

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

In the Matter of:	)	
	)	
THE ESTATE OF B. W.	)	
	)	OAH No. 10-0161-PFD
<u>2009 Permanent Fund Dividend</u>	)	Agency No. 2009-058-0877

**DECISION**

**I. INTRODUCTION**

G. W. filed an application for a Permanent Fund Dividend (PFD) on behalf of her husband, B. W. The Permanent Fund Dividend Division (Division) denied that application because Mr. W. had died during the qualifying year. Ms. W. appealed the Division’s decision.

A formal hearing was held on June 16, 2010. Ms. W. represented herself and appeared in person. The Division was represented by PFD Specialist Peter Scott, who appeared by phone. Exhibits 1 through 12 were admitted into evidence without objection. Ms. W. did not provide any additional evidence, but did present her argument as to why the Division’s decision was incorrect.<sup>1</sup>

For the reasons discussed below, the decision denying the PFD application is upheld.

**II. MATERIAL FACTS**

The PFD application for B. W. was dated March 23, 2009.<sup>2</sup> This application indicates that Ms. W. was filing it on behalf of Mr. W. who was deceased. Mr. W.’s date of death was October 29, 2008.<sup>3</sup> 2008 is the qualifying year for the 2009 PFD.<sup>4</sup>

**III. DISCUSSION**

*A. Do the PFD regulations exceed statutory authority?*

Ms. W.’s first argument<sup>5</sup> is that 15 AAC 23.103(b) exceeds the authority granted by the legislature. The relevant portion of this regulation states “An individual who dies before the application period set by AS 43.23.011 is not eligible for a dividend.”<sup>6</sup> In support of this regulation, the Division relies on AS 43.23.005(h).

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<sup>1</sup> Two discovery orders were issued prior to the date of the hearing.

<sup>2</sup> Exhibit 1.

<sup>3</sup> Exhibit 3, page 4.

<sup>4</sup> AS 43.23.095(6); 15 AAC 23.993(7) & (11).

<sup>5</sup> This argument was actually stated second during the hearing, but it was the argument she focused on and stressed as most important.

<sup>6</sup> 15 AAC 23.103(b).

AS 43.23.005(h) does not directly support the Division's position. This subsection describes how to apply on behalf of a deceased person who "would otherwise have been eligible" but it does not define one way or another whether a person who dies during the qualifying year would be eligible. Accordingly, it is still necessary to see whether there is any statutory support of the regulation stating that a person who dies during the qualifying year is not eligible for a PFD.

State residency is one of the requirements to be eligible for a PFD. Mr. W. would be eligible for a PFD if he was a resident on the date of application and a resident during the entire qualifying year.<sup>7</sup> A state resident is defined as an individual

who is physically present in the state with the intent to remain indefinitely in the state under the requirements of AS 01.10.055 or, if the individual is not physically present in the state, intends to return to the state and remain indefinitely in the state under the requirements of AS 01.10.055.<sup>8</sup>

There is no dispute that Mr. W. was a state resident as of the date of his death.<sup>9</sup> He was not, however, a resident after his death. Residency requires a specific intent and a deceased individual is simply not able to have that intent. Because he was not a state resident during all of 2008, he is not eligible for a 2009 PFD. 15 AAC 23.103(b) is a valid regulation since it merely states that a deceased person is not eligible; something that is independently established under the eligibility and residency statutes enacted by the legislature.

That this is the correct interpretation is indirectly supported by AS 43.23.005(h). This subsection authorizes payment of a PFD to a personal representative if a person dies after an application was made (by that person), but before a PFD is paid. This subsection also authorizes an application by a personal representative if the individual dies during the application period. There is no provision in this subsection for an application for someone who dies during the qualifying year. A person dying during the qualifying year is not able to submit his or her own application because the application period starts the following January.<sup>10</sup> If the legislature had intended that such a person would still be eligible, it would likely have included a provision describing who was authorized to make that application. That there is no such provision in the statutes suggests the legislature was aware and intended that a deceased person was not eligible.

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<sup>7</sup> AS 43.23.005(a)(2) & (3).

<sup>8</sup> AS 43.23.095(7).

<sup>9</sup> He had received a PFD each year since 1999. Exhibit 6.

<sup>10</sup> AS 43.23.011(a).

Finally, if the date of death does not determine when a person loses eligibility, there is no other event that would cut off eligibility. If Mr. W. continued to be a resident for PFD purposes through the entire qualifying year, then he would still be a state resident today and would presumably have qualified for the 2010 PFD and all subsequent PFDs. If this were the result intended by the legislature, it is likely that clarifying language would have already been adopted by the legislature.

