



INTERIOR BOARD OF INDIAN APPEALS

Estate of Mary Chippewa Jackson

7 IBIA 224 (10/15/1979)



# United States Department of the Interior

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

## ESTATE OF MARY CHIPPEWA JACKSON

IBIA 79-19

Decided October 15, 1979

Appeal from an order denying petition for rehearing.

Affirmed.

1. Indian Probate: Hearing Examiner: Authority

In administrative hearings, the hearing examiner (now Administrative Law Judge) has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed.

2. Indian Probate: Appeal: Administrative Law Judge as Trier of Facts

The weight and credibility of evidence are matters properly considered by an Administrative Law Judge in the first instance. His findings, when in accord with the preponderance of the substantial and probative evidence adduced, will not be disturbed.

3. Indian Probate: Evidence: Conflicting Testimony

Where there is sufficient evidence to support the findings and the testimony is conflicting, the determination of witness credibility and the findings of fact of the Examiner (now Administrative Law Judge) will not be disturbed.

4. Indian Probate: Appeal: Administrative Law Judge as Trier of Facts

An Administrative Law Judge may upon his own motion or upon motion of any party in interest schedule a supplemental hearing, if he deems it necessary.

5. Indian Probate: Children, Adopted: Indian Custom Adoptions

An Indian custom adoption, alleged to have been made prior to the effective date of the Act of July 8, 1940, cannot be recognized as valid unless the adoption is recorded, as provided in the Act, during the lifetime of the adoptive parent.

6. Indian Probate: Children, Adopted: Indian Custom Adoptions

Before an adoption by Indian custom, made prior to July 8, 1940, shall be recognized as valid, it shall be recorded with the superintendent of the agency.

7. Indian Probate: Dower: Generally

Dower does not fall to the widow as an heir of her husband, but by virtue of her marital right and without regard to the law relating to the rights of heirs.

APPEARANCES: Graybill, Ostrem, Warner and Crotty, by Sandra Watts, for appellant, Viola Margaret Jackson Barrows; Dennis Conner, Esq., for appellee, Julia Chippewa; Robert Gabriel, Esq., for appellees, children of Mollie Gopher Myers.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This is an appeal from an Order Denying Petition for Rehearing issued by Administrative Law Judge David J. McKee, on January 5, 1979.

Mary Chippewa Jackson, nonenrolled Blackfeet No. N-12194, died intestate on April 24, 1974, possessed of a one-half interest in certain trust property on the Blackfeet Reservation, inherited from her husband, Thomas Jackson, whom she married on October 25, 1925, and who predeceased her on December 6, 1963.

Thomas Jackson was also survived by a daughter, Viola Margaret Jackson Barrows, from a prior marriage to one Alice Anderson. Upon the death of her father, Viola Barrows also inherited one-half of his trust estate. <sup>1/</sup>

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<sup>1/</sup> The interest of Viola Margaret Jackson Barrows in the trust estate inherited from her father, Thomas Jackson, was subject to the dower

Viola Barrows made her home with her father and stepmother from approximately 1925 until she married in 1938.

Viola Barrows claims to be the sole heir of Mary Chippewa Jackson by virtue of an Indian custom adoption.

Hearings were held on August 19, 1975, July 25, 1977, and on May 11, 1978. Viola Barrows was represented at each hearing by counsel. At the close of the July 25, 1977, hearing, Philip Roy, counsel for Viola Barrows, requested that the record remain open for a reasonable length of time to enable him to search the records on the matter of tribal authority adoption and to see if the records contained any information or evidence that would indicate formal action or validation of an adoption. There being no objections and all parties being in agreement, Judge McKee granted counsel for Viola Barrows until September 5, 1977, for submission of additional evidence. None was submitted by September 5, 1977. Instead, Attorney Roy wrote a letter to Judge McKee dated October 28, 1977, and received November 3, 1977, wherein he said the following:

Dear Mr. McKee:

Enclosed please find the census which I have been promising you. This record indicates that Viola Jackson was carried on the census as the daughter of Mary Chippewa Jackson, deceased, over a long period of time.

My position simply is that since Viola was carried on the official census as the daughter of Thomas Jackson this fact gets us around the need for an adoption procedure.

