



INTERIOR BOARD OF INDIAN APPEALS

Estate of Harold Humpy

5 IBIA 132 (06/18/1976)

Related Board case:
7 IBIA 118



United States Department of the Interior

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

ESTATE OF HAROLD HUMPY

IBIA 76-23

Decided June 18, 1976

Appeal from an Order Denying Petition for Rehearing.

Affirmed.

1. Indian Probate: Appeal: Matters Considered on Appeal--Indian Probate: Evidence: Newly Discovered Evidence--Indian Probate: Rehearing: Generally

The Board is not required to consider new evidence first raised on appeal. However, were the Department disposed to ignoring its own regulations governing when new evidence shall be considered, appellants' case still would not be bolstered by an exceptional consideration of evidence now tendered.

2. Indian Probate: Evidence: Hearsay Evidence

Alleged declarations of the decedent were properly considered in this case under an exception to the hearsay evidence rule. In addition, Departmental regulations bestow broad authority upon the Administrative Law Judge to consider evidence "not ordinarily admissible under the generally accepted rules of evidence--" 43 CFR 4.232(b).

3. Indian Probate: Attorneys at Law: Generally--Indian Probate: Hearing: Full and Complete

The Administrative Law Judge shoulders additional responsibility in developing a complete record when parties proceed

with a hearing without counsel. In this case the Board is satisfied that the Administrative law Judge fully utilized the hearings to bring forth all the facts.

APPEARANCES: Callis A. Caldwell, Esq., for appellants; Theodore J. Schroeder, Esq., for appellee.

OPINION BY BOARD MEMBER HORTON

Harold Humpy, deceased unallotted Shoshone Indian, died intestate on March 3, 1972. Administrative Law Judge William E. Hammett conducted two hearings in the probate of this estate. The first hearing was held October 5, 1972, at Fort Hall, Idaho. The second hearing was held April 29, 1975, at Stewart, Nevada. An Order Determining Heirs was entered June 30, 1975, in which Lorraine McKee Jack Kizer was found to be a daughter of the decedent and his only lawful heir.

Elaine Humpy Browning, sister of decedent, and Jim Humpy, decedent's brother, filed a petition for rehearing on August 28, 1975, contending that the evidence admitted at the hearings and other newly discovered evidence prove that the decedent was not the father of Lorraine McKee Jack Kizer. By order dated October 16, 1975, the foregoing petition was denied and this appeal followed.

The undisputed facts in this case include the following: Lorraine McKee Jack Kizer, appellee, was born February 5, 1951, at the Indian Hospital in Owyhee, Nevada. Since the age of 2 or 3, Lorraine resided in a foster home. An aunt of Lorraine's, Loretta Jim, acted as a foster mother for Lorraine until approximately 1967. Lorraine's mother, Kathleen or Kathrine McKee, died August 12, 1962. In approximately 1957 Harold Humpy, the decedent, effected an Indian-custom marriage with Barbara Humpy, who died in 1967. A daughter, Judith Ann, was born from this couple on September 23, 1958. In approximately 1959, Barbara and Harold Humpy separated. Judith Ann Humpy was legally adopted in 1963 by Mr. and Mrs. Floyd McDaniels. ^{1/}

^{1/} At the time of the hearings in this probate, Judith was still a minor and her adopted father represented her as guardian ad litem. In his June 30, 1975, Order Determining Heirs, the Administrative Law Judge held that by reason of Judith's adoption in 1963, she forfeited all inheritance rights from her natural father but for any inheritance that might have been provided for by will. This determination was made in accordance with Idaho State law prevailing at the time of decedent's death and neither Judith nor her guardian ad litem appeals from this ruling.

The primary factual question in dispute in this case is whether the decedent was the natural father of the appellee, Lorraine McKee Jack Kizer. Appellants contend that Wilbur Jack, not Harold Humpy, is Lorraine's father.

The strongest evidence presented at the hearings in favor of the appellants' position consists of various records which identify Wilbur Jack, whose present whereabouts is unknown, as Lorraine's father. Specifically, the record contains the following documentary evidence to this effect: Exhibit 1 - An application for enrollment to share in judgment funds awarded to the Snake or Paiute Indians of the former Malheur Reservation in Oregon, submitted by the appellee in February 1965. This application lists Wilbur Jack as Lorraine's father. Since Lorraine was a minor when this application was filed, it was prepared by Loretta Jim, her foster mother. Exhibit 2 - A memorandum prepared by Dr. F. M. Ricker, dated October 12, 1965, To Whom It May Concern. This memorandum certifies that Lorraine Jack was born in the U.S. Public Health Service Indian Hospital on February 5, 1951, according to records of that facility, and that Wilbur Jack is Lorraine's father. Exhibit 3 - A Delayed Birth Certificate filed November 4, 1965, in the State of Nevada which states that Wilbur Jack is the father of Lorraine. This certificate reflects that the birth information recorded is based on the following: (1) A record of the Indian Hospital, Owyhee, Nevada, dated April 5, 1951, and (2) a record of the Owyhee Elementary School, Owyhee, Nevada, dated September 17, 1956. 2/ Exhibit 4 - A memorandum prepared by Robert J. Barry, M.D., Indian Hospital, Owyhee, Nevada, dated August 23, 1965, which states that according to a copy of a birth record on file at the U.S. Public Health Service Indian Hospital, Owyhee, Nevada, prepared April 5, 1951, Lorraine Jack was born February 5, 1951, and that her father is Wilbur Jack. The physicians' memorandums were acquired by Lorraine pursuant to her application for a delayed birth certificate.

