



INTERIOR BOARD OF INDIAN APPEALS

Estate of Mary Josephine (Mosho) Estep

48 IBIA 176 (12/19/2008)

Motion for reconsideration dismissed:

49 IBIA 14

Judicial review of this case:

Affirmed, *Edmo v. Salazar*, Civ. No. 09-0178-E-BLW (D. Idaho Mar. 31, 2010)

Related Board Case:

44 IBIA 18



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF MARY JOSEPHINE)	Order Affirming Denial of Petition for
(MOSHO) ESTEP)	Rehearing
)	
)	
)	Docket No. IBIA 06-75
)	
)	
)	December 19, 2008

Connie Mosho Edmo (Appellant) appeals to the Board of Indian Appeals (Board) from an Order Denying Rehearing entered on May 15, 2006, by Chief Administrative Law Judge (ALJ) Earl J. Waits in the estate of Mary Josephine (Mosho) Estep (Decedent), deceased Fort Hall Shoshone-Bannock Indian, Probate No. NW-180-0166. The order let stand a September 1, 2005, probate decision by ALJ Robert G. Holt, which directed the distribution of Decedent's trust estate to the lineal descendants of Decedent's maternal grandparents. Judge Holt found Appellant to be a descendant of one of Decedent's relatives, Jack Mosho, but concluded that Jack Mosho had too remote a relationship to Decedent for Appellant to inherit under the controlling law, Idaho Code § 15-2-103(d).

In her petition for rehearing, Appellant made a new argument, contending that Jack Mosho had adopted Decedent, thereby precluding inheritance by the descendants of Decedent's natural family. Judge Waits denied Appellant's petition for rehearing on three grounds. First, the petition was not sworn or otherwise under oath, as required by 43 C.F.R. § 4.241(a)(1)(i). Second, although Appellant alleged that her petition was based on newly-discovered evidence, she had not provided any affidavits or declarations of witnesses stating fully what the new testimony would be, nor had she stated justifiable reasons for the failure to discover and present this "new" evidence at the hearing held by Judge Holt, as required by 43 C.F.R. § 4.241(a)(2). And third, because the petition failed to allege proper grounds for a rehearing, 43 C.F.R. § 4.241(c) also necessitated that the petition be denied.

Appellant asks the Board to reverse Judge Waits’s order and remand the matter for further proceedings. We decline to do so. We instead affirm the order on the grounds that Appellant cannot be recognized as Decedent’s heir because she has not established Decedent’s adoption by Jack Mosho in accordance with the statutory requirements of 25 U.S.C. § 372a.

Background

I. Introduction: The Decedent, Her Will, the Indian Reorganization Act of 1934, and Idaho Laws of Intestacy

A. Decedent’s Childhood

Decedent, born April 10, 1910, was orphaned on February 26, 1911, when her parents were killed near Golconda, Nevada, in what some historians regard as the last massacre of Indians in United States history. Four children — a brother and three sisters — survived the event. Decedent was the youngest of these children. Of the four survivors, three died without issue by January 1913.¹ Decedent, who never married or had children, died on December 19, 1992.

After the massacre, Jack Mosho informed Evan W. Estep, the Superintendent of the U.S. Indian Service, Fort Hall Indian Agency in Idaho,² that Decedent and her three siblings were “second cousins to [Jack Mosho] and [his] brother[,] Sam Mosho[,] and that [he and Sam Mosho] [were] the only relatives to these children” Appellant’s Opening Brief, Ex. 2 (Declaration of Mosho Jack (a.k.a. Jack Mosho), Jul. 8, 1911). Jack Mosho also represented that the children were “full blood Indians of the Shoshone Tribe and to the best of [his] knowledge and belief ha[d] never been carried on any trib[al] roll, nor ha[d] they received any rights by reason of being ward[s] of the Government.” *Id.* He further pledged that, “[i]n the event that these children are ordered to be enrolled they will become members of our family [and] will be properly looked after and cared for by myself and my brother [and] that they should carry the family name of Mosho by adoption.” *Id.*

¹ One of Decedent’s sisters—who died at the massacre—was survived by a child of her own, Crawfish. Crawfish predeceased Decedent without issue.

² The U.S. Indian Service subsequently became the Bureau of Indian Affairs (BIA).

