



INTERIOR BOARD OF INDIAN APPEALS

Estate of Florence Bluesky Vessell

1 IBIA 312 (09/27/1972)

Also published at 79 Interior Decisions 615

Judicial review of this case:

Dismissed, *Eskra v. Morton*, 380 F. Supp. 205 (W.D. Wis. 1974)

Reversed, 524 F.2d 9 (7th Cir. 1975)



United States Department of the Interior

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

ESTATE OF FLORENCE BLUESKY VESSELL

(UNALLOTTED LAC COURTE OREILLES CHIPPEWA OF WISCONSIN)

IBIA 73-4

Decided September 27, 1972

Petition to permanently stay enforcement of an order to show cause challenges the constitutionality of a Wisconsin statute, and the matter was certified by Administrative Law Judge Vernon J. Rausch to the Board of Indian Appeals for exercise of the Secretary's authority delegated to the Board.

Petition Denied: A temporary stay of 60 days from the date hereof is issued herein.

Indian Probate: Generally

The Department of the Interior does not have authority to declare a statute of a state to be unconstitutional as being in violation of the constitution of the United States.

Indian Probate: Attorneys at Law: Generally

An attorney appearing in Indian Probate proceedings must disclose the name of the party represented by him.

APPEARANCES: Wisconsin Judicare by Peter J. Sferrazza for Constance Jean Hollen Iskra.

OPINION BY MR. McKEE

This matter arose upon the issuance of an order by Administrative Law Judge Vernon J. Rausch on March 3, 1972, to show cause why his previous order determining heirs in this estate issued February 8, 1971, should not be modified to eliminate Constance Jean Hollen Iskra from those entitled to share in the estate. Operation of the order is now temporarily stayed.

This decedent, Florence Bluesky Vessell, was an unallotted member of the Lac Courte Oreilles Chippewa Indian tribe who died intestate possessed of trust or restricted property in the State of Wisconsin on November 2, 1964. She died at the age of 55 years, unmarried, without issue or father or mother. Her heirs were determined to be collateral relatives including Constance Jean Hollen Iskra whose share in the estate was determined to be a 1/45. Constance is the grandchild

of the decedent's predeceased sister, Libby Bluesky Thayer, and the daughter of decedent's predeceased niece, Florence Thayer Hollen. Constance Iskra was shown to have two half sisters, Faye Elizabeth Hollen Gable and Ilene Loretta Hollen, each of whom was also shown to have a 1/45 share in the estate. The elimination of Constance Iskra from among the heirs entitled to take would increase the shares of Faye Gable and Ilene Hollen from a 1/45 each to a 1/30 each. No interest of any other heir, as determined in the order of February 8, 1971, is to be in any way affected.

The show cause order issued on March 3, 1972, was issued sua sponte by Judge Rausch upon receipt of a communication from the Superintendent of the Great Lakes Agency of the Bureau of Indian Affairs having jurisdiction of the trust property involved. It was called to the judge's attention that in previous probate decisions involving this family, Constance Iskra was shown to be the illegitimate child of Florence Thayer Hollen born prior to Florence's marriage to Knofel F. Hollen.

Although Constance shared in her mother's estate, she had been barred from sharing in the estate of Marian James Bluesky or Marian Caldwell, probate No. A-42-64, a predeceased maternal great aunt who died intestate and therefore the estate passed under the laws of descent of Wisconsin. Constance was barred from taking as an heir in Marian's estate by the provisions of the Wisc. Stat. Ann. 237.06 (1957):

237.06 Heirship of illegitimates

Every illegitimate child shall be considered as heir of the person who shall, in writing signed in the presence of a competent witness, have acknowledged himself to be the father of such child or who shall be adjudged to be such father under the provisions of ss. 52.21 to 52.45, or who shall admit in open court that he is such father, and shall in all cases be considered as heir of his mother, and shall inherit his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim, as representing his father or mother any part of the estate of his or her kindred, either lineal or collateral, unless before his death he shall have been legitimated by the marriage of his parents in the manner prescribed by law. (Emphasis supplied.)

There was no evidence of the illegitimacy of Constance in the record in this probate at the time of the issuance of the order determining heirs on February 8, 1971, but such evidence does appear in the probate records in the estates of the decedent's mother, Florence and of her great aunt Marian. This evidence is the basis for the issuance of the show cause order by Judge Rausch and the applicable Wisconsin Statute, above quoted, would appear to require that it be granted.