I will like some time to prepare a memorandum on this issue and would you please advise me of the time within which I have to accomplish this \* \* \*.

Counsel for Viola Barrows was notified on April 11, 1978, that a supplemental hearing would be held at Great Falls, Montana, on May 11, 1978. No request for a continuance was received by Judge McKee from either Viola Barrows or Attorney Roy.

On May 11, 1978, Mr. Greg Warner of the firm of Greybill, Ostrem, Warner and Crotty, appeared at the hearing on behalf of Viola Barrows.

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fn. 1 (continued)

rights of the surviving widow (Mary Chippewa Jackson, decedent herein), consisting of the widow's right to the use of 1/3 of Thomas Jackson's real property during her life, pursuant to Title 22, Revised Code of Montana, 1947.

He stated that he was appearing in place of Mr. Roy who had an emergency and was not able to attend. The record shows that Mr. Warner appeared on behalf of Viola Jackson at the first hearing on August 19, 1975.

Mr. Warner advised Judge McKee that it was his understanding that certain census records had been submitted which showed that Viola Margaret Jackson was carried on the census rolls as a daughter and recognized as a daughter of decedent, Mary Chippewa Jackson. Mr. Warner further advised that if any additional testimony was desired, it would have to be arranged at another date. Judge McKee responded that he did not interpret the census records as did Mr. Warner; that there had been numerous hearings on this matter; and that he had no intention of allowing any further continuance. Mr. Warner offered no new evidence. Judge McKee then allowed counsel for interested parties to orally argue their interpretations of the census records.

Counsel were then given 30 days within which to submit briefs, with an additional 10 days for reply brief.

Judge McKee issued his Order Determining Heirs on October 11, 1978, wherein in pertinent part he found:

There is no evidence in the record as to what customs the Blackfeet Tribe followed to create an "Indian Custom" adoption. There is no dispute that Viola lived in a friendly family relationship with her natural father and stepmother from the time she was a small girl until her first marriage in 1936. But there is nothing more than that.

By 1940 the question of when an Indian Custom adoption had occurred became so difficult in probate determinations that Congress stepped into the matter by passing the following statute, effective by its terms on January 8, 1941:

"In probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption,

(1) Unless such adoption shall have been

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(d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the

adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or

(2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this section or in the distribution of the estate of an Indian who has died prior to that date. \* \* \* (Act of July 8, 1940, 54 Stat 746; 25 U.S.C. 373a). 2/

Viola Jackson Barrows argues that the necessary recognition of an adoption by the Department can be found in the census records of the Blackfeet Tribe maintained by the Bureau of Indian Affairs. Exhibits 2 through 6 are copies of relevant pages from the records for the years, 1919, 1920, 1921, 1922, and 1936, showing Thomas Jackson #1 as an enrolled member of the Tribe. At no point is this decedent's name formally shown. But her name has been penned in as "wife" in the 1919 census and the 1936 census records.

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2/ The Act of July 8, 1940, effective January 8, 1941, provides:

"In probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption--

"(1) Unless such adoption shall have been--

"(a) by a judgment or decree of a State court;

"(b) by a judgment or decree of an Indian court;

"(c) by a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or

"(d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or

"(2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this section or in the distribution of the estate of an Indian who has died prior to that date: Provided, That an adoption by Indian custom made prior to the effective date of this section may be made valid by recordation with the superintendent if both the adopted child and the adoptive parent are still living if the adoptive parent requests that the adoption be recorded, and if the adopted child is an adult and makes such a request or the superintendent on behalf of a minor child approves of the recordation.

"This section shall not apply with respect to the distribution of the estates of Indians of the Five Civilized Tribes or the Osage Tribe in the State of Oklahoma, or with respect to the distribution of estates of Indians who have died prior to the effective date of this section. July 8, 1940, c. 555 §§ 1, 2, 54 Stat. 746."

Viola Margaret Jackson's name was penned in after her birth on the 1919 census and was formally shown as allottee No. 3000 in the subsequent later exhibits. As the records stand, there is no formal family grouping showing Thomas as the "head" of the family, his wife, this decedent, and the child, Viola. These are the only records produced by the claimant, Viola. There is no use of the word "adopted."

It is here concluded that this evidence is insufficient to establish a recognition of an adoption by the Department.

