



INTERIOR BOARD OF INDIAN APPEALS

Estate of Anthony "Tony" Henry Ross

44 IBIA 113 (02/01/2007)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF ANTHONY "TONY"
HENRY ROSS

- : Order Vacating Order Denying
- : Rehearing and Modifying Order
- : Determining Heirs and Decree of
- : Distribution
- :
- : Docket No. IBIA 05-28
- :
- : February 1, 2007

Varden Hopkins (Appellant) seeks review of an October 6, 2004 Order Denying Petition for Rehearing by Administrative Law Judge David A. Clapp (ALJ) entered in the Estate of Anthony "Tony" Henry Ross (Decedent), deceased Sisseton-Wahpeton Sioux, Probate No. IP GP-347-0052. That order let stand a January 13, 2004 Order Determining Heirs and Decree of Distribution by the ALJ, in which he determined that Decedent was survived by three biological daughters — Antoinette Ross, Paula Ross-McRae, and Wendy Ross — and divided Decedent's estate among these three individuals. The January 13, 2004 order rejected Appellant's claim that he was Decedent's biological son and therefore concluded that Appellant was not entitled to share in Decedent's estate. The Board of Indian Appeals (Board) concludes that manifest error occurred when the ALJ inaccurately determined that the presumption of paternity had not been rebutted. Therefore, for the reasons stated below, the Board vacates the ALJ's order denying rehearing, and modifies the Order Determining Heirs and Decree of Distribution to add Appellant as an heir.

Factual Background

Decedent died on April 8, 2002, at Granite Falls, Minnesota. At the time of his death, Decedent owned an interest in trust or restricted property located on the Sisseton-Wahpeton and Crow Creek Reservations in the State of South Dakota as well as on the Standing Rock Reservation in the State of North Dakota. The ALJ held a probate hearing on September 26, 2003 at Agency Village, South Dakota. In attendance at the hearing were Appellant; Appellant's wife, Esther Hopkins; Decedent's biological sister, L. Pauline Kipp; Antoinette Ross; and Antoinette Ross's husband, David Ross.

At the hearing, it was established without dispute that Decedent died intestate and was survived by three biological daughters, Antoinette Ross, Wendy Ross, and Paula Ross-McRae, all born of Decedent's marriage with Marilyn Blue. 1/

Also at the September 26 hearing, the evidence established that Appellant was born to Joyce Belle Hopkins. Kipp and Antoinette Ross both testified that Appellant is Decedent's biological son. Transcript at 5, 12-13. No one testified to the contrary. 2/

Antoinette Ross also submitted a letter, dated September 23, 2003, to the ALJ in which she asserted that her mother (Marilyn Blue) told her in 1999 that "[Decedent] did have a son that was born a few years before [Antoinette Ross]. [Blue] did not know his name but she did know that his mother was from the Sisseton-Wahpeton Sioux Tribe." Antoinette Ross also stated in her letter that Kipp had later identified the son as Appellant, and that she "[did] in [her] heart believe he is [her] father[']s son."

Kipp submitted a letter to the ALJ dated September 25, 2003 in which she stated that she accepted Appellant as her nephew and the oldest child of Decedent. Kipp explained,

During the Spring and Summer of 1957, my brother [Decedent] brought Joyce Hopkins to Granite Falls, Mn, and did live with her at my parents['] home. Joyce Hopkins told me after a few months that she was lonesome for her relatives in Sisseton, SD. I told my parents what she said, and they (my parents) told [Decedent] to bring her back to Sisseton, and he did.

I heard 2 years or so later that she (Joyce) had a boy from my brother. My parents, * * * myself and most of our family and relatives knew this.

[Appellant] and my brother [Decedent] did visit each other.

1/ Decedent had a fourth daughter with Blue, Patience L. Ross, who died as an infant in 1962.

2/ Wendy Ross and Ross-McRae apparently had intended to be present at the hearing, but arrived several hours late as a result of a misunderstanding concerning the time of the hearing. Oct. 17, 2003 Letter from Wendy Ross and Ross-McRae to ALJ.

