

THE FAMILY COURT OF THE STATE OF DELAWARE

IN AND OF NEW CASTLE COUNTY

C----- J. C-----
Petitioner,

v.

**DCSS/
C----- H----- (Deceased),**
Respondents.

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File No.: CN15-05898

Petition No.: 24-11716; 15-33083

REVIEW OF COMMISSIONER'S ORDER

Date of Order: 8/20/2024

Date ROCO Filed: 9/19/2024

Transcript Received: No Transcript

Death of Respondent Suggested on Record: 9/25/2024

Stipulation to Waive State Arrears Signed: 1/29/2025

Conference with Counsel: 2/21/25

Submission by Father's Counsel: 3/10/25

Order Entered: 3/24/2025

Kerr, F., Judge

Pending before the Court is a Request for Review of a Commissioner's Order ("ROCO") filed by C----- J. C----- ("Father") against the Division of Child Support Services ("DCSS") and C----- H----- ("Mother"). The Petitioner contests the Order entered by Commissioner Craig R. Fitzgerald on August 20, 2024 regarding the Denial of what was titled a "Motion to Modify Child Support" but which apparently was not actually intended to be a Motion to Modify Child Support, despite the moniker, but rather a Motion to Reopen the original child support order of 2016. In the interest of judicial economy, the Court will treat the Motion as if it were a properly filed Motion to Reopen Pursuant to Rule Family Court Civil Rule 60(b).

STANDARD OF REVIEW

A party may seek a review of a Commissioner's Order pursuant to 10 *Del. C.* § 915(d)(1), which provides:

Any party, except a party in default of appearance before a Commissioner, may appeal a final order of a Commissioner to a judge of the Court by filing and serving written objections to such order, as provided by the rules of Court, within 30 days from the date of the Commissioner's order. A judge of the Court shall make a *de novo* determination of those portions of the Commissioner's order to which objection is made. A judge of the Court may accept, reject, or modify in whole or in part the Order of the Commissioner. The judge may also receive further evidence or recommit the matter to the Commissioner with instruction.¹

Because this was a Commissioner's final order, the Court reviews the Order *de novo*.²

According to *Black's Law Dictionary* a *de novo* review is "[a]n appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings."³ Pursuant to Family Court Civil Rule 53.1(b), an appeal of a Commissioner's

¹ 10 *Del. C.* § 915(d)(1).

² *Id.*

³ *Black's Law Dictionary* (10th ed. 2014).

Order must “set forth with particularity the basis for each objection.”⁴ Upon taking the matter under review, a judge of the Court will make a *de novo* determination regarding the objected to portions of the Commissioner’s Order.⁵ A judge will make an independent decision by reviewing the Commissioner’s findings of fact determined at the Commissioner’s hearing, any testimony and documentary evidence on the record, and the specific objections of the moving party.⁶

PROCEDURAL BACKGROUND

The Division of Child Support Enforcement⁷ (DCSE) and Mother filed a Petition for Child Support on October 26, 2015, regarding J---- X----- W-----, born -/--/2015. Father was served by personal service on 3/16/2016. Father appeared in Family Court for the genetic testing. Paternity was confirmed by genetic testing and on November 6, 2016, paternity was adjudicated and Child Support was established in the amount of \$659.00 by default. Notice was sent to Father at the same address where he was served. Father was attributed with income as a barber pursuant to the Delaware Wage and Labor Survey. On April 12, 2017, Father filed a Petition to Modify Child Support as he was receiving SSI. On 8/21/2017, an interim Order was entered on Father’s Petition for Modification, which set support at \$0.00 and set arrears at \$14,604.29 as of 8/5/2017. Mother did not appear but DCSE had its own interest in the matter and did not agree to eliminate the arrears. Father wanted the arrears to be eliminated. Therefore, the current support was set at \$0.00. The 8/21/2017 Interim Order also stated that “the matter has been scheduled for a Commissioner’s Hearing on 9/26/2017 at 2:00 PM with C. Blount to

⁴ FAM. CT. CIV. P. R. 53.1(b).

