



INTERIOR BOARD OF INDIAN APPEALS

Estate of Rena Marie Edge

7 IBIA 53 (04/25/1978)



United States Department of the Interior

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

ESTATE OF RENA MARIE EDGE

IBIA 78-3

Decided April 25, 1978

Appeal from decision after reopening.

Vacated; companion estate reopened.

1. Administrative Procedure: Administrative Procedure Act--Indian Probate: Wills: Generally

Under the circumstances of this case, appellant's paternity is not an issue cognizable by the Department in probating her mother's will. In accordance with sec. 8(b) of the Administrative Procedure Act findings should be limited to issues necessary to the disposition of a case.

2. Administrative Procedure: Administrative Procedure Act--Indian Probate: Witnesses: Cross-examination

A full and true disclosure of the facts was denied when only the presiding judge was permitted to ask questions of a crucial witness. This procedure violated sec. 7(c) of the Administrative Procedure Act.

3. Indian Probate: Hearing: Generally

Although Indian probate proceedings need not be open, public hearings, parties in interest cannot be excluded therefrom.

APPEARANCES: Reid Peyton Chambers, Esq., Sonosky, Chambers & Sachse, Washington, D.C., for appellant; Virgil L. Upchurch, Esq., Anadarko, Oklahoma, for appellees.

OPINION BY ADMINISTRATIVE JUDGE HORTON

Justina Joyce Guy Kelly, appellant, is the daughter of Rena Marie Edge, a deceased Caddo Indian who died testate on January 8, 1974. She appeals from an August 5, 1977 order by Administrative Law Judge Jack Short reopening Rena Edge's estate and determining that Justin Poolaw, not Willard Guy, is appellant's father.

This appeal was docketed by the Board on December 5, 1977. The briefing time, twice extended at appellant's request, expired March 31, 1978. Appellant has requested the opportunity to present oral argument. The Board perceives no need for additional appellate argument. In accordance with 43 CFR 4.25, appellant's request is therefore denied.

Background

Appellant is the sole devisee of a last will and testament executed by Rena Edge on November 26, 1973. At paragraph 4 of the will is a statement by testatrix that none of her property was being devised to her son, Willard Guy (Jr.), or her daughter, Wildena, because of a prior agreement made with her former husband, Willard Guy (Sr.), whereby "[h]e should bequeath all of his estate and possessions to said son and daughter, and I would bequeath all of my possessions and estate to oldest daughter, Justina Joyce Kelly."

Willard Guy (Sr.) died intestate on February 2, 1974. Administrative Law Judge John Curran held a combined hearing in the estates of Willard Guy (Sr.) and Rena Edge in 1974. 1/ On November 1, 1974, Judge Curran entered an order determining heirs in the estate of Willard Guy. This order, pursuant to 25 U.S.C. § 372, distributed decedent's trust property in accordance with the Oklahoma laws of descent and distribution as follows: to Willard Bertrand Guy, Caddo Unallottee, son, one-half; to Wildena Frances Guy Beck, Caddo Unallottee, daughter, one-half.

Judge Curran retired without having approved or disapproved the last will and testament of Rena Edge. However, his successor, Administrative Law Judge Jack Short, issued an order approving will on January 16, 1976, based on testimony adduced by Judge Curran at the 1974 hearing and on answers to interrogatories propounded by Judge Short to Sharon Tait, a daughter of Rena Edge who did not attend the 1974 hearing. 2/

1/ The record is conflicting as to whether this hearing occurred August 23, 1974, or September 23, 1974.

2/ Sharon Tait was born October 21, 1946, subsequent to Rena Edge's divorce from Willard Guy (Sr.). Sharon's natural father is Jesse Sunday, Caddo-Cherokee unallotted.

In addition to upholding the validity of Rena Edge's will, Judge Short's order of January 16, 1976, set forth the names of Rena's heirs at law had the decedent died intestate. Expanding on the finding that Justina Joyce Guy Kelly, appellant, is an heir at law of the testatrix, Judge Short recited at paragraph 5 of the order that appellant was apparently born during an Indian custom marriage of Rena Edge to Willard Guy (Sr.) which preceded their ceremonial marriage in 1937. 3/

A petition for rehearing was filed in this estate on March 15, 1976. The petition alleged, among other things, that Rena Edge lacked testamentary capacity to make a will. Judge Short denied the petition by order dated May 28, 1976. No appeal was filed from such action.