The above four documents were prepared in 1965 by or for the appellee. Significantly, Lorraine's testimony establishes that through this period of time she had no reason to believe that Wilbur Jack was not her father, although she had never lived with him (Tr. II, pp. 8-9). Now, however, Lorraine submits that based on information obtained subsequent to the time the preceding documents were prepared, it can only be concluded that any documentation that Wilbur Jack is her father is simply incorrect.

2/ It is not explained in the delayed birth certificate which specific birth fact, e.g., name of parents, place or date of birth, etc., is attributable to either or both of the identified source documents. Neither the record of the Indian Hospital dated April 5, 1951, nor the September 17, 1956, elementary school record was received into evidence separately.

The Administrative Law Judge concluded that the testimony of witnesses proved Harold Humpy to be Lorraine's father, notwithstanding documentary evidence to the contrary. In light of all the evidence presented and in deference to Judge Hammett's advantageous observation of witnesses, the Board does not believe that this finding should be disturbed.

Three of the four documents relied upon by appellants in an effort to establish that Wilbur Jack is Lorraine's father are substantially duplicative in origin. The two physicians' memorandums and the delayed birth certificate refer to information contained in a record entry made at the Owyhee Indian Hospital on April 5, 1951. Accordingly, if the 1951 entry is deemed erroneous, the remaining documentary evidence cited by the appellants possesses little probative value. Judge Hammett noted in his June 30, 1975, Order Determining Heirs that the record fails to show by whom and on what basis the alleged hospital record was prepared (Order, p. 7).

[1] Attached to appellants' brief filed in this appeal are two additional documents apparently relevant to the paternity issue but neither of which was produced at the hearings or revealed to Judge Hammett as newly discovered evidence in the appellants' petition for rehearing. The Board is not required to consider new evidence first raised on appeal. See Estate of Louis Harvey Quapaw, 4 IBIA 263, 82 I.D. 640 (1975).

The documents above-mentioned consist of a purported letter to the Superintendent of the Indian Agency in Owyhee, Nevada, dated September 24, 1951, from the county public welfare department, requesting verification of certain facts pertinent to a pending request for public assistance filed by Kathleen McKee, appellee's mother. The Superintendent's purported response to this request, dated October 4, 1951, makes reference to the records on file at the Indian Hospital in Owyhee, Nevada. Contrary to the interpretation given to those records in 1965 by Dr. Ricker and Dr. Barry and contrary to the facts stated on the delayed birth certificate prepared in 1965, the Superintendent reported that Lorraine's father was merely "alleged to be Wilbur Jack." The Superintendent's response also notes the whereabouts of Wilbur Jack to be unknown, that Kathleen McKee lives here and there, wherever she can find shelter, and that as of October 1951, she resided with the Nini Yakima household in Miller Creek District. Based on the foregoing contents of the Superintendent's report, it is obvious that were the Department disposed to ignoring its own regulations governing when new evidence shall be considered, appellants' case still would not be bolstered by any such exceptional consideration of this new evidence in this appeal.

[2] No attempt will be made to review the testimony of all the witnesses in this case. Rather the Board adopts the findings and conclusions made by Judge Hammett regarding the testimony of record as set forth in his June 30, 1975, order Determining Heirs and his October 16, 1975, Order Denying Petition for Rehearing and the same is herein incorporated by reference. Doing so, we therefore reject appellants' argument that Judge Hammett improperly considered certain hearsay testimony, including alleged declarations of the decedent. Judge Hammett's orders sufficiently justify the admissibility of such testimony under recognized exceptions to the hearsay evidence rule. In addition, Departmental regulations bestow broad authority upon the Administrative Law Judge to consider evidence "not ordinarily admissible under the generally accepted rules of evidence--" 43 CFR 4.232(b).

It is frequently suggested in the appellants' brief that the proceedings in this case have failed to adduce available evidence and that the absence of counsel at the hearings has adversely affected the interests of Indian parties. See appellants' Brief, pp. 2-3, 12-13.

[3] It is not uncommon in probate proceedings of this type for Indian parties to appear without counsel. There is no existing requirement that the Secretary of the Interior furnish counsel to parties in Indian probate proceedings conducted in accordance with 43 CFR 4.200 *et seq.* Further, the absence of eligible private counsel from an Indian probate hearing, standing alone, does not present sufficient justification for requiring a rehearing in order to receive additional evidence. Estate of Peahner (Mabel) (Mable) Mahseet, 5 IBIA 27 (Decided February 13, 1976). Undeniably, however, the Administrative Law Judge shoulders additional responsibility in developing a complete record when parties proceed with a hearing without counsel. In this case the Board is satisfied that the Administrative Law Judge fully utilized the hearings to bring forth all the facts.

For all of the reasons previously stated, the Board will uphold the Order Denying Petition for Rehearing.

On June 7, 1976, the Board received a Petition to Dismiss Appeal submitted by counsel for appellee. The petition erroneously assumes that Department regulations require that the appellant respond to the appellee's answering brief. Our regulations do not make the submission of such a response mandatory and the above petition shall be denied.