⁵ 10 *Del. C.* § 915(d)(1); *see also* FAM. CT. CIV. P. R. 53.1(e).

⁶ *C.M. v. L.A.*, 2007 WL 4793042, at *1 (Del. Fam. Ct. Dec. 27, 2007).

⁷ At some point during this case DCSE became DCSS (Division of Child Support Services)

address retroactivity and arrears. As such the parties are informed to provide updated financial information to the Court prior to or at the hearing.”

On September 26, 2017, Father did not appear for the hearing regarding the Petition for Modification and the Petition was Dismissed by the Commissioner. When that Petition for Modification was Dismissed, the Interim Order, which set the current support at \$0.00, was vacated. Thus, the arrears continued to mount at the rate of the original Order which was \$659.00 per month. The Commissioner’s Order of September 26, 2017, was not appealed to a Judge and no Motion to Reargue or to Reopen was filed in the immediate aftermath of the decision. Thereafter Father filed multiple Motions to Revoke Child Support but they were not Granted as they were not the proper pleading to accomplish what Father sought to have done.

Finally, on November 30, 2020, Father filed another Petition to Modify Child Support and actually appeared for the hearing on the Petition and on July 27, 2022, the Court entered an Order which set child support at \$0.00 effective 12/04/2020. However, this still left the arrears which accumulated between the original order in 2016 and 12/04/2020 at a rate of \$659.00 per month, and the Order required Father to repay the arrears at a rate of \$5.00 per month. Neither party filed a timely appeal of the Commissioner’s Order.

On October 25, 2023, the first pleadings filed by Father’s current counsel were filed consisting of a Motion for Modification of Child Support Order and a Motion to Strike Child Support Lien. Though extremely voluminous and containing many attachments, the Motions can be summarized by the claim that since Father was on SSI during the time when the Child Support Order was in effect, the Order was not valid and could not be enforced against Father, or that the Order should be reopened pursuant to Rule 60(b). Both Motions were Denied on December 4, 2023 by a Commissioner for the sole reason that there was no open Petition in the

Court, in which the Motions could be filed. Modification of child support cannot be accomplished by Motion, only by Petition. No Review of Commissioner's Order was filed regarding the denial of these Motions within the prescribed time of 30 days.

Five months later, on May 16, 2024, Father through his counsel filed another Motion for Modification of Child Support Order, similar but not completely identical to the Motion which was denied on December 4, 2023. This time, counsel also filed a new Petition for Support Modification, incorrectly believing that this would cure the issue addressed in the December 4, 2023 Order, which it did not as a Motion to Reopen would have to be filed in the case which is being sought to reopen. On August 20, 2024, Commissioner Fitzgerald entered an Order denying the Motion as Child Support can only be modified by Petition and based on *res judicata* and also as the current Child Support was \$0.00 and therefore could not be modified to be any lower. Father filed a Request to Review the Commissioner's Order denying the second Motion for Modification of Child support Order.

While the ROCO was pending, Father filed a Petition for Custody of the child who is the subject of this support petition on the basis that the Mother had passed away. The Court denied Father's petition as unnecessary since he would automatically have custody as the sole remaining parent when Mother passed,⁸ assuming no third party had guardianship. The Court noted the death on the record and sent a letter to the parties on October 3, 2025, requesting that the parties file a Motion for Substitution pursuant to Rule 25 within 90 days and that if there were no substitution "the proceeding would continue pursuant to the interests of DCSS."

On December 19, 2024, the parties filed a Stipulation to Waive State Arrears, due to Father obtaining physical custody of J---, which for some reason was not forwarded to this

⁸ Father states he successfully obtained custody which is misleading. Custody automatically vested in Father when Mother died.

