actual income received during the period for which arrearages are due.⁵ For three children, a parent's presumptive support obligation is 33% of that parent's adjusted annual income up to a maximum of \$100,000,⁶ that is, total income after allowable deductions for such things as taxes and support of a prior child.⁷

1. Total Income

(a) Retirement

There is no dispute regarding retirement income: the record establishes that Mr. F.'s anticipated 2008 retirement income is \$41,340, and it is undisputed that the full amount of his retirement income should be included as income for purposes of child support.

(b) Deferred Compensation

Mr. F.'s request for administrative review asserted that the Division's initial calculations "grossly overstated" his taxable income.⁸ At the hearing, he asserted that the

³ Ex. 7, pp. 1, 30-31.

⁴ 15 AAC 125.030(a).

⁵ Duffus v. Duffus, 72 P.3rd 313, 321 (Alaska 2003); Spott v. Spott, 17 P.3rd 52, 56 (Alaska 2001).

⁶ 15 AAC 125.070(a), -.075(a)(3); Civil Rule 90.3(a)(2)(A) & (c)(2).

⁷ 15 AAC 125.070(a); -.065; Civil Rule 90.3(a)(1).

⁸ Ex. 10.

Division erred in its treatment of his tax deferred income. The Division argued that Mr. F.'s tax deferred income should be treated as equivalent to a lump sum payout from a retirement fund.⁹

The record reflects that Mr. F. was paid \$13,100 in Tax Deferred Wages in 2008, and that he contributed a like amount, \$13,100, to his Thrift Savings Plan.¹⁰ Based on the record, it appears that the Tax Deferred Wages were earned in 2008 and that taxation on that compensation was deferred by payment into a Thrift Savings Plan.¹¹ Because Mr. F. did not prove that the \$13,100 was a payment in 2008 of compensation earned in prior years, it is included in 2008 gross wages and it is unnecessary to determine whether payment of deferred compensation earned in a prior year should be excluded from total income for the year in which it is paid.¹²

(c) Anticipated Total Income

Mr. F.'s leave and earnings statement dated January 17, 2008, reflects earnings through his sojourn in Germany, which ended essentially contemporaneously with the pay period ending January 5, 2008. That statement shows year-to-date taxable wages of \$5,808, non-taxable wages of \$3,810, and tax-deferred wages of \$2,400.¹³ His leave and earnings statement dated October 23, 2008, shows year-to-date taxable wages of \$63,394, non-taxable wages of \$15,792, and tax-deferred wages of \$13,100.¹⁴

⁹ See Civil Rule 90.3, Commentary at III(A) (“Lump sum withdrawals from pension or profit sharing plans or other funds will not be counted as income to the extent that the proceeds have already been counted as income for the purposes of calculating child support under this rule...”).

¹⁰ Ex. 12, p. 1.

¹¹ If the \$13,100 was not wages earned in 2008, then Mr. F.'s wages earned in 2008 was \$74,090, including both his taxable and non-taxable (cost of living adjustment) wages. Mr. F.'s basic pay was \$79,786 in Germany and \$85,800 in Alaska, and his hourly wage was \$38.23 in Germany (\$79,518 for 2080 hours) and \$41.11 in Alaska (\$85,508 for 2080 hours). Mr. F.'s base pay and hourly rate indicate that his total taxable plus non-taxable wages in 2008 should have been in greater than \$74,090. Unless the Tax Deferred Wages represent compensation earned in 2008, there is no explanation for the discrepancy between the anticipated income indicated by Mr. F.'s base pay and hour rate, on the one hand, and his actual combined taxable and non-taxable wages on the other hand.

¹² Certainly, any deferred compensation paid to Mr. F. in 2008 that was earned in a prior year was not counted as income for purposes of child support in the year it was earned in at least one sense: no child support order was in existence for the year the money was earned. But in that sense, none of Mr. F.'s prior years' income was treated as income “for the purposes of calculating child support under [Civil Rule 90.3].” Had there been a child support order in effect, however, the deferred compensation would have been counted as income in the year it was earned, just as this decision treats it. In that sense, putting money into a deferred compensation account is like putting money into a savings account (albeit a tax-exempt one). Withdrawals from a savings account are not considered as income for purposes of child support.

¹³ Ex. 12, p. 2.

¹⁴ Ex. 12, p. 1.

