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

In the Matter of	)	
	)	
N L. N	)	OAH No. 15-0373-CSS
	)	Agency No. 001202622

DECISION AND ORDER DENYING MOTION TO DISMISS AND AFFIRMING ADMINISTRATIVE CHILD SUPPORT AND MEDICAL SUPPORT ORDER

I. Introduction

N L. N is the biological father of B, who is 8 years old. His paternity was established through genetic testing and an Order of Paternity was issued dated November 25, 2014.

Having established that, as the biological father, Mr. N owed a duty of support to B, CSSD issued an Amended Administrative Child Support and Medical Support Order dated March 20, 2015. This order established Mr. N's child support obligation to B in the amount of $906 per month effective April 1, 2015 and ongoing. CSSD also set arrears owing in the amount of $6,342.00 for the period from September 1, 2014 to March 31, 2015.

Mr. N appealed the March 20, 2015 order, contending that CSSD had overstated his income, the amount of support ordered was too high, and he should not have to pay the cost of the paternity testing. After appealing, he obtained counsel and amended his appeal to assert that CSSD did not have the legal authority to establish his paternity of B.

Mr. N does not challenge the finding that he is the biological father of B; rather, he contends that CSSD did not have the legal authority to establish his paternity of B because B was not born out of wedlock. Mr. N believes his position to be true because the custodian, S J. T, was married to someone else at the time of conception and birth and that person's name is on the birth certificate.

A brief hearing was held April 30, 2015. CSSD participated, as did Mr. N through his attorney. Ms. T did not participate and the matter proceeded in her absence.[1] At the hearing Mr. N requested the orders issued by CSSD in his case be vacated. CSSD did not

[1] "If the department mails a document by registered or certified mail, service is effective if the mailing is addressed to the latest address provided to the department." The notice of hearing was sent to Ms. T by certified mail to the latest address provided to CSSD. The "green card" was signed and returned. At the time set for the hearing, Ms. T was called and a voice mail message was left informing her of the number to call and that the hearing would proceed in her absence.

oppose this request and at the hearing's conclusion the undersigned indicated she would be granting Mr. N's request. However, upon further review of the record and consideration of the controlling statutes and regulations, it was ordered that CSSD address the legal issues raised in Mr. N's brief and that the record be supplemented with additional documentation.[2]

The briefing and arguments have been considered and as a result, Mr. N's request to vacate the orders in his case is denied. Specifically, Mr. N's challenge to paternity is denied as untimely. However, his challenge to the Amended Administrative Child Support and Medical Support Order raises an issue that is addressed below.

II. Facts

In this case, the parties do not disagree about the relevant facts, only about their legal implications.

Ms. T was separated from her husband, C T, when she had sexual intercourse with Mr. N.[3] This produced the obligee child, B T. B was conceived and born while Ms. T was still married to Mr. T. A paternity test was performed and it excluded Mr. T as B's biological father. Shortly thereafter, Mr. T and Ms. T petitioned for dissolution of their marriage. B was not mentioned nor identified as a child of the marriage in the Petition for Dissolution. The dissolution was granted February 19, 2008. Because Ms. T was married to Mr. T at the time of B's birth, Mr. T's name appeared on B's birth certificate.

Fast forward six years. CSSD receives Ms. T's application for child support services and paternity witness statement on September 19, 2014. These documents informed CSSD that Ms. T was married at the time of conception and birth so her husband, Mr. T, is named on the birth certificate as B's father. Ms. T wrote on her application that she knew her ex-husband was not the biological father of B because they had conducted genetic testing. Ms. T identified Mr. N as B's biological father.

On October 14, 2014, CSSD served an administrative order for genetic testing and a Notice and Finding of Financial Responsibility (NFFR) on Mr. N.[4] In response, as is his right, Mr. N requested genetic testing. The test was conducted and the results established that the

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[2] Order Reopening the Record for Additional Briefing (May 10, 2015). Mr. N addressed CSSD's post hearing submission.

