

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

IN THE MATTER OF)
)
 M. E.)
) Case No. OAH 09-0284-PFD
)
2008 Permanent Fund Dividend)

CORRECTED DECISION¹

I. Introduction

M. E. timely applied for a 2008 permanent fund dividend. The Permanent Fund Dividend Division (“the division”) determined that Ms. E. was not eligible, and it denied the application initially and at the informal appeal level. At Ms. E.’ request, a formal hearing was held on June 22, 2009. Ms. E. appeared by telephone. PFD Specialist Peter Scott represented the division.

Because Ms. E. maintained her principal home in another state during the qualifying year, was not absent for a reason listed in AS 43.23.008(a)(1) – (3) or (9) – (11), and was not accompanying another eligible resident, she is not eligible for a 2008 dividend.

II. Facts

Ms. E. was born and raised in No Name City. She has been receiving dividends since 1983. After she married D. E., a Coast Guard member stationed in No Name City, Ms. E. moved to Key West when her husband was transferred to Florida. In 2006 and 2007 both Mr. and Ms. E. received dividends. Mr. E. was eligible as an active duty member of the armed forces, and Ms. E. as his accompanying spouse. Ms. E. applied on time for a 2008 dividend. The division does not have an application on file for Mr. E. Ms. E. stated in her appeal that Mr. E. did apply for a 2008 dividend, but it was apparently lost in the mail. Ms. E. filled out an application for Mr. E. and sent it to him by email to be printed, signed, and mailed.

On July 1, 2006, Mr. E. was transferred from Key West to Seattle and Mr. and Ms. E. moved to Kent, Washington, where they rented a house. On December 20, 2006, Ms. E. made a trip to No Name City to visit her parents, staying until January 2, 2007.

Apparently Mr. E. had expected he would be transferred to No Name City not Seattle. Early in 2007, Mr. and Ms. E. still had hopes that Mr. E. would soon be transferred back to Alaska. On

¹ A proposed decision was issued on September 4, 2009, and adopted on behalf of the final decision maker on October 2, 2009. The second paragraph of the introduction incorrectly read, “Ms. E. did not maintain her principal home in another state during the qualifying year. She is therefore eligible for a 2008 decision.” This paragraph has been changed in this corrected decision under 2 AAC 64.350(b). No other parts of the decision have been changed.

April 15, 2007, Ms. E. went back to No Name City and began working for the State of Alaska Department of Health and Social Services, with the expectation that Mr. E. would soon follow. So far those orders have not come through.

In February of 2008 Mr. E. moved into an apartment in Magnolia, near downtown Seattle, that was closer to the Coast Guard base. And after more than a year of living in Alaska, Ms. E. returned to Seattle in 2008. Mr. E. maintains Alaska as his state of legal residence in his military records, and both Mr. and Ms. E. maintain formal paper ties to Alaska.

III. Discussion

15 AAC 23.143(d) contains a list of actions that, if taken during the qualifying year, will make a person ineligible for the following year. In the case of a person who has taken any one of these actions, the division need not investigate any further to determine whether the applicant maintains the proper intent to remain an Alaska resident; the person is simply ineligible the following year, regardless of residency. An example of a disqualifying action is buying a resident fishing license in another state. Even if there is no dispute that the applicant continues to be an Alaska resident, if he buys a resident fishing license in another state he cannot qualify for a dividend the following year.

One of the disqualifying actions is if

The individual has maintained the individual's principal home in another state or country, regardless of whether the individual spent a majority of time at that home, except while absent for a reason listed

(A) in AS 43.23.008(a)(1) – (3) or (9) – (11), or

(B) in AS 43.23.008(a)(13), if the eligible resident whom the individual accompanies is absent for a reason listed in this paragraph.

Thus, Alaska residents may not maintain their principal home in another state at any time during the qualifying year and still qualify for a dividend, unless they are full-time students, serving in the military, serving in Congress or working for Congress, working for the State of Alaska in a field office, or accompanying as a spouse or child an eligible person absent for one of these reasons.

