



INTERIOR BOARD OF INDIAN APPEALS

Estate of San Pierre Kilkakhan (Sam E. Hill)

1 IBIA 299 (09/15/1972)

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United States Department of the Interior

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

ESTATE OF SAN PIERRE KILKAKHAN

(SAM E. HILL)

IBIA 72-9

Decided September 15, 1972

Appeal, in lieu of a second petition for rehearing to present newly discovered evidence, after one rehearing already held.

Remanded

Indian Probate: Administrative Procedure: Applicability to Indian Probate

Examiners must conform to the requirements of the Administrative Procedure Act, 5 U.S.C. § 557 (1970) and include findings of fact and conclusions of law in their orders and decisions in Indian probate.

Indian Probate: Administrative Procedure: Official Notice, Record

No official notice of records can be taken if such record is not introduced in evidence, or identified as required by the

Administrative Procedure Act, 5 U.S.C. § 556(e) (1970) so as to be available subject to challenge by the aggrieved party.

Indian Probate: Evidence: Conflicting Testimony

The basic rule that the examiner's findings of fact will not be disturbed where there is conflicting testimony has no application where it does not appear the decision was based upon examiner's particular observation or evaluation of the witnesses or the statements made by them and he made no finding regarding the credibility of the witnesses.

Indian Probate: Evidence: Hearsay Evidence

Hearsay evidence is admissible as an exception to the general rule where it pertains to matters of family history, relationship and pedigree.

Indian Probate: Hearing Examiner: Generally--Indian Probate: Secretary's Authority: Generally

The rule that a trial examiner's findings should not be disturbed on appeal unless "clearly erroneous" is not applicable by administrative appellate tribunals, but pertains only to

judicial review by the courts.

APPEARANCES: Richard B. Price of Nansen & Price for appellants; Robert D. Dellwo of Dellwo, Rudolf and Grant, for appellees.

OPINION BY MR. MCKEE

San Pierre Kilkakhan or Sam E. Hill, Colville Allottee S-1078, died intestate February 2, 1967, and the first hearing in the probate of his estate was held August 15, 1967, at which time no parties in interest were represented by counsel. At that hearing Alice May Tatshama appeared claiming to be a daughter of the decedent and Lillian Williams Tatshama.

By his order determining heirs issued September 14, 1967, the examiner disallowed her claim and held that the decedent had died intestate, unmarried without issue, father, mother, brother, sister, or issue of deceased brothers or sisters. He determined that decedent's heirs, "second cousins" in the fifth degree of relationship, Hattie Condon Marquez and Alfred McCoy, were to share equally in the estate. The record shows them to be a grand niece and grand nephew of decedent's mother Madeline Louise Kilkakhan (Quin-ho-pe-tsa).

At the hearing a claim of relationship to the decedent was presented by Madeline Bone Wells and Sarah Bone McCraigie, representing

themselves, a nonappearing brother, Joseph Bone, and the heirs of any of their other brothers and sisters who might be dead. Their allegation was that this decedent was the son of Edward Kilkakhan, and Madeline Louise Kilkakhan (Quin-ho-pe-tsa) both deceased. They allege that their own father, Narcisse Jim or Bone was a maternal half brother to Kilkakhan, father of Edward Kilkakhan.

The examiner's ruling in the first order of September 14, 1967, was that the claim of relationship as first cousins by Madeline Bone Wells and Sarah Bone McCraigie is “* * * not supported by any of the records of the Department. The preponderance of the evidence is to the effect that decedent's father, Edward Kilkakhan had no brothers or sisters.”

The appellants herein obtained the services of the law firm of Wicks and Thomas who filed appearances on February 29, 1968, and petitioned for a rehearing which was granted by order entered March 14 1968. The rehearing was held on May 21, 1968, and the appellants appeared by Mr. Wicks. The examiner indicates in the order reaffirming the original determination of heirs entered March 11, 1971, that, “* * * the persons found to be heirs in the original Order were also present, but did not present any testimony or witnesses.” The record of the hearing includes a stipulation between Mr. Wicks and the appellees as follows:

It is further stipulated and agreed among the parties hereto that Hattie C. Marquez and Alfred McCoy are related to the decedent as shown in the original order.