On December 5, 2003 the ALJ received Depositions upon Written Interrogatories from Wendy Ross and Ross-McRae. Both stated that Appellant was not Decedent's son. Ross-McRae stated that she did not know Appellant. Wendy Ross and Ross-McRae also submitted a joint letter in which they stated that they "asked [Decedent] a year before he got sick and died, if [Appellant] was his son and he said no, he had no other children. He told us that [Appellant's] mother was already pregnant when he met her." Oct. 17, 2003 Letter from Wendy Ross and Ross-McRae to ALJ. They requested that Appellant be required to submit to DNA testing to show that he is Decedent's son "beyond a doubt." Id.

On December 16, 2003, Appellant submitted a Deposition upon Written Interrogatories to the ALJ. He identified Decedent as his biological father, and stated that his mother lived with Decedent in Granite Falls, Minnesota. Appellant stated that as a young child he "was told [Decedent] sent him clothes and money until [Decedent] moved to California and got married to someone else." Dec. 16, 2003 Dep. at 2. In response to a question as to whether Decedent ever acknowledged Appellant as his biological child to others, Appellant answered, "he must have, because his family would tell me how much [I] look, act and talk like [Decedent.]" Id.

Appellant also submitted a copy of his birth certificate, which shows his date of birth to be February 12, 1958, and excerpts from the probate of his mother's estate, Estate of Joyce Belle Hopkins, Probate No. IP TC 160R-72 (1973). ^{3/} Appellant's birth certificate identifies his parents as Joyce Belle Hopkins and "Jereme [sic] Hopkins." Appellant explained that his mother wrote "Jerome Hopkins" on his birth certificate because "[Decedent] was no longer in her life." Id. at 3. He stated that Jerome Hopkins "ha[d] always told" Appellant that he (Jerome) was not Appellant's biological father. Id. Finally, Appellant stated that neither Jerome nor Decedent were ever in his life and that, after his mother's death in 1970, he was raised by foster parents in Idaho. Id.

Probate record excerpts from Estate of Hopkins reflect that Joyce Hopkins, a Sisseton-Wahpeton Sioux, married Jerome Hopkins on November 29, 1955 and she died in 1970 when Appellant was 12 years old. Data for Heirship Finding and Family History (OHA-7 form) at 1. The record also reflects that Joyce and Jerome had a daughter, Christine, who was born in 1956. Id. At a hearing held to probate Joyce's estate, testimony was received from Jerome Hopkins and Nora (Norma) Young concerning

^{3/} Pursuant to 43 C.F.R. § 4.24(b), official notice may be taken of public records of the Department of the Interior, which include Indian probate records and transcripts.

Appellant's paternity and transcript excerpts of their testimony were submitted by Appellant. 4/

At the hearing held for the probate of Joyce's estate, Jerome Hopkins testified that he returned to Big Coulee in mid-June 1957 to care for his daughter, who had been left with Joyce's father. Hopkins Transcript at 11. At some point, Jerome learned that Joyce had been in Granite Falls, where Decedent resided, and that he "could assume" that she had relations with Decedent. Id. at 13, 19. Jerome testified that he had sexual relations with Joyce when the two reunited in the middle of June 1957 and that "it could be possible" that Appellant was his son. Id. at 11-12. Jerome testified that he was "picked up again" for work in Kansas in September 1957. Id. at 11.

Young, Joyce Hopkins's half-sister, testified that Joyce told her that Decedent was Appellant's father. Id. at 19. She also testified that when Appellant was a baby, Decedent sent him money and clothes, but after Decedent married, "he never [came any] more." Id. at 20. She also testified that Decedent had acknowledged Appellant as his son. Id.

The probate examiner in Hopkins did not resolve the issue of Appellant's paternity, concluding that it was unnecessary inasmuch as there was no dispute that Appellant was the son of Joyce Hopkins, whose estate was being probated. The examiner stated that

the testimony indicates Anthony Ross may be the father of [Appellant].
However, the decedent's husband, Jerome L. Hopkins, testified that the child was born during the time he and the decedent lived together and that he and the decedent had relations approximately nine months prior to the bir[th] of [Appellant].

Estate of Hopkins, OHA-7 form at 3. The probate examiner concluded by observing that "there exists a legal presumption which states that a child born during coverture is presumed to be a product of that marriage." 5/

4/ The transcript excerpts are undated and the records provided to the Board from Estate of Hopkins do not set forth the date of the hearing. However, the final order in Joyce's estate issued in 1973, thus the hearing took place sometime prior thereto. Appellant submitted pages 11-13 of Jerome's testimony and pages 17 and 19-20 of Young's testimony.

