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

IN THE MATTER OF	)	
	)	
W. O.	)	
	)	Case No. OAH-06-0561-CSS
	)	CSSD Case No. 001062744

DECISION & ORDER

I. Introduction

The obligor, W. O., appeals the denial of his request for relief from an administrative order issued by the Child Support Services Division (CSSD) on July 20, 2006. Administrative Law Judge Dale Whitney of the Office of Administrative Hearings heard the appeal on December 5, 2006. Mr. O. appeared by telephone. The custodian, D. A., did not appear. David Peltier represented CSSD. The children are J. A. (DOB 00/00/96), J. A. (DOB 00/00/98), G. A.-N. (DOB 00/00/00) and A. A. (DOB 00/00/03). Mr. O. is not the father of any of these children. The administrative law judge finds that CSSD should suspend efforts to collect arrears from Mr. O. until efforts to collect from the biological fathers have been exhausted.

II. Facts

The facts in this case are not in dispute. W. O. and D. A. were married on October 7, 1994. Four children were born to Ms. A. during the marriage: J. A. (DOB 11/9/96), J. A. (DOB 12/3/98), G. A.-N. (DOB 8/15/00) and A. A. (1/28/03). Mr. O. is not the father of any of them.

On February 12, 1999, the division issued a support order for J. in the amount of $50 per month effective March 1, 1999, with arrears in the amount of $1,400 from November, 1996 through February, 1999. Mr. O. did not appeal.

On December 15, 1999, the division issued a modified order, adding J. and maintaining the amount of $50 per month. Mr. O. did not appeal.

In 2001, Mr. O. filed a request for genetic testing with respect to J. and J.. The request was denied on April 11, 2001 because Mr. O. did not provide the necessary information. Mr. O. did not appeal from the denial of genetic testing.

On October 1, 2001, the division issued a modified order adding G. and increasing the support amount to $350 per month for all three children, effective August 31, 2001. Mr. O. did not appeal.

On January 8, 2004, the division issued another modification, adding A. to the order and reducing the amount of the obligation to $181 per month for all four children, effective July 1, 2003. Mr. O. did not appeal.

On March 24, 2004, Mr. O. filed a divorce complaint in the Nome superior court, asking that paternity be disestablished for all four children and that all arrears in child support be extinguished as well as ongoing support.

The superior court ordered genetic testing, which excluded Mr. O. as the father of any of the four children. On September 29, 2004, the court entered a divorce decree that disestablished paternity and terminated any future support obligation, but did not address arrears.

Mr. O. then wrote to the judge in the case, asking for relief from arrears. The court advised Mr. O. to direct his request to the division, referencing AS 25.27.166 and stating that using the division's procedures, "you will be able to extinguish any existing arrearages."

Acting on the judge's advice, Mr. O. wrote to the division and asked for relief from the outstanding arrears in his case. CSSD denied Mr. O.'s request, and Mr. O. requested a formal hearing. Administrative Law Judge Andy Hemenway determined that the request should have been forwarded to the director of CSSD for a determination as to whether relief from the order should be granted under 15 AAC 125.125, a regulation that authorizes the director to grant relief from an administrative order for many of the same reasons that relief from judgments may be afforded under Civil Rule 60(b). Upon reviewing Mr. O.'s request, the director issued the following decision:

> I have reviewed the request for relief from an agency Amended Administrative Child Support and Medical Support Order and decided that the relief will not be granted. You petitioned the Superior Court for disestablishment of paternity and asked the court to extinguish arrears owed for the children. When the court issued the disestablishment order on September 29, 2004 your future support obligation was terminated but the court did not address the arrears issue. CSSD interprets this order as meaning you still owe a duty of support up to the date you petitioned the Superior Court for disestablishment of paternity.

