ESTATE OF JOSEPH WILLESSI
Quinaielt No. 1432

IBIA 74-14 Decided August 8, 1974

Appeal from the Judge's decision denying petition for rehearing.

Reversed and Remanded.

Indian Probate: Administrative Procedure: Applicability to Indian Probate

> The requirement of the Administrative Procedure Act, that all decisions of a Judge shall include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record, is mandatory and applicable to all decisions of Judges in Indian probate proceedings.

Indian Probate: Rehearing: Generally

> A rehearing will be granted where the original hearing did not conform with the standards of a full opportunity to be heard embodied in the Administrative Procedure Act (5 U.S.C. §§ 554 and 556 (1970)).

APPEARANCES: Russel W. Busch and Robert L. Pirtle, of Ziontz, Pirtle, Morisset & Ernstoff for appellants; Jon Marvin Jonsson, Esquire, for appellees.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

The probate of the Estate of Joseph Willessi, Quinaielt Allottee No. 1432, was the subject of a hearing held on June 15, 1971. The Administrative Law Judge, Indian Affairs, issued an Order on February 10, 1972, approving a purported last will and testament dated January 12, 1968, leaving decedent's village lot appraised at $1,500 and described as Lot 1, Block 8, Village of La Push, Washington, to his cousin Nellie W. Richards, and the remainder of his estate described as: N 1/2 SE 1/4 Sec. 29,

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T. 23 N., R. 12 W., W. M., Washington, containing 80 acres, appraised at $150,000, and IIM Account amounting to approximately $62,204 to Leo Williams, son of Nellie W. Richards.

The Judge found that decedent left surviving him, the following first cousins:

Nellie W. Richards
Philip S. Talbot
Edward Talbot
Dorothy Talbot Murray
Pearl Talbot
Irene Soeneke
Phil Hansen
Esther Elvrum

However, he failed to show the birth dates, whether all were of Indian blood, or the share that each would take. See 43 CFR 4.240.

A petition for rehearing was timely filed wherein the petitioners averred that:

1) They were first cousins of decedent, Joseph Willessi;

2) Joseph Willessi lacked testamentary capacity;

3) They understood the purpose of the hearing to be only for the determination of heirs of Joseph Willessi. They did not know of the existence of the purported will dated January 12, 1968, and were unprepared to prove decedent's lack of testamentary capacity;

4) There existed newly discovered evidence.

Attached to said petition were several affidavits.

The Administrative Judge issued an Order denying the petition for rehearing on July 5, 1973. The Order was thence appealed to this Board.

In his Order Approving Will dated February 12, 1972, the Judge concluded among other things that:

> The will is in proper form and the evidence shows that the decedent was of good sound mind and disposing memory at the time he executed the will and no undue influence, coercion or fraud was used in obtaining its execution. The preparation of the will was supervised

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> by employees of the Bureau of Indian Affairs. It appears to be a proper instrument to receive Departmental approval.

In his Order Denying Petition for Rehearing the Judge stated among other things:

> Petitioners contend that they knew nothing of any will that the decedent may have made. The Notice of Hearing stated "I will take testimony and receive evidence for the purpose of determining the heirs or probating the will <u>if a will be found</u> . . . " (Underscoring supplied).

The record shows that the Notice of Hearing to which the Judge refers was a form notice sent to all interested parties whether or not there be a will in existence. The Notice did not make reference to the will of January 12, 1968 specifically, nor were copies of same forwarded to them together with the notice so that it could be argued petitioners had ample notice to prepare to contest the will.

An examination of the record, including the transcript, establishes the will dated January 12, 1968, was approved solely on the testimony of Eunice L. Jones, an employee at the bank at Forks, Washington, although it was apparently prepared by scrivener Earl E. Allen, Western Washington Indian Agency, with the assistance of an interpreter, Roy Black, Sr., of La Push and also witnessed by John B. Hill, formerly an employee of the bank at Forks, Washington, who moved to Tacoma, Washington. It further appears the will was prepared by Earl E. Allen on January 3, 1968, at the Western Indian Agency but not witnessed until January 12, 1968, when the residuary devisee and his wife brought the decedent to the bank at Forks.

Nowhere in the record is it established that the decedent was of good sound mind and disposing memory at the time he executed the will. The affidavits supporting the Petition for Rehearing would tend to show the decedent to be other than of good sound mind and disposing memory.

No good reason has been shown as to why Earl E. Allen, Roy Black, Sr., and John B. Hill were not called to testify.

Dorothy Murray, Alice Mannes, Irene Soeneke, Phillip Hansen, Philip Talbot and Esther Elvrum, all first cousins of the decedent, objected to the will. See 43 CFR 4.233(c).

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Where only one of several attesting witnesses to the will had testified without any reason being apparent why the other witnesses, one of whom was the scrivener of the will, had not appeared, it was regarded essential that the testimony of all attesting witnesses be obtained. Estate of Clemente Segundo, IA-136 (April 5, 1955); Estate of Charlotte Davis Kanine, IA-828 (January 8, 1959); Estate of Charles Mjissepe, IA-1284 (May 2, 1966).

We cannot agree that the conclusions arrived at by the Judge were supported by the evidence.

We find that the record is incomplete, and that a proper determination cannot be made on the evidence before us.

We further find that the petitioners were not given full opportunity to be heard.

Therefore, we REMAND this case to the Administrative Law Judge for a hearing de novo consistent with the views and findings set forth supra, which shall include inter alia, proper notification to all interested parties, a transcript incorporating all relevant testimony and documentary evidence admitted at the hearing and a decision including therein, findings of fact and conclusions of law. See 5 U.S.C. § 557(a)(3) (1970).

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, we REVERSE the Order Denying the Petition for Rehearing and REMAND the matter to the Administrative Law Judge for hearing de novo to determine heirs, and to approve or disapprove will of January 1, 1968.

Mitchell J. Sabagh
Administrative Judge

We concur:

David J. McKee
Chief Administrative Judge

Alexander H. Wilson
Administrative Judge

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