



INTERIOR BOARD OF INDIAN APPEALS

Estate of Charles Track, a.k.a. Charles Afraid of His Track

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

ESTATE OF CHARLES TRACK, A/K/A
CHARLES AFRAID OF HIS TRACK

(DECEASED FORT PECK ALLOTTEE NO. 1106
PROBATE NO. K-61-69-S)

IBIA 72-5

Decided March 15, 1972

Appeal from Secretary's decision after rehearing.

Affirmed.

Indian Probate: Wills: Revocation

The concept of revival of previously revoked wills is cognizable in Indian probate cases and where it appears that the Indian testator intended to republish by codicil a will which had been revoked by a subsequent will, the earlier will is deemed to have been revived by the codicil and the intervening will revoked by the codicil.

Indian Probate: State Law: Generally

Montana statutes pertaining to inheritance from illegitimates are derived from early California statutes pertaining to the same subject, and under such statutes a father of an illegitimate may not inherit from his illegitimate child unless (1) the father, after marrying the mother has adopted the illegitimate into his own family, or (2) the father, after marrying the mother of the illegitimate acknowledges his paternity.

APPEARANCES: Robert Hurly and L. Neil Axtell for appellant Joan Track Clampitt; James McCann for Raymond Track and other unspecified heirs of the decedent; James L. Sansaver and Baxter Larson for Aloysius First Sound and Lena First Sound.

OPINION BY MR. LASHER

This matter is before this Board on separate appeals filed by Joan Track Clampitt and Edith Cooper from a Decision After Rehearing entered by the Secretary of the Interior, Rogers C. B. Morton, on

June 29, 1971. 1/ At the time of issuance of the Secretary's decision, all parties in interest were advised of their right to file an appeal with this Board. The Secretary's decision affirmed the examiner's "Order Approving Will of November 13, 1958, and Codicil of March 9, 1965, and Decree of Distribution" (hereinafter referred to as "Order Approving Will") entered by the examiner on March 7, 1969.

I. Factual Background

The decedent, Charles Track, passed away on April 30, 1965, at age 88. During the last seven years of his life he executed three testamentary instruments:

1. A Last Will and Testament dated November 13, 1958, executed at the Fort Peck Indian Agency on a standard form printed by the Bureau of Indian Affairs for such purposes. (Referred to herein as the 1958 will.)
2. A will dated November 14, 1964, which contained a customary revocation clause revoking "all former wills and codicils" made by the testator. 2/

1/ Ordinarily, the decision after a rehearing would have been rendered by the examiner who conducted the hearing, in this instance, David J. McKee. However, because of Mr. McKee's unavailability by virtue of his appointment as Chairman of this Board, the Secretary requested that the record in this case be certified to him for decision. Mr. McKee has disqualified himself and has not participated in this decision on appeal.

2/ Referred to herein as the 1964 will. The circumstances surrounding the execution of this will, which was not approved by the examiner, is described by the examiner in his Order Approving Will as follows:

3. A codicil to the 1958 will dated March 9, 1965. This instrument, which did not contain a revocation clause, changed the 1958 will in only one respect: the half-interest in decedent's 4-room frame house which was left to appellant, Joan Track Clampitt, in the Sixteenth paragraph of the 1958 will, was revoked and the whole interest was devised to Elizabeth Track Brown. ^{3/}

By his 1958 will, as amended by the 1965 codicil, the decedent disposed of his interests in various trust properties by specific

fn. 2 (cont)

"The record indicates that this document was available in the home wherein the testator was residing with his daughter, Joan Clampitt and her husband, and that no attorney or other completely disinterested person, except the witnesses, participated in its execution. The record does not show it, but the original of this will was received by the examiner with a letter of transmittal written by Robert Hurley, attorney at law, Glasgow, Montana, who indicated that he had prepared the same and mailed it to the home of the testator and that he had no further connection with the will, except that the same was returned to him for safekeeping after it was executed. The record does reveal that the testator was so physically incapacitated at the time that he did not attempt to make the trip from Frazer, Montana, to Glasgow, Montana, for the purpose of seeing the attorney or giving him instructions concerning the preparation of the said will."