Jack Mosho's tribe, known today as the Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho, supported his effort to enroll the children, and, on July 8, 1911, the

Judges and Headmen of the Fort Hall Tribe of Indians . . . , for and on behalf of the tribe, having h[e]ard the testimony of Mosho Jack [a.k.a. Jack Mosho], and knowing the circumstances in the case of [the four children], all full blood Indians, . . . consent[ed] [to] the enrollment of these children with the Fort Hall Tribe of Indians without restriction.

Appellant's Opening Brief, Ex. 3 (Declaration of the Judges and Headmen of the Fort Hall Tribe of Indians, Jul. 8, 1911).

An account of the survivors's lives following the massacre explains that the children were brought into Reno after the fight and later taken in . . . by . . . the Superintendent of the Carson Indian School. On[] representation by Jack Mosho that he was an uncle to these children, [Superintendent Estep] took up the matter of their enrollment with the Fort Hall Tribe and upon approval by the Department [of the Interior], they were enrolled as members of the Fort Hall Tribe and placed with the family of Jack Mosho. About October or November, 1912, [Superintendent Estep] was authorized to bring them to the Fort Hall Reservation, and proceeded to Carson, Nevada, for that purpose, and did bring them to and place them in the Fort Hall School. In the following spring, and before application had been made for the allotment of any of the children, [one of the children,] Harriet[,] died of spinal meningitis in the hospital at Fort Hall. Shortly thereafter, [another child,] Louise[,] was pronounced tubercular by the physician and proceeded to the home of Jack Mosho . . . where she died within a very short time. . . . Some four or five months after the death of Louise, [the boy,] Cleveland[,] died of tuberculosis or meningitis in the school hospital at the Fort Hall School. [Decedent] was [also] pronounced tubercular by the Agency physician and ordered from the school. There being no proper place for her to go, she was taken into [the Estep] family temporarily[,] where, as of March 1917, Decedent] . . . remain[ed]

Appendix attached to Letter from Appellant to Judge Holt, Mar. 27, 2003, (Appendix), at 154-155 (Deposition of Evan W. Estep, Mar. 21, 1917). A synopsis of the census rolls lists Decedent as a member of Jack Mosho's household, identifying her as his "niece," from 1913 "until the year 1916[,] when [Decedent] is shown [on the census rolls] with Supt. E.W. Estep." Appendix at 137.

Jack Mosho sought Decedent's return from the Estep household. According to a 1915 document produced by Appellant, the "council leaders" at the Fort Hall Reservation signed a list of demands addressed to the Honorable Commissioner of Indian Affairs in Washington, D.C. The ninth of these demands stated that

[a] few years ago a family of our people were massacred near the Nevada line; they were all slain but one baby girl under a year old. This child was brought to the Agency and was *adopted* by Superintendent Estep, then in charge here. This child has relatives here and one of its uncles now wants the child returned. The uncle's name is Jack Moshow [sic].

Appendix at 148 (emphasis supplied).³ Assuming, as Appellant apparently would have us do, that the child referred to by the council leaders is the Decedent, it would appear that the council leaders were of the belief that the Esteps, rather than Jack Mosho, had adopted Decedent. It also appears from the record that, by 1917, the Esteps were living in Montana, and the record does not reflect that Decedent ever returned to live with Jack Mosho. *See id.* at 139 (in *Estates of Cleveland Mosho and Henie Louise Mosho*, Probate No. 23053-18, a note by the Examiner of Inheritance states that notice of the hearing to probate these estates was sent to "Mr. Evan W. Estep, the adoptive parent of [Decedent]"), and 154-157 (affidavit of Evan W. Estep, executed in Montana). It is undisputed that Decedent ultimately took the name "Estep" as her own.

According to the record in *Estate of Jack Mosho*, Probate No. 29561-18,⁴ Jack died in October 1917. He was survived by his widow, Won de va shat, with whom he had ten children. He also had two other children by two other wives. A hearing was held in January 1918 to probate Jack's estate at which Won de va shat and four additional witnesses, including his brother, Sam Mosho, testified. Each of the witnesses, including his widow, testified that all of Jack's children and his only grandchild predeceased him. None of the witnesses mentioned Decedent in his or her testimony, and there is no mention of her elsewhere in Jack's probate record. Jack's estate was inherited entirely by Wan de va shat.

³ Contrary to the document's assertion that all were "slain but one baby girl," four children survived the massacre. By 1915, however, Decedent was the only living survivor.