Judge until January 29, 2025. The Court signed the Stipulation to Waive State Arrears on January 29, 2025, thus eliminating \$15,597.77 of the \$39,169.06 from the arrears. The balance of the arrears were owed to Mother in the amount of \$23,576.29. There was no substitution of party filed for Mother and therefore the Court held a conference with counsel to discuss why this matter would not be dismissed pursuant to Rule 25 since there is basically no opposing party. The Court gave Father's counsel two weeks to provide legal authority as to how this case could proceed without an opposing party. On March 10, 2025, Father's counsel filed a Motion to extend time to provide the legal authority which was due on March 7, 2025 and legal argument based on *Holmes v. Wooley*, 792 A.2d 1018, 1022 (Del. Super. 2001).

ARGUMENTS RAISED

THE COMMISSIONER ERRED BY NOT APPLYING RULE 12(b)(6)

Father argues that the Commissioner erred by granting the Motion to Dismiss as he did not reference Rule 12(b)(6) in his Order. Rule 12(b)(6) does not apply as the Court denied a Motion and did not dismiss a Petition. In fact, there was no open Petition within which to file his Motion.⁹ Father should have filed a Motion to Reopen with the original Petition Number 15-33083. Father did not even file the correct Motion to accomplish what he was seeking. Had he done so, DCSS could have responded properly. Father was not denied due process as what was actually denied was a motion and not a new petition. Motions are governed by different rules. While Father also filed a Petition for Modification this was not the correct pleading to accomplish what he was seeking as support was already set at zero and could not go any lower. Additionally, Father is not seeking to modify the \$5.00 per month arrears payment. This

⁹ Father did file a Petition for Support Modification but current support was already at zero, so this was not the correct pleading.

payment is not mentioned anywhere in the pleadings. There is no harm to Father in having the Petition for Modification dismissed and in denying the Motion to Modify.

REOPENING THE 2016 ORDER

Father next alleges that his Motion was filed pursuant to Rule 60(b).¹⁰ As noted in the October 3, 2024 Order, Father's Motion was extremely confusing and was not clearly filed as a Motion to Reopen pursuant to Rule 60(b). In fact, one must read 45 paragraphs before the Rule 60(b) arguments are discussed. However, in Order to put this issue to rest, the Court will treat Father's Motion as if it were a properly filed Motion to Reopen pursuant to Family Court Civil Rule 60(b). Father correctly notes that "Void judgments include 'exceeding jurisdiction over the parties or subject matter, improper notice, no valid service of process, and failure to sit at a time and place required by law.'" Father does not allege that he was not served or that he did not receive notice. Father was personally served and he appeared for the first mediation where an Order for genetic testing was done. Notice of the second mediation was sent to the same address and he failed to appear. Father does not allege that the Court lacks subject matter jurisdiction.

Father argues that Rule 60(b)(4) applies as the Order was void because "it constituted legal process upon Father's SSI funds." This is incorrect. As noted previously, there was evidence presented at the hearing in 2016 that Father had income as a barber in 2013, 2014 and 2015. This evidence came from Wage and Labor reports and from Mother's testimony. Father did not attend the hearing although he was properly served and notified. There was no evidence at that hearing that Father was receiving SSI since Father failed to attend and, even if he was, evidence was presented that he also had additional income. This is therefore a question of fact as

¹⁰ He also raises Rule 501(i) which is discussed in the first argument and 42 USC §407 which has to do with collection and is really not related to the actual issue here.

to how much Father was earning in addition to his SSI and the Court cannot find that the Order is Void.

Father next alleges that 60(b)(3) applies as there was misconduct. The misconduct alleged, even if it were considered to be misconduct, occurred after the 2016 Order was entered and therefore cannot be a basis to Reopen the Order. Additionally, many of these issues surround the August 2017 interim order which was vacated when the parties did not show up for the final hearing. It does not appear that DCSS made misrepresentations as Father did owe significant arrearages, which could be collected from non-SSI funds, including the Stimulus Check and his Personal Injury Settlement. Father owed arrearages largely due to his own conduct in not coming to Court and not filing correct pleadings to correct the original order for several years.