As a result of the issuance of the show cause order, a letter of protest to the proposed action was written to the judge by Faye Gable, and he was contacted for the same purpose by Loretta Thayer Howard, an aunt. The Lac Courte Oreilles Tribal Governing Board wrote a letter of protest, but no contest of record was made by Constance Iskra.

Thereafter, Peter J. Sferrazza, staff counsel of Wisconsin Judicare, filed a petition opposing the action proposed by the judge, but he failed to state for whom he is appearing. Thereupon this Board required Mr. Sferrazza file his certificate designating the parties represented by him. It is to be noted that Constance Iskra is the only indispensable party and the only one who is in a position to challenge the judge's proposed action, as set forth in the order to show cause. Her half sisters, Faye Gable and Ilene Hollen stand to benefit by the announced intention to change the probate order. Mr. Sferrazza having filed an appearance on behalf of Constance Iskra the petition will be considered on its merits.

In the petition it is pointed out that the statutes regarding the rights of illegitimate children to inherit from collateral relatives was amended effective April 1, 1971, and appears as Wisc. Stat. Ann. § 852.05 (1971):

852.05 Status of illegitimate person for purposes of intestate succession

(1) An illegitimate child or his issue is entitled to take in the same manner as a legitimate child by in testate succession from and through (a) his mother, and (b) his father if the father has either been adjudicated to be such under ss. 52.21 to 52.45, or has admitted in open court that he is the father, or has acknowledged himself to be the father in writing signed by him.

(2) Property of an illegitimate person passes in accordance with s. 852.01 except that the father or his kindred can inherit only if the father has been adjudicated to be such under ss. 52.21 to 52.45.

(3) This section does not apply to a child legitimated by the subsequent marriage of his parents under s. 245.25, and status of an illegitimate child who is legally adopted is governed by s. 851.51. (Emphasis supplied.)

The statutory bar to inheritance by one in Constance's situation has been removed, but the change comes too late to affect her rights.

In the petition the constitutionality of the former statute is attacked as follows:

It is our contention that Wisc. Stat. 247.06 prior to its amendment in 1971 was unconstitutional, because it prohibited an illegitimate child from inheriting lineally or collaterally through her natural mother. This constitutes invidious discrimination against illegitimate children contrary to the equal protection clause of the 14th Amendment of the United States Constitution.

And the petitioners ask,

The petitioners move the Hearing Examiner (Now Administrative Law Judge) to make permanent his order staying his "order to show cause" dated March 3, 1972.

To permanently stay the Order to Show Cause and allow Constance to remain an heir would require removal of the effect of the former Wisconsin Statute. Both the original petition and the material contained in a brief in letter form to Judge Rausch by Mr. Sferrazza received August 15, 1972, have been considered. This letter is a supplement to the original petition and brief, and in it a recent decision of the Supreme Court of the United States is cited and discussed. We find that the petition and supplemental letter have raised a serious constitutional challenge to the former Wisconsin statute, and

that this matter has been properly certified to this Board for an immediate decision of the Department. However, the Department is without authority to declare the Wisconsin legislation unconstitutional. Only the courts have the authority to take action which runs counter to the will of the legislature. 3 Davis, Administrative Law Treatise, § 20.04; Public Utilities Commission v. United States, 255 U.S. 534, 539 (1958). Estate of Benjamin Harrison Stowhy, 1 IBIA 269, 79 I.D. 426 (1972).

Because of the Department's inability to entertain a challenge to the constitutionality of an act of the legislature of the State of Wisconsin, the administrative law judge acted correctly in certifying the issue to the Board. It is the policy of the Department of the Interior to expedite the exhaustion of a petitioner's administrative remedy whenever the petitioner, in good faith, raises a serious issue as to the constitutionality of an act the Department is charged with following, so that he may pursue the proper relief in the courts. Such a policy not only affords prompt relief to the petitioner, but assists Departmental officials in properly meeting their responsibilities.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals, Office of Hearings and Appeals, by the Secretary of the Interior, 211 DM 13.1 and 13.7; 35 F.R. 12081,

IT IS ORDERED:

1. That the petition to permanently stay the order to show cause is DENIED, but such order is temporarily stayed for 60 days from the date hereof pursuant to 43 CFR 4.296;

2. That this decision shall be executed and distributed by the administrative law judge pursuant to 43 CFR 4.296.

This decision is final for the Department.

//original signed
David J. McKee, Chairman

I concur:

//original signed
Daniel Harris, Member