^{3/} Referred to herein as the 1965 codicil. In his Order Approving Will the examiner made the following findings relative to the execution of the codicil:

"The third testamentary disposition under consideration is the codicil dated March 9, 1965. This testator sent word to the agency that he wished to draw a new will, according to the testimony of Ila Mae McAnally, who, after 1958, had continued her employment at the Fort Peck Agency with the same duties. The testator, because of physical incapacities, was unable to travel to the agency for this purpose, and, accordingly, Mrs. McAnally proceeded to the home of his daughter, Elizabeth Track Brown in Wolf Point, Montana, where the testator was residing at that time. She testified that she then had no knowledge of the existence of the 1964 will, but that she did take the original of the 1958 will with her for comparison and such other purpose as it might have.

"Upon her arrival at the home of Elizabeth, she was directed to the room where the testator was. She read the 1958 will to him in English, but her memory is not specific as to how far she progressed before he stopped her, indicating that his wish at that time was to change only the beneficiaries of the house mentioned in paragraph Sixteenth."

devises to his seven children, 4/ a nephew James L. Long, and eight grandchildren. On the surface, it would appear that by the 1958 will the decedent intended a fairly equal division of his property among the objects of his benefaction. By contrast, under the 1964 will, 5/ appellant Joan Track Clampitt is the primary beneficiary, receiving all of decedent's property with the exception of three specific devises to Elizabeth Track Brown, Hazel T. Anderson, and Raymond Track. In addition, she is named executrix.

The decedent was married three times. His first wife bore him one child which died in infancy. The children named as devisees in the 1958 will were the product of Mr. Track's second and third marriages. During the third marriage, 6/ Lena First Sound (sometimes referred to in the record as Tena First Sound and Tena Bearskin First Sound), to whom decedent was never married, bore him an illegitimate son, Charles Track #2, hereinafter referred to as "Charles First Sound." This illegitimate son's name was officially changed to Charles First Sound in a Tribal Court proceeding on June 23, 1941, during which Charles Track admitted paternity. The decedent never adopted Charles First Sound or took him into his home, nor did he contribute to the care or support of this son who was raised by Lena First Sound.

4/ Five daughters, Eva Mae Smith (predeceased), appellant Edith Track Stevens (Cooper), Elizabeth Track Brown, appellant Joan Track Clampitt, and Hazel Track Anderson, and two sons--Raymond Track and Roy C. Track.

5/ This will was determined by the examiner to have been revoked by the 1965 codicil.

6/ Decedent's third wife was Mary Parnell.

However, upon the death of Charles First Sound on April 12, 1952, the decedent, in the probate of his son's estate, was determined by the Examiner, J. R. Graves, to have inherited a 1/2 share of his son's allotment, the other half going to Lena. It is from this inequitable situation that Lena's claim against the decedent's estate arises. 7/

The issues raised on this appeal relate primarily to the effect of the 1965 codicil in reviving the 1958 will, and the validity of the claim of Lena First Sound. 8/

II. Revival of the 1958 Will

The appellant, Joan Track Clampitt, contends that if it is determined on this appeal that decedent had sufficient capacity to execute

7/ Lena First Sound has sought repeatedly, but unsuccessfully, to have the decedent's half-share in her son's allotment distributed to her. Her claim herein, although overtly based on decedent's failure to support his illegitimate son, is, in reality, a further effort to obtain the decedent's interest in the allotment. Due to the complexity of the questions posed, further discussion thereof will be reserved to separate sections of this decision.