*B. Different eligibility rules for different classes of people.*

At the informal appeal level, Ms. W. noted:

A child born Dec 31<sup>st</sup>, 2008 is eligible for the 2008 PFD. It is possible for a child to be conceived after the application period and be born before the end of that year. An individual in this example is clearly not an Alaskan resident for the entire year yet still qualifies.<sup>[11]</sup>

Ms. W. is correct that a child born during the qualifying year is not a state resident during the entire year but is still eligible to receive a PFD. However, the PFD statutes contain a specific exception that waives the residency requirements for recently born or adopted children.<sup>12</sup> Prior to the adoption of Senate Bill 171 in the 2010 legislative session, there was no similar exception for individuals who die during the qualifying year. Senate Bill 171 amends AS 43.23.005(h) to provide that the personal representative of an estate may apply for a PFD on behalf of a person who dies during the qualifying year.<sup>13</sup> Unfortunately, the changes to this statute do not take effect until January 1, 2011.<sup>14</sup> Until the effective date of this amendment, there is no provision that would allow the Division to pay a PFD based on the application filed in this case. Looking forward to the 2011 filing period, the new statutory language would allow applications on behalf of individuals who died during the 2009 and 2010 qualifying years, but not for anyone who died during 2008 or earlier.<sup>15</sup>

The legislature created the Permanent Fund Dividend system<sup>16</sup> and established the requirements for eligibility. The Division and the Commissioner must apply the law and

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<sup>11</sup> Exhibit 3, page 2.

<sup>12</sup> AS 43.23.005(c).

<sup>13</sup> The estate may receive a PFD if the individual 1) died during the qualifying year, 2) would have qualified for a PFD but for his or her death, 3) received a PFD for the year prior to his or her death, and 4) was a resident for at least 180 days prior to his or her death. Chapter 22, SLA 10 § 1.

<sup>14</sup> Chapter 22, SLA 10 § 10.

<sup>15</sup> The statute provides for an extended filing period when applying on behalf of a deceased individual.

<sup>16</sup> The Permanent Fund itself is established in the Alaska Constitution, but the dividend program is entirely statutory. *See* Alaska Constitution, Art IX, § 15.

regulations as the legislature provides.<sup>17</sup> Under the law and regulations applicable to the 2009 dividend, the Division had no choice other than to deny Mr. W.'s application.

*C. Must Alaska's rules be consistent with the federal government's rules?*

Finally, Ms. W. argues that the federal government deems a person to be alive for the entire year if the person is alive for at least one day during the year. She asserts that state law should be consistent with federal law. In her request for a formal hearing, Ms. W. states:

The filing period for the IRS is by concept equivalent to the PFD application period. The Federal Government has long set precedence [sic] that a person who dies in any month is deemed to be alive for that whole calendar year. This allowed me to claim my spouse and file a joint return in the year of his death. This fact alone brings into question the constitutionality of AS 43.23.011.<sup>[18]</sup>

Alaska was not required to adopt the rules governing the federal income tax in defining residency for purposes of the Alaska Permanent Fund dividend. While there may be good policy reasons to follow the federal income tax rule, there may be equally good reasons to follow a different rule. Ultimately, that is a policy question for the legislature to answer. Prior to this year, the answer was that individuals are not eligible to receive a PFD unless they are alive during the entire qualifying year. Effective January 1, 2011, that will change but the legislature did not make the change retroactive to the 2008 qualifying year for a 2009 PFD.

**IV. CONCLUSION**

Pursuant to 15 AAC 23.103(b), neither Mr. W. nor his estate may receive a 2009 PFD. This regulation is valid as an implementation of the eligibility requirements enacted by the legislature. Accordingly, the Division's decision denying the application is upheld.

DATED this 18<sup>th</sup> day of June, 2010.

By: Signed  
Jeffrey A. Friedman  
Administrative Law Judge

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<sup>17</sup> This decision does not address the question of whether the eligibility rules violate the Alaska Constitution. *But see, Eldridge v. State*, 988 P.2d 101, 103 (Alaska 1999) (PFD regulations are only subject to minimum scrutiny review under the equal protection clause of the Constitution).

<sup>18</sup> Exhibit 5, page 4.

## 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 16<sup>th</sup> day of July, 2010.

By: Signed  
Signature  
Jerry Burnett  
Name  
Deputy Commissioner  
Title

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