On March 11, 1977, Judge Short issued a Notice of Petition to Reopen the subject estate. The notice reads in pertinent part as follows:

NOTICE IS HEREBY GIVEN that on March 19, 1976, a copy of a Paternity Affidavit dated September 5, 1975, by Justin Poolaw, was submitted to this office by the Anadarko Agency. It recites that he is the natural father of Justina Joyce. A copy of the Affidavit is attached hereto and it is considered a Petition to Reopen the Order Approving Will, etc. dated January 16, 1976, for the limited purpose of reconsidering the determination made therein that Willard Guy was the father of Justina Joyce.

* * * * *

Justina Joyce is an heir at law of this decedent and the sole beneficiary of her will regardless of who her father might be; therefore, distribution of this estate IS NOT STAYED pending action on this Petition to Reopen.

This Notice is issued pursuant to 43 CFR § 4.242(d). [Emphasis in original.]

3/ Attached to appellees' answer brief filed March 8, 1978, is a purported copy of a divorce petition signed by Willard Guy (Sr.), in which he states, inter alia, that he and Rena Edge "were legally married in Anadarko, Oklahoma, on or about January 4, 1939, * * *." It is irrelevant to this case whether the ceremonial marriage of Rena and Willard took place in 1937 or 1939.

Interested parties were allowed 15 days to file written objections to the petition to reopen. No objections were filed. A hearing on reopening was held April 14, 1977. Appellant, a resident of Valdosta, Georgia, did not attend. ^{4/} On April 13, 1977, Judge Short received testimony in camera from Justin Poolaw, a Kiowa Indian, concerning statements made in his affidavit of paternity dated September 5, 1975.

By order dated August 5, 1977, Judge Short modified the order approving will dated January 16, 1976, by a substitute finding that Justin Poolaw, not Willard Guy (Sr.), is the father of Justina Joyce Guy Kelly. Judge Short's order of August 5, 1977, is the subject of this appeal.

Discussion and Conclusions

[1] At the outset we concur with appellant that under the circumstances of this case determination of her paternity is not an issue cognizable by the Department in probating her mother's will. ^{5/} The Act of June 25, 1910, as amended, 25 U.S.C. § 373, has been interpreted as requiring Secretarial approval of technically proper wills to effectuate the stated wishes of Indian testators, notwithstanding departmental preferences or state law. Tooahnippah v. Hickel, 397 U.S. 598 (1970); Hansen v. Hoffman, 113 F.2d 780 (10th Cir. 1940). In the case at hand, Rena Edge's will was shown to be a valid testamentary instrument. This ultimate finding is all that was required to dispose of the subject case.

Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 557(c), which is applicable to Indian probate proceedings conducted pursuant to 25 U.S.C. §§ 372 and 373, Estate of Lucille Mathilda Callous Leg Ireland, 1 IBIA 67, 78 I.D. 66 (1971); Estate of Mitchell Robert Quaempts (Kuneki), 6 IBIA 10 (1977), provides that all decisions shall include a statement of findings and conclusions, as well as the reasons or basis therefor, "upon all the material issues of fact, law, or discretion presented on the record." The requirements of section 8(b) are comparable to those set forth in Rule 52, Fed. R. Civ. P., relating to court findings in nonjury cases. Stauffer Laboratories, Inc. v. F.T.C., 345 F.2d 75, 82 (9th Cir. 1965). ^{6/} One of the purposes of Rule 52 is to limit findings to issues necessary to

^{4/} Appellant's absence from the hearing is addressed at p. 6, Brief for Appellant, filed February 6, 1978.

^{5/} On occasion paternity issues do arise in the probate of Indian wills such as where a testatrix devises property to children of a specific marriage or where a testator's disclaimer of paternity in a will casts doubt on his testamentary capacity. See Estate of Albert Attocknie, IA-1442.

^{6/} But cf. N.L.R.B. v. Winn-Dixie Greenville, Inc., 379 F.2d 958, 960 (4th Cir. 1967), in which the court notes that the review

the disposition of a case. 5A Moore's Federal Practice § 52.06 [1]. See also Sonkem-Galamba Corp. v. Atchison, 34 F. Supp. 15, 16 (W.D. Mo. 1940), aff'd 124 F.2d 952 (8th Cir. 1942). It is clear that the above purpose also attaches to section 8(b) and that the paternity findings in the Rena Edge estate are not in conformity with this purpose. 7/

It would however be incongruous for the Board to vacate Judge Short's August 5, 1977 revised determination of paternity without disturbing the paternity finding made in his order approving will on January 16, 1976. The Administrative Law Judge exceeded his authority in each instance.

