

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

IN THE MATTER OF:)
)
 C. B.)
)
) OAH No. 09-0402-CSS
) CSSD Case No. 001057475
_____)

DECISION AND ORDER

I. Introduction

This case concerns the obligation of C. B. for the support of E. A. B. The custodian of record is D. F.

The Child Support Services Division established a support obligation of \$168 per month, which was modified to \$250 per month effective January 1, 1998.¹ Ms. F. requested modification review, and on July 2, 2009, the division issued a modified administrative support order in the amount of \$381 per month, effective April 1, 2009.

Mr. B. appealed and the assigned administrative law judge conducted a telephonic hearing on September 10, 2009.² Mr. B. and Ms. F. participated, and Erinn Brian represented the division. Mr. B. submitted supplemental documentation after the hearing, and a supplemental hearing was conducted on December 21, 2009, with all parties' participation.

Based on the preponderance of the evidence in the record, the division's post-hearing calculation is adopted, and modified child support is set at \$455 per month.

II. Facts

C. B. has five minor children. E. is the second eldest. Mr. B. is subject to three child support orders: one for his eldest child, in the amount of \$381 per month, a second for E., and a third for his middle child, in the amount of \$250 per month. Mr. B.'s two youngest children live with him and his present wife.

Mr. B. is a 50% owner, with his wife, of a grocery store in Eastern State. The store, which Mr. B. has owned for only a few years, operates as a limited liability company. In 2008, the store had gross receipts of \$396,278, and gross profit (total income minus the cost of goods sold) of \$149,507.³ The firm's deductions from taxable income include salaries (\$40,089) and other ordinary business deductions (\$55,431). In addition, the firm deducted \$46,003 for

¹ In Re B., Department of Revenue No. 970692 (Exhibit 1).

² See AS 25.27.190, 15 AAC 05.030, 15 AAC 125.118(f).

³ Ex. 10, p. 1.

depreciation, including \$24,844 treated as an expense under Section 179 for vehicles used in the business,⁴ and a carryover from 2007 of \$19,085, also for a vehicle used in the business.⁵ The allowable deduction for purposes of child support in 2008 is \$9,201.⁶ The business's net taxable income in 2008 was \$7,984.⁷ After federal income tax, the business had a net profit for tax purposes of \$6,786.⁸ The net corporate income for child support purposes was \$43,588.⁹ Mr. B.'s share of that income is \$21,794.

Mr. B. draws a weekly salary from the business of \$750 and has two weeks of unpaid vacation each year. He receives commissions of about \$92.38 per month and a bonus in the form of reduced payments for grocery items of about \$190 per month.¹⁰ His total annual income for child support purposes is \$62,683, consisting of his share of the corporate net profit (\$21,794) and his wages, commissions and bonus (\$40,889).

II. Discussion

The presumptive annual child support obligation for one child is 20% of the adjusted annual income, which is the individual's total income minus allowable deductions.¹¹ When the child support obligation changes by an amount greater than 15% of the existing order, a material change of circumstances is presumed and the existing order may be modified.¹²

The division initially calculated Mr. B.'s modified support obligation as \$381 per month, based on his 2008 income without providing a credit for support of his prior child. However, Mr. B. subsequently provided a copy of the support order for his older child, and at the hearing he testified that in 2009 his weekly salary from the business was raised from \$500 to \$750. After the hearing, the division submitted a revised calculation based on the updated income

⁴ Ex. 7, p. 6 (line 8). In 2008, the business placed in service three vehicles: a 2006 Ford van valued at \$17,344, a 2000 Dodge van valued at \$4,000, and a 2000 Ford Explorer valued at \$3,500. Ex. 7, p. 7.

⁵ Ex. 7, p. 6 (line 10). The business placed a Ford van valued at \$19,085 in service on the date it was incorporated, June 15, 2007. It took no depreciation on that vehicle in 2007 nor was it treated as a Section 179 expense. See Ex. 7, p. 8 (line 26).

⁶ The vehicles were all listed as five-year property, so the allowable deduction is 20% of basis (cost of purchase).

⁷ Ex. 7, p. 1 (line 30).

⁸ The firm paid a federal income tax of \$1,198. Ex. 7, p. 1 (line 31). State income (\$699) and franchise (\$50) taxes were presumably included in the deduction for taxes and licenses. See Ex. 7, p. 1 (line 17); Ex. 7, p. 13 (lines 9, 14).

⁹ This is the sum of the net income for federal tax purposes (\$6,786) plus the amount (\$36,802) by which the depreciation allowed for tax purposes (\$46,003) exceeds the depreciation allowed for purposes of child support (\$9,201).

¹⁰ Exhibit 6 & Post-Hearing Brief.

¹¹ Civil Rule 90.3(a)(2)(A); 15 AAC 125.010, -.070(a).

¹² Civil Rule 90.3(h)(1).

information and providing the appropriate credit for his older child, resulting in a modified support obligation of \$455 per month.¹³

The division's post-hearing calculation does not attribute any income to Mr. B. from the business other than direct and indirect cash payments. However, the profits of a closely-held corporation are generally included in income for child support purpose, and accelerated depreciation not allowed.¹⁴ Including Mr. B.'s share of the net business profit as income, and disallowing accelerated depreciation, Mr. B.'s presumptive child support obligation is \$728 per month.

The support obligation may be reduced if the presumptive amount would result in a manifest injustice due to unusual circumstances.¹⁵ The obligor must provide clear and convincing evidence of manifest injustice.¹⁶ In determining whether manifest injustice exists, all of the relevant circumstances should be considered.¹⁷ In this case, Mr. B.'s testimony at the supplemental hearing established that the accelerated income in 2008 reflected unusual expenses for capital equipment. In addition, his testimony established that because the business is still in a start-up mode, the net profits of the business must be retained in order to ensure the long term success of the firm. Mr. B. testified that the start-up mode should be completed in 2011 or 2012. Mr. B.'s testimony was highly credible: it was clear and consistent, and reflects the evidence in the record. Accordingly, there is clear and convincing evidence that, due to the unusual circumstances of this case, at this time accelerated depreciation should be used and the net profits of the business should not be considered available for child support purposes. The division should, however, review Mr. B.'s income information no later than 2011 and determine whether business income should be treated differently.

IV. Conclusion

A material change of circumstances is presumed and the existing support order may be modified. There is clear and convincing evidence of unusual circumstances warranted excluding the net profits of a closely-held business from income, and applying accelerated depreciation. The case should be reviewed in 2011.

¹³ Ex. 10.

¹⁴ 15 AAC 125.020(c).

¹⁵ 15 AAC 125.075(a)(2).

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

¹⁷ *See* 15 AAC 125.080.

CHILD SUPPORT ORDER

The Modified Administrative Child Support and Medical Support Order dated July 2, 2009, is **AMENDED** as follows; in all other respects, the Amended Administrative Child Support and Medical Support Order dated July 2, 2009, is **AFFIRMED**:

Amended modified ongoing child support is set at \$455 per month, effective April 1, 2009.

DATED: March 1, 2010.

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 25th day of March, 2010.

By: Signed

Signature
Andrew M. Hemenway

Name
Administrative Law Judge

Title

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