5/ The signature page for the OHA-7 form has not been included in the record, however, it appears that the probate examiner completed this information after the hearing.

Following the receipt of the above evidence, the ALJ in the instant case issued an order on January 13, 2004 determining heirs and a decree of distribution. The ALJ rejected as insufficient Appellant's evidence that he was Decedent's biological son, and determined that Decedent's heirs were Antoinette Ross, Wendy Ross, and Ross-McRae. In finding that Appellant had not proven paternity, the ALJ relied on Appellant's birth certificate, which identified Jerome as Appellant's father; the lack of a signed document or affidavit by Decedent acknowledging Appellant as Decedent's biological father; the marriage between Joyce and Jerome at the time of Appellant's conception and birth; and Jerome's testimony in the probate hearing for Joyce Hopkins's estate that he had physical relations with Joyce approximately nine months before Appellant's birth. The ALJ cited to Minnesota Statute § 257.55(1)(a), Presumption of Paternity, under which "a man is presumed to be the biological father of a child if * * * [h]e and the child's biological mother are or have been married to each other and the child is born during the marriage." The ALJ then concluded:

Absent a signed affidavit of paternity executed by the decedent or a DNA blood test (note that this Tribunal cannot fund nor order such a test), the undersigned hereby concludes that [Appellant] was conceived during the marriage of Joyce Belle Hopkins and Jerome Hopkins, and, a probable child of Jerome Hopkins, and accordingly, [Appellant] cannot be found to be an heir in the decedent's trust estate.

Jan. 13, 2004 Order at 2.

Appellant, through counsel, filed a timely petition for rehearing. Appellant requested the opportunity to submit DNA evidence, which he was "confident [would] determine him to be the biological child of the decedent." Petition for Rehearing at 2. On April 19, 2004, Appellant provided the ALJ with a "Relationship Assay Report" (Report) completed by Gay L. Bush, Ph.D. of Identity Genetics, Inc., which shows the results of the DNA testing of Appellant and Kipp. The report calculated the "Cumulative Avuncular Index" to be 15 and concluded that "[t]hese data suggest that it is 15 times more likely that [Appellant] and [Kipp] are related as nephew – aunt than it is likely that they are genetically unrelated." Appellant's expert submitted a subsequent letter, explaining the avuncular index:

The avuncular index is a likelihood ratio of two probabilities. Formally stated, it is the probability of observing the data seen in this particular case if the two individuals are related as nephew-aunt divided by the probability of seeing these data if the two individuals are not genetically related. Stated

another way, we are 15 times more likely to see these data if [Appellant] and [Kipp] are related as nephew aunt than if they are not related.

Sept. 7, 2004 Letter from Dr. Bush to ALJ.

On October 6, 2004, the ALJ denied Appellant's petition for rehearing. The ALJ determined that, based on the information in the DNA report and in the expert's subsequent letter, "it is impossible to determine, with the evidence offered, just what the probability is that [Kipp] and [Appellant] are aunt-nephew." Oct. 6, 2004 Order at 3. The ALJ noted that the Report's conclusion "relates only in an uncertain manner to the direct question that confronts us, the relationship, or lack thereof, between our decedent and the Petitioner." Id. The ALJ further noted that Decedent was the only known brother of Kipp, thus ruling out the possibility that another male sibling of Kipp could have potentially fathered Appellant. Id. The ALJ stated that because he did not know "and Dr. Bush cannot tell us" the odds that unrelated people have the "same data indicating an equivalent genetic similarity as shown between [Kipp] and [Appellant]," he could not mathematically calculate the "affirmative odd/probability that [Kipp] and [Appellant] are in fact related as nephew-aunt." Id. Ultimately, the ALJ concluded that "[w]e are left only with a ratio, and no possibility of going any further." Id. Accordingly, the ALJ let stand his January 13, 2004 order determining heirs and decree of distribution.

Appellant filed an appeal with the Board that contained a Statement of Errors of Fact and Law. Appellant claims that the ALJ erred in rejecting both Dr. Bush's April 14, 2004 Report and Dr. Bush's September 10, 2004 supplemental letter. Attached to Appellant's appeal is a "Revised Relationship Assay Report" (Revised Report) by Dr. Bush dated November 29, 2004.