Appellant submits that the revised finding of paternity, which she alleges to be erroneous, is in direct conflict with a departmental decision issued October 9, 1976, by the Acting Area Director of the Bureau of Indian Affairs, Anadarko Area Office. This BIA decision rejected appellant's application for enrollment in the Kiowa Tribe which she sought on grounds that Justin Poolaw is her natural father.

We agree that Judge Short's revised determination of paternity is inconsistent with the above-described action of the BIA. On the

fn. 6 (continued)

standard contained in Rule 52 (findings will not be set aside unless clearly erroneous) is inapplicable to agency decisions issued under section 8(b), APA.

7/ Departmental procedures for discharging the Secretary's obligations under 25 U.S.C. § 373 are set forth at 43 CFR 4.200 et seq. 43 CFR 4.240(a)(1) provides that in all cases the administrative law judge shall incorporate in his decision "the names, birth dates, relationships to the decedent, and shares of heirs with citations to the law of descent and distribution in accordance with which the decision is made; or the fact that the decedent died leaving no legal heirs." Subsection (2) of the above regulation specifies the findings required to be incorporated in testate decisions.

For many years hearing examiners have made findings regarding heirs at law in testate cases where the will is approved. This practice would seem attributable to one of the following interpretations: that section 4.240(a)(1) requires such findings in all probate cases; or that these findings are not prohibited by regulation and may be useful to the parties or the Department.

Unrelated to this appeal, the above-described practice was a topic of discussion at the Department's 1978 Indian Probate Conference attended by all administrative law judges. The general consensus was that existing regulations do not require heirship at law findings in all probate decisions and that such findings should not be included in testate cases unless they are relevant or necessary.

other hand, we consider Judge Short's initial determination of appellant's paternity to be inconsistent with Judge Curran's order in the estate of Willard Guy, entered November 1, 1974, wherein appellant was not listed as an heir at law of the decedent. ^{8/} Thus, irrespective of our holding that it is inappropriate to decide appellant's paternity through probate of her mother's will, this issue would not be conclusively decided by allowing either of Judge Short's paternity rulings to survive.

[2] Further, as a matter of due process it would be unacceptable to let stand Judge Short's order of August 5, 1977. A crucial witness in the special paternity proceeding, Justin Poolaw, was allowed to testify privately before Judge Short a day in advance of the scheduled hearing "because he was reluctant to appear in the presence of others and he wanted to avoid as much controversy as possible * * *." Order dated August 5, 1977, at 1. Although cross-examination is not always a right in formal adjudicatory hearings, American Public Gas Ass'n. v. FPC, 498 F.2d 718 (D.C. Cir. 1974), the departmental practice has been to afford parties an opportunity to cross-examine witnesses appearing in Indian probate proceedings. In the case at hand, we believe that a full and true disclosure of the facts was denied when only the presiding judge was permitted to ask questions of Mr. Poolaw. This procedure therefore violated section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which reads in pertinent part: "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

[3] Assuming arguendo that it was a proper exercise of discretion by the Administrative Law Judge to preclude cross-examination of Mr. Poolaw by any of the parties, it was nevertheless reversible error to prevent the parties from hearing his testimony. We believe this procedure also violated the APA, ibid, as well as 43 CFR 4.231(a) which states: "(a) All testimony in Indian probate hearings shall be under oath and shall be taken in public except in those circumstances which in the opinion of the Administrative Law Judge justify all but parties in interest to be excluded from the hearing."

Based on the points and authorities reviewed above, the order dated August 5, 1977, must be vacated and the January 16, 1976 order approving will modified by deleting therefrom findings as to appellant's paternity and testatrix's heirs at law (paragraph 5 of the original order).

^{8/} This finding is discussed infra under Collateral Findings and Conclusions.