[3] Exhibit 12.

[4] Exhibit 4.

likelihood of Mr. N being B's biological father was 99.99% as compared to an unrelated male of the same race.[5]

As a result, CSSD issued an order dated November 25, 2014, establishing Mr. N as B's biological parent, informing the Alaska Bureau of Vital Statistics of this finding of paternity, and seeking repayment of $863.58 for paternity testing. CSSD also issued an Administrative Child Support and Medical Support Order dated December 8, 2014, establishing child support for one child in the amount of $771 per month effective January 1, 2015, and ongoing and arrears in the amount of $3,084 for the period from September 1, 2014 through December 31, 2014.[6]

Mr. N requested an administrative review because he believed the amount of support ordered was incorrect and he wanted to discuss the costs associated with the DNA testing.[7] He provided his 2013 Federal income tax return and end of year 2014 paystubs. Using this information, CSSD issued an Amended Administrative Child Support and Medical Support Order dated March 20, 2015.[8] This order established monthly child support for one child in the amount of $906 effective April 1, 2015 and ongoing. It also calculated arrears owing in the amount of $6,342 for the period from September 1, 2014 through March 31, 2015.[9]

Mr. N appealed the March 2015 order and requested a formal hearing.[10] He obtained counsel. With the assistance of his attorney, Mr. N changed the focus of his appeal from the amount of support ordered to the Order Establishing Paternity. He argued that, when two people are married at the time of birth and the husband is placed on the birth certificate, but the mother is not married to the biological father, the child is not born out of wedlock. Therefore, CSSD does not have the authority to establish paternity for the biological father until it disestablishes the husband's paternity. Mr. N also argued that the Department of Revenue's regulation defining "out of wedlock" is invalid in part because a child cannot have two legal fathers.

III. Discussion

A. *Law of the Case*

This case presents an issue of first impression for this tribunal under CSSD's amended statute and regulations: whether the term "out of wedlock" in CSSD's establishment of paternity

5 Exhibit 3.
6 Exhibit 5.
7 Exhibit 6.
8 Exhibit 7.
9 Exhibit 7.
10 Exhibit 8.

proceedings applies to the mother or the child. If this term applies to the mother, then B was not born out of wedlock. If this term is applied to B, then he was born out of wedlock.

A brief overview of the evolution of relevant statues and regulations is instructive. Before January 1996, CSSD did not have the authority to administratively establish and disestablish paternity. Effective January 1, 1996, the legislature granted CSSD the authority to administratively establish or disestablish paternity.[11] The legislature also directed the division to adopt "regulations that establish …(D) procedures for establishing and disestablishing paternity…."[12]

Fulfilling this directive, the Department of Revenue adopted 15 AAC 125.216. In 2001, this regulation was amended by adding section (j):

> In this section, a child is *born out of wedlock if the mother* of the child *is not married to the child's* <u>*biological*</u> *father* at conception, during the pregnancy or at birth. The agency will consider a child to be born out of wedlock even if the child's mother marries after the child is born.[13]

Applying the regulation as written, "out of wedlock" describes the status of B, not his mother. Paternity testing establishes that Mr. N is B's biological father. Mr. N and Ms. T were not married. Therefore, B was born out of wedlock.

B. *15 AAC 125.216(j) Is Not Contrary To The Applicable Statutory Scheme*

Mr. N argues that 15 AAC 125.216(j) defining out of wedlock is contrary to AS 25.27.165(a) and AS 18.50.160(d). The logic Mr. N offers in support of his argument is difficult to follow and is flawed. He argues:

> The former statute [AS 25.27.165(a)] specifically provides that the agency has the authority to institute administrative proceedings only "to determine the paternity of a child <u>born out of wedlock</u>. (emphasis added) Reference to AS 18.50.160(d) must then be made, as that statue specifies what is required when a child is born to a married woman (that is, the child is born 'in wedlock'). CSSD's regulation conflicts with that statute also.[14]

Alaska Statute 18.50.160(d) is part of the Vital Statistics Act provides that for purposes of a birth certificate there is a presumption of paternity if

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11 AS 25.27.020(a)(11); AS 25.27.165(a).
12 AS 25.27.020(a)(2)(D).
13 15 AAC 125.216(j) (emphasis added).
14 Mr. N's Response To CSSD's Submission To The Record at 4, 5 (emphasis in original).