8/ Although the testamentary capacity of the decedent at the time of the execution of the 1964 will and the 1965 codicil was questioned on several occasions during the proceedings, if these issues were not abandoned by the parties, as appears to be the case, certainly the paucity of evidence introduced on the subject was insufficient to overcome the presumption of testamentary capacity arising from the regular execution of the will and codicil. See Estate of William Cecil Robedeaux, 1 IBIA 106; 78 I.D. 234 (1971). We see no need to dwell on this point. Suffice it to say that we have carefully reviewed the record and are satisfied that the testator had the requisite capacity to make final testamentary disposition of his property on both occasions. The appeal of Edith Cooper challenging the propriety of the

the 1965 codicil, the codicil must stand alone unrelated to the 1958 will since the 1964 will permanently and effectively revoked the 1958 will. ^{9/} Stated another way, the appellant maintains that the 1958 will, because of its prior revocation, had no legal existence at the time the 1965 codicil was executed, and was not susceptible to revival even if Mr. Track were capable of executing the 1965 codicil. We disagree with this rationale for the reason that it ignores the well-established concept of revival of preciously revoked wills. ^{10/}

Simply stated, the "revival" rule is that if a codicil is executed which purports to be a codicil to a will which has been revoked by a later will, the later will is thereby revoked by implication, and the earlier will is revived, provided it is still in existence. 57 Am. Jur. Wills, § 488 (1948); Annot., 33 A.L.R.2d 922 (1954). The theory of the rule is that since the republication of a will once revoked makes such will speak as of the time of the

fn. 8 (cont.)

attorneys fees allowed herein amounts to nothing more than an expression of opinion on her part. Although the amounts of these fees are substantial, they are not unconscionable and there is no indication that the examiner abused his discretion in arriving at the amounts allowed.

^{9/} As we have previously pointed out, Joan Track Clampitt is the primary beneficiary under the 1964 will.

^{10/} The words "republication" and "revival" have, from a technical standpoint, different meanings. When a codicil is said to "republish" a will, it is meant that a will, then valid and in effect, but originally considered to have been published as of the date of its execution, is republished as of the date of the codicil. When it is said that a codicil has "republished" a will not otherwise in effect because

republication, a codicil which republishes an earlier will impliedly revokes an intervening will which revokes the earlier will either expressly or by reason of provisions inconsistent with those of the earlier will. 57 Am. Jur., Wills § 488 (1948); cf. Annot., 59 A.L.R.2d 11 (1958). 11/

A prior will must be in actual existence to be revived by a codicil which refers to it in adequate terms where the prior will had been previously revoked. 95 C.J.S. Wills, § 303b(2)(b) (1957). In the instant case, the 1958 will was not physically destroyed or mutilated. It was in actual physical existence and at least part of it was read to the decedent by the scrivener at the time the decedent executed the 1965 codicil. 12/

In order to effect a revival of a revoked will by a codicil, it must also appear that the testator intended to revive the previously revoked will. The testator's intention must appear in the codicil itself, 95 C.J.S. Wills, § 303b(2)(b), or from other evidence. See 3 Page, The Law of Wills, § 29.150 (1961). A reading of the 1965 codicil reveals that the 1958 will was specifically referred to therein. Furthermore, the 1965 codicil made an express

n. 10 (cont.)

of its prior revocation, something has been added, namely, the revival of a formerly, but not presently, effective instrument. See Annot., 33 A.L.R.2d, 922 (1954).

11/ We see no reason why such rule should not be cognizable in and applicable to Indian probate proceedings, where the circumstances warrant it.

12/ It does appear, however, that at the time the 1965 codicil was

change in the 1958 will, and such change is entirely consistent with a revival of the 1958 will and inconsistent with the 1964 will. The facts of this case are to be distinguished from the situation where the codicil makes an ambiguous reference to the decedent's "last will" or in which changes made in the codicil could be equally applicable to the intervening will as well as the prior will.

From this, and with due consideration to the testimony of the scrivener, we conclude that the decedent intended to revoke the 1964 will and the revocation clause contained therein and to revive the 1958 will. There is no showing to the contrary.