No further briefing was submitted by Appellant; no other parties submitted briefs.

Discussion

1. Introduction

On appeal, Appellant argues that the ALJ erred in rejecting the original Report based on the fact that the data was expressed in terms of an avuncular index, and not in terms of a percentage. Appellant asserts that the ALJ did not properly interpret the Report. Appellant offers, for the first time on appeal, a Revised Report in which "the findings were expressed in terms that [the ALJ] was seeking." Notice of Appeal at 3. Appellant explains that, after he received the October 6, 2004 Order Denying Rehearing, he contacted

Dr. Bush to determine if she could provide a revised report to respond to the ALJ's concerns. The Revised Report lists the same data as the earlier report, except it calculates the "probability of paternity" to be 93.30 percent.

Ordinarily, the Board does not consider evidence or argument, such as the Revised Report, that is presented for the first time on appeal, Estate of Peter Chatelaine, 40 IBIA 160, 161 (2004), and we do not do so now. We do, however, conclude that there is manifest error in the ALJ's consideration and treatment of the presumption of paternity ^{6/} and conclude that there is both a preponderance of the evidence rebutting the presumption as well as establishing that Appellant is the son of Decedent. Therefore, we modify the January 13, 2004 Order Determining Heirs and Decree of Distribution to reflect that Appellant is an heir of Decedent and shares equally in his estate with Antoinette Ross, Paula Ross-McRae, and Wendy Ross. ^{7/}

2. Standard of Review

The Board's review of probate decisions is governed by 43 C.F.R. § 4.318, which provides that

[a]n appeal will be limited to those issues that were before the administrative law judge or Indian probate judge upon the petition for rehearing * * *. However, * * * the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

"Manifest injustice" or "manifest error" arise when the injustice or the error is obvious. Estates of Walter George and Minnie Racehorse George Snipe, 9 IBIA 20, 22-23 (1981); cf. Estate of Glenn Begay, 16 IBIA 115, 118 (1988) (the Board has authority "in extraordinary cases" to correct manifest error). Errors in math that can alter the outcome

^{6/} The law typically has referred to the presumption as the presumption of legitimacy, hearkening back to a day when children who were not conceived by a married couple were termed "illegitimate" and society frequently stigmatized such children. See Michael H. v. Gerald D., 491 U.S. 110, 161-162 (1989) (White, J., dissenting). Society has, in large degree, has moved past such conduct and, therefore, we will refer to the presumption as one of paternity rather than one of "legitimacy."

^{7/} Because of our disposition of this appeal, Appellant's motion for an evidentiary hearing before this Board is moot.

for an appellant as well as errors in determining heirs are “manifest errors” within the meaning of Section 4.318. See Ward v. Billings Area Director, 34 IBIA 81, 90 (1999) (mathematical miscalculation of damages in a timber trespass case is manifest error); Estate of Paul Widow, 17 IBIA 107, 114 (1989) (“omission of an heir or heirs is manifest error”).

3. Analysis

When a child is conceived and born during the course of a valid marriage, as was Appellant, it is presumed that the child’s parents are the husband and wife. Estate of Robert M. Morin, 9 IBIA 188, 189 (1982). This presumption of paternity exists in part for the protection of the child to provide him or her with the stability and security of two parents who are responsible for the child’s well-being and comfort. See, e.g., Michael H., 491 U.S. at 124-125; 41 Am. Jur. 2d Illegitimate Children § 15 (2005). This presumption ordinarily is not conclusive, however, and may be rebutted by showing (a) the biological unlikelihood of the husband fathering a given child (e.g., due to impotency or sterility, or excluded through DNA testing) or (b) that the husband and wife did not have access to one another at the time of conception for the purpose of sexual relations (e.g., due to legal separation, extended absence, death). See Michael H., 491 U.S. at 124; 41 Am. Jur. 2d Illegitimate Children §§ 16-17, 26-27; 14 C.J.S. Children Out-of-Wedlock §§ 17, 22 (1991). If the presumption is rebutted, the presumption drops out and is no longer considered. 14 C.J.S. Children Out-of-Wedlock § 14. Once the presumption is rebutted, the inquiry typically turns to whether the evidence is sufficient under the applicable standard to establish paternity.