The facts in this case are far removed from the facts in the Solicitor's decision in the Estate of Abner Henry Hall, IA-4 (December 9, 1949). The claimant in that case was recognized as an adopted daughter in her foster mother's estate in a probate decision [emphasis in original] issued May 20, 1935, by the Assistant Secretary of the Interior. This recognition brought the matter within the provisions of the act of July 8, 1940, when the time came for a decision in the probate of the Estate of Abner Henry Hall, supra, the adoptive father who died intestate January 4, 1946. His sole heir was determined to be his adopted daughter without evidence of any action taken to meet the other requirements of the act of July 18, 1940.

Viola Barrows filed a timely petition for rehearing on December 7, 1978. The petitioner alleged in substance that the Administrative Law Judge in his Order Determining Heirs committed the following errors--

1. Stated incorrectly in said Order that there was no evidence in the record as to what customs the Blackfeet Tribe followed to create an "Indian Custom" adoption.
2. Abused the discretion of his office in refusing to accept affidavit of Jackie Parsons.
3. Disallowed a supplemental hearing on his own motion on the issue of "Indian Custom" adoption and the traditions and customs of the Blackfeet Tribe in regard thereto.
4. Failed to take into consideration all relevant evidence submitted.
5. Failed to follow the body of laws as set forth in the decisions of the Office of Hearings and Appeals, relating to "Indian Custom" adoption.
6. Did not determine that decedent's dower reverted to her living heirs upon her death.

An order denying said petition for rehearing was issued on January 5, 1979, wherein the Judge found, inter alia, the following--

1. The affidavit of Jackie Parsons should not be considered, because it was not offered in evidence at a hearing. Hearings in this matter were held on August 19, 1975, July 25, 1977, and May 11, 1978, respectively.
2. The substance of the affidavit of Jackie Parsons was immaterial, in that there was nothing in it that pointed to compliance with the requirements of the Act of July 8, 1940, 54 Stat. 746, 25 U.S.C. § 372a.
3. The weight and interpretation to be given certain evidence is vested in the administrative law judge.
4. When a party rests his case at the end of a hearing, he is precluded from introducing further evidence, especially when an opponent objects to same.
5. The decedent's dower interest is not an inheritable estate.
6. There is no evidence that the tribal officials had ever ruled on the question of adoption in this case and the evidence that the Secretary of the Interior had recognized an adoption is given no weight. The requirements of the Act of July 8, 1940, were not met.

An appeal was filed with this Board on March 7, 1979, wherein the appellant alleged the Judge committed certain prejudicial errors. These contentions are similar in nature to those referred to in the petition for rehearing, above.

The Board having fully and carefully reviewed the record, including testimony of witnesses and documents, affirms Judge McKee's Order Determining Heirs of October 11, 1978, and his findings that the evidence of record is insufficient to establish a recognition of an Indian custom adoption by the Bureau of Indian Affairs or by the Department.

The appellant contends the Judge abused the discretion of his office in refusing to accept the affidavit of Jackie Parsons.

We agree that "Due Process" demands that a litigant be afforded an opportunity to be heard and to support his or her allegations by proof and argument.

We believe that this opportunity was afforded the appellant at three hearings held on August 19, 1975, July 25, 1977, and May 11,

1978. Moreover, appellant was represented by able counsel at all three hearings. "Due Process" neither contemplates nor requires that a record remain open indefinitely.

[1] In administrative hearings, the hearing examiner (now Administrative Law Judge) has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed. Cella v. United States, 208 F.2d 783 (7th Cir. 1953), certiorari denied, 347 U.S. 1016 (1954).

At the conclusion of the hearing held on July 25, 1977, appellant's counsel stated their argument is more legal than anything else. Counsel then requested that Judge McKee leave the record open for a reasonable length of time to search the records on the matter of tribal authority adoption or anything that would indicate formal action or validation, or recognition of an adoption by the Bureau of Indian Affairs or the Department. Judge McKee continued the hearing to September 5, 1977, for the submission of additional evidence. No additional evidence was submitted by that date.

We think that the appellant had ample opportunity to submit additional proof and to support her allegations.