Father's final argument for reopening is for "any other reason justifying relief" under Rule 60(b)(6). At the heart of this argument, and really all the arguments made by Father, is the concept that he should not have been attributed with income as a barber in 2016 as he was on SSI in 2016 when the Order was entered. While the 2016 Order states "Default" on the title, there was a hearing on the merits and evidence was presented regarding Father's income, and the Court performed a support calculation based upon the evidence provided at the time. Since Father was not present, he did not provide any income information or evidence of his SSI or other income. There was evidence presented that Father had worked in 2013, 2014 and 2015, through Income and Quarterly Wage tables and Mother's testimony, as a barber. The evidence presented showed that Father earned over \$20,000.00 in one quarter in 2014. The Courts of this State have held that "an Order to pay child support where the obligor's *only* source of income is his SSI benefits violates the protection from legal process provided to Social Security benefits

under 42 USC §407.” *DCSE/K.W. v. K. B.*, 2010 WL 8019900, Del. Fam, *4; Family Court Civil Rule 501(i). At the hearing in 2016, which Father did not attend, there was evidence that Father had income other than SSI and Father was not there to testify that he was receiving solely SSI and thus the Court attributed him with income as a barber based upon the evidence presented by Mother and DCSE.

Father did not appeal the 2016 Order to a Judge within the time required by Court Rules. The effective date of the 2016 Order was October 27, 2015, thus creating a back support obligation. Father argues that the Court is prohibited from using SSI income as the basis for a child support order. However, this is not what happened in 2016. As noted above, the Court attributed Father with income as a barber due to the Quarterly Wage and Labor reports from 2013, 2014 and 2015, and Mother’s testimony that Father worked as a barber. While Father did present evidence in August 2017 when he first filed for modification, Father failed to appear for the final hearing and his petition was therefore dismissed. Father did not file to Reopen this dismissal.

The question before the Court is whether the facts support a finding of “extraordinary circumstances.” Father cites a case in which a mother filed to Reopen a case after 2 ½ years on the basis that the Commissioner’s prior decisions were inconsistent with Delaware Case Law regarding social security payments.” In the present case, the 2016 Commissioner’s Order was not inconsistent with Delaware Case Law regarding SSI payments as there was no evidence that Father was on SSI at that time. There was evidence that Father was earning income based on quarterly wage reports, including one report that Father earned over \$20,000.00 in one quarter in 2014. The Court cannot find that Father’s argument constitutes extraordinary circumstances.

Additionally, a petitioner is obligated to act without unreasonable delay in filing a Motion to Reopen.¹¹ Had Father filed a Motion to Reopen upon learning of the Default Order in 2016, or immediately after his Petition to Modify was dismissed in 2017, it would have been a much easier decision on the part of the Court as the timeliness of the filing of the Motion is also something which has to be considered as part of the analysis. In the present case, Father waited approximately 8 years from the original Order and 7 years from the dismissal of the first Petition for Modification Order before filing the pending Motion. Unfortunately, Mother passed away in September 2024 and her testimony was part of the evidence of Father's employment back in 2016. Thus, Father's delay had an impact on the evidence and the Court does not find that it can reopen the 2016 Order due to Father's delay.

However, the Court does find that it would meet the extraordinary circumstances test to modify the child support to zero (0) effective 08/07/2017, the effective date of the interim order dated 8/21/2017. The Court first recognizes that Father and DCSS agreed at the mediation on 8/7/2017 that current support would be set at zero and that there would be hearing "to address retroactivity and arrears." It would be reasonable for Father to rely upon this Order and to believe that current support was zero. Further, neither parent appeared for the Commissioner's hearing and this means that the Court did not rely upon any testimony from Mother as it did in the 2016 hearing and her passing would therefore have no impact. To compound matters further, Father was sent notices from DCSS in 2018 and 2019 that state his current support is "0" and DCSS did not seek findings of contempt for nonpayment of arrears due to Father's disability status.

