



INTERIOR BOARD OF INDIAN APPEALS

Gertrude E. Sherman v. Acting Portland Area Director, Bureau of Indian Affairs

9 IBIA 25 (06/29/1981)

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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

GERTRUDE E. SHERMAN

v.

ACTING AREA DIRECTOR, PORTLAND AREA OFFICE,

BUREAU OF INDIAN AFFAIRS

IBIA 80-6-A

Decided June 29, 1981

Appeal from decision by Acting Area Director declaring mother of deceased Klamath Indian to be decedent's sole heir entitled to decedent's share of judgment funds awarded the Klamath Tribe.

Reversed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally--
Indian Probate: Klamath Tribe--Indian Tribes: Judgment Funds

While it is true that the Klamath Termination Act, August 13, 1954, 68 Stat. 718, 25 U.S.C. §§ 564-564x (1976), rendered inapplicable to Klamath tribal members the Secretary's usual jurisdiction over Indian heirship determinations as set forth in 25 U.S.C. §§ 372-373 (1976) (see 25 U.S.C. § 564h), Congress, by the more

recent Act of Oct. 1, 1965, 79 Stat. 897, 25 U.S.C. §§ 565-565g (1976), specifically empowered the Secretary of the Interior to determine the rightful heirs of deceased Klamath enrollees entitled to a share of judgment funds payable from the United States for the limited purpose of seeing that such funds are distributed to the heir or heirs so determined.

2. Bureau of Indian Affairs: Administrative Appeals: Generally--
Indian Probate: Klamath Tribe

The Secretary has no statutory authority to pay creditors' claims against estates of deceased Klamath Indians out of judgment funds distributable by the Secretary under the Act of Oct. 1, 1965, 79 Stat. 897.

APPEARANCES: Edwin D. Harris, Esq., for appellant Gertrude E. Harrington Sherman; Kurt Engelstad, Esq., for appellee Anna S. Nickels, (at hearing); Anna S. Nickels, pro se, after hearing; Vernon Peterson, Jr., Esq., Office of the Regional Solicitor, Portland, Oregon, for the Department.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

This appeal arises from a decision rendered May 22, 1979, by the Acting Area Director, Portland Area Office, Bureau of Indian Affairs, determining the heirship of Herman Gene Sherman, deceased Klamath enrollee No. 1782. The Acting Area Director's heirship determination was rendered under delegated authority from the Secretary, who, pursuant to the Act of October 1, 1965, 25 U.S.C. § 565a(b) (1976), is required to determine the heirs of any deceased Klamath enrollee entitled to a share of certain judgment funds awarded the Klamath Tribe. The heirs

so found by the Secretary are thereupon considered legal successors to the decedent's distributive share of the fund.

In this case, the Acting Area Director held Anna S. Nickels, surviving mother of Herman G. Sherman, to be decedent's sole heir. In reaching this conclusion, the Acting Area Director rejected the claim of Gertrude E. Harrington Sherman, appellant herein, that she was the decedent's surviving spouse. Specifically, the Acting Area Director held that appellant could not have been married to Herman Sherman because there was no evidence that she had obtained a divorce from a prior husband identified as John Jordan.

The Acting Area Director's decision was appealed by Gertrude E. Sherman to the Commissioner of Indian Affairs pursuant to provisions of 25 CFR Part 2. By memorandum dated October 22, 1979, Acting Deputy Commissioner of Indian Affairs, Sidney Mills, referred the appeal to the Board of Indian Appeals for resolution pursuant to 25 CFR 2.19(a)(2).

Upon receipt of the administrative record, it was apparent to the Board that the Acting Area Director's decision was reached without the benefit of any evidentiary hearing. In light of the factual controversies involved, it was deemed appropriate by the Board to refer this case to the Hearings Division of the Office of Hearings and Appeals for a fact-finding hearing and issuance of a recommended decision by

an Administrative Law Judge. Such referral was ordered by the Board on October 29, 1979, pursuant to the authority of 43 CFR 4.361(a) (1979), as amended, January 23, 1981, 46 FR 7334, 7337 (§4.337) (1981).