To rebut the presumption of paternity as well as to establish paternity in Indian probate cases, the standard of proof is a preponderance of the evidence. See Estate of William Youpee, 28 IBIA 200, 202 (1995); Estate of Emerson Eckiwaudah, 27 IBIA 245, 250 (1995). Under the preponderance of the evidence standard, the moving party has the burden of showing that the existence of a fact is more probable than its non-existence. See Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 137 n. 9 (1997); 29 Am. Jur. 2d Evidence § 157 (1994). The probate judge may take judicial notice of common, generally indisputable facts, such as the normal nine-month period of human gestation. See Estate of Louis Harvey Quapaw, 4 IBIA 263, 276 (1975). 8/

8/ Judicial notice, like presumptions, also may be challenged. C. Fishman, Jones on Evidence at § 2.14. Therefore, while it is true that the period of human gestation is commonly understood to be approximately nine months from the time of the mother’s last menses, it is equally known and understood that human gestation may be longer or shorter (continued...)

In addition and citing 25 U.S.C. § 371, the Board repeatedly has held that the determination of paternity in Indian probate proceedings is a question of federal, not state law. See, e.g., Estate of Eckiwaudah, 27 IBIA at 248; Estate of James Howling Crane, Sr., 12 IBIA 209, 211 (1984); Ruff v. Portland Area Director, 11 IBIA 267, 273 (1983). Therefore, state laws relating to proof of paternity are not applicable to determinations of paternity in an Indian probate proceeding. See Estate of Chatelaine, 40 IBIA at 161; Estate of Eckiwaudah, 27 IBIA at 248.

In sum, a child conceived and born to a married couple is presumed to be the child of the husband and wife in the marital relationship. To prove that a man other than the husband is the father of the child is a two-step process. First, the presumption must be rebutted: A preponderance of evidence must establish that the husband is not the father, either by showing the biological unlikelihood of the husband fathering the child or by showing that the husband and wife did not have access to one another for sexual relations at the time of conception. If the evidence is insufficient to rebut the presumption, the presumption is then conclusive and the husband is deemed to be the father. If the evidence proves that the husband is not the father of the child, the presumption of paternity drops out of the case and the moving party may then proceed to the second step of establishing paternity by another man.

We turn now to a discussion of the errors in this appeal. The ALJ first erred in citing to Minnesota's statutory presumption of paternity, rather than citing to the Board's cases. In and of itself, this error was harmless because the Board recognizes the same presumption. See, e.g., Estate of Elmer James Whipple, 16 IBIA 225, 226 (1988); Estate of Morin, 9 IBIA at 189. However, we reiterate that issues relating to paternity are determined as a matter of federal, not state, law. Estate of Chatelaine, 40 IBIA at 161.

8/(...continued)

by several days or weeks. Id. at § 2.39; see also Wisc. Stat. § 891.395 (1996, 2007 Supp.) (“The conception of the [greater-than-5.5-pound] child shall be presumed to have occurred within a span of time extending from 240 days to 300 days before the date of its birth, unless competent evidence to the contrary is presented”). Parties to probate proceedings that include paternity issues can, of course, seek to rebut presumptions, as has Appellant herein, and may challenge facts of which a judge has taken judicial notice. For example, in paternity actions, the presumption of paternity perhaps may be rebutted by medical evidence if, e.g., the blood types of the husband and the child preclude the likelihood of the husband fathering the child. Similarly, judicial notice of a nine-month gestation period may be contradicted by medical evidence if, e.g., the child's birth weight or other evidence indicates a shorter or longer gestation period.

Second, we find manifest error in the ALJ's analysis of the evidence presented in rebuttal to the presumption. That error was the miscalculation of the nine-month period of gestation and finding it to coincide with the time of Jerome and Joyce's reunion in mid-June 1957. That is, based on Jerome's testimony at Joyce's probate proceeding — that he and Joyce reunited in mid-June 1957 and had sexual relations at that time — the ALJ determined that the presumption of paternity was not rebutted because the husband and the wife therefore had access to one another for the purpose of, and indeed did have, sexual relations at the time of Appellant's conception. 9/ However, nine months prior to February, the month in which Appellant was born, is the month of May rather than June. Thus, the ALJ overlooked the evidence presented concerning Jerome's absence and Joyce's cohabitation with Decedent in May 1957.

