



INTERIOR BOARD OF INDIAN APPEALS

Estate of Frank Jones

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF FRANK JONES

DECEASED FORT PECK ALLOTTEE

IBIA 72-8

Decided December 19, 1972

Appeal from the decision of Administrative Law Judge William Hammett, Billings, Montana, dated November 16, 1971, denying appellant's petition for rehearing.

Affirmed.

Indian Probate: Appeal: Dismissal

An appeal from the denial of a rehearing will be dismissed when a petition for rehearing, apparently based on newly discovered evidence, does not allege evidence of sufficient weight to cause a possible change in the original decision.

Indian Probate: Appeal: Dismissal

A petition for rehearing, apparently based on newly discovered evidence, was properly denied when the petition, by not stating why such evidence was not discovered and presented at prior hearings, failed to comply with 43 C.F.R. § 4.241(a) and an appeal from the denial will be dismissed.

Indian Probate: Notice of Hearing: Generally

There is a presumption that persons living within the vicinity of the posting places specified in 25 CFR § 15.2 will have notice of hearing because the posting requirements of the section insure such notice is reasonably probable.

Indian Probate: Rehearing: Generally

The requirements in 43 CFR § 4.241(a) that a petition for rehearing must state specifically and concisely the grounds upon which it is based, and shall fully set out any newly discovered evidence are for the purpose of allowing the presiding officer the opportunity to make a judgment as to whether a further hearing is warranted.

Indian Probate: Rehearing: Generally

A rehearing was properly denied where a person who lived near a posting place on a reservation which was twice posted in five places with notice of hearing and notice of rehearing respectively, and who, by a mere allegation of lack of notice, fails to meet the burden of proof necessary to overcome the presumption of notice.

APPEARANCES: L. Neil Axtell, for appellant

OPINION BY MR. HARRIS

Frank Jones died intestate on May 21, 1966. His wife, Annie Small Jones, whom he married in 1942, had predeceased him in 1954. Five children were born to their marriage. Sybil Jones Scott, the appellant, is one of those children.

Following a probate hearing on October 27, 1966, an Order Determining Heirs was entered by Examiner McKee on March 31, 1967. The heirs of Frank Jones, under the applicable Montana State Law of Intestacy, were determined to be the five surviving children and each was declared eligible to receive one-fifth of the estate.

The estate was reopened and hearing was held on June 19, 1969, to determine if there were additional heirs. Based on the testimony of Catherine Iron Bear Jones that she and Frank Jones had cohabited in 1939 and he had fathered her child, the Secretary of the Interior on June 29, 1971, issued an Order Determining Heirs after Reopening, and to the five children previously named as heirs, added Manfred Iron Bear Jones as an heir, and determined the share of each to be one-sixth of the estate.

The appellant by her attorney, filed a petition for rehearing on August 27, 1971. As a basis for the requested rehearing the petition set out that Agnes Jones White Hawk, a sister of the deceased, would testify that statements by Catherine Iron Bear Jones that she had lived with Frank Jones and that she was the common law wife of Frank Jones were false. Attached to the petition was the following affidavit:

AGNES JONES WHITE HAWK, being duly sworn on oath, deposes and says:
That the testimony given by Cathryn Iron Bear Jones of Poplar, Montana, on the 19th day of June, 1969, at Poplar, Montana, in the estate of Allottee 2818, Frank Jones, to the effect that the said Cathryn Iron Bear Jones was the common law wife of Frank Jones, is entirely false.

Examiner Hammett, by order entered November 16, 1971, denied the requested rehearing on the grounds that, while apparently alleging newly discovered evidence, the petition did not comply with the

applicable regulation 43 CFR 4.251, in that it failed to state reasons why the evidence was not discovered and presented at the prior hearings.

The order by Examiner Hammett is the subject of this appeal. Appellant erroneously contends that the record shows notice was sent to her. However, she contends, that it is less likely for her to have gotten it in the mail while living on a reservation than in an off reservation community. Therefore, appellant contends, without notice of the hearings she did not appear and present Agnes Jones White Hawk's statement. Solely on the basis of these contentions appellant seeks to have the examiner's order overturned and a second rehearing granted.

It is noted that appellant does not allege error by the Examiner in finding that she was not in compliance with the provisions of 43 CFR 4.251 concerning the form and content of a petition for rehearing, but instead offers a "reason"--lack of notice of hearing--for not discovering or presenting the statement.

With respect to the Notice of Hearing, the then applicable regulation 25 CFR § 15.2 states:

Hearings to determine the heirs of Indians or to probate their wills shall be conducted only after notice of the time and place of such hearing shall have been

posted for 20 days in five or more conspicuous places on the reservation of which the decedent a resident or, if the decedent was not a resident of a reservation, in five or more conspicuous places in the vicinity of the proposed place of hearing.

A search of the record on appeal discloses no indication that notice of either the October 1966 or the June 1969 hearing was mailed to anyone. As can be seen from the quoted regulation, no mailing was required.