A final problem in connection with the revival of the 1958 will arises from the fact that the scrivener of the 1965 codicil, Mrs. McAnally, was unaware of the existence of the 1964 will. It might be contended that the scrivener's mind should be considered as if it were the mind of the testator, and that, accordingly, there could be no intention to revive the former instrument since it was not known to the scrivener that it had even been revoked. However, there is considerable precedent for the rule that in order to effect a revival of the earlier will, knowledge of its subsequent revocation is not necessary. See Annot., 33 A.L.R.2d 922 (1954). We subscribe to this view and are satisfied that in the circumstances of this case

fn. 12 (cont.)

executed the scrivener, Mrs. Ila Mae McAnally, was unaware of the existence of the 1964 will.

the ignorance of the scrivener as to the existence of the 1964 will is not crucial inasmuch as it otherwise appears that it was the intention of the decedent to revive the 1958 will.

Accordingly, the decision of the Secretary of the Interior of June 29, 1971, affirming Examiner McKee's Order Determining Heirs is, in this respect, affirmed for the reasons stated hereinabove.

III. The Claim of Lena First Sound

A. History

When Charles First Sound passed away in 1952, unmarried and without issue, his allotment passed to his father and mother who each received an individual one-half interest therein. Mention is made in the record that the decedent herein forthwith executed an affidavit disclaiming any interest therein, 13/ whereupon he was advised by the hearing examiner conducting the probate of his son's estate that if he so desired he could execute a deed conveying his interest to Lena First Sound. The decedent actually executed such a deed on December 1, 1954. However, the deed was not approved by the Area Office because the decedent's wife, Mary Parnell, refused to extinguish her inchoate dower rights by joining in the deed and also

13/ We do not find this affidavit in the record herein or in any of the associated files we have examined in reaching our determination. It appears, however, that the decedent was motivated at this time by a sense of fairness, perhaps stemming from his failure to adopt his son or otherwise make any contributions to his son's care and support during the twenty-four years of his life.

because the deed failed to specify that oil and gas rights in the property were reserved to Indians having tribal rights on the Fort Peck Reservation as required by pertinent federal statutes. After the deed was returned to the decedent without approval he made no further attempts to meet the requirements necessary for a valid conveyance of his interest in the lands in question to Lena First Sound. 14/

On June 22, 1967 Lena First Sound petitioned the Secretary of the Interior for approval of the 1954 deed, the Superintendent, the Area Director, and Commissioner of Indian Affairs having previously refused approval thereof. In a decision entered June 11, 1968, 15/ by Harry R. Anderson, Assistant Secretary of the Interior, the appeal was denied. 16/

14/ Perhaps due to the fact that the property had become quite valuable and he was receiving substantial royalties from an oil and gas lease approved September 1, 1955. As of February 15, 1972, there was accumulated in decedent's Indian Money Account the sum of \$66,258.03 which sum for the most part represents oil royalties from decedent's half share in the allotment.

15/ This file is designated Appeal of Lena Bearskin First Sound, IA-1668 (June 11, 1968).

16/ The decision, in pertinent part, states: "There are significant intervening events in the present case which require disapproval of the deed. After the deed of December 1, 1954, was returned in 1955 without approval, the grantor made no attempt to fulfill the requirements made by the Area Director: in fact, the grantor appears to have rested on the statement made to him at that time that no further consideration would be given the deed since he made no further move looking to the conveyance of his interest to the appellant. Moreover, the deceased until his death in 1965 accepted as his own his share of oil and gas revenues from the allotment and included his interest in a specific devise in a will. In these circumstances, it cannot be said that the grantor manifested the necessary consent or continuing

Lena First Sound filed her claim herein on June 12, 1965 in the sum of \$13,322.50, computed to some extent on the basis of a daily charge of \$1.50, for the "proportionate share of support given by claimant to the decedent's son" during the son's lifetime. In his "Order Approving Will" herein, the examiner sustained this claim, but in the enlarged sum of \$27,500. 17/

fn. 16 (cont.)

application' that the deed be approved. See Bacher v. Patencio, 232 F. Supp. 939 (D.C. S.D. Cal. 1964), aff'd, 368 P.2d 1010 (9th Cir. 1966)."

