



INTERIOR BOARD OF INDIAN APPEALS

Estate of Edward Lockwood, Jr.

7 IBIA 271 (11/20/1979)



United States Department of the Interior

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

ESTATE OF EDWARD LOCKWOOD, JR.

IBIA 79-25

Decided November 20, 1979

Appeal from order by Administrative Law Judge Daniel S. Boos denying rehearing.

Affirmed.

1. Evidence: Credibility of Witnesses--Indian Probate: Marriage:
Common Law

Common-law marriage is not established where one claiming to be the common-law wife of decedent testifies she cannot recall the time the alleged marriage occurred, and where her claim is not supported by a preponderance of other credible evidence, showing public assumption of the marriage relationship.

2. Administrative Procedure: Administrative Procedure Act--Indian Probate: Administrative Procedure: Applicability to Indian Probate

The Board of Indian Appeals has authority to reverse findings of fact by an Administrative Law Judge even when not clearly in error. But an Administrative Law Judge will not be reversed when his decision turns upon findings concerning credibility, which in turn are based upon the demeanor of witnesses, and such findings are supported by substantial evidence.

3. Administrative Procedure: Administrative Law Judges--
Administrative Procedure: Hearings

The Administrative Law Judge properly exercised his authority to control the hearings where he controlled the manner of examination but did not limit the scope of testimony of witness, and where he permitted adequate time for submission of proposed findings by the parties prior to issuance of the final order.

APPEARANCES: Lewis E. Brueggeman, Esq., for appellant Hazel Lockwood; Thomas K. Schoppert, Esq., and William P. Fitzgerald, Esq., for appellees Emma Lockwood Jones, Belva Lockwood Vallie, Pansy Lockwood Goodall, Hilda Lockwood Smith, Estate of Wilford Lockwood, Etta Cecelia Lockwood Drags Wolf, Beulah Lockwood, Cleo Jean Lockwood Hayer, Frank Norman Lockwood, Clayton Lee Lockwood, Loris Elaine Lockwood Zuck, Lana Geraldine Lockwood Hansen, Mason Mandell Lockwood, Leroy Michael Lockwood, Deborah Kaye Lockwood, Juliette Lockwood, and Ace Lockwood.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On appeal from the order denying rehearing, appellant seeks to overturn a determination she is not the common-law wife of Edward Lockwood, Jr., who died intestate at Billings, Montana, on March 28, 1977. At the time of his death, decedent was the beneficial owner of trust lands and accounts located at the Fort Berthold reservation in North Dakota. The thrust of appellant's claim for relief addressed to this Board is that the Administrative Law Judge's finding that decedent was unmarried is not factually correct. Appellant attacks the finding as to decedent's marital status which is the stated basis for the order denying her petition for rehearing, and she argues the Administrative Law Judge erroneously interpreted the testimony of witnesses concerning marriage at the four evidentiary hearings held in the probate of decedent's estate.

The facts of the case are set forth in the Administrative Law Judge's order determining heirs, which is attached. 1/

1/ The Montana law governing common-law marriage is not at issue in this case; the parties clearly agree with the statement of that law as it appears in the order determining heirs, as does this Board. The issues on appeal in this case are almost entirely factual, as the attached order demonstrates.

Appellant asserts, generally, that the Judge's order is based only upon the testimony of the Indian heirs, all of whom disputed appellant's claimed marriage to decedent, and that the order ignores the testimony of other disinterested witnesses, some of whom felt decedent and appellant were man and wife. Additionally, appellant charges the Administrative Law Judge erred by his treatment of witnesses which allegedly encouraged contemptuous treatment of appellant, and further, that appellant was prejudiced by a failure to permit her to file proposed findings of fact and conclusions of law at the conclusion of the proceedings.

