

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

IN THE MATTER OF)
)
D. & E. A.)
) Case No. OAH 09-0676-PFD
2009 Permanent Fund Dividend)

DECISION

I. Introduction

B. A. timely applied for 2009 permanent fund dividends on behalf of his minor daughters D. and E. The Permanent Fund Dividend Division (“the division”) determined that the applicants were not eligible, and it denied the applications initially and at the informal appeal level. Mr. A. requested a formal hearing.

This case follows a similar case in which the division had denied an application from D. for a 2008 PFD. That denial was affirmed after a formal hearing and the decision was adopted as the final administrative decision of the Department of Revenue. The parties have agreed that the facts in this case are undisputed and that all of the issues in this case were addressed in D.’s 2008 case. The parties agreed that another hearing was unnecessary, and that this decision should be based on the written record in this case, and the written record, testimony, and argument in the previous case. The entire record in *In The Matter of D. A.*, case number 09-0381-PFD, is therefore incorporated into the record for this case.

In this case E. A., born in 2008, joins her older sister D., who was born in 2006.

II. Facts

D. was born in California and is a United States citizen. E. was born in Soldotna and is also a United States citizen. The children’s father, B. A., is a Canadian citizen, and their mother is a British subject. Besides being U.S. citizens, the children are also Canadian citizens, and they are eligible to apply for British citizenship through their mother.

As a Canadian, Mr. A. is in the United States for employment purposes on a “TN” visa that is valid until 2012. The children’s mother is in the country on a “TD” visa, which is a derivative of a TN visa.

The A. family moved to Alaska on September 18, 2006. As the holder of a TN visa, Mr. A. may not establish his domicile within the United States. This means that he cannot form the intent to remain in the United States indefinitely without violating the terms of his visa. To obtain a TN

visa, Mr. A. was required to demonstrate that his work would end at a predictable time and that he would leave the country on completion of his work. In the past, when his visa expired, Mr. A. has left the country as required, traveled to the border, and applied for another TN visa, which has always been granted. Mr. A. testified that he plans to continue obtaining new TN visas indefinitely and he does not anticipate any problem doing so, but that he does not intend to seek status as a permanent resident of the United States. When asked, Mr. A. testified that if his visa was not renewed and he was required to leave the United States, “at this point” he would take his children with him. Thus, the children would not stay in Alaska in the physical custody of anyone besides their parents, even though they have the right to as United States citizens.

Recognizing that they are not eligible, Mr. and Ms. A. have not applied for permanent fund dividends for themselves, only for D. and E. As a sponsor, the children’s parents have named an attorney who has agreed to receive their dividends in trust for the girls. The attorney is an eligible Alaskan who received a 2009 dividend.

III. Discussion

In order to be eligible for a permanent fund dividend, the applicant must be an Alaska resident.¹ An Alaska resident is someone who is physically present in the state and has the intent to remain in Alaska indefinitely and to make a home in the state.²

The issue in this case is whether three-year-old D. and one-year-old E. have the requisite intent to remain in Alaska indefinitely and make their home in Alaska.

Previous cases have established that

Children generally derive their intent to live in Alaska, and thus their residency, through their parents. This does not mean the child will always be a resident of the same place as his parent, but rather that the parent forms the child’s intent for him because the minor lacks the legal capacity to form intent.³

Although they are not Alaska residents, the children’s parents could intend for the children to remain in Alaska indefinitely, regardless of what happens to the parents. Such a scenario is not implausible when the parents are from an underdeveloped or war-torn country, as opposed to England and Canada, and the children have relatives in Alaska who could care for them. Nor is it inconceivable that parents might move to another state or country but leave their children in Alaska

¹ AS 43.23.005(a)(2)-(3).

² AS 32.23.095(7); AS 01.10.055.

