



INTERIOR BOARD OF INDIAN APPEALS

Estate of Jack Kenworthy

21 IBIA 4 (10/04/1991)



United States Department of the Interior

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

ESTATE OF JACK KENWORTHY

IBIA 91-37, 91-53

Decided October 4, 1991

Appeal from an order denying reopening issued by Administrative Law Judge William E. Hammett in Indian Probate IP SA 50N 82.

IBIA 91-37 reversed and remanded; IBIA 91-53 dismissed.

1. Indian Probate: Notice of Hearing: Generally--Indian Probate: Reopening: Standing to Petition for Reopening

Under 43 CFR 4.211(a), constructive notice of an Indian probate hearing can be given through posting in the vicinity of the hearing. In order to find that a person received constructive notice through posting, and thus lacks standing to petition for reopening under 43 CFR 4.242(h), the probate record must show that the notices were properly posted in accordance with the regulation.

APPEARANCES: Mark Sockkappa, Esq., Kotzebue, Alaska, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Evelyn (Kenworthy) Karmun filed two separate appeals from two orders issued on December 11, 1990, by Administrative Law Judge William E. Hammett in the estate of Jack Kenworthy (decedent). For the reasons discussed below, the Board of Indian Appeals (Board) reverses one of those orders, dismisses the appeal from the second order, and remands this matter for further consideration.

Background

Decedent, an Inupiaq Eskimo, was born January 26, 1898, and died intestate on December 13, 1971. Judge Hammett held a hearing to probate decedent's trust or restricted estate in Kotzebue, Alaska, on June 8, 1983. Based upon the evidence presented at the hearing, Judge Hammett issued an order on April 21, 1983, finding that decedent's sole heir was his son, Joseph Kenworthy.

By petition dated September 13, 1990, appellant sought reopening of decedent's estate. Appellant stated that she had been adopted by decedent through Indian custom, and she did not receive notice of the probate hearing or a copy of the order determining decedent's heirs. She asked that, upon reopening, she be included as an heir of decedent.

By order dated December 11, 1990, Judge Hammett denied appellant's petition on the grounds that she was residing in Kotzebue at the time of the original hearing. The Judge held that 43 CFR 4.242(h) prohibits reopening when the petitioner was in the vicinity at any time while the notices of hearing were posted. ^{1/}

The Board received appellant's notice of appeal from this decision on February 4, 1991. The appeal was assigned Docket No. IBIA 91-37.

On March 19, 1991, appellant filed a second notice of appeal, this time seeking review of another order issued on December 11, 1990, by Judge Hammett. In the second order, Judge Hammett reopened decedent's estate on the petition of Stanley Kenworthy, determined that Stanley was decedent's son, and included him as an heir of decedent. Judge Hammett found that Stanley was not in the vicinity of any of the posting places while the notices were posted. This notice of appeal was assigned Docket No. IBIA 91-53.

The two appeals were consolidated by Board order dated April 26, 1991. Appellant filed a brief in each appeal.

Discussion and Conclusions

Appellant argues that she did not receive actual notice of the original hearing and that she cannot be held to have received constructive notice through posting because there is no evidence that posting was accomplished in accordance with the requirements of 43 CFR 4.211(a). Section 4.211(a) provides:

An administrative law judge may receive and hear proofs at a hearing to determine the heirs of a deceased Indian or probate his will only after he has caused notice of the time and place of the hearing to be posted at least 20 days in five or more conspicuous places in the vicinity of the designated place of hearing, and he may cause postings in such other places and reservations as he deems appropriate. A certificate showing the date and place of posting shall be signed by the person or official who performs the act.

Appellant contends (1) notice of the hearing was posted in only four places in Kotzebue, with one posting in Nome, which is not in the vicinity of the hearing; and (2) there is no evidence that posting was properly accomplished because the probate record contains no certificate showing the date and place of posting by the person or official who performed the act.

^{1/} Section 4.242(h) provides in pertinent part:

"If a petition for reopening is filed more than 3 years after the entry of a final decision in a probate, it shall be allowed only upon a showing * * * that the petitioner had no actual notice of the original proceedings; and that petitioner was not on the reservation or otherwise in the vicinity at any time while the public notices were posted."

[1] The Board has reviewed the probate record and finds that it does not contain the certificates of posting required by 43 CFR 4.211(a). Furthermore, there is no other evidence tending to show that the notices were posted after being mailed by Judge Hammett's office. Accordingly, because there is no evidence in the probate record that notice of the hearing was properly posted, appellant cannot be held to have received constructive notice of the hearing, even though she was in Kotzebue at the time of that hearing. 2/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Hammett's December 11, 1990, order denying appellant's petition to reopen is reversed, and this case is remanded to him for reopening on the issue of whether appellant was decedent's adopted daughter. Appellant's appeal from Judge Hammett's order reopening decedent's estate on the petition of Stanley Kenworthy is dismissed as moot.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

2/ Because of this holding the Board need not reach either appellant's argument concerning the locations at which notice was posted or her notice of appeal from Judge Hammett's order reopening decedent's estate and finding that Stanley Kenworthy was an heir of decedent. Appellant does not contest the finding that Stanley was an heir; rather she objects to not receiving notice of Stanley's petition. This objection is rendered moot by the Board's reversal of Judge Hammett's denial of her petition to reopen.