

DWIGHT H. AND VERNA K. HUSTON

IBLA 73-259

Decided June 16, 1975

Appeal from California State Office, Bureau of Land Management decision R 06891, rejecting an application to purchase a tract of land within an unpatented mining claim pursuant to the Mining Claims Occupancy Act.

Set aside and remanded.

1. Mining Occupancy Act: Qualified Applicant

In order for an applicant to qualify for a conveyance under the Mining Claims Occupancy Act, 30 U.S.C. §§ 701 et seq. (1970), he must show that as of October 23, 1962, he was a residential occupant-owner of valuable improvements in an unpatented mining claim which constituted a principal place of residence for him and his predecessors in interest for not less than seven years prior to July 23, 1962.

2. Mining Occupancy Act: Principal Place of Residence

The Mining Claims Occupancy Act, 30 U.S.C. §§ 701 et seq. (1970), only requires that valuable improvements on an unpatented mining claim constitute a principal place of residence for a qualified applicant, not that such be the principal place of residence of the applicant.

3. Evidence: Credibility -- Hearings -- Mining Occupancy Act: Principal Place of Residence -- Oaths

Under the Mining Claims Occupancy Act, 30 U.S.C. §§ 701 et seq. (1970), where the

record includes a statement as to a principal place of residence which conflicts with a more detailed statement made under oath by the same person, the matter may be remanded for hearing in order to resolve the conflict and protect the rights of a third party.

4. Mining Occupancy Act: Principal Place of Residence

For purposes of the Mining Claims Occupancy Act, 30 U.S.C. §§ 701 et seq. (1970), under certain circumstances a principal place of residence of minor children and wife may be considered a principal place of residence of the father-husband.

5. Mining Claims: Title -- Mining Occupancy Act: Qualified Applicant

Under California law, when a mining claim is purchased by a husband using community property funds, even though title is taken in the husband's name alone, a gift to the husband will not be presumed in lieu of other evidence and the wife may be considered a qualified applicant for purposes of the Mining Claims Occupancy Act, 30 U.S.C. §§ 701 et seq. (1970).

6. Mining Occupancy Act: Principal Place of Residence

Under the Mining Claims Occupancy Act, 30 U.S.C. §§ 701 et seq. (1970), where a couple owns no other residence, a principal place of residence held by a disabled husband, for reasons of health, may be considered a principal place of residence of his wife, even though she is customarily away from the mining claim during the week in order to work elsewhere.

7. Mining Occupancy Act: Conveyances

Under 30 U.S.C. § 703 (1970), where land applied for under the Mining Claims Occupancy Act is withdrawn in aid of a

governmental unit other than the Department of the Interior, the Secretary may convey an interest in the land only with the consent of the head of the governmental unit concerned.

APPEARANCES: Arnold O. Steele, Esq., of La Jolla, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Appellants have appealed from a decision by the California State Office, Bureau of Land Management, dated December 14, 1972, rejecting their application filed pursuant to the Mining Claims Occupancy Act of October 23, 1962, as amended, 30 U.S.C. §§ 701 et seq. (1970), to purchase a five-acre tract of land known as Lord Elgin's Silver Duke millsite claim. Such application was filed on July 20, 1965, and amendments were filed on April 4 and November 24, 1967.

In 1947 Charles Ducret initiated the chain of title by locating the claim as the Expansion Group Millsite. The cabin on the claim was the family home where Ducret's daughter, June, lived while attending high school. Following Ducret's death in November 1959, his daughter inherited the claim, and on June 28, 1960, she and her husband, Jack E. Rafferty, relocated the claim as the Silver Duke lode claim. By deed dated May 14, 1962, acknowledged May 15 and recorded May 24, June D. Rafferty quitclaimed her interest in the claim to her husband as part of a divorce property settlement. On June 11, 1962, Jack Rafferty quitclaimed the Silver Duke lode claim to appellant, Capt. Dwight H. Huston. Appellants state in their application that they both paid Rafferty for the claim. Subsequently, on June 17, 1965, appellants relocated the Silver Duke lode mining claim as a five-acre millsite claim, Lord Elgin's Silver Duke. Such five-acre tract is that which is sought by appellants. The tract was, at the critical date October 23, 1962, a part of the Silver Duke lode claim which was declared null and void on July 12, 1965, following a contest proceeding. On August 18, 1966, appellants waived their interest in the millsite claim.

The rejection of appellants' application was based on an investigation made by the Forest Service, United States Department of Agriculture, California Region. The report concluded that appellants were not qualified applicants because they "may not have used the cabin * * * as a principal place of residence on October 23, 1962." In addition, it was stated "it seems unlikely that Jack and June Rafferty's princip[al] place of residence immediately previous to filing for divorce was the mining claim in question."

In an affidavit filed on November 28, 1967, appellants state:

That we are the Applicants herein and are husband and wife who own and occupy the cabin at Deer Park, which is the subject of the above proceedings * * *.