The Division's post-hearing brief appears to determine Mr. F.'s anticipated 2008 gross wages by adding the wages shown on the two leave and earnings statement, plus extrapolated wages for the remainder of the year based on the amounts shown on the October 23 statement.¹⁵ This methodology treats the year-to-date wages shown on the October 23 statement as consisting only of wages paid after January 17, and it includes additional wages for 5.5 pay periods. The methodology yields anticipated 2008 wages of \$134,045 (\$110,099 taxable and tax-deferred; \$23,946 non-taxable).¹⁶

The preponderance of the evidence supports an alternative methodology. First, the record indicates that Mr. F. had no tax-deferred compensation after July, when (at the rate of \$1,200 per paycheck) Mr. F. would have received \$13,100 in tax-deferred compensation, and the Division's amended order notes that Mr. F.'s last three paychecks did not include tax-deferred income, nor did his October 23, paycheck.¹⁷ Because the preponderance of the evidence is that Mr. F. received no additional tax-deferred compensation after October 23, no such compensation should be attributed him in extrapolating his gross wages. Second, rather than showing only wages paid after January 17, the October 23 statement includes wages paid through January 17. Thus, the difference between the January 17 and October 23 statements (rather than their sum) represents Mr. F.'s Alaska wages through October 23: \$57,586 in taxable wages and \$11,982 in non-taxable wages. Mr. F. earned those wages in twenty biweekly pay dates beginning January 31 and ending October 23, which means that his average biweekly Alaska paycheck included \$2,879 in taxable wages and \$599 in non-taxable wages. Third, with biweekly paychecks Mr. F. would have had four, not 5.5, additional paychecks after October 23, for an additional \$11,516 in taxable wages and \$2,396 in non-taxable wages.

Adjusted to reflect these changes the preponderance of the evidence is that Mr. F.'s anticipated 2008 wages are \$106,198 (\$74,910 taxable; \$18,188 non-taxable; \$13,100 tax deferred), and his anticipated 2008 total income is \$147,538.¹⁸

¹⁵ Post Hearing Brief.

¹⁶ Ex. 13.

¹⁷ Ex. 8, p. 4; Ex. 12, p. 1.

2. *Adjusted Income*

(a) Tax Deduction

The Division's initial calculation of Mr. F.'s adjusted income was based on taxable income of \$117,299 and included a deduction of \$24,316 for federal income tax (20.7% of taxable income),¹⁹ based on the tax rate applicable to a single person with one exemption.²⁰ Mr. F.'s notice of appeal argued that his 2008 tax obligation will be greater than the deduction provided by the Division,²¹ based on his 2006 tax return, which shows adjusted gross income of \$103,853 and a tax obligation of \$21,343 (20.6% of adjusted gross income).²²

The Division's calculations, using the standard deduction under the on-line calculator, provide the same exemption that Mr. F. claimed on his 2006 taxes, and the percentage of his income deducted for taxes was essentially identical in 2006 and in the 2008 calculation.²³ At the hearing, Mr. F. did not object to use of the on-line calculator as the basis for the determination of the appropriate deduction.

(b) Child Care Expenses

Mr. F.'s appeal form asserted that his payments for child care had not been accounted for.²⁴ However, the record reflects that the Division's calculation from which he appealed included a deduction of \$620 per month for child care expenses.²⁵ At the hearing, the parties testified that Mr. F. is longer making those payments, rather Ms. F. is.²⁶ The division's post-hearing calculations omit any deduction for those payments.²⁷

¹⁸ \$93,098 (taxable + non-taxable wages) + \$41,340 (retirement income) + \$13,100 (tax deferred wages).

¹⁹ Ex. 9, p. 1.

²⁰ Post Hearing Brief at 1.

²¹ Ex. 10.

²² Ex. 7, p. 22. "Taxable income" on the division's worksheet does not reflect the standard deductions and exemptions, which are accounted for in the calculation of the applicable tax. Thus, "taxable income" on the division's worksheet is equivalent to "adjusted gross income" (line 38) on the tax return, and is not equivalent to "taxable income" (line 43) on the tax return. The latter figure reflects standard deductions and exemptions (lines 40 and 42).

²³ Ex. 7, p. 21.

²⁴ Ex. 10.

²⁵ Ex. 9, p. 1 (line 2h).

²⁶ The record indicates that Mr. F. made the payments at least through July, 2008. Ex. 7, pp. 55-56. Mr. F. testified that he stopped making the payments after he spoke with representatives of the division, presumably after he was served with the order on July 21, 2008.

