

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

IN THE MATTER OF)	OAH No. 09-0697-CSS
B. J. W.)	CSSD No. 001148271
)	
_____)	

DECISION AND ORDER ON REMAND

I. Introduction

On June 17, 2010, a formal hearing was held for the appeal regarding the child support obligation of B. J. W. for the child, K. Mr. W. and the child's mother K E.-W. participated. Andrew Rawls, Child Support Services Specialist, represented the Child Support Service Division (Division). The hearing was audio-recorded. The record closed on July 15, 2010.

This case was characterized by the Division as Mr. W.'s appeal of the Division's Amended Administrative Order to Disestablish Paternity issued on November 5, 2009, but it is actually Mr. W.'s attempt to stop additional collections and recover the money collected from him under the order establishing his child support obligation for the child, K. This obligation was established in the Division's Administrative Child and Medical Support Order issued on December 6, 2007. Mr. W. did not timely appeal this order. Having reviewed the record in this case and after due deliberation, I concluded that the Administrative Child and Medical Support Order should be vacated.

After the proposed Decision and Order was issued the Division filed an untimely proposal for action. The adopting authority then remanded the case with instructions to delete specified language in the discussion section of the proposed Decision and Order. That language has been deleted in this Decision and Order on Remand.

II. Facts

Ms. E.-W. and Mr. W. were married when K. was born on May 1, 2007.¹ Prior to her birth the couple had a period of separation, but when K. was born Ms. E.-W. and Mr. W. were living together. ² Prior to K.'s birth, Ms. E.-W. told Mr. W. that he was the child's father based

¹ Division's Pre Hearing Brief & Recording of Hearing-Testimony of Ms. E.-W.

² Recording of Hearing-Testimony of Ms. E.-W. & Mr. W.

on her doctor's estimate of the date of conception.³ When the child was born however, Mr. W. was informed that the child's blood type made it very unlikely that he was the child's father and Ms. E.-W. told Mr. W. that she no longer believed that he was the father.⁴ Mr. W. believed that he could still be the father at that time because of his discussions with the child's doctor and told Ms. E.-W. that he wanted to be named as the father on the child's birth certificate.⁵ Mr. W. was named as K.'s father on her birth certificate without an affidavit of paternity or genetic testing because Ms. E.-W. and Mr. W. were married when K. was born.⁶ A few weeks after the child's birth, Mr. W. was arrested, and incarcerated on a felony charge for which he was subsequently convicted. Mr. W.'s projected release date is in October of 2020.⁷

Ms. E.-W. testified that she knew who K.'s biological father was as soon as K. was born, because her understanding was that K.'s blood type excluded Mr. W. and there was only one other possible father.⁸ Ms. E.-W. requested public assistance the month that K. was born.⁹

Ms. E.-W. testified that she told her public assistance caseworker that there was no way that Mr. W. could be K.'s father because Ms. E.-W. and Mr. W. have negative blood type while the child is positive. Ms. E.-W. testified that she provided documentation showing that Mr. W. could be not be K.'s father to her public assistance caseworker, but was told by her public assistance caseworker that she could not establish K.'s biological father's paternity through her claim for public assistance and would first have to disestablish Mr. W.'s paternity at her own expense.¹⁰ Ms. E.-W. testified she then contacted the Child Support Services Division by phone without giving her name and was given the impression that she would have to pay \$400 to disestablish Mr. W.'s paternity.¹¹ Ms. E.-W. testified her public assistance caseworker discouraged her from establishing K.'s biological father's paternity. Ms. E.-W. indicated that she thought she had real no choice but to claim child support from Mr. W. until he took action to disestablish his paternity.¹²

³ Recording of Hearing-Testimony of Ms. E.-W. & Mr. W.

⁴ Recording of Hearing-Testimony of Ms. E.-W. & Mr. W.

⁵ Recording of Hearing-Testimony of Ms. E.-W. & Mr. W.

⁶ Recording of Hearing-Testimony of Ms. E.-W. & Mr. W.

⁷ Recording of Hearing-Testimony of Mr. W.

⁸ Recording of Hearing-Testimony of Ms. E.-W.

⁹ Division's Post Hearing Submission to Record & Recording of Hearing-Testimony of Ms. E.-W.

¹⁰ Recording of Hearing-Testimony of Ms. E.-W.

¹¹ Recording of Hearing-Testimony of Ms. E.-W.

¹² Recording of Hearing-Testimony of Ms. E.-W.