[1, 2] Although factually complex, the legal issues on appeal ultimately resolve into a question of the weight to be accorded findings based upon the Administrative Law Judge's assessment of the demeanor of the witnesses appearing before him, especially the testimony by appellant herself. 2/ Appellant squarely presents the issue as a factual matter, and urges that the preponderance of evidence establishes her to be the common-law wife of decedent, and that the Administrative Law Judge erred in rulings concerning the credibility of witnesses based upon demeanor which led to his conclusion decedent was single.

In State Director for Utah v. Edgar Dunham, 3 IBLA 155, 78 I.D. 272 (1971), the opinion of the Interior Board of Land Appeals aptly summarized the approach which both the law and necessity require to be taken when evaluating a record for factual error by the initial fact-finder where demeanor of witnesses is the key to the decision made thus:

It is clear that the agency, rather than the examiner, is the primary fact finder. * * * His findings may be reversed by the agency even when not clearly erroneous. * * *

2/ The Administrative Law Judge's appraisal of appellant's demeanor is supported, not only by other testimony, but also by the record itself. She was unable to remember the day she married decedent, or the day he gave her a gold wedding band (although she makes this event the centerpiece of her case). Unable to describe her contribution to the claimed marriage in detail, she ends by declaring she had no interest in burying decedent since he had "folks" who could do that, or else that the funeral should have been handled by the Veterans Administration, since decedent had been in service. Her lack of detailed information about decedent is in sharp contrast to the testimony of one of the neighbors who, though only a casual acquaintance, knew about decedent's school experiences, military service, and intimate details of current concerns which worried and interested decedent.

It is axiomatic that there are no prescribed rules or methods of evaluating the credibility of oral testimony. In the brief time that the witness testifies, it is difficult for the trier of the facts to ascertain whether the witness is telling the truth. More important in this regard than knowledge of the substantive law and the law of evidence is the natural and acquired shrewdness and experience by which an observant man forms an opinion as to whether a witness is or is not telling the truth. The most acute observer would never be able to catalogue the nuances of voice, the passing shades of expression, or the unconscious gestures which he had learned to associate with falsehood; and if he did, his observations would probably be of little use to others. Every man must learn matters of this sort for himself, and though no sort of knowledge is as important to a hearing officer, no rules can be laid down for its acquisition. No process is gone through the correctness of which can be independently tested. The judge or hearing officer has nothing to trust but his own nature and acquired sagacity.

* * * * *

Witnesses are on occasion affected by bias, partisanship, over zealousness, and other constraints. We do not intend to suggest any failing in the witnesses in the hearing below. We simply must accord proper weight to the fact findings of a hearing examiner where they depend primarily on the credibility of the witnesses and are supported by substantial evidence. As indicated above, the appellant has chosen to make such findings the gravamen of his appeal. [3/]

Examining the fact-findings by the Administrative Law Judge using the stated standard, there appears no reason to reverse his order. The Judge's conclusions are supported by other evidence, and his findings concerning the demeanor of certain witnesses, which reduced the effect of their testimony in his judgment, is consistent with the record as a whole. He correctly found decedent to be a single man at the time of his death.

3/ State Director for Utah v. Edgar Dunham, at 78 I.D. 273-275 (citations to authority and footnotes omitted). For a recent judicial assessment of the role of the agency reviewer in relation to the initial agency fact-finder in the administrative process see Nelson v. Interior Board of Land Appeals, 598 F.2d 531 (9th Cir. 1979). (The rule laid down in the Dunham case is favorably discussed in dicta in First Federal Sav. and Loan Assn. of Fayetteville v. Federal Home Loan Bank Bd., 426 F. Supp. 454, aff'd, 570 F.2d 693 (D.C. Ark. 1977).)