> the mother was married…the name of the husband shall be entered on the certificate as the father of the child unless (a) paternity has been lawfully determined otherwise by a tribunal….

Mr. N proposes that because the regulation defining "out of wedlock" is contrary to these statutes, that CSSD is required to disregard 15 AAC 125.216(j) because it is invalid.

Except in very unusual circumstances "executive branch decision makers simply do not have the authority to declare a regulation invalid: that is a function solely for the courts. Instead, agencies and boards in the executive branch must follow the regulation."[15] If Mr. N's proposition were accepted, it would force the administrative law judge and the Commissioner of the Department of Revenue to invade the court's jurisdiction by declaring 15 AAC 125.216(j) invalid.

Mr. N is contending that a regulation designed to implement a process to identify a child's biological father who has a legal obligation to support his child, is somehow superseded or overridden by a vital statistics statute that recognizes that a father's name on a birth certificate may need to be corrected. The record is devoid of any legislative or regulatory history that would support Mr. N's argument that 15 AAC 125.216(j) is in conflict with any statute.

Next, Mr. N argues that his paternity of B has not been lawfully determined because CSSD's jurisdiction is limited to children born out of wedlock; therefore, his name should have never been placed on the birth certificate. Under the presumption of parentage established by AS 18.50.160(d), Mr. N contends that B was not born out of wedlock so CSSD does not have the authority to administratively establish paternity.

A genetic test established a probability of Mr. N's parentage at 99.99 percent. A "probability of parentage of 95% or higher establishes a probability of parentage that may be rebutted only by clear and convincing evidence."[16] This standard has not been met.

C. *CSSD Is Not Required To Disestablish Paternity Before It May Initiate An Action To Establish Paternity.*

The Bureau of Vital Statistics entered Mr. T's name on B's birth certificate pursuant to AS 18.50.160(d). This statute embodies the common law principal that a child born to a married

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[15] *In re Matthew J. Morrison*, OAH No. 08-0471-MED at 8 *citing* with approval at fn. 42 Alaska Dep't of Law, Hearing Officer's Manual (5th ed. 2002) at 10 (explaining that repeal under Administrative Procedure Act is the only way executive branch agencies have been empowered to overturn problematic regulations).

[16] AS 25.20.050(d).

woman is presumed to be the offspring of her husband, and his name shall be entered on the birth certificate unless "paternity has been lawfully determined otherwise by a tribunal…."[17]

Mr. N reasons that CSSD could not lawfully establish paternity, so his name must be removed from B's birth certificate. In support, he cites to the 1997 Alaska Supreme Court case, *CSED v. Wetherelt.*[18] In *Wetherelt*, the court found that CSSD lacked the authority to determine the paternity or nonpaternity of the child in question.[19] The statute discussed and applied in *Wetherelt* required a court proceeding to determine whether a child was born out of wedlock.[20] However, that statute was amended to give CSSD the ability to administratively establish and disestablish paternity. Mr. N's reliance on *CSED v. Wetherelt*[21] is misplaced.

Next, although Mr. N does not dispute that he is the biological father of B, he believes CSSD cannot consider the genetic testing results until it first disestablishes the paternity of Mr. T. He offers that a child cannot have two legal fathers. B does not have two legal fathers. He now has one legal father, Mr. N, who is named on the birth certificate and who is his biological father.