⁴ Pursuant to 43 C.F.R. § 4.24(b), we take official notice of the records in *Estate of Mosho*, which have been added to the record in this appeal.

B. Decedent's Will, the Indian Reorganization Act of 1934, and Idaho Laws of Intestacy

Decedent died testate. Her will, executed October 30, 1986, made no specific mention of her Indian trust assets, real or personal.

On September 1, 2005, Judge Holt issued his decision in Decedent's estate. He found that section 4 of the Indian Reorganization Act, codified at 25 U.S.C. § 464, as amended, precluded the residuary devisees from receiving an interest in Indian trust or restricted real property on the Fort Hall Reservation because the devisees were neither "heirs of Decedent . . . [nor] of Indian descent." Decision at 3. Accordingly, Judge Holt found that Decedent's "estate must pass as though Decedent died intestate." *Id.*

Reasoning that Decedent's heirs at law must be determined in accordance with the statutes of descent of the State of Idaho, where Decedent's trust lands are located, Judge Holt held that Idaho Code § 15-2-103(d) applied. This Idaho statute provides that, if a decedent leaves no surviving spouse, issue, parents, or issue of parents, then the lineal descendants of a decedent's grandparents are considered heirs. Judge Holt determined that Decedent had never married, had no issue, had no surviving parents, and there were no surviving issue of parents. He then examined whether Decedent's grandparents had surviving issue. He determined that Decedent's maternal grandparents alone had surviving issue. Judge Holt then concluded that Decedent's trust estate "should pass to the issue of Decedent's maternal grandparents" and ordered that the estate be distributed to the descendants of Decedent's maternal grandparents. Decision at 5, 8. Appellant is not a descendant of Decedent's maternal grandparents, and thus takes nothing under Judge Holt's reading of the facts and the law surrounding Decedent's estate. Judge Holt's decision makes no mention of Decedent's purported adoption.

II. Appellant's Petition for Rehearing and the Order Denying Rehearing

Appellant, acting pro se, timely petitioned for rehearing on the grounds that she had "obtained new information that was known at the time of the probate proceedings, but was not included in the probate package." Petition for Rehearing, Oct. 20, 2005.⁵ In her

⁵ Appellant claimed that her petition for rehearing was made on behalf of "the children of Tommy Lee Mosho": Appellant, LeAnna Mosho, Pauline Mosho Tindore, Rozella Mosho, Theodora Mosho, and Verlene Mosho. Petition for Rehearing, Oct. 20, 2005. Judge Waits found no written evidence that anyone had joined Appellant in her petition. He

(continued...)

petition, Appellant urged that Jack Mosho had adopted Decedent, thereby precluding inheritance by the descendants of Decedent's natural maternal grandparents. As previously indicated, on May 15, 2006, Judge Waits denied Appellant's petition for rehearing on three grounds.

First, the petition was not sworn or otherwise under oath, as required by 43 C.F.R. § 4.241(a)(1)(i). Second, although Appellant alleged that her petition was based on newly-discovered evidence, she had not provided any affidavits or declarations of witnesses stating fully what the new testimony would be, nor had she stated justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearing held by Judge Holt, as required by 43 C.F.R. § 4.241(a)(2).⁶ And third, because the petition failed to allege proper grounds for a rehearing, 43 C.F.R. § 4.241(c) also necessitated that the petition be denied.

III. Proceedings Before the Board

Appellant secured counsel and timely appealed to the Board from Judge Waits's Order Denying Rehearing. Appellant also submitted an opening brief. Tonya Pahneeno Anderson, a descendant of Decedent's maternal grandparents and an heir under Judge Holt's probate decision, timely filed an answer brief. Appellant filed a reply brief.

In her submissions to the Board, Appellant argues that rehearing "was requested . . . to challenge . . . Judge Holt's finding of certain heirs and to introduce newly discovered evidence that was not before Judge Holt at the initial hearing on March 14, 2005." Appellant's Opening Brief, Mar. 22, 2007, at 6. In particular, Appellant argues (1) that Judge Holt erred in failing to develop a complete record, *id.* at 6-9; (2) that Judge Waits erred in denying Appellant's petition for rehearing based on technical requirements, *id.* at 9-12; and (3) that Judge Waits erred in denying the introduction of newly discovered evidence of Decedent's adoption by Jack Mosho, *id.* at 12- 15.⁷

⁵(...continued)

therefore treated the petition as if it had been filed solely by Appellant.