³ In the Matter of C., C. & B.W., Department of Revenue case number 030690 at 3 (2004). See also *State v. F. L. A.*, 608 P.2d 12, fn. 14 (Alaska, 1980)(minors do not have capacity to contract, minors cannot alone convey property, cannot borrow money or execute a mortgage, and in some cases may not consent to a medical operation).

to live with friends or relatives, although this is easier to imagine with much older children. In such a case, so long as the parents plan to keep the children in Alaska on a permanent or indefinite basis, the children become Alaska residents even if their parents were not in the state and had no intent to ever return. Mr. A., however, testified that his intent is to keep the family together, and that D. and presumably E. will accompany him should he be required to leave the country. Thus, under the facts of this particular case, the residency of these two children has been tied to their parents. At this point it is not certain that the children will be in Alaska beyond 2012, although Mr. A. does not anticipate any problem keeping the family in Alaska much longer.

Although there are significant differences, it is instructive to compare this case to the *Cosio* case.⁴ Although they were in the country illegally, the *Cosios* subjectively intended to remain in Alaska indefinitely and to make their home in the state. The court found that “it makes abundant sense to conclude that aliens who may not legally live in Alaska are not permanent residents for dividend purposes.” Mr. and Ms. A. are not in the country illegally, but they may not legally form the intent to remain indefinitely. They are only in the country for so long as Mr. A. has qualifying employment and the United States is willing to renew his visa. Mr. A. may reasonably expect the United States to continue renewing his visa forever, but he does not have a legal right to remain in the country, and thus in Alaska, for more than the period of his current visa.

The children differ from both their parents and the *Cosios* in that they do have the legal right to remain in Alaska indefinitely. If the children intended to stay in Alaska indefinitely, they would be eligible residents, and Mr. A. is correct that the division may not discriminate against the children merely because of their parents’ citizenship. However, the children do not have the intent to remain in Alaska indefinitely. Because Mr. A. has decided that he will take D. and E. with him wherever he goes, their intent has been pinned to Mr. A.’ ability to remain in Alaska.

If their parents intended for them to remain in Alaska indefinitely, the girls would be Alaska residents. But Mr. A. testified that if he is required to leave the country, he will take his daughters with him. Thus, the girls’ intent, as formed for them by their parents, is to only stay in the country for so long as Mr. A. is permitted to remain in the country, which is for a limited time ending at a date certain in 2012. It is possible that, when the girls are older, their parents will decide that it is so important for them to remain in the United States or in Alaska that the girls will stay in Alaska indefinitely regardless of the parents’ immigration situation, perhaps by placement in the physical custody of a friend or relative if necessary. Such arrangements are not necessarily unusual,

especially with older teenage children. At the point when their parents decide the girls will be staying in Alaska indefinitely, regardless of how long the parents are allowed to remain in the state, the girls would be Alaska residents under AS 05.10.010. Until their parents decide that the girls will remain in Alaska indefinitely regardless of the parents' immigration status, the girls cannot form the requisite intent to become Alaska residents. Not because of the immigration status of their parents, but because their parents have made a decision to only keep them in Alaska for as long as Mr. A. has the legal right to remain in the country, which is until a date certain in 2012.

Because the applicants are not eligible for 2009, dividends, it is not necessary to address an issue raised by the division regarding the applicants' proposed sponsor. The proposed sponsor is a licensed attorney who has been retained by their parents to represent the applicants. While the sponsor would normally be a child's parent or a person with physical custody of the children for a plurality of the qualifying year, any individual may serve as a sponsor if there is a demonstrated need for that person to serve as the sponsor. In this case, the children's lawful custodians are not eligible residents. If the children were eligible Alaska residents, there would be a need for them to have a sponsor other than their parents. Because they are not eligible residents, it is not necessary to determine who would be the most appropriate sponsor.

IV. Conclusion

Although they are United States citizens and have the right to remain in Alaska indefinitely, the applicants in this case are only in Alaska for so long as their nonresident parents are permitted to remain in the United States. Because their parents are only in the United States for a limited time and do not currently have the legal ability to form the intent to remain in Alaska indefinitely, the applicants also do not have the intent to remain in Alaska beyond the current period of their father's visa. The applicants are therefore not Alaska residents, and do not qualify for permanent fund dividends.

DATED this 18th day of March, 2010.

By: *Signed* _____
DALE WHITNEY
Administrative Law Judge

⁴ *Department of Revenue v. Cosio*, 858 P.2d 621 (1993).
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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 23rd day of April, 2010.

By: Signed
Signature
Virginia Blaisdell
Name
Director, Administrative Services Division
Title

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