[3] Appellant's argument concerning claimed errors in hearing procedure employed by the Administrative Law Judge is also without merit. The verbatim transcript of proceedings shows a lengthy and complicated probate to have been conducted according to requirements of 43 CFR 4.230, 4.231, and 4.232 and in conformity to the standards of the Administrative Procedure Act, section 4, 5 U.S.C. §§ 556, 557 (1976). No specific conduct by the Administrative Law Judge towards any witness is pointed out by appellant as prejudicial to her case. In several instances the Administrative Law Judge stopped the continued repetition of the same or similar questions by counsel; in no instance was there a limitation of any witnesses' testimony; no testimony which was offered was refused. Similarly, although appellant claims she was denied the right to file proposed findings, it does not appear any were offered by her. ^{4/} The bulk of the testimony was concluded in this matter on August 29, 1978. Although there was another hearing on January 22, 1979, the testimony of the three witnesses who appeared was known to both sides beforehand: clearly, proposed findings could have been submitted to the Administrative Law Judge on the date of the last hearing. Certainly, proposed findings could have been offered before February 5, 1979, the date the order issued. Appellant did not assign lack of opportunity to file proposed findings as a basis for granting rehearing when she petitioned for that relief. She now proposes no findings or conclusions for the consideration of this Board on appeal. On this record it is concluded that no offered findings were actually refused by the Administrative Law Judge and that the absence of such proposed findings in this matter has in no way affected the result reached.

^{4/} 5 U.S.C. § 557(c) (1976), provides in pertinent part:

“(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions--

“(1) proposed findings and conclusions; * * *.

“The record shall show the ruling on each finding, * * * presented.”

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from is affirmed.

This decision is final for the Department.

//original signed
Franklin Arness
Administrative Judge

We concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge

//original signed
Mitchell J. Sabagh
Administrative Judge

Attachment



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
ROOM 3329, 316 NORTH 26TH STREET
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PROBATE
IP-BI-550B-77

ORDER DETERMINING HEIRS

WHEREAS, Edward Lockwood, Jr., Allottee 2029 of the Arika-ra Indian Tribe of the Fort Berthold Reservation in the State of North Dakota, died intestate possessed of trust or restricted property on March 28, 1977, at the age of 65 years.

Hearings were duly held on September 8, 1977; September 15, 1977; August 29, 1978; and January 22, 1979, for the purpose of determining the heirs of the decedent. Based on the evidence adduced therein, the following findings and conclusions are made:

Edward Lockwood, Jr. was reared on the Fort Berthold Indian Reservation. He attended schools in Bismarck, North Dakota; Pierre, South Dakota; and Haskell Institute in Lawrence, Kansas. He served in the United States Navy from 1943 through 1945. Upon leaving the service, he returned to North Dakota, living in the country east of Twin Buttes and north of Beulah. He later moved to Billings, Montana, and, from early 1972 until the time of his death, resided at 402 South 32nd Street in a two story, white frame house. When Edward first moved there it was owned by Mrs. May Huff, who resided there. Other residents were Margarita "Margo" Alvarado, Charles Henry, "Bill" Dunham and Hazel Dunham, husband and wife. Mr. Dunham died on April 24, 1972.

On May 29, 1973, Edward purchased the house from Mrs. Huff. Mr. Alvarado and Hazel Dunham continued to reside there also. In September of 1975, one William Adamson moved in at the request of Edward and Hazel. He apparently received his room and some meals in exchange for cleaning, doing errands, and being generally helpful. Mr. Adamson is disabled because of arthritis. He receives a small pension. Hazel Dunham also receives two small pensions. Edward, until his death, received a small pension and some lease rentals from his trust land. It was not fat city. Mr. Adamson stayed about six months and then left to enter the V.A. Hospital in Miles City.

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The record does not disclose whether or not anyone immediately replaced Mr. Adamson as factotum. However, in January of 1977, two and one-half months before Edward died, Harry Evans and his wife moved in, helping both Edward and Hazel in exchange for free room and board.

Mr. and Mrs. Evans continued living in the house with Hazel after the death of Edward. Mr. Evans has a general power of attorney for Hazel, and she has made a will naming the Evans as beneficiaries.

There is no substantial dispute as to the above facts.

The controversy here stems from the assertion of Hazel Dunham that she is the surviving spouse of Edward by virtue of a common-law marriage.