17/ The gist of the examiner's rationale, too lengthy to quote in toto, is as follows: "In the determination of this proceeding, the examiner is prone to consider the fact that the other half of the royalty which this decedent received before his death was unjust enrichment in view of the fact that he had fathered the child, never supported him, and had been frustrated in his deed attempt to make things right.

"Following the entry of this order, Lena will have no further opportunity to make any claim upon the royalties to be received by the devisees under the decedent's will from her son's land, and in view of the fact that she cared for the child, Charles First Sound, during the 25 years of his life, five years as an invalid with running sores on his leg, it would seem that the \$27,500.00 of royalty (decedent's one-half only) accumulated during probate, said royalty now being held in the IIM account, should properly be awarded to her under her claim.

"A finding is made that the claim of Lena First Sound shall be allowed in the amount of \$27,500.00. This is in lieu of the claim for not only the full amount of all royalties received from the property, before and after decedent's death, but also the title to the minerals which this examiner is powerless to award.

"The \$27,500.00 claim allowed to Lena First Sound shall be paid only from the royalty derived from the oil production from the lease on the lands of Charles First Sound, Allotment No. 3550." (Emphasis supplied).

Although we generally agree with the result reached by the examiner, from our review of the record in this matter and the record in the Estate of Charles First Sound, deceased Fort Allottee No. 3550, we believe that in order to reach a sound and truly just decision in this matter, we must first recognize and answer a basic question not heretofore raised by any of the parties hereto, i.e., whether the decision by Examiner J. R. Graves in the estate of Charles First Sound 18/ to divide the illegitimate's allotment equally between his father and his mother was correct. This is a fundamental proposition for if the half-interest in his son's allotment was improperly distributed to the decedent the estate of Charles First Sound should be reopened and such interest properly distributed according to the laws of descent and distribution governing the estates of illegitimate children in effect in Montana at that time. 19/

18/ Examiner Graves entered his Order Determining Heirs therein on January 12, 1953.

19/ Should it appear that the decedent was not entitled to share in his son's estate, this half-interest in the allotment should be deleted from the inventory of assets comprising his estate and the question of the validity of the examiner's allowance of the claim of Lena First Sound becomes moot since it appears that the true nature of her claim was for the other half of her son's allotment and the royalties accruing therefrom which had accumulated in the decedent's Indian Money Account. Whether a claim solely in the nature of a claim for non-support which was never reduced to judgment in a state court having jurisdiction to consider and determination liability therefor is recognizable in Indian probate proceedings is not before us. It would appear, however, that should it be determined upon reopening of the estate of Charles First Sound that the decedent herein was entitled to a half-share of his son's allotment, it would become necessary to remand this matter for further hearing to take further evidence as to the dollars and cents amount of such support and to allow the parties opportunity to present legal arguments as to the propriety of claims founded in equity in Indian probate proceedings.

Let us now turn to this question.

B. The Correctness of the Examiner's Holding in the Estate of Charles First Sound

As previously noted, the correctness of Examiner Graves' determination that the allotment of Charles First Sound should be distributed to his father, Charles Track, and his mother, Lena First Sound, in equal shares has not been challenged in these proceedings by any of the parties. ^{20/} Hence, in the probate proceedings in the instant case, the question was not before the examiner. Although the basis for Examiner Graves' decision does not appear in the formal documents in the Charles First Sound probate file, in a letter dated February 2, 1953, to Mrs. First Sound contained therein, Graves indicates that "under the laws of the state of Montana, the decedent's heirs are his mother and father, each taking a 1/2 share." Although we disagree with his interpretation thereof, we do believe that Examiner Graves properly referred to the Montana statutes to determine the heirs of Charles First Sound rather than to the federal statute pertaining to the inheritance rights of illegitimate children, i.e., section 5 of the Act of February 28, 1891, 26 Stat. 795, 25 U.S.C. § 371 (1952) which provides that for the purpose of determining the descent of land to the heirs of any deceased Indian under the