¹¹ See *Opher v. Opher*, 531 A.2d 1228 (Del. Fam. 1987)

During this time, Father attempted to eliminate his support retroactively by filing Motions to Revoke Support which were denied as they were the wrong motion to file to obtain this relief. The documentation attached to both side's pleadings in the current pending ROCO indicates that in 2020 Father was finally sent a statement which does reference current support being due in the amount of \$7908.00 and arrears of \$37,787.29. The notices from the two years prior were erroneous and could lead Father to believe that the 2017 Order setting arrears to zero was still in effect. Father filed to modify support shortly thereafter and successfully set current support at zero effective 12/4/2020. The Court notes that there could be a basis to Reopen the dismissal of the 2017 Modification Petition if Father were to file such a Motion but, as will be noted further in this decision, there is another obstacle which will be discussed later in this Opinion.

Additionally, in the current Motion, Father basically refiled a Motion that had already been filed and denied from which he did not seek a Review of Commissioner's Order, which brings us to the next issue.

RES JUDICATA

Husband argues that *res judicata* cannot apply as there was no hearing or trial. Husband cites the case of *K.G. v. S.G.*¹² in support of this argument. However, Father overlooks the remainder of the statement relied upon in *K.G. v. S.G.*, which explains that there was no opportunity for the father in that case to plead *res judicata* because the petition for arrears did not require a responsive pleading. In the present case, there was an opportunity to plead *res judicata* which was done by DCSS successfully. The Delaware Supreme Court set forth the elements

¹² 2001 WL 1669711, *2 (Del Fam. Ct. Apr. 20, 2001)

which must be met in order for *res judicata* to apply in *LaPoint v. Amerisource Bergen Corp.*¹³

The *LaPoint* Court stated that the five-part test of *res judicata* is satisfied if:

- (1) The original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the case must have been decided adversely to the appellants in the case at bar; and (5) the decree in the prior action was a final decree.¹⁴

In the present case, the original Order entered by Commissioner Mayo on December 4, 2023, was entered on a “Motion for Modification of a Child Support Order” and the Motion was denied “pursuant to Family Court Civil Procedure Rule 7(4) failure to make a prima facie case as there is no open pending support petition.” Father did not file a Request for Review of Commissioner’s Order of the December 4, 2023, Order by Commissioner Mayo, thus making that Order final. Instead, Father took a second bite of the same apple by filing almost the same Motion to Modify on May 16, 2024. Father’s counsel did not change the title of the Motion, despite knowing at that time that calling it a Motion to Modify Child Support was incorrect and confusing. However, the Court notes that the 12/4/2023 Order by Commissioner Mayo did not address the Motion on its merits due to the title of the Motion and the need to read through 20 paragraphs before coming to the section which addresses Rule 60(b). While a better practice would have been to file a Review of Commissioner’s Order at that time, or to file a concise Motion for Reargument on the 60(b) issues only, the Court does recognize that the 60(b) issues

¹³ 970 A.2d 185,192 (Del. 2009) citing *Dover Historical Society, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1092 (Del. 2006).

¹⁴ *Id.*

were not addressed on the merits and would not require an open petition as the whole point is to reopen an old petition. Thus, the Court does not find that it was *res judicata*. Likewise, the 8/20/2024 Order does not address the 60(b) issues, probably again due to the title of the Motion, the Petition number in which it was filed, the filing of a new Petition for Modification, despite the current Order being set at zero and this time the Commissioner would have to read 45 paragraphs before arriving at any discussion of a request to Reopen the old Order.

This brings us to the final and ultimately decisive issue on this ROCO which was not raised in the ROCO itself as the issue arose after the filing of the ROCO, and that is the death of one of the parties.

