

JOE L. HERBERT

IBLA 91-432

Decided November 3, 1993

Appeal from a decision of the Acting Townsite Trustee, Alaska State Office, Bureau of Land Management, rejecting application for unrestricted deed and accepting application for restricted deed to a townsite lot in the Chalkyitsik Townsite. USS 4496.

Vacated and remanded.

1. Alaska: Townsites--Townsites

Where a decision of the Alaska Townsite Trustee, approving one of two conflicting applications for the same townsite lot, is based on a state divorce decree, rather than on the statutes and regulations governing townsites in Alaska, that decision will be vacated and remanded for a determination of who occupied the lot or was entitled to occupancy thereof on the date of approval of the final subdivisional survey.

APPEARANCES: Judith K. Bush, Esq., Alaska Legal Services Corporation, Alaska, for appellant.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Joe L. Herbert has appealed from a June 17, 1991, decision of the Acting Townsite Trustee, Alaska State Office, Bureau of Land Management (BLM), approving the application of his ex-wife, Charlotte Herbert, for a restricted deed and rejecting his application for an unrestricted deed to the same townsite lot, described as Lot 4, Block 6, Tract A, U.S. Survey 4496, Chalkyitsik Townsite, Alaska.

The record shows that appellant filed his application on September 11, 1980, and Charlotte Herbert filed her application on January 16, 1981. Appellant's application states that a log cabin was built on the lot in 1961 by Thomas William, and that appellant bought the cabin and the lot from William in 1966 for \$600. Charlotte Herbert stated in her application that she bought "the house" from William in 1970 and occupied it "1970 to 1973."

In his decision the Acting Townsite Trustee noted that the Herberts were married in September 1958; that a 1980 divorce decree awarded full ownership of the house in Chalkyitsik to Charlotte Herbert; and that the Chalkyitsik Townsite survey was approved on July 26, 1973. He found that

William "as the original occupant established the claim under the townsite laws;" that "the subsequent transfer to Herberts, occurring at some point during their marriage, transferred his claim to them;" and that the "divorce decree clearly transferred the Herbert's joint claim to Charlotte Herbert" (Decision at 2).

In reliance on 43 CFR 2565.3(c), the Acting Townsite Trustee approved Charlotte Herbert's application and rejected appellant's. 1/

In a October 9, 1991, affidavit accompanying his statement of reasons (SOR), appellant provides more facts regarding the occupancy of the house on the lot in question, some of which differ from the facts related in his application for a deed. In his affidavit, he states that he and his wife moved to Chalkyitsik in 1961; that they moved into the house on the lot in question in 1972 after paying William \$800, each contributing \$400; that he has lived in the house and maintained it since 1972 until the present; that the last time Charlotte lived in the house was in the summer of 1974, at which time she left and has not returned; and that she obtained a Decree of Divorce on July 10, 1980.

Appellant argues that the Acting Townsite Trustee erroneously relied on the state court divorce decree in determining entitlement to the town-site lot. He denies that the divorce decree awards any property, real or personal, to either party, and he argues that the state court could not have entered a valid order relating to the house or lot as it was without jurisdiction to determine ownership or possession of the townsite lot and improvements thereon. Appellant contends that the Acting Townsite Trustee apparently was relying on findings of fact and conclusions of law signed by the state court judge on the same day as the divorce decree, which were not incorporated as part of the decree itself. 2/ Nevertheless, even if those findings and conclusion had been incorporated, appellant argues, a different result does not obtain. The state court has no jurisdiction over disposition of townsite lots, appellant urges.

[1] Appellant is correct regarding improper reliance by the Acting Townsite Trustee on the state court divorce decree. Appellant and Charlotte Herbert each sought the lot in question pursuant to section 11 of the Alaska Townsite Act of March 3, 1891, 43 U.S.C. § 732 (1970) (repealed by section 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2790 (1976), effective October 21, 1976, subject to valid existing rights) and section 3 of the Alaska Native Townsite Act of

1/ 43 CFR 2565.3(c) provides: "Only those who were occupants of lots or entitled to such occupancy at the date of the approval of final subdivisional townsite survey or their assigns thereafter, are entitled to the allotments therein provided."

2/ Findings of Fact IV. states that Charlotte Herbert purchased a house in Chalkyitsik in 1972 and that "[s]he will retain ownership of that house" (Exhibit C, SOR). Conclusions of Law II. states that "[f]ull ownership of the house in Chalkyitsik (sic) shall be awarded to the plaintiff." Id.

May 26, 1926, 43 U.S.C. § 735 (1970) (also repealed by section 703(a) of FLPMA). Section 11 provided for the entry of lands in Alaska "for town- site purposes, for the several use and benefit of the occupants of such townsites" by a trustee appointed by the Secretary of the Interior and provided that, upon entry, the Secretary "shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the townsite, including the survey of the land into lots." Section 3 extended the provisions of section 11 of the Act of March 3, 1891, to Native town- sites, subject to the same limitations and restrictions. See Aleknagik Natives, Ltd. v. United States, 635 F. Supp. 1477, 1497 (D. Alaska 1985), aff'd, Aleknagik Natives Ltd. v. United States, 886 F.2d 237 (9th Cir. 1989); Marlin L. Virg-In, 117 IBLA 285, 293 (1991); Native Village of Circle, 114 IBLA 377, 378-79 (1990); Bristol Bay Housing Authority, 95 IBLA 20, 22 (1986). Regulations promulgated by the Secretary of the Interior to implement these acts are found at 43 CFR Subparts 2564 and 2565.

In applying the referenced townsite acts, this Board and the courts have consistently held that the townsite trustee properly awards town- site lots only to those inhabitants who occupied the lots or are entitled to such occupancy at the date of approval of the final subdivisional town- site survey. 43 CFR 2565.3(c); Marlin L. Virg-In, supra at 293; Native Village of Circle, supra at 379; Bristol Bay Housing Authority, supra at 23; Ruth B. Sandvik, 26 IBLA 97, 98 (1976); 43 CFR 2565; City of Klawock v. Andrew, 24 IBLA 85, 83 I.D. 47 (1976), aff'd, City of Klawock v. Gustafson, Civ. No. K-74-2 (D. Alaska Nov. 11, 1976). According to BLM's decision, the final subdivisional townsite survey for the Chalkyitsik Townsite was approved on July 26, 1973.

Determination of ownership of Federal townsite lots is solely the responsibility of the Secretary of the Interior, and, as appellant correctly points out, a state court has no jurisdiction to adjudicate owner- ship or right to possession of property held in trust or subject to a restriction against alienation. Ollestead v. Native Village of Tyonek, 560 P.2d 31, 33 (D. Alaska 1977), cert. denied, 434 U.S. 938 (1977). Thus, the fact that a state court in 1980 found that Charlotte Herbert purchased the house on the lot in question in 1972, and concluded that she was entitled to "full ownership" of the house has no bearing on the townsite trustee's responsibility to dispose of townsite lots in accordance with the townsite statutes and regulations, unless, of course, it sheds light on what the occupational situation of lot 4 was on July 23, 1973. We find that it does not. Nor does the record before us definitely show who occupied Lot 4 or was entitled to such occupancy at the date of the approval of final subdivisional townsite survey.

As indicated, there is conflicting evidence in the record regarding when the Herberts' occupancy of the cabin on Lot 4 commenced and how much was paid for the cabin and by whom. In addition, and most critically, however, the record regarding occupancy on July 23, 1973, is unclear. Although appellant asserts that he has been in continuous occupancy since 1972 and has stated in his affidavit that Charlotte last lived in the house in the summer of 1974, his counsel states in his SOR that Joe and Charlotte "lived there together until Charlotte left Chalkyitsik (either in 1973 or

1974)" (SOR at 1-2). In her application, Charlotte states that she occupied the house "1970 to 1973," a period she described in the application to be "3 yrs." Occupancy from January 1970 to January 1973 would be a period of 3 years, yet that time period would not encompass the approval date of final subdivisional survey. Thus, it is impossible to determine with certainty based on the present record the facts necessary to resolve the question of title to the townsite lot in question. Accordingly, the case record must be returned to the Townsite Trustee in order to develop a record on which to base a decision.
2/

Therefore, pursuant to the authority delegated to the Board of Land Appeals, the decision appealed from is vacated and remanded for action consistent with this decision.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

3/ The regulations provide at 43 CFR 2565.4(b) that "[i]n the case of conflicting applications for lots, the trustee, if he considers it necessary, may order a hearing to be conducted in accordance with part 1850 of this chapter."