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

In the Matter of:)
) OAH No. 07-0701-CSS
R. L. M.) CSSD No. 001117644
)

DECISION AND ORDER

I. Introduction

The Child Support Services Division (CSSD) issued an Administrative Order to Disestablish Paternity on November 29, 2007. The effect of the order was to determine that R. L. M. is not the biological father of A. K. P., a boy born March 17, 2002. The order recited that even though Mr. M. is not A.'s father, he remains responsible for child support owed prior to his petition for paternity disestablishment.[1]

Mr. M., who is alleged to owe approximately $9,500 in past-due support accrued prior to the disestablishment, appealed the disestablishment order. He does not challenge the disestablishment itself; instead, his appeal is directed at the preexisting child support obligation that led to the arrears. That obligation was set in an Amended Administrative Child and Medical Support Order and Administrative Review Decision, both issued August 9, 2005.[2] Mr. M.'s appeal is therefore, in effect, a delayed appeal of the August 9, 2005 orders.

Administrative Law Judge Kay L. Howard held a hearing on this appeal on January 3, 2008. Mr. M. participated by telephone. Andrew J. Rawls, Child Support Specialist, represented CSSD. A.'s custodian, B. P., did not participate. The hearing was recorded. The record remained open until January 24, 2008, in order to receive information about Mr. M.'s incarceration history.

This case presents two issues: first, whether a delayed appeal of the 2005 support order should be entertained, and second, whether that order should be overturned. For the reasons discussed below, both questions must be answered in the affirmative.

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[1] Exh. 18 (Administrative Order to Disestablish Paternity).
[2] Exhs. 13-14.

II. Facts

Soon after A.'s birth, his mother submitted an affidavit alleging that T. M. was the father.[3] She noted in her sworn statement that she had sexual relations during the relevant period with both Mr. M. and Mr. M., but reasoned that Mr. M. was the father because "R. and I are both Caucasian and my son is not full Caucasian—he is half Samoan."[4]

In early 2004, a paternity test indicated that Mr. M. was not A.'s father.[5] On November 30, 2004, CSSD issued a Notice of Paternity and Financial Responsibility and Administrative Order for Genetic Testing to Mr. M., obtaining personal service on him on February 17, 2005.[6] Mr. M. did not respond,[7] and on March 22, 2005, CSSD issued an Order Establishing Paternity declaring him to be the legal father.[8] There is no evidence in the record to show when this document was mailed or otherwise served on Mr. M., but it is known that he eventually received it because of his subsequent appeal.

On April 5, 2005, CSSD issued an Administrative Child Support and Medical Support Order setting ongoing support at $160 per month and assessing arrears back to the child's birth of $4,252.[9] Mr. M. received this order on May 26, 2005.[10]

Shortly beforehand, on May 17, 2005, Mr. M. had appealed the Order Establishing Paternity.[11] On June 9, 2005, CSSD moved in that appeal for a remand for CSSD to "send Mr. M. a Petition for Genetic Testing and Disestablishment of Paternity."[12] Without awaiting action on its motion, the agency apparently sent "Petition for Genetic Testing/Affidavit" packets to Mr. M. on June 8 and July 8, 2005.[13]

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[3] Exh. 1.
[4] Exh. 1 at pg. 2. The spelling of Mr. M.'s name is taken from a later document, Exh. 2.
[5] Exh. 2 (LabCorp report).
[6] Exhs. 3-4. Mr. M. admits that he was served directly and that the same paperwork had reached him through this mother.
[7] Testimony of Mr. M..
[8] Exh. 5.
[9] Exh. 6.
[10] Exh. 8.
[11] Exh. 9.
[12] Exh. 10.
[13] *See* Exh. 12.

On July 12, 2005, Administrative Law Judge Dale Whitney granted CSSD's motion and remanded the matter to CSSD for genetic testing.[14] The order of remand did not address the later Administrative Child Support and Medical Support Order.[15]

CSSD took no further action following the remand until August 8, 2005, when it issued a "Denial of Petition for Genetic Testing," stating that "Your petition regarding genetic testing . . . has been denied."[16] Since Mr. M. had not submitted such a petition, the intent of the Denial was unclear. At the time the Denial was issued, Mr. M. was incarcerated.[17] There is no evidence in the record to indicate the Denial was sent to Mr. M. at any address, past or present, or that he received it.

On August 9, 2005, CSSD issued an Amended Administrative Child and Medical Support Order and an Administrative Review Decision setting ongoing support at $160 per month with arrears of $4,901.[18] Apparently because CSSD believed the paternity issue to have been resolved at the agency level, the Administrative Review Decision erroneously stated that "If you want to pursue this issue further, it will have to be done through the court system."[19] Notably, in any event, there is no certificate of mailing or other evidence that either August 9, 2005 order was served on Mr. M.[20]

Just over two years later, on September 6, 2007, A.'s mother executed a Petition for Genetic Testing, making a sworn statement that:

> I have never believed Mr. M. to be the father. His name was put on the CSSD paperwork only because it asked for names of people who I had intercourse with before and after I found out I was pregnant. Mr. M. is Caucasian as am I. A. K. P. is of mixed races, not just Caucasian. This is why I do not believe Mr. M. to be the biological father of A. K. P. [21]

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[14] Exhs. 10-11. He concluded, with apparent concurrence from CSSD, that the appeal was past the deadline but the deadline should be waived pursuant to 15 AAC 05.030(k).

[15] Rightly or wrongly, the agency appears not to have included it in the materials given to the ALJ. *See* Exh. 10.

[16] Exh. 12.

[17] Communication from Debra Walsh, CCO, Jan. 8, 2008. This was faxed to the OAH but the record does not indicate whether it was served on the parties. Thus, it has been included with this decision. *See* Attachment A.