IMPACT OF MOTHER'S DEATH

Mother passed away on September 17, 2024. On October 4, 2024, the Court sent an Order to both parties advising that if no substitution were made for Mother that the case would move forward as to DCSS. To this date, the Court has not received a substitution of the estate or a personal representative for Mother. DCSS and Father agreed that DCSS has waived the State arrears and that State arrears are zero (0). The Court held a conference with counsel to determine why the Motion to Reopen would not be Dismissed under Rule 25 as to Mother as there is effectively no opposing party. Father's counsel indicated that she had not researched this issue and request time to provide legal support. Father's argument in his memorandum is that the arrears are not part of Mother's estate as they are for the benefit of the Child and cites *Holmes v. Wooley*, a Superior Court Trial Decision, which addressed whether or not child support could be attached to satisfy a judgment debt owed to the child support obligor. This case does not seem applicable to the current issue, which is whether or not this action can continue under Rule 25 without an opposing party. Father's case law seems to be about to whom the back support or

arrears would be owed if collected from the insurance company for his injury settlement. If Father is accurate about the law, then the funds from the insurance settlement would go to him as J----'s custodian and there is no need to Reopen the Order, except if Father is still seeking to be repaid the funds intercepted from the COVID relief check. If Father is not accurate, he will need to open an estate.

As has been explained earlier in this Order, the 2016 Order was entered after a hearing which included testimony from Mother regarding Father's employment as a barber as well as reports on Father's reported wages. As Father delayed for years in filing to reopen this proceeding, and Mother is no longer available to testify, as set forth in the earlier analysis of Rule 60(b) the Court does not find a basis to Reopen the 2016 Order. The Court did discuss earlier that there may be a basis to reopen the August 2017 Order dismissing Father's Motion to Modify. If the COVID Relief funds were paid to Mother, Mother's representative or estate would have to be joined. If the funds were paid to the State, Father owed the State far more than the amount of the COVID Relief check as of August 2017 as set forth in the letter dated August 21, 2017, which is the date where Father and the State agreed in an interim order to set current support at zero (0) dollars and were to have a hearing about the back support and arrears only. At that time, Father owed the State \$13,945.29 which would have been the amount accumulated between the 2016 Order until August 21, 2017. Finally, the Court interprets that by stipulating that State arrears are zero (0) that Father is not seeking credit for the COVID check from DCSS.

Rule 25(a) of the Family Court Civil Procedure Rules states that "Unless the motion for substitution is made not later than 90 days after the death is suggested on the record ... the action shall be dismissed as to the deceased party. In this case, no substitution was made within the timeframe. The Court sent notice on October 3, 2024, that Mother's death was reported by

Father in his custody petition. This notice advised the parties that they had 90 days to file a substitution of party. The Order went on to state that "If no substitution is made within the timeline, the proceeding shall continue with respect to DCSS." No substitution was made within the timeline. Therefore, this action is Dismissed as to Mother. DCSS is not requesting any arrears but there is still the issue of the COVID Relief Check. As noted earlier, the record shows that Father and DCSS reached an agreement in 2017 to set current support at 0 in an interim order. That order was vacated when neither parent appeared for the commissioner's hearing which was supposed to be about arrears and back support only. The Court finds that at the time of that interim Order, Father owed the State \$13,945.29. The State has agreed to waive arrears. While it is not clear who received the funds from the COVID Relief check, Father cannot get it from Mother because she is not a party to this action anymore and he cannot receive it from DCSS as the Court finds no basis to Reopen the 2016 Order as an integral witness to the 2016 proceeding has passed away and the Motion is extremely untimely.

CONCLUSION

The Court finds that this ROCO is Dismissed as to Mother, C----- H-----, for the reasons set forth herein. Father's arrears owed to the State are set at zero (0) dollars by agreement of the State and Father. If Father is still requesting the COVID funds from the State, that request is **DENIED** for the reasons set forth herein.

IT IS SO ORDERED.

FELICE GLENNON KERR, Judge

Cc: Parties/Counsel
The Honorable Craig Fitzgerald

Date mailed: