



INTERIOR BOARD OF INDIAN APPEALS

Estate of Matthew Cook

7 IBIA 62 (05/05/1978)

Related Board case:  
9 IBIA 52



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

## ESTATE OF MATTHEW COOK

IBIA 78-4

Decided May 5, 1978

Appeal from an Order Denying Petition for Rehearing.

Reversed and Remanded.

1. Indian Probate: Rehearing: Generally

A rehearing will be granted where a party has been denied a full opportunity to be heard.

2. Indian Probate: Marriage: Proof of Marriage

Proof of a marriage must be established by clear and convincing evidence by the one alleging such a marriage.

3. Indian Probate: Divorce: Indian Custom

In order to accomplish an Indian custom divorce by either of the parties to the marriage, it is necessary to establish by convincing evidence that a separation occurred plus the intent on the part of at least one of the parties that the separation was permanent.

APPEARANCES: Tim Weaver, Esq., Hovis, Cockrill and Roy, for appellant, Mary C. Jack; Linda Anisman, Esq., of Alaska Legal Services Corporation, for appellee, Sarah Peele Cook.

### OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON

Mary Cook Jack, hereinafter referred to as appellant, through her attorney Tim Weaver of Hovis, Cockrill and Roy, has appealed Administrative Law Judge Robert C. Snashall's order of August 30, 1977, denying appellant's petition for rehearing.

Matthew Cook, hereinafter referred to as decedent, died intestate October 4, 1976, at the age of 60 years.

A hearing was duly held and concluded in the above-entitled matter on June 22, 1977. Thereafter, on June 27, 1977, Judge Snashall issued an order wherein he determined the decedent's heirs to be Sarah Peele Cook, the appellee herein (referred to hereinafter as such) and 10 children, including the appellant herein.

The appellant on August 22, 1977, filed a petition for rehearing with Judge Snashall wherein she, among other things, asserted that any alleged Indian custom marriage between the decedent and appellee prior to December 16, 1953, was invalid since the decedent's marriage to his first wife and mother of appellant, Irene W. Cook, was not formally dissolved until January 7, 1957, and that evidence to that effect would be presented at a rehearing if granted.

The Judge in denying the petition on August 30, 1977, stated:

The records of the Yakima Indian Agency and the evidence on hearing clearly disclosed sufficient evidence upon which it could be reasonably held decedent and Sarah Peel [sic] Cook entered into an Indian custom marriage at a date unidentified but probably prior to the birth of their first child on December 27, 1946; that this marital relationship existed to and including the date of decedent's death on October 4, 1976. In view of the above cited cases, it is clear that even were petitioner able to substantiate her contentions as to the marriage of her mother and decedent and the facts of their legal divorce, such would not and could not overcome the preponderance of the evidence that Matthew Cook must have intended to terminate his marriage to Irene W. Cook by Indian custom divorce some time prior to the birth of his first child by Sarah Peel [sic] Cook on December 27, 1946, and therefore prior to the tribal outlawing of Indian custom marriage and divorce on December 16, 1953.

Since the evidence offered by petitioner in support of her Petition for Rehearing could not, even if true, change the outcome of these proceedings, it does not appear a rehearing in this matter would serve any useful purpose.

The appellant on November 25, 1977, filed a notice of appeal from the Judge's denial of August 30, 1977. After several extensions of time, the appellant on February 21, 1978, filed with the Board a brief in support of her appeal alleging as follows:

(1) that the trial court (Judge Snashall) erred in denying appellant's petition for rehearing in that she was denied the opportunity to be fully heard regarding the decedent's first marriage and divorce and

the decedent's second purported Indian custom marriage to the appellee.

(2) that the evidence at the initial hearing was insufficient to establish a "common-law" or "Indian custom marriage" between decedent and Sarah Peele Cook.

(3) that the court (Judge Snashall) erred in making findings not supported by the evidence.

(4) that the court (Judge Snashall) erred in determining the custom of the Yakima Nation without hearing evidence.

We must agree with appellant's first allegation. Appellant does not contend that the Judge prevented her from testifying or that he treated her unfairly. However, she contends she was confused and wholly unaware of her responsibilities regarding the burden of proof concerning decedent's previous marriage and the termination thereof by Indian custom divorce.