That said cabin has been the princip[al] residence of DWIGHT H. HUSTON ever since June 11, 1962 and was the principle place of residence of DWIGHT H. HUSTON as of October 23, 1962; that said DWIGHT H. HUSTON is a disabled veteran having received severe shrapnel wounds in the head during World War II; that as a result of said wounds, DWIGHT H. HUSTON has two silver plates in his skull; that said wounds have caused DWIGHT H. HUSTON to severe [sic] sinus trouble requiring him to live in a dry climate; that said DWIGHT H. HUSTON lives in said cabin most of the time, coming to San Diego only for allergy shots and medical treatment every week. That said DWIGHT H. HUSTON resides in said cabin at all times except when in San Diego for treatment.

That VERNA K. HUSTON is employed at Miramar N.A.S. as a Supply Clerk (GS-4) and resides at 4651 Troy Lane, La Mesa, California, during the week because of the demands of her employment; that although living in La Mesa, VERNA K. HUSTON considers her princip[al] residence the same as her husband's, i.e., the cabin located at Deer Park.

[1] Under certain circumstances, the Secretary of the Interior is authorized under 30 U.S.C. § 701 (1970) to convey "to any occupant of an unpatented mining claim" an interest up to a fee simple in land within the claim.

As stated in section 702, a qualified applicant, who is eligible for a conveyance under section 701, is:

* * * a residential occupant-owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962.

[2] The issue presented herein is whether or not appellants and their predecessors in interest 1/ met the residency requirements

1/ Walter L. Hurlburt, 7 IBLA 255, 258 (1972).

of the Act as interpreted in 43 CFR 2550.0-5(d):

The term "a principal place of residence" means an improved site used by a qualified applicant as one of his principal places of residence except during periods when weather and topography may make it impracticable for use. The term does not mean a site given casual or intermittent residential use, such as for a hunting cabin or for weekend occupancy. (Emphasis added.)

There is no dispute that the claim was used as a principal place of residence by Charles Ducret from 1947 until his death in November 1959. However, there is conflicting evidence in the record concerning the residency of June and Jack Rafferty. Appellants filed two affidavits in July 1970 with the Riverside District and Land Office following a request for information by such office concerning the use of the cabin on the claim from July 23, 1955, through October 23, 1962. The two affiants, A. T. Knight and Granville Martin, state that the Raffertys occupied the claim following the death of June's father, Charles Ducret, and that such occupation continued until the time of their separation and subsequent sale of the property to appellants. A. T. Knight states in part:

[T]hat Mr. Ducret continuously occupied the premises as a residence and worked in the neighborhood; that Charles Ducret's daughter, June, attended high school in Julian, California, and following the death of Charles Ducret, June Ducret Rafferty and her husband, Jack, and their two children occupied the premises for two years and sold the property to Dwight and Verna Huston in 1962. That from 1960 to 1962 the Raffertys occupied the premises as a permanent residence and made improvements and repairs thereon.

That Dwight and Verna Huston have occupied the premises in Pine Valley as a residence from the time that they purchased the property in 1962 until this date.

The Martin affidavit is to the same effect.

On the other hand, the Forest Service report contains evidence which disputes residency by the Raffertys. Therein, it is stated that June Rafferty filed for a divorce on May 3, 1962, and listed her address as 519 N. Mariposa, Los Angeles, California. Jack Rafferty's address was listed as 77 Montebello, Chula Vista,

California. The report includes a statement dated July 21, 1971, written by the Forest Service Impact Officer and signed by Jack Rafferty:

From 1960 to 1962 my previous wife June Ducreat [sic] and I lived at 77 Montabello [sic] in Chula Vista, and not on the Mining Claim in Deer Park. We did visit the claim on weekends and maintained the property before selling it in 1962.

The record does not show that the Rafferty statement was made available to appellants for comment prior to the State Office decision.

It is clear that under 43 CFR 2550.0-5(d), supra, a cabin on a mining claim need not be shown to be the principal place of residence of an applicant or of his predecessors in interest; it need only be a principal place of residence. Frank O. O'Mea, 10 IBLA 187, 192 (1973). The Forest Service supplemental report of July 14, 1971, and letter of September 23, 1971, indicates that a portion of the Forest Service recommendation to Interior was based on a misunderstanding of the law.

[3, 4] On appeal, appellants filed an affidavit with their statement of reasons for appeal, sworn to by Jack Rafferty:

She [June Rafferty] refused to sell it on several occasions. She intended to live there with the children because she wanted them to grow up in the country. During the week I lived at 77 Montebello Street in Chula Vista to be near my work. We did, during this period of time, maintain both the house on Montebello and the claim in Deer Park as residences. My wife spoke of the cabin in Deer Park as "her Home." She was there much more than an occasional weekend basis. It was a principal residence for us, particularly for my wife. I was there on weekends, she on a more regular basis.

Jack Rafferty's two statements are difficult to reconcile; if the later, more detailed statement under oath should be determined to be true then the first statement should not be permitted to bar Capt. Huston from his right to be considered a qualified applicant. A question exists as to the Raffertys' residence before and after they separated and Jack Rafferty took title.

Prior to the Rafferty divorce, Jack Rafferty was frequently at the claim together with his minor children and wife. Under certain circumstances, a principal place of residence of minor children and a mother may be considered a principal place of residence of a father. Accordingly, it is proper that the case be

remanded for further evidence. Appellants will have the opportunity to present - at hearing ^{2/} before any decision is rendered against them - evidence as to whether the claim was a principal place of residence of Jack or June Rafferty, or both, during the periods from 1955-62. Evidence also may be presented as to whether the claim should be construed to have continued to be a principal place of residence of Jack Rafferty and the children until the date of sale to Capt. Huston. The additional evidence to be received on remand will be received only as to the question of residence of Mr. and Mrs. Rafferty.

The question of whether appellants used the claim as a principal place of residence from the time of the sale by Rafferty to and as of October 23, 1962, is more readily resolved. There is considerable evidence in the record concerning occupation of the claim after October 23, 1962, but qualifications must be determined on the basis of facts as they existed on and prior to October 23. Occupancy subsequent to that date is not determinative of one's ability to qualify under the Act. Ola McCulloch Sibley, 73 I.D. 53, 56 (1966).

As to the period June 11, 1962, through October 23, 1962, the State Office decision states that the Forest Service report does not support the applicants' allegation that they used the claim as a principal place of residence. The reasons stated were that Dwight Huston continued to receive mail in La Mesa, California, until 1964 when he rented a post office box in Julian, California. Appellants registered to vote in 1950, listing their address as Troy Lane, La Mesa, California, such address being the same as that used when both appellants voted in the 1966 general election. Such dates relate only indirectly to the critical period in 1962. It is also stated the gas records show that gas used at the cabin is below that of the average residence. While such factors are properly considered, they are more determinative of whether the cabin was the principal place of residence for appellants, rather than a principal place of residence.

In support of appellants' occupancy, Capt. Huston states that he has continually resided on the claim as a principal place of residence since June 11, 1962. In his affidavit of January 15, 1973, Capt. Huston affirms:

I live on said property constantly. It is my princip[al] residence. I leave there only to visit the Navy Hospital in San Diego once a week for allergy shots and once a month to the ENT Clinic at the Navy Hospital in San Diego. On the occasions of the visit to the hospital I sometimes stay overnight in La Mesa.

Until recently my wife VERNA was employed by the United States Navy at Miramar NAS.
Every Friday

^{2/} Cf. Eugene P. Tiscornia, Sr., 13 IBLA 136 (1973).

evening I drove to San Diego to pick up my wife and drive her to our residence on the above property in Deer Park for the week-end. Every Sunday evening or Monday Morning I drove her back to San Diego for the beginning of the work week.

Appellants' evidence is thus that the claim was purchased primarily because of Capt. Huston's health problems; that he is a disabled veteran with a 100% service-incurred disability; that he has a number of allergies, all service connected; that the dry mountain air is beneficial to such allergies; and that he lived on the claim except for visits to the Naval Hospital in San Diego. We conclude that Capt. Huston is a qualified applicant.

[5] Although record title was taken in the name of Capt. Huston, appellants state in their application that "applicants" paid Rafferty for the claim. It is not certain that Mrs. Huston's contribution to the fund was community property; however, this seems probable in view of Mrs. Huston's employment and appellants' claim that Mrs. Huston was a joint owner. Property acquired by either spouse during marriage is presumptively community property under California law. Estate of Walsh, 66 Cal. App. 2d 704, 152 P.2d 750 (1944). The husband controls community property. Under the facts and California law, and in lieu of other evidence, no gift of either separate or community funds to Dwight H. Huston is presumed, even though title was taken in his name alone. In Re Sill's Estate, 121 Cal. App. 202, 9 P.2d 243 (1932); Althof v. Conheim, 38 Cal. 230 (1869). Because there is no evidence to prove that Verna K. Huston relinquished her interest in the funds, she will be regarded as an owner with her husband as of June 11, 1962.

[6] Appellants admit that Mrs. Huston did not live on the claim during the week, as her job required her to reside at 4651 Troy Lane, La Mesa, California, a home owned not by appellants but by Capt. Huston's parents. There is no evidence that appellants had a home elsewhere, as was the case in Tiscornia, supra.

Under the unusual facts of this case, it is entirely consistent that Mrs. Huston should consider her principal residence to be the same as her husband's. Affidavit, supra. We conclude that appellants in good faith established the cabin on the claim as a principal place of residence at the time of their purchase in June 1962 and that it remained such a principal place of residence through October 23, 1962.

[7] According to 30 U.S.C. § 703 (1970), where the lands for which application is made have been withdrawn in aid of a governmental unit other than the Department of the Interior, the Secretary of the Interior may convey an interest in the land only with the consent of the head of the governmental unit concerned. In this instance

the land sought by appellants is located in a national forest. For that reason, it is for the head of the Forest Service to determine the nature of the relief which should be granted to appellants. Bernice H. Doll, A-31141 (April 27, 1970).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for further action consistent herewith.

Joseph W. Goss
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Edward W. Stuebing
Administrative Judge