The record does not disclose whether Mr. Robert Dellwo, attorney for the two designated heirs, appeared at the rehearing or that he participated in the stipulation although his appearance was filed May 3, 1968, prior to the rehearing.

In his order after the rehearing reaffirming the original order determining heirs, the examiner made the following findings and stated:

As stated in the original Order, the allegations of the Petitioners are not supported by any records of the Department of the Interior, in that Quin-ho-pe-tsa was the mother of Narcisse Bone (Narcisse Jim), a Canadian, who died in 1926, and that Quin-ho-pe-tsa was also the mother of Edward Kilkakhan, who was the father of the instant decedent.

The pertinent part of the testimony of the witnesses as to decedent's ancestry is based on hearsay.

The relation of Hattie Condon Marquez and Alfred McCoy is substantiated by the records of the Interior Department and testimony presented in the original hearing. Petitioners have stipulated that the relation of these 2 persons to the decedent is as shown in the Original Order Determining Heirs. (Emphasis supplied)

The record before us includes an exchange of correspondence between the examiner and the law firm of Nansen and Price who have not yet filed an appearance herein although they signed and filed the notice of the appeal by Sarah Bone McCraigie and Madeline Bone Wells. The record further includes a petition for a second rehearing which was filed simultaneously with the notice of appeal on January 19, 1972. Both Mr. Wicks and Mr. Thomas have been separately appointed to the bench of the Washington Courts and do not appear here for the appellants.

The petition for a second rehearing is based upon new evidence in the minutes of the Enrollment Committee of the Colville Reservation discovered very recently by the efforts of Nansen and Price. It appears this evidence would tend to substantiate the position of Madeline Bone Wells, et al. Under the provisions of 43 CFR 4.241(e) successive rehearings are barred, and the examiner was without jurisdiction to grant the petition for rehearing. The attorney, upon being advised of this regulation, filed the notice of appeal, and a notice of docketing was issued by this Board on February 16, 1972.

Note is taken of the examiner's failure to conform to the basic precepts of the Administrative Procedure Act, 5 U.S.C. § 557 (1970) wherein specific findings of fact are to be made and conclusions of law are to be reached. Without discussion of the facts supporting such findings, and without a statement of the law upon which the conclusions are based, it is not possible for this Board to determine how the decision is reached. Estate of Lucille Mathilda Callous Leg Ireland, 1 IBIA 67, 78 I.D. 66 (1971); Estate of Oscar Ough, Sr., 1 IBIA 76, 78 I.D. 105 (1971).

It does appear, however, in the two decisions entered by the examiner, that he considers "records" of the family relationship to be of greater substance than oral testimony. However, this case record does not include any record of the Bureau of Indian Affairs tendered or admitted in evidence which would substantiate the claim of relationship made by Hattie Condon Marquez and Alfred McCoy. No such specific record is identified by the Examiner as is required by 5 U.S.C. § 556(e) (1970). See Estate of Julius Benter, 1 IBIA 24 (November 17, 1970). A party is denied his opportunity to rebut material which is unavailable to him because it cannot be found.

Further, the examiner misconceives the exception to the hearsay rule of evidence as it pertains to family history, relationship and pedigree. In 29 Am. Jur. 2d Evidence, Sections 508, 509 and 515, it is stated:

In section 508:

A well-recognized exception to the hearsay rule exists in respect of proof of matters of family history, relationship, and pedigree, and, subject to certain limitations and restrictions hereinafter noted, hearsay evidence is admissible to prove such matters. * * *

In section 509:

Since one point in favor of receiving hearsay evidence upon matters of family history or pedigree is its reliability, it has frequently been put forth as a condition upon which such evidence is received that it emanate from a source within the family. * * *

In section 515:

While it is generally held that a declarant as to matters of pedigree or relationship must have been a member of the family or, according to some authorities, a person closely associated therewith, there is no such requirement regarding a witness on the stand who merely repeats the declarations. Moreover, a witness on the stand who is in a position to know the facts as to pedigree can testify to those facts even if not a member of the family, since this is not hearsay, but personal knowledge evidence. A fortiori, a witness can testify as to his own pedigree.