Based on Ms. E.-W.'s application for public assistance and the fact that Mr. W. was named as K.'s father on her birth certificate, the Division served Mr. W. with an Administrative order to Provide Financial Information on August 22, 2007.¹³ This order did not inform Mr. W. that he had the right to have genetic testing done or the right to contest his paternity before his child support obligation was established.¹⁴ At this time, Mr. W. was already incarcerated and believed that he might be K.'s biological father.¹⁵ Mr. W. cooperated with the Division, explaining that he did not object to paying child support but had limited resources due to his incarceration.¹⁶

The Division served Mr. W. with an Administrative Child and Medical Support Order on December 6, 2007.¹⁷ This order set Mr. W.'s ongoing child support at the minimum amount of \$50 per month due to his incarceration. The order also established arrears going back to May of 2007. This order provided Mr. W. with notice of his right to file an appeal within 30 days, and specifically mentioned a request for genetic testing as one of the grounds to request an administrative review.¹⁸

Mr. W. explained that he was acting as co-counsel in his own defense against the criminal charge and was involved in the trial and his sentencing proceedings when he was sent the Administrative Child and Medical Support Order. Mr. W. explained that he did not really start to think clearly about child support issues until he spoke with his brother after his criminal sentencing and became convinced that he was not K.'s father.¹⁹

On June 22, 2009, Mr. W. filed a request to for an administrative review of the Division's Administrative Child and Medical Support Order issued on December 6, 2007.²⁰ The Division treated this request as a petition to disestablish paternity.²¹ Genetic tests were conducted and these tests showed that Mr. W. was not K.'s father.²²

The Division issued an Amended Administrative Order to Disestablish Paternity on November 5, 2009. This order disestablished Mr. W.'s paternity of K. and provided that his name would be removed from her birth certificate. The order also provided that Mr. W. was

¹³ Exhibit 1.

¹⁴ Exhibit 1.

¹⁵ Recording of Hearing-Testimony of Mr. W.

¹⁶ Exhibit 3.

¹⁷ Division's Pre Hearing Brief & Exhibit 3.

¹⁸ Exhibit 3.

¹⁹ Recording of Hearing-Testimony of Mr. W.

²⁰ Exhibit 4.

²¹ Division's Pre Hearing Brief & Exhibit 5-8.

²² Exhibit 7.

responsible for child support owed under Administrative Child and Medical Support Order before June 29, 2009, the date of the petition for genetic testing.²³

Mr. W. attempted to appeal the Division's plan to hold him liable for support by sending a letter to the Director of the Alaska Office of Children's Service.²⁴

The Division responded to this letter and Mr. W. requested a formal hearing.²⁵ Prior to the hearing, Mr. W. also filed a modification action in Superior Court. The formal hearing was continued until the court dismissed Mr. W.'s modification action. After the hearing, a post hearing scheduling order was issued giving the parties additional time to file documents and briefing. In accordance with this schedule, the Division filed a Submission to Record, which provided information about the Division's actions to seek child support from K.'s biological father. The Division estimated that it should be able to establish child support arrears against K.'s biological father in the monthly amounts of \$527.91 for 2007, \$599.87 for 2008, and \$845 for 2009, 2010 and ongoing. In addition to being able to establish these higher monthly amounts of child support for the periods covered by Mr. W.'s child support order, the Division believes that it will be easier to collect child support from K.'s biological father because he is employed, while Mr. W. will be incarcerated for some time to come. The Division reported that it has already collected \$950.98 in child support from Mr. W. out of a total of approximately \$1,680 due under the order before the petition for genetic testing was issued.²⁶

Based on the evidence in the record, I find that it is more likely than not would work an injustice not to relax the appeal deadline for Mr. W. to request an Administrative review of the Administrative Child and Medical Support Order issued on December 6, 2007.²⁷

III. Discussion

The issues raised in this appeal are best resolved by using the Administrative Law Judge's regulatory authority to waive administrative appeal deadlines to avoid an injustice.²⁸ The deadline is the thirty day deadline to request genetic testing by requesting an administrative review of the Amended Administrative Child and Medical Support Order. The injustice is enforcing a child support order against an unrelated indigent man, rather than the child's father who can pay and would be liable for significantly more support, because a deadline was missed

²³ Exhibit 8.

²⁴ Exhibit 9.

²⁵ Exhibit 10-12.

²⁶ Division's Post Hearing Submission to Record & Exhibit 15.

²⁷ Recording of Hearing & Division's Post Hearing Submission to Record.