⁶ In response to the "new" information, Judge Waits observed that "[s]ome of the information provided by [Appellant] [was], in fact, in the probate file and was duly taken into consideration in rendering a decision." Order Denying Rehearing, May 15, 2006, at 2. Our review of the probate record confirms Judge Waits's observation. *See infra* at n.8.

⁷ In response to an order from the Board to address her standing to bring this appeal, Appellant argues that she is an "interested party" within the meaning of 43 C.F.R. §§ 4.201 (continued...)

Central to Appellant's appeal is the contention that Jack Mosho adopted the orphaned Decedent. *See* Appellant's Opening Brief at 3 ("The four children [who survived the massacre] were considered adopted by the Jack Mosho family and carried the Mosho family name."). In furtherance of this position, Appellant appended "newly discovered documents" to her opening brief. *See id.* at 14.⁸ These documents, Appellant asserts, "show that [Decedent] was adopted by Jack Mosho. Therefore, the Mosho family members are the only heirs of [Decedent]." *Id.* Appellant further argues that "[t]his case presents an extraordinary set of circumstances[,] which justifies a reversal and remand for further proceedings." Appellant's Reply Brief, May 1, 2007, at 4.⁹

Discussion

I. Standard and Scope of Review

On appeal, Appellant bears the burden of proving error in the order denying rehearing. *Estate of Norman Under the Baggage, Sr.*, 37 IBIA 124, 125 (2002). In general, the Board's scope of review on appeal is limited to the issues that were before the ALJ in a

⁷(...continued)

and 4.320(a) because she is a putative heir, and that she is a putative heir because she is a direct descendant of Jack Mosho's parents. We assume, for purposes of this decision only, that Appellant has standing to assert that Decedent was adopted by Jack Mosho.

⁸ Appellant places particular significance on Exhibits 1 through 5 to Appellant's Opening Brief. Contrary to Appellant's assertion that the aforementioned exhibits represent "new" information, the probate record before Judge Holt contained Exhibits 1 through 4, albeit a retyped copy of Exhibit 1. *See* Appendix at 105-07, 112, 114-15. It appears that Appellant submitted these records to Judge Holt with her letter to him of March 27, 2003.

⁹ On October 30, 2008, the Board issued an Order to Show Cause Why Decedent's Will Should Not be Approved and Funds Distributed in Accordance with the Will. The order proposed to (1) approve Decedent's will, and (2) order the distribution of the funds in Decedent's IIM account. Appellant alone filed a response, arguing that the Board lacks statutory authority to distribute the funds to non-Indians.

The Board had initially believed that the scope of Judge Holt's decision did not encompass the funds in Decedent's IIM account. *See* Order to Show Cause, Oct. 30, 2008. Upon further consideration, the Board concludes that Judge Holt's decision treated Decedent's IIM account as part of her trust "estate," and thus he did not omit the distribution of Decedent's IIM funds in his decision. Therefore, the Board does not act upon its proposed Order to Show Cause.

petition for rehearing or reopening, but the Board may exercise the inherent authority of the Secretary to correct a manifest injustice or error when appropriate. 43 C.F.R. § 4.318. The Board reviews questions of law de novo. *Estate of Elmer Wilson, Jr.*, 47 IBIA 1, 7 (2008); *Birdtail v. Rocky Mountain Regional Director*, 45 IBIA 1, 5 (2007).

II. Proof of Adoption in Indian Probate Proceedings as Required by 25 U.S.C. § 372a

Although Appellant asserts that Jack Mosho adopted Decedent, Appellant makes no effort to establish the statutory requirements of 25 U.S.C. § 372a, the law governing the determination of heirs by adoption in Indian probate matters under the exclusive jurisdiction of the Secretary of the Interior. This statute provides, in relevant part, as follows:

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—

* * * *

(2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this Act[, January 8, 1941,] 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 Act 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.

