

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

In the Matter of)
)
 N. and D. A.)
) OAH No. 11-0087-PFD
 2010 Permanent Fund Dividends) Agency Nos. 2010-064-9543/9544

DECISION

I. Introduction

N. and D. A. timely applied for 2011 permanent fund dividends on March 2, 2010. The Permanent Fund Dividend Division (division) determined that the A.s were not eligible because they were no longer Alaska residents for purposes of the PFD program. For this reason, the division denied their applications initially and at the informal appeal level. The A.s requested a formal hearing which was held April 15, 2011. Ms. A. appeared by telephone for herself and Mr. A.'s estate.¹ PFD Specialist Peter F. Scott represented the division and appeared by telephone. The evidence establishes that on the date of application, March 2, 2010, it is more likely than not that the A.s were residents of Alaska for purposes of the PFD Program.

II. Facts

Mr. A. moved to Alaska over 50 years ago and Ms. A. moved to Alaska over 40 years ago. At the time of filing their 2010 PFD applications on March 2, 2010 Mr. A. was 83 years old and Ms. A. was 72 years old. In June 2009 they moved into senior housing in Ninilchik.² Over the years they had collected more belongings than would fit in their new apartment so they rented a storage facility for the overflow.³

On November 6, 2009, the A.s' flew to Washington on one way tickets to visit their daughter for the holidays. No return ticket was purchased because they were not sure when they would return and Mr. A. wanted to drive back to Alaska, an idea that Ms. A. had not agreed to.⁴ Shortly after arriving, Mr. A.'s medical conditions worsened and it was decided that they would stay with their daughter while Mr. A. sought medical attention.

¹ Mr. A. died in March 2011.

² Exh. 4 at 7 – 10.

³ A. Testimony; Exh. 7 at 3 – 10.

⁴ A. Testimony.

The A.s cancelled their senior housing agreement, their daughter flew to Alaska and moved the rest of the A.'s belongings in storage. Mr. A. was moved into a Washington nursing home in July, 2010. He died in March 2011.

On March 2, 2010, the A.s applied on line for their 2010 PFD's. In response to the application question asking if they were in Alaska on that day, they answered "no" because they were in Washington⁵ When asked if they were returning to Alaska, they answered "no." When asked if they maintained a principal home in Alaska they answered "yes." When asked the reason for their absence from Alaska, the A.s answered that they were absent under code "L - Life - Threatening Care."

The A.'s "no" answers prompted further inquiry from the division. It sent the A.s a form specifically asking them if they intend to return to Alaska to remain indefinitely and if so, when would they return. These forms were signed by Ms. A. and dated after Mr. A. had moved into the nursing home. On each form she again marked "no" when asked if they intended to return and when asked to provide a return date left it blank. Based on this information the division concluded that the A.s were not eligible for the 2010 PFD because they no longer maintained the intent to return to Alaska to remain indefinitely. The division believed that the A.s now maintained their primary residence in Washington.

Ms. A. appealed explaining that she "mistakenly marked the 'no' box. We were fully intending to return to Alaska after the holidays spent with our daughter in Seattle All our household goods, post office box, telephone and car are all in AlaskaUnfortunately it was clear that my husband could not travel safely after his hospitalization and current stay in a nursing home for recovery. My husband speaks of returning 'home' as soon as he is able."⁶ This statement is signed and dated September 27, 2010.⁷

The division considered the A.s' evidence and affirmed its prior decision that the A.s were not residents of Alaska for purposes of the 2010 PFD. This formal appeal followed.

III. Discussion

To be eligible for a PFD, an applicant must meet several eligibility criteria one of which is that an applicant must be a "state resident on the date of application" and "during the entire

⁵ EXH 2 at 1, 2.

⁶ Exh. 4 at 6.

⁷ Exh. 4 at 5.

qualifying year.”⁸ A person who establishes residency in Alaska remains a resident during an absence from the state, unless the person establishes or maintains residency in another state, or performs other acts in a manner or is absent under circumstances that are inconsistent with the intent to remain in Alaska indefinitely and make a home in the state.⁹ The qualifying year for the 2010 PFD is 2009.¹⁰ The “date of application” is the date on which the application is timely filed.¹¹ Here the date of application is March 2, 2010. The division contends that while absent, the A.s have established a principal home in Washington and are therefore absent under circumstances that are inconsistent with Alaska residency¹²

In support of its position, the division relies upon a 2009 decision, *In re R.M.*, OAH No. 09-0147-PFD (September 16, 2009). In *In re R.M.*, the division denied Mr. M.’s application for a 2007 PFD after concluding that Mr. M.’s long term medical absences (since 2004) and medical conditions established that it was more likely than not that Mr. M. no longer intended to return to Alaska and remain indefinitely as required for PFD eligibility. Mr. M. was a long term Alaska resident who was injured and sought medical treatment in Washington. For three years before the division denied his application, Mr. M. was living in apartment in Washington with a friend. He was considered disabled and spent most of his time absent from Alaska. In 2006, the qualifying year for the 2007 PFD, Mr. M. was absent from Alaska 290 days. While Mr. M. wanted to return to Alaska and kept his belongings and boat at in storage in Juneau, the division reasoned that because of his medical conditions it was unknown when or whether Mr. M. would be able to return to Alaska to live. The decision notes Mr. M.’s desire to return to Alaska but emphasized that while one may desire to return, “a person does not intend to do what he is unable to do, no matter how much he wishes to.”¹³

Applying the distinction between desire and intent discussed in *In re R.M.*, the division reasoned that the A.'s situation was analogous to Mr. M's: they both left their belongings in storage in Alaska, they both were registered to vote in Alaska and they both wanted to return to Alaska as soon as possible but were prevented from doing so by medical conditions. All were living with someone in Seattle while they received medical care and had no idea when or whether they would be able to return. Therefore, the division concluded that under *In re R.M.*,

⁸ AS 43.23.005(a)(2) & (3).