The disestablishment action is secondary to the establishment of paternity. Establishment of paternity has the consequence of disestablishment. It is anticipated that Mr. N would respond to this finding by citing to the three year statute of limitation at AS 25.27.166(b)(2). However, the three-year statute of limitation applies to *persons* filing petitions to disestablish paternity.[22] CSSD is not a person and it does not file a petition to disestablish when it seeks to establish paternity. CSSD is not changing the existing law, but rather it is fulfilling its responsibility and exercising its authority to establish the paternity of a child born out of wedlock.

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17 AS 18.50.160(d)(1). The mother, the husband, and the biological father may also execute affidavits as to paternity. AS 18.50.160(d)(2).

18 931 P.2d 383 (1997).

19 931 P.2d at 388-89.

20 931 P.2d at 388-89.

21 931 P.2d 383 (Alaska 1997).

22 AS 25.27.166(b) provides that the agency must have procedures that allow a person to petition for disestablishment of paternity within three years after the child's birth or when he knew or should have known of the father's putative paternity.

D. *CSSD Has The Authority To Establish Paternity In This Administrative Proceeding Because B Was Born Out Of Wedlock.*

Alaska Statute 25.27.165 authorizes CSSD to "institute administrative proceedings to determine the paternity of a child born *out of wedlock.*"[23] A child is born out of wedlock if the mother is not married to the child's biological father.[24] Mr. N and Ms. T were not married. Therefore, B was born out of wedlock. Because he was born out of wedlock, CSSD has the jurisdiction and authority to establish paternity.

Mr. N does not dispute that the DNA test establishes he is the biological father of B. The genetic test established a probability of Mr. N's parentage at 99.99 %. A "probability of parentage of 95% or higher establishes a probability of parentage that may be rebutted only by clear and convincing evidence."[25] The 99.9 % probability of parentage is clear and convincing evidence and therefore sufficient to overcome the common law presumption of paternity.

E. *It Does Not Serve An Injustice To Require A Biological Father to Support His Child.*

Paternity was established by an administrative order dated November 25, 2014. Here, Mr. N is appealing the Amended Administrative Child Support and Medical Support Order dated March 20, 2015. The order establishing paternity is a distinct administrative order from the order appealed here, the Administrative Child Support and Medical Support Order, with its own appeal rights. Mr. N had 30 days to appeal the order establishing paternity.[26] He did not. Therefore, his attempt to piggy-back a challenge to his paternity is procedurally incorrect.

Mr. N's relief if any is to request the deadline established in 15 AAC 05.030(d) be waived. To prevail on his request he would need to show that strict adherence would work an injustice. Mr. N is the biological father of B. The intent of the statutes, regulations, and Civil Rule 90.3 is that the biological parents contribute to the maintenance their child based on their ability to pay support. Strict adherence to the deadline effectuates the intent of child support. For this reason, there is no injustice and Mr. N's challenge to the order of paternity raised in his appeal is denied because it is untimely.

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23 AS 25.27.165(a).
24 15 AAC 125.216(J).
25 AS 25.20.050(d).
26 15 AAC.05.030; 15 AAC 125.226(g).

IV. Conclusion

The phrase "out of wedlock" describes the child's relationship to his or her biological mother and a biological father. Marriage creates a presumption of paternity but that presumption can be overcome by clear and convincing evidence. Genetic testing establishes that Mr. N is the biological father of B. Mr. N and Ms. T were not married at the time of B's conception or birth, therefore, under the controlling statute and regulation, B was born out of wedlock and CSSD is authorized to administratively establish paternity and child support. Mr. N's appeal is denied.

Furthermore, any challenge to the order of paternity raised by Mr. N in this matter is denied as untimely.

V. Child Support Order

1. N L. N is liable for child support in the amount of $906 per month for one child effective September 2014 and ongoing.
2. All other terms of the Modified Administrative Child Support and Medical Support Order dated March 20, 2015 remain in full force and effect.

Dated: September 9, 2015

Signed
Rebecca L. Pauli
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 26 day of October, 2015.

By: *Signed*
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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