25 U.S.C. § 372a.

Thus, because Jack Mosho died in 1917 and Decedent is not recognized as his adopted daughter in the distribution of his estate, his alleged adoption of Decedent must be established through evidence showing that the Department of the Interior otherwise recognized the alleged adoption prior to section 372a's effective date, January 8, 1941. *See id.*; *see also, Estate of Frank Anasouk Topsekok*, 34 OHA 30, 42 (2007). Appellant must establish that Jack Mosho's alleged adoption of Decedent took place *and* was recognized by the Department of the Interior. Appellant must then prove that she is a descendant of one of Jack Mosho's parents. As a direct descendant of one of Decedent's alleged paternal

grandparents-by-adoption, Appellant would then be eligible to share in the distribution of Decedent's trust estate under Idaho Code § 15-2-103(d).

In this instance, Appellant has not presented evidence of adoption sufficient under section 372a. Indeed, Appellant makes no mention of section 372a in either her petition for rehearing, her opening brief, or her reply brief. Instead, Appellant argues that materials held in BIA files, but which allegedly were not furnished to Judge Holt in their entirety, conclusively establish that Jack Mosho adopted Decedent. *See* Appellant's Opening Brief at 9, 12 (“[Decedent] was adopted in 1911 by Jack Mosho. . . . As the record shows, however, no one knew about the records until they were discovered in the Fort Hall Agency files by Appellant.”).

Contrary to Appellant's arguments, the documents to which Appellant points do not establish that an adoption occurred, but instead establish at best that Jack Mosho *intended* to adopt Decedent and her siblings, if their enrollment in the tribe were approved. *See* Declaration of Mosho Jack (a.k.a. Jack Mosho) (“In the event that these children are ordered to be enrolled they will become members of our family and will be properly looked after an[d] cared for by myself and brother and that they should carry the family name of Mosho by adoption.”). Appellant has failed to direct the Board to any evidence that the Department of the Interior recorded, recognized, or accepted Jack Mosho's adoption of Decedent through Indian custom or otherwise. *See Estate of Irene Theresa Shoots Another Butterfly*, 16 IBIA 213, 217-18 (1988). As such, Appellant has failed to present the Board with evidence that would permit us to recognize Appellant as an heir of Decedent by virtue of the latter's adoption by Jack Mosho. Without such evidence, section 372a statutorily prohibits the Board from recognizing Appellant as Decedent's heir. *See Estate of Topsekok*, 34 OHA at 47 (“In an Indian probate proceeding, the Department is prohibited by statute from recognizing a person as an heir by virtue of adoption unless such adoption was effectuated by one of the . . . methods specified in [section 372a].”).

We further note that despite Appellant's insistence that Decedent is the adopted daughter of Jack Mosho, certain documents in the record describe Decedent as having been adopted by Superintendent Estep, not Jack Mosho. *See* Additional Information in the Heirship Cases of Heine Louise Mosho and Cleveland Mosho, at AR, Part 1 (“notices were sent to the interested parties . . . as well as a copy to Mr. Evan W. Estep, the adoptive parent of [Decedent]”); *see also* Appendix at 148 (“This child was brought to the Agency and was adopted by Superintendent Estep, then in charge here.”).¹⁰

¹⁰ We express no opinion on whether the Esteps legally adopted Decedent.

We therefore find that Appellant has not carried her burden of proving that Decedent was adopted by Jack Mosho.¹¹

Conclusion

We affirm Judge Waits's Order Dismissing Petition for Rehearing on the alternate grounds that Appellant has failed to establish that the Department of the Interior recognized the alleged adoption of Decedent by Jack Mosho in accordance with section 372a(2). Thus, Appellant cannot be recognized as an heir of Decedent by virtue of adoption. Accordingly, Decedent's Indian estate does not pass to the Mosho family under Idaho law, and Appellant has no right to Decedent's estate.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board hereby affirms the May 15, 2006, Order Denying Rehearing entered by Judge Waits. The determination that Decedent's interests in Indian trust estate passes to the descendants of Decedent's maternal grandparents stands.

I concur:

// original signed
Maria Lurie
Acting Administrative Judge

// original signed
Debora G. Luther
Administrative Judge

¹¹ Appellant argues that Judge Waits's denial of her pro se petition for rehearing on procedural grounds was inequitable. *See* Appellant's Opening Brief at 9-12. Because the Board affirms the Order Denying Rehearing on the grounds that Appellant has not established the proof necessary for determining that she should be recognized as an heir of Decedent by virtue of a valid adoption under section 372a, we need not reach the issue of whether Judge Waits properly denied Appellant's petition for rehearing on procedural grounds.