^{20/} Nor was this question raised during the probate proceedings in Estate of Charles First Sound, Probate, C-M-53, (File No. 1136) or in Lena First Sound's administrative appeal from the decision of the Commissioner of Indian Affairs denying approval of Charles Track's deed in Appeal of Tena Bearskin First Sound, IA-1668 (June 11, 1968).

provisions of the subject Act, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose of aforesaid, taken and deemed to be the legitimate issue of the father of such a child.

This department has heretofore interpreted Section 371 to create inheritance rights only in the illegitimate child, not in the father. Thus, the acting Solicitor, in Estate of John Slickpoo, IA-130 (February 28, 1955) held as follows:

* * * However, it is now well settled that the language of the 1891 Act to the effect that "every Indian child, otherwise illegitimate, shall for such purpose [of determining the descent of land] be taken and deemed to be the legitimate issue of the father of such child" bestows inheritance rights only upon the illegitimate child, and does not create a right of inheritance in the father. Thus, any claim which a father may make in such a situation is not aided by the above federal statute, but necessarily must depend upon the State law.

C. Construction of the Montana Statute

The pertinent Montana statute in effect at the time of Charles First Sound's death, and at the present time, R.C.M. 1947, § 91-404, provides as follows:

Illegitimate children to inherit in certain events. Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the

father of such child, and in all cases is an heir of his mother, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family, in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate: saving, to the father and mother, respectively their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate.

The question then is whether, under the above-quoted statute, the father of an illegitimate has any rights in the illegitimate's estate. Since we have been unable to find any Montana cases which have construed the subject statute in the somewhat rare situation involved here where it is the father who seeks to obtain rights in his illegitimate child's estate, we must proceed without benefit of precedent.

Some preliminary observations should be made. First, the announced purpose of the statute, and we believe its primary

purpose, is to provide for the rights of illegitimate children to inherit from their parents, and from their lineal or collateral kindred, and not vice versa. Second, the statute is in abrogation of the common law rule that upon the death of an illegitimate intestate his property will descend only to the heirs of his body, and in the absence of such a specific statutory provision conferring rights of inheritance neither the mother nor the father of an illegitimate has any right of inheritance from such child who dies intestate. 10 Am. Jur. 2d, Bastards § 160 (1963). Thus in the absence of such specific statutory provisions the father of an illegitimate has no right to inherit upon the death of the illegitimate intestate. 10 Am. Jur. 2d, Bastards, § 164 (1963); Annot., 48 A.L.R.2d 759; Estate of W. B. Harrison, Myrick Prob., 121 (Calif. 1876). Finally, statutes of this kind are strictly construed, and the courts have indicated a marked reluctance to extend the right to inherit to persons not named therein. Annot., 48 A.L.R.2d 759. 21/

21/ From the nature of his remarks and the organization of his material, we gather that the author of the annotation believed, as we do, that the Montana statute should not be construed so as to provide for inheritance rights of the father of an illegitimate.