Ms. E. has been maintaining her principal home in another state since leaving Alaska, but she has remained eligible so long as she was accompanying Mr. E., and so long as he was eligible. In 2005, Mr. E.'s application was denied, and Ms. E.'s application was also denied because her absence during 2004 was not allowable under AS 43.23.008. In this case, Ms. E.' absence is allowable, because it is less than 180 days and consistent with continuing Alaska residency. But for part of the qualifying year Ms. E. was maintaining her principal home in Washington State, and the

person she was accompanying, though in the military, was not an eligible resident.² For this reason, regardless of whether she continues to be an Alaska resident, and in spite of the fact that she spent most of the qualifying year in Alaska, Ms. E. is not eligible for a 2008 dividend. This determination is based on acceptance of the division's argument that, in this particular case, Ms. E.'s "principal home" was in Washington State where she and her husband had rented a house and lived together. Ms. E.' principal home was not in Alaska at that time, regardless of her continuing residency and strong ties to the state.

The above discussion resolves this case, regardless of whether Ms. E. continues to be an Alaska resident. The division argues further that by maintaining her principal home in another state while her husband is not eligible, Ms. E. has taken an action that is inconsistent with continuing Alaska residency, and that she is therefore no longer an Alaska resident under AS 01.10.055(c). In this argument the division reads AS 01.10.055(c) too narrowly.

AS 01.10.055(c) states that a person who performs acts that are inconsistent with the intent to return to Alaska to remain indefinitely and make a home is no longer an Alaska resident. The division's error is in confusing an act that is an automatic disqualifier in a regulation with an act that proves subjective intent under a broad statute. To use the example of the fishing license again, taken by itself the act of buying a resident fishing license in another state would seem to be an act that is inconsistent with the intent to return to Alaska to make a home. But under the statute, one must look at all the evidence and try to determine what the person's true intent was. The evidence may show that the person's intent was to come home to Alaska after fraudulently saving a few dollars on the cost of a fishing license Outside. While this behavior is not commendable, enforcing fishing regulations in other states would not be the division's concern. Entering into a long-term employment contract that required one's presence in another state could be an act inconsistent with Alaska residency, unless it could be shown that the person intended all along to breach the contract at a specific time and return to Alaska. In all cases, the division's concern is to determine the truth about the person's genuine intent to return to Alaska. There are no automatic rules or technical triggers in the inquiry into whether a person is still an Alaska resident.³

² One might argue that Mr. E. was eligible, but simply did not get an application in to the division on time. However, one of the eligibility criteria is actually applying for a dividend. AS 43.23.005(a)(1). It is the applicant's responsibility to ensure that the division actually receives the application on time. 15 AAC 23.103(g). Because Mr. E. did not get an application to the division during the 2008 application period, he is not eligible for a 2008 dividend.

³ Although the Supreme Court has ruled that a person lacking the legal ability to remain indefinitely in country cannot legally form the requisite intent for residency, even for persons who intend to stay in Alaska forever and reasonably believe that they will be allowed to do so. *Cosio v. State of Alaska, Dept. of Revenue*, 858.P.2d 621, 624 (Alaska 1993).

The necessity of examining evidence to learn an individual's subjective intent is not always easy or convenient. This fact is not avoidable when residency is the issue. The regulation that applies to this case, 15 AAC 23.143(d), permits the division to avoid the effort altogether by simply denying applications from people who have taken certain actions during the qualifying year that are generally associated with non-resident status. If there is a genuine dispute about whether Ms. E. really plans to ever come back to Alaska, that question will have to be decided another day by weighing the evidence that is available at the time. But the question cannot be answered by merely pointing out that her husband forgot to file his application in 2008.

IV. Conclusion

Ms. E. maintained her principal home in another state during part of the qualifying year. She was not accompanying an *eligible* spouse on active duty in the military. Ms. E. is not eligible for a 2008 dividend. Nothing in this decision is intended to affect Ms. E.' eligibility for 2009 or subsequent dividends.

DATED this 5th day of February, 2010.

By: Signed
DALE WHITNEY
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.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 8th day of February, 2010.

By: Signed
Signature
Dale Whitney
Name
Administrative Law Judge
Title

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