



INTERIOR BOARD OF INDIAN APPEALS

Estate of Annie Bear

5 IBIA 149 (07/21/1976)



United States Department of the Interior

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

ESTATE OF ANNIE BEAR

IBIA 76-31

Decided July 21, 1976

Petition to reopen estate.

Denied.

1. Indian Probate: Reopening: Generally

The Board has frequently held that petitions to reopen closed estates require compelling proof that delays in requesting relief have not been occasioned by lack of diligence on the part of petitioning parties.

2. Indian Probate: Wills: Construction of

The Board realizes that the Department's October 26, 1927, order approving will construes the devise to John Sherman to be conditional upon his taking care of testatrix's son, petitioner in this case, but, based on the scant record developed in the original probate proceeding, it is not beyond reason that this construction was erroneous.

3. Indian Probate: Reopening: Generally

Where continued effect has been given to a natural disposition of property for over 53 years, the reopening of an estate based on alleged failures of a conditional devisee who is no longer alive to defend his inherited interest would risk greater possible injustices than such reopening could hope to prevent.

APPEARANCES: David Garcia, Esq., for Jesse J. Bear, petitioner.

OPINION BY BOARD MEMBER HORTON

Tacankuwastewin or Annie Bear, deceased Devils Lake Sioux Allottee No. 295, died testate on May 25, 1923, at Fort Totten, North Dakota. Her final will, dated May 18, 1923, devised certain properties to her two surviving children, Ida Bear and Jesse J. Bear, and other property to her surviving husband, William Irish. The will named only one other devisee, John Sherman, brother of the testatrix, who was devised 40 acres of trust land.

The latter devise is the subject of the petition to reopen this estate. It reads as follows:

Fourth, I give, devise and bequeath to John Sherman, who is to take care of my son, Jesse, the NW 1/4 of the SE 1/4, Sec. 15, Twp. 152 N. of R. 64 W. 5th P.M. in North Dakota (Benson County). This allotment I understand I inherit thru Henry Onehouse.

The Department of the Interior approved the will of Annie Bear by order dated October 26, 1927. A key provision of this order reads:

This approval is with the understanding that the devise of 40 acres of land to John Sherman will stand approved only in the event that he intends and does properly take care of and provide for the decedent's child, Jesse, as contemplated by and in accordance with the terms of the will.

The petitioner in this case is Jesse J. Bear who now claims that his uncle, John Sherman, failed to care for him as required by Annie Bear's will and the Department's October 26, 1927, order. Accordingly, Jesse Bear asks that the devise of property to John Sherman be set aside.

Jesse Bear's petition to reopen the Annie Bear estate was filed with Administrative Law Judge Daniel S. Boos on March 15, 1976. Because the subject estate has been closed for over 48 years, Judge Boos forwarded the petition to this Board by memorandum dated March 23, 1976, with a recommendation that the Board grant the petition. This procedure is in accordance with the requirements of 43 CFR 4.242(h) which provides, inter alia, the following:

(h) If a petition for reopening is filed more than 3 years after the entry of a final decision in a probate, and if it shall appear to the Administrative Law Judge that there exists a possibility for correc-

tion of a manifest injustice, he shall forward the petition to the Board of Indian Appeals with a showing as to all intervening rights and a recommendation as to the action to be taken.

Notwithstanding the recommendation of the Administrative Law Judge, it is the Board's conclusion that the petition to reopen this estate should be denied. Our reasons follow.

John Sherman, the individual whose conduct is attacked in this petition, died December 1, 1970. See Estate of John Sherman, deceased Devils Lake Sioux Allottee No. 294, Probate No. BI-609-B-72. The 40 acres devised to John Sherman by Annie Bear were included in the probate of his estate. His heirs now seek to sell a portion of this allotment, according to a memorandum from the Superintendent of the Fort Totten Agency, but the agency desires clarification of the legal status of the 40 acres before proceeding further.

[1] Jesse Bear, who was age 3 when his mother died, is now approximately 55 years old. He reached majority age in approximately 1941. His petition to reopen his mother's estate makes no attempt to justify the apparent long delay in seeking correction of an alleged injustice. The Board has frequently held that petitions to reopen closed estates require compelling proof that delays in requesting relief have not been occasioned by lack of diligence on the part of petitioning parties. Estate of David Marksman (Deceased Bad River Chippewa Allottee 354(4)), 5 IBIA 56 (1976); Estate of George Mortimer Cummings (Deceased Cheyenne River Allottee 3484), 2 IBIA 112, 80 I.D. 789 (1973). We find the petitioner has not been diligent in this case and that the requested reopening can be denied on this ground alone.

In his January 30, 1976, affidavit in support of his petition Jesse Bear states that he was reared following his mother's death in 1923 by his paternal aunt, maternal grandparents and a cousin, but not by John Sherman. John Sherman is no longer living and presumably the relatives named by petitioner in his affidavit are also deceased. ^{1/} John Sherman's death, standing alone, makes it extremely difficult to now examine with any fairness what steps, if any, Jesse's uncle undertook to care for him or what agreements, if

^{1/} The original probate file contains no documents dated after November 30, 1927. The September 17, 1925, testimony of Jesse Bear's paternal aunt is included in this record in which she states she is 60 years old. The October 23, 1924, testimony of William Irish, surviving husband of the testatrix, shows that Jesse Bear moved in with his paternal aunt following the death of his grandmother with whom Jesse had been living previously.

any, John Sherman may have established with other relatives regarding care for Jesse. 2/

In addition, the probate record in this case maintained subsequent to the Department's October 26, 1927, order approving Annie Bear's will contains no prior petitions or other pleas by relatives of Jesse Bear to nullify the devise to John Sherman. A presumption is therefore permissible that the relatives whom Jesse Bear claims supported him through childhood either 1) received assistance of some kind from John Sherman, or 2) entered into some agreement with John Sherman regarding Jesse's upbringing, or 3) acquiesced to a nonsupporting role by John Sherman with respect to Jesse's needs. See Estates of Teddy Punlay and Haw-wau-na-ha-sun-ah, IA-8 (October 6, 1949, and April 7, 1950) in which a petition to reopen an estate was denied where the petition was not filed for 35 years, and the moving party acquiesced during this period in the original finding.

2/ In the only testimony of record given by John Sherman he testified on September 16, 1925, in the following pertinent respects:

"Q. Do you intend to take care of this child, Jesse Bear, the son of Annie?"

"A. I intend to take care of the boy just as soon as they approve it, as soon as he is my boy (Examiner's Note: The witness evidently considers that the approval of the will would make him guardian of the child, Jesse Bear).

"Q. Do you wish it to be understood that you are willing to take this child at any time and rear him, if given to understand that you have the right to do so?"

"A. I wanted to take the child when the grandmother died, but I asked Nancy Otaapena (Jesse's paternal aunt) for him and she wanted to wait till the will was approved.

"Q. Did Nancy Otaapena refuse to let you have the child?"

"A. Yes. She wanted to keep the boy because she wanted to live in Peter Bear's house (father of Jesse Bear and Annie Bear's second husband)."

Nancy Otaapena gave the following testimony on September 17, 1925:

"Q. You are taking care of Jesse Bear, the son of Annie Bear, are you not?"

"A. Yes.

"Q. Has John Sherman ever offered to take care of this boy?"

"A. No.

"Q. Did you ever ask John Sherman to take the boy?"

"A. No, I never asked him. I have taken care of the boy for a while, so I hate to let him go now. But if it is decided that John Sherman should have him, then I have no objection."

The Board is not unmindful that the original record in this case contains correspondence between officials of the Department which questions John Sherman's fulfillment of the terms of the order approving will entered October 26, 1927. However, the last entry in the original file merely consists of a memorandum dated November 30, 1917, from the Assistant Commissioner of Indian Affairs to the Superintendent of the Fort Totten Agency requesting that statements be obtained from John Sherman and his wife, under oath, "setting forth fully whether they wish to take the decedent's son, Jesse, and provide and care for him as contemplated in the decedent's will." The Superintendent was further advised, "If they do not wish to take him they should so state specifically."

There is no evidence that the Superintendent responded to the foregoing memorandum and the Board perceives no way of reconstructing what might have been produced, if anything, by the Superintendent in response to the Assistant Commissioner's foregoing request.

[2] Assuming arguendo that John Sherman in no respect contributed to the support of Jesse Bear, as alleged, it is arguable that the testatrix never contemplated that the devise of a fraction of her estate to her brother remain contingent on his active support of the decedent's son. The Board realizes that the Department's October 26, 1927, order construes the devise to John Sherman to be conditional, but, based on the scant record developed in the probate of Annie Bear's will, it is not beyond reason that this construction was erroneous. For example, Annie Bear's statement that she was leaving 40 acres of land to John Sherman "who is to take care of my son, Jesse, * * *" may have represented no more than the testatrix's belief that her brother would care for her son. 3/ We have found no corroborative evidence in the probate file that the testatrix clearly intended John Sherman to inherit from her only if he provided for the needs of Jesse Bear. Further, if the testatrix wanted to insure by her final will how her son would be cared for, it is puzzling to the Board that more specific language was not included in her will. In this regard we also note that no one was mentioned in the will as responsible for Ida Bear, Jesse's full-blood sister, who was approximately 12 years old when Annie Bear made her will.

3/ John Sherman's testimony tends to support this possible construction:

"Q. Was there any particular reason why your sister, Annie Bear, should have given you the custody of this child?

"A. After Peter Bear died I always helped Annie and therefore she knew that I would take care of the boy and use him right" (Sept. 16, 1925, testimony, p. 1).

[3] There is of course nothing unnatural about a devise of property from sister to brother, particularly when the sister's children and surviving husband are named primary beneficiaries as in the case at hand. Moreover, where continued effect has been given to a natural disposition of property for over 53 years, the reopening of an estate based on alleged failures of a conditional devisee who is no longer alive to defend his inherited interest would risk greater possible injustices than such reopening could hope to prevent.

For the foregoing reasons the petition to reopen the Annie Bear estate shall be denied and we hold that John Sherman died seized of the 40 acres of property which Annie Bear devised to him in her final will with the title thereto held in trust for John Sherman and his heirs by the Secretary.

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 Petition to Reopen filed by Jesse J. Bear and dated March 15, 1976, be, and the same is, hereby denied.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Wm. Philip Horton
Member of the Board

I concur:

//original signed
Alexander H. Wilson
Administrative Judge