



INTERIOR BOARD OF INDIAN APPEALS

Estate of James Growing Thunder

3 IBIA 18 (07/15/1974)

Judicial review of this case:

Dismissed, *Growing Thunder v. Morton*, No. 74-73-BLG (D. Mont. Mar. 15, 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 JAMES GROWING THUNDER
FORT PECK ALLOTTEE NO. 2210, deceased

IBIA 75-1

Decided July 15, 1974

This is an appeal from a decision denying petition for rehearing.

Affirmed.

Indian Probate: Generally

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

APPEARANCES: Cate and Lynaugh, by Thomas J. Lynaugh, Esquire, for the appellants.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This is an appeal from the Decision and Order of Administrative Judge William E. Hammett dated January 18, 1974, excluding Nancy Growing Thunder and Vernon Growing Thunder, illegitimate minor children, from inheriting their respective shares of their maternal grandfather's estate because of a provision of the Revised Code of Montana (1947) which precludes illegitimate children from inheriting lineally or collaterally through their natural mother from their maternal grandfather.

Section 91-404, Revised Code of Montana (1947) reads as follows:

Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits 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 does not represent his father or mother by inheriting any part of the estate of his

or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family, in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother, respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate.

The record establishes that James Growing Thunder, Fort Peck Allottee, died intestate on January 23, 1973, leaving surviving him a son, three daughters and three minor children of a daughter, Genevieve Growing Thunder Griego, who predeceased James Growing Thunder on August 27, 1967. Two of the children of the predeceased daughter, namely, Nancy Growing Thunder and Vernon Growing Thunder, the appellants herein, are illegitimate. The third child, Genevieve Griego, is legitimate. Karen M. Growing Thunder Brown is the Guardian Ad Litem of the illegitimate children.

Upon the culmination of a proceeding to determine the heirs and settle the Estate of the decedent, James Growing Thunder, the Administrative Law Judge issued a Decision and Order on January 18, 1974, determining the following children and granddaughter to be the surviving heirs pursuant to Section 91-403-1 of the Revised Code of Montana (1947):

Estate of Adrian J. Growing Thunder - son (born 5-14-40; died 6-22-73)	1/5
Judith A. Growing Thunder - daughter	1/5
Karen M. Growing Thunder Brown - daughter	1/5
Joycelyn R. Growing Thunder Fogarty - daughter	1/5
Genevieve Griego - granddaughter	1/5

Nancy Growing Thunder and Vernon Growing Thunder were precluded from inheriting from decedent, their maternal grandfather pursuant to Section 91-404 of the Revised Code of Montana referred to supra.

The illegitimate minor children timely petitioned for rehearing through their guardian ad litem where it was alleged that the Administrative Law Judge erred in applying Section 91-404 supra, because it was void and in violation of the Fourteenth Amendment of the Constitution.

The petition was denied for the reason that the Administrative Law Judge was without jurisdiction to rule upon the constitutionality of a state statute. Whereupon the petitioners appealed to this Board.

We find that the petition and appeal have raised a serious constitutional challenge to Section 91-404 of the Montana 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 section of the Montana statute in question 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). Estate of Florence Bluesky Vessell, 1 IBIA 312, 79 I.D. 615 (1972).

Because of the Department's inability to entertain a challenge to the constitutionality of an act of the legislature of the State of Montana, 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.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, it is ORDERED:

That the Administrative Law Judge's Decision and Order of January 18, 1974, stands unchanged and shall not be executed prior to the expiration of 60 days from the date hereof.

This decision is final for the Department.

//original signed
Mitchell J. Sabagh
Administrative Judge

I concur:

//original signed
David J. McKee
Chief Administrative Judge