Assuming that Jackie Parsons' affidavit had been made part of the record, we are satisfied that it was not material or relevant to the issue of compliance with the requirements of the Act of July 8, 1940. Consequently, it would be worthy of little or no weight.

[2] The weight and credibility of evidence are matters properly considered by an Administrative Law Judge in the first instance. His findings, when in accord with the preponderance of the substantial and probative evidence adduced, will not be disturbed. Estate of Roland Loyd (Mobeadlema) Botone, 7 IBIA 177, 180 (1979); United States v. Del De Rosier, 8 IBLA 407, 79 I.D. 709 (1972).

[3] Where there is sufficient evidence to support the findings and the testimony is conflicting, the determination of witness credibility and the findings of fact of the Examiner (now Administrative Law Judge) will not be disturbed. Estate of Roland (Mobeadlema) Botone, ibid.

Appellant further argues that Judge McKee erred in not allowing for a supplemental hearing on his own motion on the issue of "Indian Custom" adoption and the traditions and customs of the Blackfeet Tribe in regard thereto.

[4] We cannot agree. It is an elementary principle of Administrative Law that it is the Administrative Law Judge who determines the course of an administrative proceeding. See Cella v. United States, ibid. The Code of Federal Regulations, Title 43, section

4.235 clearly enunciates that an Administrative Law Judge may upon his own motion or upon motion of any party in interest schedule a supplemental hearing if he deems it necessary. Judge McKee did not see fit to schedule a supplemental hearing. We see no abuse of discretion here.

We are in accord that a preponderance of the evidence, including the Blackfeet census records, establishes that Thomas Jackson, Blackfeet Allottee No. 2229, was a widower; that Thomas Jackson's daughter was Viola Margaret Jackson, Blackfeet Allottee No. 3000; that Thomas Jackson married one Mary Chippewa on October 23, 1925, after the death of his former wife, Alice Anderson; and that Viola Jackson lived with her natural father, Thomas Jackson, and her stepmother, Mary Chippewa Jackson, approximately from 1925, until she married in 1938.

[51 An Indian custom adoption, alleged to have been made prior to the effective date of the Act of July 8, 1940, cannot be recognized as valid unless the adoption is recorded, as provided in the Act, during the lifetime of the adoptive parent. Estate of Milward Wallace Ward, 4 IBIA 97, 82 I.D. 341 (1975); Estate of Mark Fish Guts, IA-79 (April 21, 1952).

[6] Before an adoption by Indian custom, made prior to July 8, 1940, shall be recognized as valid, it shall be recorded with the superintendent of the agency. Estate of Jeanette Ezekial, IA-643 (May 17, 1956).

[7] We cannot agree that dower is an inheritable right. Dower does not fall to the widow as an heir of her husband, but by virtue of her marital right and without regard to the law relating to the rights of heirs. Dahlman v. Dahlman, 72 P. 748, 28 Mont. 373.

A widow's dower right is terminated by her death prior to assignment or admeasurement, and her right does not survive to the heirs of the estate or to her personal representatives.

The appellant further contends that the Judge erred in failing to follow the body of laws as set forth in the decisions of the Office of Hearings and Appeals, relating to "Indian Custom" adoption.

We have reviewed the decisions to which the appellant makes reference and find them not to be factually or legally relevant to the case at bar.

To recapitulate, we find that the appellant was afforded "Due Process" in that ample opportunity was afforded to submit proof and support her allegations. We further find that the affidavit of Jackie Parsons was offered after the hearing process was completed and that it was within the discretion of the Administrative Law Judge to

refuse to consider said affidavit. We further find that it was not relevant to the main issue. We find that it was not an abuse of the Administrative Law Judge's discretion in not scheduling a supplemental hearing. We further find that the Administrative Law Judge did in fact follow the body of laws as set forth in the decisions of the Office of Hearings and Appeals, relating to "Indian Custom" adoption.

Consequently, for the foregoing reasons, this appeal should be dismissed.

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 Board AFFIRMS the Order Determining Heirs issued by Judge McKee on October 11, 1978, and this appeal is DISMISSED.

This decision is final for the Department.

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//original signed

Mitchell J. Sabagh  
Administrative Judge

We concur:

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//original signed

Franklin Arness  
Administrative Judge

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//original signed

Wm. Philip Horton  
Chief Administrative Judge