²⁷ Ex. 13, Ex. 14.

A parent is entitled to a deduction from income for amounts paid for “work-related child care expenses for the children who are the subject of the child support order.”²⁸ This provision applies to the parent’s own expenses for work-related child care, that is, expenses incurred so that the paying parent can work. In determining pre-order arrears, the in kind provision of child care services to the custodial parent, or direct payment of child care expenses of the custodial parent are credited to child support only if the parties intended to treat them as such.²⁹ The requirement that the parties intend to treat the payments (or services) as a credit against child support ensures that the dependent child is the intended beneficiary of the payments or services. When (as in this case) the custodial parent’s pre-order child care expenses are paid directly by the non-custodial parent, there is no question but that the dependent children was the beneficiary of the payments. The paying parent should therefore generally be provided a credit for those expenses.³⁰

(c) Retirement Contributions

During 2008, Mr. F. paid at least \$13,100 into his federal Thrift Savings Plan, and at least \$526 into his federal retirement program. He is entitled to deduct a maximum of 7.5% of his gross wages for his voluntary contributions into retirement accounts from his total income. Mr. F.’s gross wages in 2008 included his taxable wages, his non-taxable wages, and the \$13,100 in Tax Deferred Wages. Under the alternative methodology his 2008 anticipated gross wages are \$106,198 and he is entitled to a deduction of \$7,965 (\$664 per month).

3. *Presumptive Obligation*

Based on anticipated 2008 total income of \$147,538, Mr. F.’s anticipated 2008 adjusted income is \$100,647, and his presumptive support obligation for three children is \$2,750, as shown on Appendix A. There is no evidence that the presumptive support obligation in 2009 will be more than 15% greater or lesser than in 2008.

²⁸ Civil Rule 90.3(a)(1)(E).

²⁹ See 15 AAC 125.105(b), (c).

³⁰ See Ogard v. Ogard, 808 P.2d 815, 817 (Alaska 1991).

B. Adjustment to Presumptive Support Obligation

1. *An Increase is Not Warranted*

The Division may increase the presumptive support obligation of a parent whose adjusted annual income is in excess of \$100,000 if it determines that “an additional award is just and proper, taking into account the needs of the children, the standard of living of the children, and the extent to which that standard should be reflective of the parent’s ability to pay.”³¹

Ms. F. has not asserted that the support obligation should be increased beyond the presumptive amount, and there is no evidence that an additional award would be appropriate under the facts of this case.

2. *A Decrease is Not Warranted*

The support obligation may be reduced if the amount as calculated under 15 AAC 125.070 would result in a manifest injustice due to unusual circumstances.³² The obligor must provide clear and convincing evidence of manifest injustice.³³ In determining whether manifest injustice exists, all of the relevant circumstances should be considered.³⁴

Mr. F. argues that the amount of his support obligation is in excess of his children’s actual needs. However, the presumptive cap on the support obligation for parents whose adjusted income is in excess of \$100,000 renders that argument unavailing: the cap by its nature prevents unnecessarily increasing support beyond reasonable limits. To the extent that Mr. F. suggests that the presumptive support amount would impose an unreasonable burden upon him, he offered no testimony or evidence to support such a claim. For these reasons, Mr. F. has not shown that imposition of the presumptive amount would be manifestly unjust.

IV. Conclusion

Based on the testimony at the hearing and the evidence in the record, arrears and ongoing support should be set at the capped amount, crediting child care payments against the support obligation.

³¹ 15 AAC 125.075(a)(3).

³² 15 AAC 125.075(a)(2).

³³ 15 AAC 125.075(a); *see* Civil Rule 90.3(c)(1).

³⁴ *See* 15 AAC 125.080.

CHILD SUPPORT ORDER

The Amended Administrative Child Support and Medical Support Order dated September 12, 2008, is **AMENDED** as follows; in all other respects, the Amended Administrative Child Support and Medical Support Order dated September 12, 2008, is **AFFIRMED**:

1. Mr. F.'s arrears are set at \$2,750 per month, with a credit of \$4,340 for pre-order payments.
2. Amended ongoing child support is set at \$2,750 per month, effective January 1, 2009.

DATED: December 31, 2008.

Signed _____

Andrew M. Hemenway
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 and Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 26th day of January, 2009.

By: *Signed* _____

Signature

Andrew M. Hemenway _____

Name

Administrative Law Judge _____

Title

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