The record substantiates the appellant's contention that she did not understand the proceedings and as a result was unable to properly present or establish her side of the case.

Moreover, the Judge's ruling considered evidence that was not subject to cross-examination or rebuttal, nor was the appellant apprised that such evidence would be used.

[1] In view of the circumstances, a rehearing is justified since the appellant was denied a full opportunity to be heard. Estate of Little Toby (Tobin), A-24519 (November 24, 1947).

We also must agree with appellant's second allegation. It appears the findings regarding decedent's second marriage were based primarily on the Judge's statements appearing in the transcript of the proceedings where he states in relevant part: "\* \* \* because Matthew Cook is allegedly married to a Sarah Peel [sic] Cook and they indicate that was by Indian custom \* \* \*" (Tr. 5). And where he in relevant part states further "\* \* \* I understand from the agency that he was married to Sarah Peel [sic] Cook \* \* \*" (Tr. 6).

Aside from the foregoing statements, the record is void of any evidence to substantiate the alleged second marriage.

[2] In order to establish a marriage, either by common law or Indian custom, proof thereof must be established by clear and convincing evidence by the one alleging such a marriage. Estate of Louise Wilson (Oyler, Jennison, Stanley or McKibben), IA-1380

(March 1, 1966) (same case as IA-T-20 (April 25, 1969)); Estate of Dan P. Mullings, a/k/a Dan Mullins, IA-S-1 (April 12, 1968).

Appellant in her third allegation assigns error on the part of the Judge in making findings that were not supported by the evidence. The appellant addresses specifically the findings that an Indian custom divorce had occurred between the decedent and appellant's mother, Irene W. Cook.

[3] In order to accomplish an Indian custom divorce by either of the parties to the marriage, it is necessary to establish by convincing evidence that a separation occurred plus an intent on the part of at least one of the parties that the separation was permanent. Estate of Sarah Chah-se-nah (Sarah Bruner), IA-2 (September 28, 1949) (same case as IA-2 (June 29, 1950)) and Estate of Sam Pierre Alexander, IA-918 (December 9, 1960).

The evidence clearly does not support the Judge's finding regarding the Indian custom divorce. The Judge in support of such finding states in relevant part in his Order Denying Petition for Rehearing “\* \* \* that Matthew Cook must have intended to terminate his marriage to Irene W. Cook by Indian custom divorce sometime prior to the birth of his first child by Sarah Peel [sic] Cook on December 27, 1946 \* \* \*.”

Appellant in her fourth and final allegation contends that the Judge erred in determining the custom of the Yakima Nation without hearing evidence. The contention primarily addresses the custom regarding divorces rather than marriages.

Although the Department has previously recognized that the Yakima Tribe abolished Indian custom divorces after December 16, 1953, Estate of Mitchell Robert Quaempts (Kuneki), 6 IBIA 10 (1977), we are in agreement with appellant's fourth contention that the present record does not reveal with any specificity what factors were regarded as necessary to effect an Indian custom divorce prior to December 16, 1953.

Considering the entire appeal, we find that appellant was denied a fair hearing in that she was denied the opportunity to be fully heard or to rebut the findings of the Judge which appeared for the first time in his Order of August 30, 1977, denying appellant's Petition for Rehearing. Clearly, under such circumstances, the appellant is entitled to be fully heard on the findings of August 30, 1977.

Accordingly, for the foregoing reasons, appellant's Petition for Rehearing should be granted and the Judge's order to the contrary reversed.

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 Order Denying Petition for Rehearing entered by Administrative Law Judge Robert C. Snashall on August 30, 1977, is REVERSED and the appellant's Petition for Rehearing is GRANTED. The matter is REMANDED for further proceedings on the issues set forth herein.

Done at Arlington, Virginia.

\_\_\_\_\_  
//original signed  
Alexander H. Wilson  
Chief Administrative Judge

We concur:

\_\_\_\_\_  
//original signed  
Mitchell J. Sabagh  
Administrative Judge

\_\_\_\_\_  
//original signed  
Wm. Philip Horton  
Administrative Judge