Appellant has, prior to the first hearings in 1966 and until the present time, lived on the Fort Peck Indian Reservation at Brockton, Montana. To comply with § 15.2 the notice of hearing was required to be posted on the reservation in five places at the time when the hearing and rehearing were held. The record on appeal contains copies of such notices which reflect posting of the notice of hearing and notice of rehearing at the Fort Peck Indian Agency in Poplar, at appellant's post office in Brockton, at the post offices in Poplar, Wolf Point, and Frazier--all of which are on the Fort Peck Indian Reservation in Montana. All such notices were posted over 20 days prior to the hearing or rehearing in accordance with the above-quoted regulation.

The requirements of the regulation were designed to ensure with reasonable probability that persons interested in the hearing would receive notice of the hearing. The form of the notice of hearing is

within the discretion of the Secretary of the Interior, and if such notice meets the above test it satisfies due process of law standards and is sufficient, Bowling, et al. v. U. S., 299 F. 438 (8th Cir. 1924).

When the posting requirements of 25 CFR § 15.2 are met, persons living within the vicinity of any place of posting are presumed to have had notice of the hearing. The basis for this presumption is two-fold: by compliance with the posting requirements diligent and reasonable efforts have been made to notify all known and unknown claimants against an estate; secondly, trust or restricted estates of deceased Indians primarily involve title to land and there is a need for finality of decision in such cases in order that reliance may properly be placed on such titles by all concerned. Estate of Basil Blackburn, 1 IBIA 261, 79 I.D. 422 (1972), Estate of Kate Bitner and Rae Bitner, 1 IBIA 277, 79 I.D. 437 (1972).

As set out above, appellant alleges lack of notice merely because it was less likely for her to receive her mail while living on a reservation than while living off reservation. Already noted is the absence of any requirement to mail a notice of hearing and the fact that none was mailed. Nothing further is offered with respect to the claim of lack of notice. It is incumbent upon one claiming lack of notice of a hearing by the Interior Department to determine heirs of a deceased allottee to make a showing of such lack. Bowling, et al. v. U. S.,

299 F. 428, 443. It is clear that appellant, with the above unsupported allegation, has failed to meet its burden of proof and is therefore presumed to have had such notice. On the basis of the foregoing the “reason” supplied by appellant in an effort to comply at this late date with the requirements of 43 CFR 4.251 concerning a petition for rehearing is found to be without merit.

Title 43 CFR 4.241(a) states in pertinent part:

[a] * * * petition for rehearing * * * must state specifically and concisely the grounds upon which it is based. It the petition is based upon newly-discovered evidence, it shall * * * also state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision. * * *

The purpose of the specifications in Title 43 CFR § 4.241(a) is to require the filing of a petition for rehearing which can serve the same function as a motion for a new trial in court. To require petitioner to specifically state the basis of his request provides him with opportunity to point out to the presiding officer the nature and extent of any error which may have occurred in the trial of a matter at the original hearing. The section also requires one who contends he has discovered new evidence to describe that evidence and give justification for its lack of presentation at any prior hearings. Compliance with these requirements is necessary so that the presiding officer may make a judgment as to whether such evidence is truly new or relevant; whether it is material or of sufficient

weight to cause a possible change in the decision previously rendered; and whether there is any justification for failure to present evidence alleged as new, at earlier proceedings. Non-compliance with the provisions of this section subjects the petition to dismissal for that reason alone. Estate of Lucy Feathers, 1 IBIA 336 (December 11, 1972); Estate of Ralyen or Rabyea Voorhees, 1 IBIA 62 (1971). See also Estate of Moses Neaman, IA-146 (October 28, 1954).

An examination of the petition filed by Sybil Scott Jones clearly reveals that no challenge is made to the significant finding by the Secretary that Frank Jones was the father of Manfred Iron Bear Jones. All that is challenged is a statement by his mother that she was the common law wife of Frank Jones. No finding on that point was made by the Secretary in his order after reopening. While an examination of appellant's petition leaves unclear whether their challenge to Catherine Iron Bear Jones' status as Frank's common law wife is "newly discovered evidence" it is clear that further evidence on the point is of no value in view of their lack of challenge to paternity of her son, Manfred Iron Bear Jones.

The applicable statute, 25 U.S.C. § 371 states:

For the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of section 348, of this title, 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 aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall be for such purpose be taken and deemed to be the legitimate issue of the father of such child:

* * *

For the purpose of determining descent of land, by its terms § 371 applies to Manfred Iron Bear Jones who has been found to be the child of Frank Jones and Catherine Iron Bear Jones. The plain meaning of the words leads to the reasonable conclusion that Congress intended to protect the right to inherit from the father for both classes of children, those born of parents who cohabited and those born of parents who did not. To this effect see In Re House, 11 N.W. 27, 132 Wisc. 212 (1907), Gray, et al. v. McKnight, et al., 183 P. 489, 75 Okla. 268 (1919), Solicitor's Opinion, 58 I.D. 149 (1942), Estate of Harry Colby, 69 I.D. 113 (1962), and Estate of Nelson Drags Wolf, IA-D-12 (September 19, 1967). Based on the foregoing it is found that appellant's petition for rehearing fails to allege evidence of sufficient weight to cause a possible change in the decision previously rendered.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the examiner's order denying the petition for rehearing is AFFIRMED.