In view of the applicability of the rule of strict construction, it is significant that the Montana statute in question does not "expressly" provide for the father to inherit. 22/

The structure of the statute in question, R.C.M. 1947, § 91-404, is worthy of comment. It breaks down into four parts: (1) The first section provides for the inheritance rights of an illegitimate child who has been acknowledged in writing by his father. (2) The second clause provides that in all cases the illegitimate is an heir of his mother. (3) The third section provides that the illegitimate does not represent his father or mother for the purpose of inheriting from his or her lineal or collateral kindred unless before the illegitimate's death his parents have married, and his father after such marriage has acknowledged the illegitimate as his child or adopted the illegitimate into his family. 23/ (4) The fourth part

22/ Another Montana statute does specifically provide that the mother is a successor to her illegitimate child. Thus, R.C.M. 1947 § 91-405 provides:

"If an illegitimate child, who has not been acknowledged or adopted by his father, dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs at law."

23/ At the end of the third section of the statute is this clause: ". . . saving to the father and mother respectively, their rights in the estates of all the children in like manner as if all had been legitimate . . ." We believe this language relates only to the third section, the effect of which is to predicate the inheritance rights of the father on the happening of either of the combined events: (1) marriage of the father and mother and acknowledgment of the illegitimate by the father after such marriage, or (2) marriage of the father and mother and adoption of the illegitimate by the father into the father's family.

provides that the issue of all marriages null in law or dissolved by divorce are legitimate.

In accord with the foregoing, we view the statute as contemplating two means of "acknowledgment": (1) for the son to inherit from his father, a mere acknowledgment in writing signed by the father of the child is sufficient; (2) for the father to inherit from the illegitimate son, there must be a marriage between the father and the mother of the illegitimate followed by either an acknowledgment of paternity by the father of the illegitimate child, or an adoption of the illegitimate into the father's family.

Under our interpretation, Charles Track was not entitled to inherit from his illegitimate son. He was never married to his son's mother nor did he adopt his son into his own family. From the record before us, it appears that the only acknowledgment during the lifetime of Charles First Sound was his oral testimony at the change of name hearing in the tribal court. Whether at this time the father executed an acknowledgment in writing is not shown. 24/

24/ If the decedent did execute an acknowledgment in writing during the lifetime of Charles First Sound it would make no difference to the ultimate conclusion reached here. So also, the affidavit executed by the decedent relinquishing any claim in his son's estate, executed shortly after his son's death, in our opinion is not an acknowledgment by the father of the illegitimate, since for such an acknowledgment to have any efficacy whatsoever it must surely occur during the lifetime of the illegitimate.

In attempting to divine the meaning of the subject Montana statute we have had occasion to examine the statutes of other states having similar content, and in particular, the California statutes pertaining to "Succession" from which the Montana statute derived. Of particular significance is the North Dakota statute. Section 56.01.05 of the North Dakota Century Code (Vol. 11, 1960) provides as follows:

"Every child born out of wedlock is an heir of the person who in writing signed in the presence of a competent witness acknowledges himself to be the father of such child. In all cases such child is an heir of his mother. He inherits the father's or mother's estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock. He, however, does not represent his father or mother by inheriting any part of the estate of the kindred of his father or mother, either lineal or collateral, unless before his death his parents shall have intermarried and his father after such marriage shall have acknowledged him as his child or adopted him into his family. In that case such child and all the legitimate children in such family are considered brothers and sisters and on the death of any one of them intestate and without issue the others, subject to the rights in the estate of such deceased child of the father and mother respectively, as is provided in this code, inherit his estate as his heirs in the same manner as if all the children had been born in wedlock. The issue of all marriages null in law or dissolved by divorce are deemed to have been born in wedlock."
(Emphasis supplied)

The authors of the North Dakota statute used periods in lieu of the confusing semicolons found in the Montana statute to separate

the various sections comprising the paragraph. Thus, in the North Dakota statute, the important clause in which the inheritance rights of the father and mother are reserved is clearly linked to the section pertaining to the illegitimate's right to inherit from lineal or collateral kindred of his mother or father, and is clearly not connected to the other sections of the statute, and it is quite apparent that the rights of the father are not "saved" by his mere acknowledgment in writing that he is the father of such child. Indeed, it is questionable whether the father of an illegitimate can inherit under any set of circumstances under the North Dakota statute.