Mr. O. again requested a formal hearing, resulting in this case. In answer to questions from the administrative law judge, CSSD stated that the identities of the biological fathers are known, and that the division is currently working on establishing paternity orders against those men. CSSD stated further that its intent is to collect support from Mr. O. up to the time he disestablished paternity in 2004, and then to collect support from the fathers of the children after that time. The division stated that it does not intend to collect support from both the fathers and Mr. O. for any

overlapping periods. CSSD's intent, therefore, is to relieve all of the fathers of their duty to support their children during periods in which, legally, CSSD might be able to collect some small amount of support from Mr. O. to be divvied up among the four children.

III. Discussion

According to AS 25.27.166(d),

> If a decision under this section disestablishes paternity, the petitioner's child support obligation or liability for public assistance under AS 25.27.120 is modified retroactively to extinguish arrearages for child support and accrued liability for public assistance based on the alleged paternity that is disestablished under this section. This subsection may be implemented only to the extent not prohibited by federal law.

Civil Rule 90.3(h)(2) states that "child support arrearage may not be modified retroactively, except as allowed by AS 25.27.166(d)."

According to 15 AAC 125.125(b)(5):

> The director will grant relief under this section from an administrative order if the party demonstrates, to the director's satisfaction…(5) that the order, if the order is an administrative support order, has been satisfied, released or discharged, or that a prior paternity judgment upon which that support order was based has been reversed or otherwise vacated, so that prospective application of the order is no longer equitable.

The director's decision cites 15 AAC 125.125 and offers the following reasoning:

> When the court issued the disestablishment order on September 29, 2004 your future support obligation was terminated but the court did not address the arrears issue. CSSD interprets this order as meaning you still owe a duty of support up to the date you petitioned the Superior Court for disestablishment of paternity.
>
> CSSD has not cited any federal law that would prohibit retroactive modification of Mr. O.'s support order to eliminate any obligation to pay arrears. To the extent the order constitutes or is analogous to a judgment, Civil Rule 60(b)(5) permits relief from a judgment when "it is no longer equitable that the judgment should have prospective application…." Civil Rule 60(b)(6) allows relief from a judgment for "any other reason justifying relief from the operation of the judgment." While 15 AAC 125.125 excludes the language of Civil Rule 60(b)(6) from the reasons that the director may grant relief from an order, in *State, CSED v. Maxwell* the Alaska Supreme Court made it clear that all of Civil Rule 60(b) applies to the superior court's ability to grant relief from a child support order. [1] It is, therefore, clear that the judge who disestablished Mr. O.'s paternity could have granted relief from the entire order if he had not expected that CSSD would administratively extinguish the arrears under AS 25.27.166(d). There is no

[1] *State, CSED v. Maxwell*, 6 P.3d 733 (Alaska 2000).

apparent reason that the commissioner would not have the same authority over an administrative order, even if the court did not address the issues.

In *Ferguson v. Child Support Enforcement Division*,[2] the Alaska Supreme Court decided that prospective application of a judgment does not include prospective collection of unpaid support that has already accrued. But there is a risk to relying on that case as an immutable rule. The *Ferguson* court relied heavily on policy concerns in reaching its decision: "CSED argues that it is a matter of social policy to resolve paternity disputes promptly. We agree." This argument was directed against legal obligors like Mr. O. who could have escaped liability if they had been more prompt in disestablishing paternity. But CSSD should be prepared for the possibility that, under certain factual scenarios, similar policy bases might support the opposite result. For example, if CSSD was entirely aware that it was collecting from the wrong man, but stuck with an existing order for years instead of establishing paternity for the real father, the policy behind *Ferguson* could easily support retroactive modification in order to ensure that CSSD is at least as diligent in resolving paternity issues as putative fathers. That may not be the particular factual situation in this case, but with multiple obligors for the same children this case does appear to present new policy considerations and legal questions. In considering policy, the reasoning behind guiding Supreme Court decisions should be given as much weight as the particular rules the court has announced in previous cases. In cases such as *Button* [3] and *Maxwell*,[4] the court has not hesitated to back away from the rule of *Ferguson* when the interests of justice so require.