⁹ AS 01.10.055.

¹⁰ AS 43.23.095(6).

¹¹ 15 AAC 23.993(b)(2).

¹² Division Position Statement at 3.

¹³ *In re R.M.*, Oah No. 09-0147-PFD at 2 (September 16, 2009).

Mr. A., while he may desire to return, could not form the intent to return to Alaska and was, therefore, no longer a resident. As for Ms. A., the division denied her PFD reasoning that Ms. A.'s intent was linked to Mr. A.'s intent and that because his ability to return was uncertain, so was hers.

In re R.M., is instructive in that it identifies an applicant's ability to return as a factor to be considered when determining intent but it is not the only factor. The record must be viewed as a whole and the evidence weighed.

The focus in this appeal is the A.s' intent on March 2, 2010. Unfortunately, much of the evidence contained in the file was collected well after that date and it is unclear whether the information represents the A.s' intent as of March 2 or after Mr. A. was placed in a nursing home. For example Ms. A.'s written statement in September 2010 that "[u]nfortunately it was clear that my husband could not travel safely after his hospitalization and current stay in a nursing home for recovery." At the time of their applications, Mr. A. had not entered the nursing home.

The evidence in the record cutting against the A.s is that they left on a one-way ticket, Ms. A. answered "no" when asked if they were returning to Alaska to remain indefinitely and did not supply an anticipated date of return. Also, they moved out of their apartment shortly before traveling to Washington.

The evidence in support of the A.'s appeal is that as of March 2, 2010, Mr. A.'s medical situation was still under assessment; he was not placed in a nursing home until four months later. Nor was Mr. A. continuously hospitalized during this period. The A.'s household possessions and vehicle remained in Alaska. Ms. A. testified that the items were placed in storage to save money because they planned on returning but did not know when.

Weighing the evidence, the purchase of a one way ticket is neutral. It is not uncommon for "snow birds"¹⁴ to purchase a one-way ticket so they may have flexibility to plan their return. The airlines' fees and travel restrictions do not provide a traveler with flexibility and if a person does not have to return to work on a certain date, it is not unreasonable to travel on a one-way ticket. Similarly vacating their apartment under these circumstances is of neutral persuasive value. It makes economic sense if someone is going to be gone for several months to place belongings in storage versus continuing to pay rent. If the A.s intended to remain in

¹⁴ The term given to Alaskan's who go south for the winter.

Washington, it would have been economically advantageous to have the A.'s daughter sell their belongings or move them to Washington rather than to continue to pay storage fees.

Unlike Mr. M. who had been absent for the majority of the qualifying year and prior years, the A.s had recently arrived in Washington when Mr. A.'s condition worsened. When Ms. A. responded to the division's second inquiry asking if they were intending to return to Alaska and if they had a return date, she responded based on her knowledge and intent as of August 2010. The form provided by the division does not emphasize that the relevant period is up through the date of application. By August 2010, Mr. A. was in a nursing home and Ms. A. did not know when she would return to Alaska because she was caring for her husband. The situation was different, however, at the time of the A.'s applications.

At the time of their applications, the A.'s household belongings and vehicle were in Alaska. As indicated on their applications, their principal home was in Alaska. Ms. A.'s testimony was that they were still expecting to return to Alaska. Ms. A. completed their applications honestly and to the best of her ability based on information known at the time.

Much of the information relied upon by the division was provided by Ms. A. after Mr. A. had entered the nursing home. It is difficult to discern whether the answers reflected circumstances as they existed at the time of the application – which is the relevant time – or as they existed after Mr. A. had entered the nursing home. However, based on the credible testimony of Ms. A. and the evidence, it was more likely than not that as of the date of application, the A.s desired and intended to return to Alaska to remain indefinitely. Therefore, on the date of application the A.s are residents of Alaska for purposes of the 2010 PFD.

This decision is restricted to the A.'s 2010 PFD applications. Their 2011 applications will be decided under the facts and time period relevant to the 2011 PFD. The division's argument that Ms. A.'s intent is so closely tied to Ms. A. such that if he does not intend to return and remain in Alaska indefinitely, his intent must be attributed to Ms. A. is not well taken. The A.s are adults and while couples intents may be dependent, they are not always dependent on each other. Ms. A.'s absence might be allowable under AS 43.23.008(a)(6) or (7), providing care for a family member. However, that is a factual inquiry to be resolved in the future.

IV. Conclusion

It is more likely than not that at the time of filing their 2010 PFD applications, N. and D. A. were Alaska residents for purposes of the 2010 PFD and are therefore each eligible to receive a 2010 PFD. The decision of the division to deny the A.s their 2010 PFDs is REVERSED.

DATED this 18th day of May, 2011.

By: 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.

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

DATED this 13th day of June, 2011.

By: Signed
Signature
Rebecca L. Pauli
Name
Administrative Law Judge
Title

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