INTERIOR BOARD OF INDIAN APPEALS

Estate of Harold Humpy

7 IBIA 118 (03/29/1979)

Also published at 86 Interior Decisions 213

Related Board case:
5 IBIA 132

United States Department of the Interior

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

ESTATE OF HAROLD HUMPY

IBIA 78-19 Decided March 29, 1979

Appeal from an order denying petition for rehearing after hearing upon reopening.

Reversed.

1. Indian Probate: Divorce: Indian Custom: Generally

   A divorce in accordance with Indian or tribal custom has long been recognized by the Congress, the courts, and the Department.

2. Indian Probate: Divorce: Indian Custom: Generally

   The courts have recognized Indian-custom divorces so long as the Indians continue in tribal relations.

3. Indian Probate: Divorce: Indian Custom: Generally

   In recognizing the validity of Indian-custom divorces, no distinction is made in the kind of marriage which such divorce dissolves so long as the parties contracting the marriage and effecting the divorce are Indian wards of the Government and living in tribal relations.

4. Indian Probate: Divorce: Indian Custom: Generally

A divorce by Indian custom may be accomplished unilaterally by either of the parties to the marriage.

5. Indian Probate: Divorce: Indian Custom: Generally

The validity of Indian-custom divorce depends on whether the parties were living in tribal relations and whether it was an accepted and recognized custom of the tribe involved.

APPEARANCES: Jack H. Robison, Esq., of Johnson and Olson, for appellant, Ethelyn Murphy Humpy; Theodore J. Schroeder, Esq., of Sinai, Ohlson, Schroeder and Specchio, for appellee, Lorraine Kizer.

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON

Ethelyn Murphy Humpy, hereinafter referred to as appellant, through her attorney, Jack H. Robison of Johnson and Olson, has appealed Administrative Law Judge William E. Hammett's order of July 5, 1978, denying petition for rehearing after hearing upon reopening.

Harold Humpy, hereinafter referred to as the decedent, an unallotted Shoshone Indian of the Duck Valley Indian Reservation of

Nevada, died intestate near Fort Hall, Idaho, on March 3, 1972, possessed of trust property situated in the State of Idaho.

Hearings were held on October 5, 1972, and April 29, 1975, at Fort Hall, Idaho, and Stewart, Nevada, for the purpose of ascertaining the heirs at law of the decedent. Thereafter, on June 30, 1975, an Order Determining Heirs was issued wherein Lorraine Kizer, the Appellee herein, was determined to be the decedent's daughter and his sole heir. On June 18, 1976, this Board affirmed the said order thus making such determination final for the Department (5 IBIA 132).

On November 18, 1976, the appellant, through her attorney, Callis A. Caldwell, filed a Petition to Reopen alleging she was the surviving spouse of the decedent. The petition was granted and the matter heard at Pocatello, Idaho, on April 7, 1977. From the evidence adduced at the hearing of April 7, 1977, the judge on April 19, 1978, issued an order wherein he, among other things, found the marriage between the decedent and the appellant had been terminated by an Indian-custom divorce and that the decedent died unmarried. Accordingly, he affirmed his Order Determining Heirs of June 30, 1975.

The appellant on June 16, 1978, petitioned the judge for a rehearing stating as basis therefor:

1. The finding of the administrative law judge that Harold and Ethelyn Humpy were divorced by an Indian custom is improper.

The Indian custom relied upon by the administrative law judge has not been shown to apply to the tribe of which this husband and wife were members, nor has it been shown that this custom applies to nonmember Indians living on the Fort Hall Indian Reservation.

2. That the administrative law judge failed to apply State law governing the divorce of a nonmember Indian couple on the Fort Hall Indian Reservation. The circumstances of this case indicate it must be determined what law is applicable to nonmember Indians living on the Fort Hall Reservation. The decision of the administrative law judge failed to take into consideration the Code of Federal Regulations which the claimant asserts as the applicable law based upon review of the various sources of law which may apply.

The judge on July 5, 1978, denied the petition for the following reasons:

1. That Jack H. Robison, attorney for petitioner, was not an aggrieved party under 43 CFR 4.241 in that the petition did not have the signature of Ethelyn M. Humpy.

2. That the petition for rehearing did not raise any issues not raised by the evidence adduced at the hearing or in the posthearing brief filed by the petitioner.

Thereafter, on September 1, 1978, the appellant filed a notice of appeal. It is the contention of the appellant that the administrative law judge's finding that Harold and Ethelyn Humpy were divorced by Indian custom is improper in that (1) the custom relied upon by the judge has not been shown to apply to the tribe of which this husband and wife were members nor (2) has it been shown that this custom applies to nonmember Indians living on the Fort Hall Indian Reservation.

Before addressing the appellant's contentions regarding her appeal, the matter of the appellee's motion to dismiss dated October 6, 1978, requires consideration. The bases for the appellee's motion to dismiss are set forth as follows:

1. That the appellant, Ethelyn Humpy, was not, in fact, the real party in interest.

2. That appellant has not given her approval to the appeal in view of her whereabouts being unknown.

3. That the appeal is merely an expression of harassment by previous appellants, or their relatives, or their attorney.

4. That the notice of appeal allegedly filed by the appellant on September 1, 1978, is signed only by her attorney thereby indicating lack of approval thereof by the appellant.

The motion to dismiss must be and is hereby denied in view of the affidavit, dated October 16, 1978, filed by appellant's attorney evidencing the fact that appellant approved and authorized the notice of appeal dated September 1, 1978, and that she is, in fact, the real party in interest. In addition, 43 CFR 4.291 authorizes a notice of appeal to be signed by an attorney.

From a review of the record and briefs filed by the parties the only issue to be resolved is whether the marriage between the decedent and the appellant was terminated by an Indian-custom divorce.

[1] There appears to be no question that a divorce in accordance with Indian or tribal custom has long been recognized by the Congress, the courts, and the Department. See Estate of Noah Bredell, 53 I.D. 78 (Apr. 12, 1930), and cases cited therein.

[2] Regarding such divorces, the courts have held that so long as the Indians continue in tribal relations, their domestic affairs are controlled by their peculiar customs. Bredell, supra.

[3] In recognizing the validity of such divorces, no distinction is made in the kind of marriage which such divorce dissolves so long as the parties contracting the marriage and effecting the divorce are Indian wards of the Government and living in tribal relations. Bredell, supra.

[4] Moreover, a divorce by Indian custom may be accomplished unilaterally by either of the parties to the marriage. Estate of Hugh (William) Sloat, IA-74 (Apr. 10, 1952).

[5] From the authorities hereinabove cited it is quite evident that the validity of Indian-custom divorce depends on whether the parties were living in tribal relations and whether it was an accepted and recognized custom of the tribe involved.

In the case at bar, the decedent, a Shoshone Indian of the Duck Valley Reservation, Nevada, purportedly married the appellant, a member of the Goshute Reservation, Utah, in 1951. The marriage, according to the record, was performed by a tribal judge of the Duck Valley Reservation in Owhyee, Nevada, in accordance with the Shoshone-Paiute Domestic Relations Code. 1/ Subsequent thereto, the couple moved to the Fort Hall Reservation in the State of Idaho where they resided from 1952 until they separated in 1956.

The appellant's main contention, as we see it, is that Administrative Law Judge Hammett's finding that the decedent and the appellant

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1/ Chapter 3 - Domestic Relations, Section 2 Marriage and Divorce.

"All marriages shall be on authority of licenses, either tribal issued by the clerk of the Shoshone-Paiute Indian Court, or State issued by the County Clerk, and the ceremony shall be performed, in the case of a tribal license by the Judge of the Shoshone-Paiute Indian Court, or in the case of a State license, by any person qualified by State law to perform such ceremonies, or in either case, by the Missionary."

were divorced by Indian custom was improper in that the custom relied upon by the judge has not been shown to apply to the tribe of which the parties were members.

The Shoshone-Paiute law and order code of the Duck Valley Reservation, Nevada, while setting forth how marriages are to be solemnized, makes no provision as to how marriages are to be terminated. 2/ Moreover, a review of the record indicates the absence of evidence to substantiate an existing or recognized Indian custom regarding divorce on the Duck Valley Reservation. In fact, the evidence tends to indicate that divorce could only be effected through the courts. In the absence of a recognized Shoshone-Paiute tribal custom regarding divorce, it is rather difficult to support the judge's finding that the decedent's marriage to appellant had been terminated by an Indian-custom divorce. Presumably such finding may have been based on some theory of a universal Indian-custom divorce.

A review of Bredell, supra, and the authorities cited therein, indicates quite clearly that the validity and recognition of Indian- or tribal-custom divorces must be based on the custom and usage of each tribe involved. The right to designate the customs that are to be given recognition in regulating matters that affect the internal

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2/ See Footnote 1, supra.

and social relations rests with each tribe as an incident of its sovereignty. U.S. v. Mazurie, 419 U.S. 544 (1975).

In the absence of a finding of an accepted or recognized Indian custom regarding divorce among the Shoshone-Paiute tribes of the Duck Valley Reservation, we hold that the decedent's marriage to the appellant could not have been terminated by tribal or Indian custom. Accordingly, as the surviving spouse, appellant is entitled to share in the decedent's estate. The judge's decision to the contrary must be reversed.

Since we are in agreement with the appellant's main contention that the judge's finding of an Indian-custom divorce was improper, we see no necessity for considering appellant's other contentions regarding the applicability of Indian custom and usage to nonmember Indians living on the Fort Hall Reservation.

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 confirming Order Determining Heirs after Reopening, dated April 19, 1978, issued by William E. Hammett, is hereby reversed and the matter is remanded to Judge Hammett for the purpose of entering an appropriate order to carry out the dictates of the Board as set forth herein.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Alexander H. Wilson
Chief Administrative Judge

We concur:

//original signed
Mitchell J. Sabagh
Administrative Judge

//original signed
Wm. Philip Horton
Administrative Judge