The original California statute, the precursor of the Montana statute, was short lived. Under subsequently enacted California statutes the father is given no inheritance rights in the estate of his illegitimate child unless the child has been legitimated by a subsequent marriage of his parents or adopted by his father as provided by the civil code, and where such is not the case, the illegitimate's estate is succeeded to as if he had been born in lawful wedlock and had survived his father and all persons related to him through his father. See Cal. Prob. Code, § 256.

We have also referred to similar statutes in the states of Idaho and Utah which are couched in nearly identical language

to the Montana statute and find that there have been no interpretations of these statutes inconsistent with the conclusions which we here reach.

We are constrained to conclude that there exists a strong probability that the decision reached by Examiner Graves which resulted in the decedent's receiving a half interest in his illegitimate son's allotment may be erroneous and that the foundation upon which the decisions of the Commissioner and other officials of this Department in repeatedly denying Lena First Sound's claim over the years is unsound. There is but one solution which will result in a just and equitable resolution of the claim of Lena First Sound in this instance -- a reopening of the Estate of Charles First Sound. To implement this determination, an order is being issued simultaneously herewith, in the exercise of the authority reserved to the Secretary in Section 1.2 of Title 25 of the Code of Federal Regulations and pursuant to 43 CFR § 4.242(h), directing the reopening of the Estate of Charles First Sound, deceased Fort Peck Allottee No. 3550, Title Plant File No. 1136 (1953) with provision therein affording the parties hereto full opportunity to present evidence and legal argument material to the question herein discussed.

IV. Conclusion and Order

Pursuant to the authority vested in this Board by virtue of its delegation from the Secretary, 35 F.R. 12081, 211 DM 13.7, the appeals of Edith Cooper and Joan Track Clampitt are denied and the Decision After Rehearing entered by the Secretary of the Interior on June 29, 1971, insofar as the matters raised by these appeals are concerned, is affirmed. The Secretary's decision affirming the Examiner's approval of the 1965 codicil and the 1958 will and directing distribution of decedent's estate according to the terms thereof, is affirmed in all respects with the exception, as hereinbefore noted, that the inclusion of the Charles First Sound allotment as part of the decedent's assets in these probate proceedings and the approval of the decedent's will, to the extent that it disposes of such allotment, is the subject of an order for reopening in Estate of Charles First Sound being executed simultaneously herewith, and accordingly, as to that single asset, that part of the Secretary's decision must be held in abeyance pending the outcome of such reopening proceedings.

If, as a result of such proceedings, the half interest in the Charles First Sound allotment is found to be the property of Lena First Sound, a final order will be entered in the instant matter directing the removal of said property as an asset of Charles Track's estate and closing these proceedings and directing the distribution

of the property to Lena First Sound in accordance with the determination reached in the reopening proceedings.

If, on the other hand, it is determined upon the conclusion of the reopening proceedings that the half-interest in the Charles First Sound allotment was properly distributed to the decedent, Charles Track, a final order will be entered herein supplementing such decision and directing the distribution of said property to the four grandchildren of decedent to whom the property was devised by Paragraph Fifteenth of the decedent's 1958 will.

In view of the fact that the fees of Sansaver and Larson, attorneys for Lena First Sound, were made payable out of the asset in controversy and may be subject to readjustment after conclusion of the reopening proceedings in Estate of Charles First Sound, that part of the Secretary's decision and the Order Setting Attorney's Fees dated June 29, 1971, will be held in abeyance until the conclusion of the reopening proceedings at which time the Examiner conducting the reopening proceedings should make a combined determination of their fees for their services herein together with their services in the reopening proceedings. The \$1500 fee allowed attorney James McCann for his efforts in the instant proceedings

is hereby affirmed. In the respects specified, this decision is final for the Department.

//original signed
Michael A. Lasher, Alternate Member

I concur:

//original signed
David Doane, Alternate Member