



INTERIOR BOARD OF INDIAN APPEALS

Estate of Milward Wallace Ward

4 IBIA 97 (07/18/1975)

Also published at 82 Interior Decisions 341

Related Board case:

46 IBIA 5

Judicial review of this case:

Dismissed, Ward v. Frizzell, No. C75-175 (D. Wyo. Jan. 8, 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 MILWARD WALLACE WARD

IBIA 75-40

Decided July 18, 1975

Appeal from an order denying petition for rehearing.

Affirmed.

1. Indian Probate: Children, Adopted: Indian Custom Adoptions

An Indian custom adoption, alleged to have been made prior to the date of the Act of July 8, 1940 (54 Stat. 746, 25 U.S.C. § 372a), cannot be recognized as valid unless the adoption is recorded, as provided in the Act, during the lifetime of the adoptive parents.

2. Indian Probate: Rehearing: Generally

An order denying a rehearing is proper when the petition for rehearing alleging newly

discovered evidence fails to state any other grounds which would require a rehearing and, accordingly, an appeal from the denial will be dismissed.

APPEARANCES: Alfred Ward, Irene Ward Wise, Elizabeth A. Collins, pro se; Christopher A. Crofts of Hamilton and Hursh, a professional corporation, for Ina D. Witt, Walter Thompson, Charles G. Thayer, Jerry K. Thayer, Ingrid G. Teuscher and Mike Witt.

OPINION BY ADMINISTRATIVE JUDGE WILSON

The above-entitled matter comes before this Board on an appeal filed by Alfred Ward, Irene Ward Wise, and Elizabeth A. Collins, hereinafter referred to as appellants, from an order denying petition for rehearing, issued by Administrative Law Judge William E. Hammett, on November 21, 1974.

In their petition for rehearing the appellants in essence alleged error on the part of the Administrative Law Judge in not finding that Milward Wallace Ward, hereinafter referred to as decedent, was adopted by Delbert Ward, Sr., and Susan L. Ward, according to Shoshone Indian custom and as a result thereof, the appellees rather than the appellants were found to be the decedent's heirs at law.

The Judge in denying the petition found that the appellants had failed to meet the requirements of 43 CFR 4.241(a) which in relevant part provides:

* * * If the petition for rehearing is based upon newly-discovered evidence, it shall be accompanied by affidavits of witnesses stating fully what the new testimony is to be. It shall also state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision.* * *

The Judge further found that no additional evidence had been presented which would effectively controvert the basis for the initial decision of September 11, 1974.

The basis for the original decision of which the appellants complain was that the evidence presented at the hearings held in the matter on August 3 and August 9, 1973, failed to meet the requirements of 25 U.S.C. § 372a in establishing an adoption recognizable thereunder. Accordingly, the Judge found the decedent's heirs to be his natural mother and natural half-siblings, the appellees herein.

The record, as presently constituted, clearly indicates that the appellants failed to establish a recognizable adoption under the provisions of 25 U.S.C. § 372a. The evidence presented by appellants at

the hearing and in their petition for rehearing clearly fell short of establishing a recognizable adoption under section 372a, supra.

Recordation of an Indian custom adoption as a requirement of recognition under 25 U.S.C. § 372a for inheritance purposes has long been considered by the Department as being mandatory rather than directory.

[1] An Indian custom adoption, alleged to have been made prior to the effective date of the Act of July 8, 1940 (54 Stat. 746, 25 U.S.C. § 372a), cannot be recognized as valid unless the adoption is recorded, as provided in the Act during the lifetime of the adoptive parents. Estate of Mark Fish Guts, IA-79 (April 21, 1952). Before an adoption by Indian custom made prior to July 8, 1940 shall be recognized as valid, it shall be recorded with the Superintendent of the Agency. Estate of Jeanette Ezekial, IA-643 (May 17, 1956).

The record further indicates that appellants failed to meet the requirements of 43 CFR 4.241(a) regarding rehearings. Appellants as justification attributed their failure to present evidence regarding the Indian custom adoption at a prior hearing on inadequate notice of the hearing and on their belief and understanding that their attorney would submit a brief on their behalf as well as a claim for care as permitted by the Judge during the hearing. The foregoing reasons are

unacceptable. The record contrary to the appellants' contention shows that appellants and their counsel had ample time before, during and subsequent to the hearings to present evidence in support of their contentions regarding Indian custom adoptions. Their failure to do so should however in no manner affect the rights of the appellees.

Moreover, appellants' statement and petition for rehearing clearly show that they have no new evidence to justify a rehearing nor do they present any new legal basis for a contrary decision.

The Department has consistently held that a petition for rehearing will be denied where the petition alleges newly discovered evidence but fails to state the alleged newly discovered evidence or to state why such evidence was not presented at a prior hearing.

[2] An order denying a rehearing is proper when the petition for rehearing alleging newly discovered evidence fails to state the alleged newly discovered evidence and fails to state any other grounds which would require a rehearing, and, accordingly, an appeal from the denial will be dismissed. Estate of Lucy Feathers (Grace Medicinebird Lefthand, Bitner, Ridgby, White Plume or Geary), 1 IBIA 336, 79 I.D. 693 (1972).

For the foregoing reasons, the Board finds that the Administrative Law Judge in his Order of September 11, 1974, did not err in finding

that a valid adoption under 25 U.S.C. § 372a had not been established by the appellants and that the reasons set forth in their petition for rehearing did not meet the requirements of 43 CFR 4.241(a). Accordingly, the Order Denying Petition for Rehearing, dated November 21, 1974, should be affirmed.

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 Administrative Law Judge's Order Denying Petition for Rehearing dated November 21, 1974, is hereby AFFIRMED.

This decision is final for the Department.

//original signed
Alexander H. Wilson

Administrative Judge

I concur:

//original signed
Mitchell J. Sabagh
Administrative Judge