We conclude, based on the undisputed evidence, that not only was Jerome absent in May 1957, but that Joyce and Decedent were cohabiting at that time. Jerome testified at Joyce's probate hearing that he had been away prior to mid-June 1957 10/ and that it was his understanding that Joyce had been in Granite Falls with Decedent. Decedent's sister stated that “[d]uring the Spring and Summer of 1957, [Decedent] brought Joyce Hopkins to Granite Falls, Mn, and did live with her at my parents['] home. Joyce Hopkins told me after a few months that she was lonesome for her relatives in Sisseton, SD.” Sept. 25, 2003 Letter from Kipp to ALJ. These facts lead us to find that Jerome and Joyce did not have access to one another at the time of Appellant's conception and, thus, the presumption is rebutted. 11/

9/ No evidence was presented to show that Jerome was physically incapable of fathering Appellant: First, the DNA evidence offered by Appellant only purports to show that Decedent could be his father and does not purport to exclude Jerome. Second, the evidence in Estate of Hopkins demonstrates that Jerome fathered a daughter two years before Appellant was born and therefore evidently is capable of fathering children. Thus, the ALJ appears to have considered whether Appellant had established that Joyce and Jerome did not have access to one another at the time of conception.

10/ Jerome testified that he returned to Big Coulee in mid-June 1957 to take care of his daughter. He testified that he was “picked up again” in September for work in Kansas, thus suggesting that he might have been in Kansas during the time of Appellant's conception in May 1957.

11/ Other evidence also is consistent with the finding that Jerome is not Appellant's father. Appellant stated that Jerome was never a father to him and, when his mother died, he was
(continued...)

Since Appellant rebutted the presumption of paternity, the next issue is then whether the preponderance of the evidence supports the determination that Decedent is his father. We conclude that it does. 12/

First, as noted above, it is undisputed that Decedent and Appellant's mother were cohabiting and likely had sexual relations at the time of his conception. Second, there is an absence of any evidence suggesting that Joyce had sexual relations with any other man in May 1957. Third, Joyce's half-sister, Nora (Norma) Young, testified at the hearing held to probate Joyce's estate that Joyce told her that Decedent was the father of Appellant and that Decedent acknowledged Appellant as his son by visiting him and providing money and clothes for him until Decedent married. Fourth, Decedent's sister stated that it was common knowledge in Decedent's family that Decedent had a son by Joyce. Sept. 25, 2003 Letter from Kipp to ALJ. Finally, in a statement against her interests, Decedent's daughter, Antoinette Ross, wrote that her mother (Blue) told her that Decedent had a son who was a few years older than Antoinette and that his mother was from the Sisseton-Wahpeton Tribe. 13/

We have considered Decedent's statements to his daughters Wendy Ross and McRae-Ross that Appellant is not his son, but find them undermined by Decedent's explanation that Joyce was already pregnant when they began cohabiting. If true, Appellant would have been born sooner than he was.

Taking all of the evidence together, we conclude that a preponderance of the evidence establishes that Appellant is the son of Decedent and is, therefore, entitled to share in the distribution of his trust assets. Therefore, without reaching the issue of the proffered DNA evidence, we determine on the basis of manifest error that the January 13 order must

11/(...continued)

placed into foster care in Idaho. Appellant also explained that his mother told him that the reason Jerome's name appeared on Appellant's birth certificate was because Decedent was no longer in her life.

12/ We decline to remand for further proceedings to decide this issue because Judge Clapp is no longer with the Office of Hearings and Appeals, and therefore the determination must be made on the record without additional credibility determinations. In this respect, the Board is equally situated to make the determination as a newly-assigned ALJ would be.

13/ According to Joyce's probate, she was of the Sisseton-Wahpeton Tribe. Estate of Hopkins, OHA-7 form at 1.

be modified to add Appellant as Decedent's son and heir, together with Decedent's daughters, Antoinette Ross, Ross-McRae and Wendy Ross to share and share alike.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the ALJ's October 6, 2004 Order Denying Petition for Rehearing and modifies the January 13, 2004 Order Determining Heirs and Decree of Distribution consistent with this opinion.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge