



INTERIOR BOARD OF INDIAN APPEALS

WELSA Heirship Determination of Robert Fairbanks

38 IBIA 136 (10/18/2002)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

WELSA HEIRSHIP DETERMINATION
OF ROBERT FAIRBANKS

: Order Vacating Order on
: Reconsideration and Amended Final
: Order and Remanding Case
:
:
: Docket No. IBIA 02-50
:
: October 18, 2002

This is an appeal from a January 9, 2002, order on reconsideration and a January 9, 2002, amended final order issued by Administrative Judge Thomas K. Pfister in the heirship determination of Robert Fairbanks (Decedent) under the White Earth Reservation Land Settlement Act (WELSA), 25 U.S.C. § 331 note. The appeal was filed by Decedent's son, Jack R. Fairbanks (Appellant). For the reasons discussed below, the Board vacates the two January 9, 2002, orders and remands this matter to Judge Pfister.

On December 21, 1998, Judge Pfister issued a final order in which he determined Decedent's heirs to be his wife Lucy Johnson Fairbanks, his daughter Audrey Fairbanks Larsen, and Appellant.

On September 18, 2001, the Superintendent, Minnesota Agency, Bureau of Indian Affairs (BIA), notified Judge Pfister that BIA had information indicating that Decedent had fathered two additional children, neither of whom had been listed on BIA's initial submission to the Office of Hearings and Appeals. The Superintendent attached several documents to his memorandum and requested that Judge Pfister review the documents and determine whether reconsideration of the December 21, 1998, order was warranted. 1/

On January 9, 2002, Judge Pfister issued an order on reconsideration in which he found that one of the two additional children, Delores M. Fairbanks Raisch (Raisch), was a legitimate child of Decedent. He further found that the evidence did not support a conclusion that the

1/ 43 C.F.R. § 4.354(c) permits reconsideration in a case where "the administrative judge becomes aware of sufficient additional evidence to justify correction of error," apparently without regard to the 30-day time limit applicable to petitions for reconsideration.

other additional child, Robert Dale Cook, was a legitimate child of Decedent or an illegitimate child properly acknowledged under Minnesota law. 2/ On the same date, he issued an amended final order, in which he included Raisch as an heir of Decedent.

With respect to Raisch, Judge Pfister cited testimony in the probate of Raisch's grandmother, Margaret Fisher or DeJordan (Fisher), for his conclusion that Decedent was married to Raisch's mother, Sarah Johnson nee Fisher or DeJordan (Johnson).

On appeal to the Board, Appellant contends that Judge Pfister failed to consider other evidence which contradicted the testimony given in Fisher's probate—in particular, documents and testimony in Johnson's probate, indicating that Johnson and Decedent were never married. Appellant submits copies of documents from Johnson's probate with his notice of appeal.

It does not appear that Judge Pfister considered any of the documents from Johnson's probate. He did not mention them in his order on reconsideration, and they were not included in the record transmitted to the Board by the Superintendent. 3/

The Board ordinarily declines to consider evidence presented for the first time on appeal. E.g., Shoshone-Bannock Tribal Credit Program v. Portland Area Director, 35 IBIA 110, 114-15 (2000); Mosay v. Minneapolis Area Director, 27 IBIA 126, 132 (1995). In this case, however, Appellant had no opportunity to present his evidence to Judge Pfister. As far as the record shows, the Judge did not inform the parties of the Superintendent's September 18, 2001, memorandum, or offer them any opportunity to respond, before issuing his order on reconsideration and his amended final order. 4/ Under these circumstances, it would clearly be inappropriate to exclude Appellant's evidence.

2/ The Minnesota laws of inheritance in effect on Mar. 26, 1986, apply to heirship determinations under WELSA. 25 U.S.C. § 371 does not apply. See WELSA Heirship Determinations of Thomas J. Shingobe and Esther Bellecourt Smith, 31 IBIA 201 (1997).

3/ The Superintendent's Sept. 18, 2001, memorandum to Judge Pfister mentioned Johnson's probate. However, none of the documents attached to his memorandum, as it appears in the present record, relate to her probate.

As Judge Pfister's order on reconsideration states that 20 pages of documentation were attached to the Superintendent's Sept. 18, 2001, memorandum, and there are still 20 pages attached, the Board concludes that the documents relating to Johnson's probate were never attached to the Superintendent's memorandum and thus were not before Judge Pfister.

4/ Although 43 C.F.R. § 4.354(c) is not a model of clarity, it appears to require notice to interested parties, with an opportunity to respond, in all cases where a reconsidered decision is a possibility. Even if the regulatory notice requirement is not applicable to cases such as this one, notice to parties is required as a matter of due process.

The evidence in Johnson's probate contradicts the evidence in Fisher's probate. This matter must therefore be remanded to Judge Pfister so that he may weigh this conflicting evidence and make any further inquiries necessary in order to determine whether or not Raisch qualifies as Decedent's heir under the Minnesota laws of inheritance in effect on March 26, 1986.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Pfister's January 9, 2002, order on reconsideration and his January 9, 2002, amended final order are vacated, and this matter is remanded to him for further consideration.

//original signed

Anita Vogt
Administrative Judge

//original signed

Kathryn A. Lynn
Chief Administrative Judge