Common-law marriage is an informal, non-ceremonial, marriage by present agreement or mutual consent of the parties. It is given statutory recognition in Montana, Sec. 48-101, R.C.M. (1947), as follows:

"Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by mutual and public assumption of the marital relation."

A person alleging that a common-law marriage was contracted must prove, by a preponderance of the evidence, the elements thereof. Miller v. Sutherland (1957) 131 Mont. 175, 309 P.2d 322. These elements are mutual consent, cohabitation, and repute. Repute is also referred as holding out and reputation.

With regard to mutual consent it is stated in Miller v. Townsend Lumber Co. (1968) 152 Mont. 210, 448 P.2d 148, that "while the mutual consent need not be expressed in any particular form . . . it must always be given with such an intent on the part of each of the parties that marriage cannot be said to steal upon them unawares." Hazel testified that Edward had asked her to marry him three times and that she accepted the last offer, at some date in 1974 which she could not remember. At the time she testified Hazel was 73 years old. In giving

her testimony she was quite argumentative and somewhat evasive and unresponsive. She was not a particularly credible witness.

It would seem that in the normal course of events third persons who could give corroborative evidence would not likely be present at a time when a proposal of marriage was being advanced and accepted. This has to be the reason underlying the further requisite elements of a common-law marriage set forth above. There is some testimony tending to corroborate Hazel's statement. Some time prior to the alleged acceptance, Edward purchased a gold wedding band from Margo Alvarado for twenty dollars and gave it to Hazel.

Mr. Harry Evans who, as we noted above, arrived on the scene in January 1977, testified concerning a conversation he had with Edward touching on the ring:

"He said he loved his wife very much and he had always intended to be married, but they couldn't afford it right at the present time, so he bought a wedding band from Margo and gave it to his wife." (Tr. p. 21.)

Similarly, Margo Alvarado testified, concerning the ring:

"Well, he give it to Mrs. Dunham. See he had plans to marry her and he never decide [sic] what to do." (Tr. p. 15.)

This hardly serves to corroborate that words of mutual consent were spoken by persons who knew and intended that matrimony in full should be the present result.

There is a paucity of evidence tending to establish that Edward and Hazel openly cohabited as husband and wife. There is no question as to whether they lived in the same house. They did. However, they had separate rooms. Harry Evans testified that Edward once told him that he had sexual relations with Hazel, although neither he nor his wife had ever observed them in each other's bedroom. (Tr. p. 59.) On the other hand, Beulah Lockwood, a half sister of Edward, testified that, while visiting Edward during a five-day period, she twice observed Hazel having intercourse with men whose identity she did not know. (Tr. p. 141, 144-145.)

In any event, cohabitation means more than living together, or sexual intercourse. There must be a conscious and open

association as husband and wife. The documentary evidence on this point overwhelmingly establishes that there was no such conscious relationship. Hazel, throughout the entire period in question received Social Security and Veterans Administration checks in the name of "Hazel Dunham". She signed rent receipts for the garage which Edward rented to a neighbor "Edward Lockwood by Hazel Dunham". On ten occasions during 1974, 1975, and 1976, Edward received emergency services at St. Vincent Hospital in Billings. The one page hospital record for these visits contains space for listing "nearest relative". Belva Lockwood, "sister", is so shown on two records. Six records show the nearest relative to be A. James Lockwood, A. C. James Lockwood or Acey Lockwood, "nephew". Two have no nearest relative designated. (Exhibit 15)

A letter, dated March 24, 1977, from Emma Lockwood Jones, a full sister, to Edward begins with the salutation, "Dear brother Ed and Hazel". The letter is addressed, however, to "Mr. Edward Lockwood". (Exhibit 14) This is the sole piece of documentary evidence tending to establish cohabitation and repute and it certainly does not preponderate.

The bulk of the testimony in this matter deals with the question of repute. Looking first at the testimony supporting proponent's contention we have the statement by Harry Evans, quoted above, which is ambiguous at best. Mr. Evans was very evasive in his answers, coming close to saying that he thought a marriage existed. He never did, though, anywhere in his testimony, say that he was under the impression they were married.

