

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

IN THE MATTER OF )  
 )  
S & D D )  
 )  
2002 PERMANENT FUND DIVIDEND )

Case No. OAH 04-0021-PFD  
CASELOAD NO. 040311

**PFD FORMAL HEARING DECISION & ORDER**

**I. Introduction**

B C timely applied for 2002 permanent fund dividends for his granddaughters S and D D. The Permanent Fund Dividend Division initially granted the applications, but then determined that the children were not eligible. The division denied the applications and assessed the dividends, affirming its decision at the informal appeal level. The applicants requested a formal hearing; the Department of Revenue heard the appeal on October 21, 2004. Mr. C appeared by telephone, as did J D, the children's mother. Thomas Coté represented the PFD Division. The hearing examiner finds that S is eligible for a 2002 dividend, but D is not.

**II. Facts**

J D arrived in Alaska with her children A and S in December of 2000. Ms. D's husband and her oldest child, J, planned to join Ms. D in Alaska a bit later. When she arrived in Alaska, Ms. D was pregnant with D. Although she planned to quit working after D was born, Ms. D stayed with her California employer and took maternity leave in order to maintain her medical benefits through the duration of her pregnancy. Ms. D and the children stayed in an Anchorage apartment with Ms. D's parents, B C and his wife. Ms. D's brother and sister-in-law lived in an apartment on the same floor of the building, and her sister-in-law helped to raise the children. After D was born, Ms. D returned to California on March 16, 2001 to collect the remainder of the family's personal belongings and so that Ms. D could formally quit her job. She and her husband drove back to Alaska in their van on June 23, 2001.

The division asserts that the children lack an eligible sponsor. Although Mr. C did qualify for a 2002 dividend, the division asserts that the children were not in his lawful and physical custody during the qualifying year.

There is no serious dispute that S was present in Alaska at the beginning of the qualifying year, and that D was present in Alaska when she was born on January 28, 2001. Regardless of whether Ms. D was an eligible resident at the beginning of the qualifying year, there is no serious dispute that her intent was for her children to remain in Alaska indefinitely and to make their home in this state. There is no dispute that the children lived in Mr. C's home for all of the qualifying year and through the date of application, with the exception of the three-month period Ms. D was back in California, during which the division suspects that D was also in California. Further, there is no dispute that the girls' older sister A, with whom they lived, was in Mr. C's custody throughout the qualifying year. A was originally a party to this case, but the division withdrew its objection to her application when Mr. C produced school records showing that she had been in school in Anchorage through the qualifying year, and that the Anchorage School District considered Mr. C and his wife to be A's legal guardians. Mr. C could not produce such records for S and D because they are too young to be in school.

### **III. Discussion**

The differences between legal and lawful custody have been reviewed many times in previous cases and need not be again explained. The question in this case is whether Mr. C's custody of the children was lawful, not legal. There is no evidence that there was anything unlawful about the children living with Mr. C in his home, or his exercise of physical custody over his granddaughters.

There has been a great deal of discussion as to whether D returned to California with Ms. D or whether she remained in Alaska. It appears more likely than not that she stayed in Alaska while Ms. D was back in California finishing the move, but regardless of whether she stayed in Alaska or made the brief trip to California, D does not qualify for other reasons.

The division argues that D does not meet the requirement of AS 43.23.005(a)(3) that the applicant be an Alaska resident for the entire qualifying year, because she was born in January of the qualifying year. The division also argues that D is not to be included in

the provision of AS 43.23.005(c) that a child born in the two years before the dividend year is eligible if she was born to or adopted to by an eligible resident.

To qualify for a dividend, a person must have been physically present during the entire qualifying year or only absent for allowable reasons, and the person must have been an Alaska resident for the entire qualifying year. AS 43.23.005(c) creates an exception to these rules for children who were born to or adopted by an eligible Alaska resident. Although one could easily argue that D was an Alaska resident upon her birth even though her mother was not, it cannot be overlooked that D was not born to or adopted by an eligible resident. Ms. D was not eligible, because she still had full-time permanent employment in California, and appears to have had other residency ties to California.

Though some might argue that D could have been “present” in Alaska before her date of birth, the depth of such a proposition exceeds the appropriate scope of an administrative decision regarding a modest property interest. The intent of the legislature appears to be that children must have been born as Alaska residents before the beginning of the qualifying year, or be born to or adopted by fully eligible Alaskans in order to qualify for dividends for that year. Because D was not born to eligible parents and was not born before the beginning of the qualifying year, she cannot qualify for a 2002 dividend.

#### **IV. Conclusion**

A preponderance of the evidence shows it is more likely than not that S D was a state resident in the lawful and physical custody of her grandfather, B C for the entire qualifying year. Ms. D’s credible testimony and other evidence in the file show a likelihood that S’s situation was essentially the same as her older sister A’s. S’s application for a 2002 dividends should be granted. D D was not an Alaskan resident for all of the qualifying year, and she was not born to or adopted by eligible Alaska residents during the two years proceeding the dividend year. The division was correct to deny her application.

#### **V. Order**

THEREFORE, IT IS ORDERED that the application of S D for a 2002 permanent fund dividend be granted;

IT IS FURTHER ORDERED that the application of D D for 2002 permanent fund dividend be denied.

DATED: this 14<sup>th</sup> day of January, 2005.

By: Signed  
DALE WHITNEY  
Revenue Hearing Examiner

#### **V. Adoption**

I, Terry Thurbon, under the authority of AS 43.05.010, order that the attached decision relating to the eligibility of S and D Doming for 2002 permanent fund dividends be adopted and entered in the applicant's file as of this date as the final administrative determination in this matter.

**Appeal Rights:** Applicants may ask the Commissioner of Revenue to reconsider this decision by filing a written Motion for Reconsideration within 10 days after the date of this decision, pursuant to 15 AAC 05.035(a). The motion must state specific grounds for relief, and should be addressed to: Commissioner's Office Appeals (Reconsideration), Alaska Department of Revenue, P.O. Box 110400, Juneau, Alaska 99811-0400.

If a Motion for Reconsideration is not filed, this order is the final administrative decision of the Alaska Department of Revenue. Appeals may be taken to the Alaska Superior Court. Appeals must be filed within 30 days of the date of this order, in accordance with Rules of Appellate Procedure 601-612 and 15 AAC 05.040.

DATED: January 14, 2005

By: Signed  
Terry L. Thurbon  
Chief Administrative Law Judge

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