[18] Exhs. 13.

[19] Exh. 13 at pg. 6. ALJ Whitney's order had noted that "The parties will retain their normal appeal rights upon CSSD's conclusion of the matter;" hence, an administrative appeal rather than resort to the courts would have been possible.

[20] Mr. M. was incarcerated at the time they were issued, but there is no indication of mailing to any address.

[21] Exh. 16.

Mr. M. submitted a Petition for Genetic Testing of his own a few days later.[22] Subsequent genetic testing established that he could not be the father.[23] CSSD issued its Administrative Order to Disestablish Paternity on November 29, 2007, with the disestablishment effective September 11, 2007.[24]

III. Discussion

Since Mr. M. does not quarrel with what the disestablishment order actually did—declare him not to be the father—this case is effectively an appeal of the August 9, 2005 orders that created his financial liability for arrears. In the ordinary course of events, it would be too late to appeal a 2005 order. 15 AAC 05.010(b)(6) sets an appeal time of 30 days after an administrative review decision.

A department regulation, 15 AAC 05.030(k), gives discretion to waive the appeal deadline in appropriate circumstances. That discretion has been reaffirmed in a recent decision of the Commissioner of Revenue.[25] In general, the discretion has been, and should be, exercised only in genuinely exceptional cases. The discretion parallels that available to courts to relax appeal deadlines under Alaska Rules of Appellate Procedure 521 and 602.[26]

The Alaska Supreme Court has held that there are circumstances in which an appellate tribunal *must* exercise its discretion to relax an appeal deadline. Two such circumstances are relevant to this case. First, when an order is not served on the aggrieved party, the time for appeal generally does not run.[27] Second, when an order is issued without an appropriate notification of appeal rights, the time for appeal likewise does not run.[28] The Supreme Court has held that the constitutional guarantee of due process *compels* relaxation of deadlines in circumstances such as these.[29] The compulsion extends to internal agency appeal deadlines.[30]

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[22] Exh. 15.

[23] Exh. 17 (LabCorp report).

[24] Exh. 18.

[25] *In re C.J.B.*, OAH No. 06-0515-CSS, Decision and Order adopted May 7, 2008.

[26] *Cf. Manning v. Alaska R.R. Corp.,* 853 P.2d 1120, 1123 (Alaska 1993).

[27] *See Manning,* 853 P.2d at 1124 (abuse of discretion not to permit appeal two years after 30-day deadline where "[t]here is no record evidence that Manning ever received the letter or a copy of it").

[28] *Id.* ("for [the thirty day deadline] to apply, an agency must clearly indicate . . . that the claimant has thirty days to appeal"); *Carson v. Renkes,* 113 P.3d 638, 642 (Alaska 2005) (lack of appeal rights statement meant "thirty-day period for filing an administrative appeal has . . . not begun to run").

[29] *Romulus v. Anchorage School Dist.*, 910 P.2d 610, 615-6 (Alaska 1996).

[30] *See Pruitt v. City of Seward,* 152 P.3d 1130, 1136 (Alaska 2007).

In this case, there is no evidence that Mr. M. was ever served with the agency's ambiguous August 8, 2005 notice, denying a petition that had never been filed, nor with its two August 9, 2005 orders, setting a child support amount with arrears to the child's birth. Even if he had been served, Mr. M. would have encountered in one of the orders a direct misstatement of his appeal rights: "If you want to pursue this issue further, it will have to be done through the court system."[31] The effect of this statement, had he had an opportunity to read it, would have been to misinform him regarding his right to appeal administratively within 30 days. Thus, there are two independently sufficient circumstances preventing enforcement of the appeal deadline.[32]

It is true, of course, that Mr. M. was remiss in the summer of 2005 in not returning the petition packets the agency mailed him on June 8 and July 8 of that year. Part of the reason for this may have been his incarceration that began on August 4, 2005, but incarceration is not a circumstance beyond a person's control, and so some responsibility still falls on Mr. M.[33] The fact remains, however, that had Mr. M. appealed the August 9 orders and presented, as he now does, evidence showing he did not father A., the orders would certainly have been vacated. Because he did not have that opportunity to appeal, it must be given to him now.

IV. Conclusion

Mr. M. must be allowed to proceed with his appeal effectively challenging the August 9, 2005 orders, and those orders must be vacated because their underlying premise—that he was A.'s father—has been proven wrong. Since the orders were the conclusion of a remand from a valid appeal of the first Order Establishing Paternity (March 22, 2005), the effect of an adverse outcome of the appeal is to cancel Mr. M.'s legal paternity of A. from the beginning.

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[31] Exh. 13 at pg. 6.

[32] Because of these circumstances compelling relaxation of the appeal deadline, it is not necessary to consider other circumstances that might argue for revisiting the order under 15 AAC 05.030(k) or, through the CSSD director, under 15 AAC 125.125, such as the fact that it was always implausible that Mr. M. could have fathered a mixed-race child with another Caucasian.

[33] Mr. M. conceded at the hearing that he "screwed up" and that under the circumstances he would not expect reimbursement of any amounts (which appear to be small) that he may already have paid in child support under the old paternity order. This order will not require reimbursement.

V. Order

Accordingly, IT IS ORDERED:

1. The Order Establishing Paternity of March 22, 2005 and all subsequent child support orders in this case are vacated;

2. R. L. M. is not liable for child support for A. K. P. for any time period.

3. To the extent that R. L. M. has paid support in the past for A. K. P., this order does not require that the amounts be refunded.

DATED this 22nd day of July 2008.

By: *Signed*
Kay L. Howard
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 AS 25.27.210 within 30 days after the date of this decision.

DATED this 11th day of August 2008.

By: *Signed*
Kay L. Howard
Administrative Law Judge

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