The administrative law judge has been unable to find a case specifically stating how CSSD should collect support when there are multiple men who could be legally required to simultaneously pay support for the same child. In *CSED v. Kovac* the Supreme Court, at the insistence of CSED, made it clear that biological fathers are not excused from their duty to pay support because of the existence of an order against another man.[5] CSSD's position in Mr. O.'s case appears to be a reversal of the position it argued to the *Kovac* court. While the *Kovac* court did not specifically say that the disestablished father was excused from paying arrears, the court accepted CSED's position that it was erroneous to begin collecting support from the biological father only after the date that the legal father disestablished his paternity. In the *Kovac* case,

[2] *Ferguson v. Child Support Enforcement Division*, 977 P.2d 95 (Alaska 1999).
[3] *State, CSED v. Button*, 7 P.3d 74 (Alaska 2000).
[4] *State, CSED v. Maxwell*, 6 P.3d 733 (Alaska 2000).
[5] *State, CSED v. Kovac*, 984 P2d 1109 (Alaska 1999).

Kovac was the biological father and a man named Romer was the legal father. Like Mr. O., Romer had disestablished paternity. Kovac argued that CSED should continue to collect arrears from Romer up until the time Romer had disestablished paternity. But unlike in Mr. O.'s case, CSED was attempting to collect first from the biological father, Kovac:

> CSED argues that the superior court erred in ruling that Kovac's duty to support R.M. attached as of May 22, 1996, the date that Judge Curda effectively disestablished Romer's paternity. CSED insists that Kovac's child support duty arose upon R.M.'s birth, persuasively arguing that *State, CSED v. Rios*[6] controls the issue. In *Rios*, relying upon statutory and common law, we held that "a biological parent's duty of support commences at the date of the birth of the child."[7]

The *Kovac* court contemplated the situation of a biological father when another man has been named as the legal father, particularly a man who for whatever reasons is not diligent in defending his own financial interests. The court noted that allowing biological fathers to evade their responsibility when someone else has been named as the legal father is detrimental to children and contrary to the purpose of child support:

> Precluding an award from the date of the child's birth would create an incentive for men to avoid their child support obligations for some period of time by delaying the process of adjudicating paternity. The creation of such an incentive would, of course, run counter to the statutory purpose of providing for the needs of children without regard to circumstances of birth.

The *Kovac* court went on to examine another case bearing many similarities to Mr. O.'s case:

> More recently, in *Rubright v. Arnold*,[8] we affirmed an order establishing the paternity of a biological father, Rubright. The order held Rubright responsible for child support accruing from the day that his son, C.A., was born. C.A. was born while his mother was married to another man, Arnold, and C.A.'s birth certificate listed Arnold as the father. Accordingly, Arnold was presumed to be C.A.'s parent, and his legal paternity had never been disestablished. By recognizing Rubright's duty to pay support from the date of C.A.'s birth, we effectively held that a presumptive father's paternity need not be disestablished before a newly-established biological father's duty to pay support arises (footnotes omitted).

Again, in *Rubright*, the issue concerns the duty of the biological father, not whether CSSD can or should continue to collect arrears from the legal father. But in certain ways, the issues can be seen as opposite sides of the same coin. If CSSD can and should collect arrears from the biological fathers, it follows that CSSD should not be collecting from Mr. O.. In a footnote to

[6] 938 P.2d 1013 (Alaska 1997).
[7] *Id*. at 1015 (citing AS 25.20.030; *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) (superceded by rule in other respects)).
[8] 973 P.2d 580 (Alaska 1999).

the last sentence of the above-quoted paragraph, the *Kovac* court addresses the situation of overlapping support orders:

> See *id*. at 584-85 (expressly stating that Rubright could be liable for C.A.'s support even if Arnold had not been a party to the paternity action). This aspect of *Rubright* may seem to be in tension with several cases holding that legal fathers whose biological paternity is disestablished should normally be granted only prospective relief from their child support obligations. See, e.g., *State, CSED v. Wetherelt*, 931 P.2d 383, 387-88 (Alaska 1997). But the tension is more apparent than real: Any potential overlap in child support obligations between a newly-established biological father and a former legal father may be remedied through reimbursement. See *Matthews v. Matthews*, 739 P.2d 1298, 1299 (Alaska 1987) ("A parent's duty of support encompasses a duty to reimburse other persons who provide the support the parent owes.")(superceded by rule in other respects). Cf. *Smith v. Cole*, 553 So. 2d 847, 854-55 (La. 1989) (recognizing the concept of "dual paternity" in which a child born into a marriage with a non-biological father retains a legal parent/child relationship based on presumptive fatherhood for purposes of legitimacy and inheritance, while becoming the child of a newly-established biological father for purposes of child support). See also *Flanigin v. State, CSED*, 946 P.2d 446, 450 (Alaska 1997) (recognizing that "child support arrearages are imposable by law from the date of a child's birth").

This footnote suggests that, while in a sense Mr. O. remains liable for support that accrued before he disestablished paternity, the underlying obligation is really the biological father's. To the extent Mr. O. has been required to pay support under cases such as *Ferguson*, he is entitled to sue the real fathers for reimbursement of any support he has ever had to pay. This dicta indicates that the biological father's obligation is greater than the legal father's. CSSD has stated that, when there are two potential targets for collection, it will only target one person. Whenever possible, CSSD should attempt to collect first from the obligor with the greater underlying duty of support.

This is not to say that Mr. O.'s obligation for arrears before the time of disestablishment is meaningless. If CSSD could show that, despite its best efforts to locate the biological fathers, there were for some reason no possibility of collecting support for one or more of the children during a particular time period before disestablishment, then Mr. O. would be the correct person to collect from up until the time he disestablished his paternity. It would then be up to Mr. O. to do his best to collect reimbursement for that money from the biological father, and that burden is the price a legal father pays for not being diligent in timely correcting an erroneous establishment of legal paternity. But CSSD has known that Mr. O. was not the father of any of these children since 2004, and it is only now in the process of establishing orders against the fathers. CSSD should be subject to the same sense of urgency in resolving paternity

matters as legal, biological and putative fathers; when there is a serious question of paternity, cases should not languish merely because CSSD has already managed to establish one order against somebody.

Absent a showing that there is likely to be any difficulty collecting arrears from the fathers, CSSD's attempts to pursue collection from Mr. O. should be suspended until such time as efforts to collect from the fathers have been exhausted. In accordance with the Supreme Court's decision in *CSED v. Mitchell*,[9] CSSD is not required to reimburse Mr. O. for arrears he has already paid and that have been passed on to the custodian or used to reimburse public assistance; for those funds, Mr. O. may seek reimbursement directly from the fathers. But CSSD should suspend further collection efforts from Mr. O., and instead look directly to the fathers.

IV. Conclusion

Mr. O.'s paternity has been disestablished. CSSD has commenced collection of support from the fathers of the children in this case. CSSD should discontinue collection efforts against Mr. O. in favor of efforts to collect both ongoing support and arrears from the fathers.

V. Order

IT IS HEREBY ORDERED that CSSD suspend efforts to collect further arrears from Mr. O. until CSSD has exhausted efforts to collect arrears from the biological fathers of the children in this case.

DATED this 5th day of July, 2007.

By: *Signed*
DALE WHITNEY
Administrative Law Judge

[9] *CSED v. Mitchell*, 930 P.2d 1284 (Alaska 1997).

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.

Under AS 25.27.062 and AS 25.27.250, the obligor's income and property are subject to withholding. Without further notice, a withholding order may be served on any person, political subdivision, department of the State, or other entity.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 25.27.210 within 30 days after the date of this decision.

DATED this 10th day of August, 2007.

By: *Signed*
Jerry Burnett
Director, Administrative Services

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