Two credible witnesses, Maria Contreras, a neighbor, and William B. Adamson, mentioned above, stated that they were under the impression that Hazel and Edward were married.

Two other witnesses, John Wagenman, age 70, and Lloyd Wilson, age 75, testified that they thought Edward and Hazel were married. Both were very vague in their perceptions, were obviously confused, and appeared to have limited or impaired faculties. I do not find their testimony credible.

Virtually every witness was asked whether either Edward or Hazel had ever stated that they were married. Only one witness, John W. LaFrey, gave an affirmative answer. Mr. LaFrey, who is an uncle of Harry Evans, testified that on one occasion he visited the house and Edward introduced Hazel to him as follows: "Jack, this is my wife, Hazel Lockwood." (Tr. p. 93.)

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Mr. LaFrey stated that he had known Edward about thirty years "when I was rodeoing". Edward's sisters, Emma, Etta, and Hilda and his brother, Wilford, all testified that Edward had never been a rodeo cowboy. So did August Little Soldier who, himself, was a rodeo performer from 1934 to 1961. A highly credible witness, Mr. Little Soldier, a Gros Ventre and an enrolled member of the Three Affiliated Tribes of the Fort Berthold Reservation, "grew up with" Edward. He testified that he had a conversation with Edward in July or August of 1975, as follows:

Mr. Brueggemann: Did he tell you he was staying with a lady in Billings?

Answer: No, he never mentioned a lady. He didn't mention any woman. Like I said, I asked him if he was married. I said, "I suppose you're married by now?" and he says, "No, no way am I going to get married." He says, "I'm getting too old for that." He says, "Why should somebody get married at my age?" (Tr. p. 164.)

In a similar view Beulah Lockwood testified as follows:

Mr. Schoppert: All right, Beulah, let's carry on during those five days. We won't necessarily, at this point, characterize her as a good or a bad person, but what you observed, the things that her and Edward did together. Did Edward say, "This is my wife"?

Answer: No, he said he would never marry. I asked him, I said, "Who is that woman?" and he said, "That's a woman and she's just staying with me." And she slept in the front room and he slept in the back room. And they never were like man and wife.

Mr. Schoppert: They never slept together?

Answer: No.

Mr. Schoppert: When you were there?

Answer: No, not at all.

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Mr. Schoppert: Did she ever say that she was married to him?

Answer: No, she never did because he told me right in front of her that he would never marry her.

Mr. Schoppert: And that was about five years ago?

Answer: Uh-huh.

(Tr. p. 139.)

Mr. Schoppert: Did you meet him at these two funerals, your mother's funeral and the Goodall funeral?

Answer: Yes.

Mr. Schoppert: And did you have any occasion to talk with Ed then?

Answer: Yes.

Mr. Schoppert: Did you ever ask him if he had married that woman in the meantime?

Answer: Yeah, I asked him and he said, "No, I'll never marry her."

Mr. Schoppert: And that was in the fall of 1976 at the Goodall funeral, right?

Answer: Yes.

(Tr. p. 140.)

Mr. Clifford Hole, a neighbor, and very credible witness, appears to have been Edward's best acquaintance and friend in the neighborhood. They visited each other frequently. Mr. Hole gave the following testimony:

Mr. Fitzgerald: Did he ever state to you that he was married to Hazel?

Answer: No.

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Mr. Fitzgerald: Did he state the opposite?

Answer: Yes.

Mr. Fitzgerald: Will you please describe what he stated to you about being married to Hazel?

Answer: Well, he said he wasn't married to her. He said they weren't married.

Mr. Fitzgerald: Why would he state that Hazel was continuing to live with him?

Answer: Well, he told me that he felt sorry for her because she didn't, she couldn't take care of herself, she didn't have enough money to support herself.

(Tr. p. 261.)

On cross-examination Mr. Hole testified that Edward had made similar statements on more than one occasion. (Tr. p. 265.)

The testimony of Mr. LaFrey is inconsistent with that of other credible, disinterested witnesses. It is so inconsistent that it must be considered totally lacking in credibility.