Collateral Findings and Conclusions

We previously noted that Judge Short's initial finding that Willard Guy is the father of appellant is inconsistent with Judge Curran's order in the estate of Willard Guy, entered November 1, 1974, in which appellant was not listed as an heir at law of the decedent. Appellant submits that Judge Curran's order is not tantamount to a determination that she is not a daughter of Willard Guy. According to appellant, Judge Curran did not include her as an heir at law of the decedent "because Joyce had made no claim on that estate, due to an agreement between her mother and father whereby Rena would devise her estate to Joyce and Willard would leave his to the other two children." Appellant's opening brief at 16; see also, reply brief at n. 1.

Judge Curran's order makes no reference to the alleged agreement between appellant's mother and Willard Guy which Rena Edge refers to in her will. More important, there is no evidence that appellant perfected an enforceable waiver of her interest, if any, in Willard Guy's estate. ^{9/} Finally, appellant's representation that Judge Curran was not apprised of evidence that Willard Guy was not her father (opening brief at 16) is incorrect. ^{10/} These circumstances serve to reinforce the otherwise reasonable interpretation that Judge Curran's order means what on its face it plainly conveys.

^{9/} The Department has previously held that it cannot determine legal heirs to Indian land on the basis of a waiver or agreement absent approval by an authorized representative of the Secretary. Estate of Maggie (Weipa) (Maggie George), IA-1409 (July 5, 1966); Estate of Charles Red Breath Bear, 6 IBIA 36 (1977). This precedent, which we consider controlling, is founded upon the Secretary's trust responsibility to heirs of allotted land, and perhaps from the property doctrine that title to property vests as of the date of death of the decedent. Further, as a practical matter successors to Indian land intent on divesting themselves of equitable title may do so by appropriate Departmental conveyance. Ibid, n.1.

Although neither the Department nor the courts have held that state laws of renunciation are applicable to inheritance of trust land, there is no evidence that a renunciation was attempted in this case in accordance with state law. Oklahoma, where the property at issue in the Willard Guy estate is situated, requires that a disclaimer of interests occur by way of a written instrument "which must be signed, witnessed and acknowledged by the disclaimant in the manner provided for deeds of real estate." Okla. Stat. 84 § 22.

^{10/} See, e.g., testimony of Helen Edge Keahbone, sister of Rena Edge, at p. 10, transcript of 1974 hearing, and BIA's Data for Heirship Finding and Family History furnished in the Willard Guy estate pursuant to 43 CFR 4.210(b) (2) and 4.236(a) (9).

Based on the evidence in both the Willard Guy and Rena Edge estates, it is, however, impossible to conclude that Judge Curran's exclusion of appellant as an heir at law of Willard Guy was proper. Coupled with the fact that a subsequent BIA determination identifies Willard Guy as appellant's father, it is incumbent on the Department to reopen the above estate to resolve conclusively whether appellant is an heir at law of Willard Guy. Estate of Tennyson B. Saupitty, 6 IBIA 140 (1977). 11/

It is not within the authority of the Board to review enrollment decisions of the BIA. 43 CFR 4.1 and 4.351. However, the Bureau accords great weight to consistent heirship findings of the Department and will reconsider enrollment determinations in light of such findings. Estate of Tennyson Saupitty, at 141-142. 12/

ORDER

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 order entered August 5, 1977, by Administrative Law Judge Jack Short in the Estate of Rena Edge is hereby VACATED; the order approving will entered by Judge Short on January 16, 1976, in the Estate of Rena Edge is Modified by striking therefrom paragraph number five (5).

IT IS FURTHER ORDERED that the Estate of Willard Guy be Reopened and that Administrative Law Judge Sam Taylor, Tulsa, Oklahoma, conduct a full evidentiary hearing concerning whether or not appellant, Justina Joyce Guy Kelly, is an heir at law. If she is found to be a

11/ Pursuant to 25 U.S.C. § 371, appellant is a lawful heir of the decedent if he is found to be her natural father.

12/ By virtue of 25 CFR 1.2 the Secretary retains the implied power to reconsider "final and conclusive" enrollment determinations. See Sealaska Corporation v. Roberts, 428 F. Supp. 1254 (D. Alaska 1977).

lawful heir, the interests in the estate should be redistributed if possible. 13/

//original signed
Wm. Philip Horton
Administrative Judge

We concur:

//original signed
Mitchell J. Sabagh
Administrative Judge

//original signed
Alexander H. Wilson
Chief Administrative Judge

13/ Estate of Tennyson Saupitty at 143.