²⁸ For an in depth discussion statutory and regulatory provisions granting this authority and the case law supporting its application in paternity disestablishment cases, see *In the Matter of C.B.*, Decision and Order on Remand, OAH

under mitigating circumstance. Mr. W. had a due process right to contest his paternity of K. and have genetic testing done before his child support obligation was established.²⁹ His failure to timely take the steps necessary to exercise that right should be excused by waiving the deadline and vacating his child support order, so that the Division can collect child support for all the periods covered by Mr. W.'s order from K.'s father.

Appeals of administrative child support orders are conducted under the procedures set out in 15 AAC 125.118. The procedures in 15 AAC 05.010 and 15 AAC 05.025-15 AAC 05.040 also apply to these appeals. After an Administrative Child and Medical Support Order is issued establishing an obligor's duty to pay child support, a party may file a request for an administrative review.³⁰ Under 15 AAC 05.030(k), a hearing officer may waive any administrative appeal requirements or deadlines established in 15 AAC 05.010--15 AAC 05.030 if it appears that strict adherence to the deadline or requirement would work an injustice. The thirty day appeal deadline for requesting an administrative appeal for an Administrative Child and Medical Support Order is therefore subject to the waiver provisions of 15 AAC 05.030(k).

This case was referred to Office of Administrative Hearings on appeal of an administrative disestablishment order. Mr. W. is not appealing the disestablishment of his paternity but he is protesting the language in that order that holds him liable for arrears that accrued before the petition for genetic testing. However, Mr. W. original appeal was actually filed as a late request for an administrative review of the Division's Administrative Child and Medical Support Order issued on December 6, 2007, which the Division effectively denied by treating the request as an attempt to initiate a disestablishment proceeding.

There is persuasive evidence showing that it would work an injustice to strictly enforce the filing deadline for Mr. W.'s late request for genetic tests before his child support obligation was established in the Administrative Child and Medical Support Order. Mr. W. is not the father of K. K.'s biological father will be legally liable for more child support to provide for K. or to reimburse the state for her support for the periods covered by Mr. W.'s child support order.

While Mr. W. had an obligation to timely respond to the Division's order there are factors that mitigate his delay. Mr. W. was incarcerated and was contesting his conviction and sentencing on a felony charge when his child support obligation was being established. He still believed that he was K.'s father at that time.

Caseload No. 06-0515-CSS, which was distributed to the parties with the Post Hearing Scheduling Order.

²⁹ *State, Dep't of Revenue, CSED v. Maxwell*, 6 P.3d 733 (Alaska 2000),

³⁰ 15 AAC 125.118(a).

The presumption of married man's paternity of a child of the marriage is not something that a reasonable person would necessarily assume was incorrect and there are many legitimate considerations which might lead a reasonable person to delay contesting paternity in these circumstances. In this case, despite the evidence indicating that he probably was not K.'s father, Mr. W., who was under a great deal of stress at the time, apparently engaged in some wishful thinking, hoping against hope that he was her father until his brother convinced him to come to terms with the evidence to the contrary.

Furthermore, it appears that the State of Alaska, which sought child support as reimbursement for public assistance from Mr. W. based on his now disestablished paternity of K., was timely made aware of the evidence regarding blood types, and the mother's belief about who K.'s father was, but did less than it could have to timely establish the paternity of K.'s biological father, who is obviously a better source of support for her.

It is not clear whether the Division planned to relieve the biological father of his child support obligation to the child in this case for the period covered by Mr. W.'s remaining order, but it is clearly in K.'s and the state's best interest to seek support from the biological father rather than Mr. W. for all the months going back to her birth. This can be accomplished by simply vacating the order against Mr. W.

If Mr. W. had timely filed his request for an administrative review and genetic testing, or the Division had timely been given the information it needed to initiate a paternity action against K.'s biological father from Ms. E.-W. or her public assistance caseworker, Mr. W.'s child support order for a child that is not his would never have gone into effect. By allowing Mr. W.'s late appeal this, the correct result, can be achieved and K. will be able to receive support from her real father, who earns a good income and is not sentenced to prison for the next ten years.

The Division should not be required to reimburse Mr. W. from its own funds as it is the biological father, rather than the Division, who owes Mr. W. reimbursement.

IV. CHILD SUPPORT ORDER

The Amended Administrative Child and Medical Support Order issued on December 6, 2009 is Vacated. The Division's Amended Administrative Order to Disestablish Paternity issued on November 5, 2009 is amended to remove the second paragraph, which refers to Mr. W.'s continued support obligation for arrears and the Division's disbursement of collections from Mr. W.

DATED this 20th day of August, 2010.

By: Signed

Mark T. Handley
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 23rd day of August, 2010

By: Signed
Signature
Mark T. Handley
Name
Administrative Law Judge
Title

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