Where pedigree is sought to be established by evidence of common or general reputation in the neighborhood, it is a matter of some dispute whether a witness testifying thereto need be a member of the family in question.

The examiner discounted as hearsay and disregarded the uncontroverted testimony presented by the appellants. At the rehearing the appellees did not attempt to contradict the testimony presented by the appellants, which corroborated the testimony of the appellants offered at the original hearing. It should be noted here that the Examiner's decision does not appear to be based upon his particular observation or evaluation of the witnesses of the contending parties or an evaluation of the statements there made. He made no finding regarding the credibility of the witnesses. Therefore, the basic rule, that where there is conflicting testimony the findings of fact of the Examiner will not be disturbed on appeal, is not applicable to this appeal. See Estate of Jackson Searle, IA-S-2 (December 9, 1968).

The attorney for respondents, Alfred McCoy and Hattie Condon Marquez, in his brief on appeal stated, "Under the rules of appeal the finding of the examiner should not be reversed unless clearly

erroneous.” We point out that this statement by counsel displays a common misunderstanding of a fundamental distinction between administrative appellate rules and judicial appellate rules with respect to the weight to be given examiners' decisions by reviewing authorities. The "clearly erroneous" rule pertains to Rule 52(a) of the Federal Rules of Civil Procedure, and is applicable by the courts, but not by administrative appellate tribunals. Kenneth Culp Davis, in his treatise entitled, Administrative Law Treatise, Section 10.04, summarizes the case law as follows:

The final distillation from the case law is that the primary fact-finder is the agency, not the examiner; that the agency retains “the power of ruling on facts * * * in the first instance”; that the agency still has “all the powers which it would have in making the initial decision”; that the examiner is a subordinate whose findings do not have the weight of the findings of a district judge; that the relation between examiner and agency is not the same as or even closely similar to the relation between agency and reviewing court; that the examiner's findings are nevertheless to be taken into account by the reviewing court and given special weight when they depend upon demeanor of witnesses; and that the examiner's findings probably have greater weight than they did before adoption of the APA.

The leading case on this question is National Labor Relations Board v. Universal Camera Corp., 190 F.2d 429 (2d Cir. 1951) wherein Judge Frank in the opinion stated at 432:

* * * An examiner's finding binds the Board only to the extent that it is a "testimonial inference", or "primary inference," i.e.; an inference that a fact to which a witness orally testified is an actual fact because that witness so testified and because observation of the witness induces a belief in that testimony. The Board, however, is not bound by the examiner's "secondary inferences," or "derivative inferences," i.e., facts to which no witness orally testified but which the examiner inferred from facts orally testified by witnesses whom the examiner believed.

Although this matter has been in litigation since the decedent's death on February 2, 1967, we hold that a further hearing is necessary to prevent manifest injustice. We suggest, however, that the examiner schedule and hold such rehearing as expeditiously as possible, giving due consideration to the convenience of parties and witnesses.

The record indicates that some or all of the children and heirs of Narcisse Jim or Bone, father of the appellants, may be of Canadian nationality to whom fee patents will be issued in the event that it is ultimately determined that they are in fact heirs of the decedent. This matter of nationality should be fully investigated at the rehearing to prevent the need for further rehearing at a later date.

We note that the authenticity and reliability of the purported record of the proceedings before the Enrollment Committee, tendered as an appendix to the petition for rehearing, has not been established. This record is not yet in evidence and it must be fully tested and admitted in evidence before it can be considered at all. This rule also applies to all other records relied upon by the Examiner, including those heretofore referred to by him in his orders.

ORDER

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7, 35 F.R. 12081, 43 CFR 4.296 it is hereby ordered:

1. That the Examiner's decision is VACATED; and
2. That this matter is REMANDED for a further hearing after due notice given to the parties pursuant to 43 CFR 4.211 with special instructions that the Examiner, among other things, make specific findings of fact regarding the nationality of the appellants as heirs or children of Narcisse Jim or Bone, and that he issue a new decision based upon all the evidence in the record including that newly adduced at the supplemental hearing; such decision to be final for the Department

unless an appeal is taken therefrom; and

3. That this order is effective immediately.

//original signed
David J. McKee, Chairman

I concur:

//original signed
David Doane, Alternate Member