The following disinterested, credible witnesses from the neighborhood testified that they knew Edward and Hazel: Harry Houseman, bartender; Irvin Herman, bartender; Jose Ramero, bar owner; George Lambrecht, store owner; Clifford Hole, Blanche Hole, Frank Holy, Betty Holy and Lora Norby, neighbors. Not one testified that they thought Edward and Hazel were married.

The Montana Supreme Court, in Miller v. Townsend Lumber Co., *supra*, stated that the "parties must enter on a course of conduct to establish their repute as man and wife. By repute we mean reputation, being the character and status commonly ascribed to ones actions by the public." Repute is similarly defined in Miller v. Sutherland, *supra*.

The evidence herein falls far short of establishing a reputation by Edward and Hazel that they were married. They did not conduct themselves in such a manner so that the public generally would take them to be married. Indeed most of their close neighbors did not take them to be married.

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I find that no common-law marriage was ever contracted by Edward Lockwood and Hazel Dunham, and that Edward Lockwood, at the time of his death, was a single man, without issue. His parents predeceased him.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by Section 1 of the act of June 25, 1910 (25 U.S.C. 372) and other applicable statutes, and pursuant to 43 CFR Part 4, I hereby find that the heirs of said decedent, determined in accordance with the laws of the State of North Dakota, Sec. 30.1-04-03, North Dakota Uniform Probate Code, and their respective shares in decedent's estate are:

Emma Lockwood Jones,	sister,	10/90
Belva Lockwood Vallie,	paternal half-sister,	10/90
Pansy Lockwood Goodall,	paternal half-sister,	10/90
Hilda Lockwood Smith,	paternal half-sister,	10/90
Wilford Lockwood	paternal half-brother,	10/90
(Subsequently deceased)		
Etta (Cecelia) Lockwood	paternal half-sister,	10/90
Drags Wolf,		
Beulah Lockwood,	paternal half-sister,	10/90

Children of previously deceased paternal half-brother, Roy Lockwood:

Cleo Jean Lockwood Hayer,	niece,	5/90
Frank Norman Lockwood,	nephew,	5/90

Children of previously deceased paternal half-brother, LeRoy Lockwood:

Clayton Lee Lockwood,	nephew,	1/90
Loris Elaine Lockwood Zuck,	niece,	1/90
Lana Geraldine Hansen,	niece,	1/90
Mason Mardell Lockwood,	nephew,	1/90
LeRoy Michael Lockwood,	nephew,	1/90
Deborah Kaye Lockwood,	niece,	1/90
Lisa Ann Lockwood,	niece,	1/90
Leslie Karen Lockwood,	niece,	1/90
Donna Rae Lockwood,	niece,	1/90
Lois Helen Lockwood,	niece,	1/90

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The Data for Heirship Finding and Family History in the record in this estate contains the birthdates and the identification numbers of the decedent's heirs. Said document is by this reference made a part hereof.

The claim of Aarthun Funeral Home, Hazen, North Dakota, in the amount of \$1,355.00, for funeral expenses, is hereby allowed and shall be paid, after payment of the probate fee, from funds now held or hereafter accruing to the credit of said estate. This was the only claim filed.

The inventory and appraisal of trust real property belonging to this estate is attached hereto and, by this reference, made a part hereof.

The estate of said decedent subject to the jurisdiction of this Department having been valued at \$78,065.11, a probate fee of \$75.00 shall be collected by the Superintendent or other office in charge at the Fort Berthold Indian Agency, pursuant to the act of January 24, 1923 (25 USC 377).

Done at Billings, Montana, and dated February 5, 1979.

//original signed
Daniel S. Boos
Administrative Law Judge

THE VALUE SHOWN IN THIS ORDER MAY BE AN ESTIMATE.
It is made for the purpose of fixing the probate fees required by law to be collected and it may not necessarily represent the present market value of the property. Further investigation of value should be made before entering into any negotiations involving this property.