An evidentiary hearing was held by Administrative Law Judge Robert C. Snashall on April 16, 1980, in Portland, Oregon. Gertrude E. Sherman, appellant, and Anna S. Nickels, appellee, were represented by counsel at this hearing. On September 9, 1980, Judge Snashall issued his findings and recommended decision. Therein, he concluded that the Office of Hearings and Appeals, including the Board of Indian Appeals, has no jurisdiction to enter an heirship determination in this case; assuming such authority does exist, Judge Snashall recommended that the Board reverse the Acting Area Director's heirship determination and hold for the appellant. All interested parties were allowed to file exceptions to the recommended decision. By memorandum dated September 26, 1980, counsel for the Office of the Regional Solicitor, United States Department of the Interior, Portland, Oregon, filed a statement disagreeing with Judge Snashall's jurisdictional ruling. By letter dated October 14, 1980, counsel who represented appellee Anna Nickels at the evidentiary hearing informed the Board that any further appearances by appellee in this matter would be accomplished by her, pro se. The Board received exceptions to the recommended decision from Anna Nickels, pro se, on October 10, 1980. No exceptions have been filed by appellant.

Jurisdiction

For the proposition that the Office of Hearings and Appeals lacks jurisdiction to enter a final heirship determination in this case, including thereby a declaration of succession to decedent's share of judgment funds awarded the Klamath Tribe, Judge Snashall stated as follows:

It should be noted at the outset, however, the Klamath Termination Act of August 13, 1954, 68 Stat. 718, withdrew Klamath probate matters from application of the general Indian probate and other applicable laws. 25 U.S.C. 564(h). This general withdrawal of Federal jurisdiction over members of the Klamath Tribe was further buttressed by the Act of August 15, 1953 (commonly known as Public Law 280), 667 [sic] Stat. 588, 28 U.S.C. 1360 (1970), which in essence, inter alia, gave civil and criminal jurisdiction over all Indian country within the state of Oregon to the said state with the exception of the Warm Springs Indian Reservation. The Act of October 1, 1965, supra, which by section 565a(b) provides for distribution of judgment funds to members of the Klamath Tribe, mandates that "a share payable to a deceased enrollee shall be paid to his heirs or legatees upon the filing of proof of death and inheritance satisfactory to the Secretary of the Interior, who's [sic] findings and determinations upon such proof shall be final and conclusive." The Secretary's authority to make these determinations was delegated to the Area Director, Portland Area Office, Bureau of Indian Affairs. See 30 F.R. 14335 (November 16, 1965); 10 BIAM 2.3A. The undistributed judgment funds are not to be paid to a deceased Indian's estate, but rather the Act provides that such funds are to be paid directly to the heirs or legatees of the decedent as determined by the Secretary. Such funds do not therefore become a part of the decedent's trust estate, nor do they take on the character of Indian trust monies, and are by virtue of the above statutes distributable through state court probate proceedings. In fact, it appears the Office Hearings and Appeals has no jurisdiction whatsoever in these proceedings and that the Area Director should deposit the share of judgment funds applicable to decedent, and others similarly situated,

with the appropriate state court for its determination of heirs or devisees. (cf: Act of September 21, 1968, (Public Law 90-507), 82 Stat. 860, (California Judgment Funds; the Act of May 21, 1970 (Public Law 91-259), 84 Stat. 253 (Umatilla Judgment Funds). Clearly, Congress did not intend as to distribution of Klamath judgment funds the applicability of 43 CFR Part 4 nor departmental decisions in accordance therewith. (cf: Act of July 1, 1973, 87 Stat. 99 as affected by the Act of October 19, 1973 (Public Law 93-134), 87 Stat. 466.) However, inasmuch as the undersigned cannot determine jurisdiction the hearing was held as directed by the Board.

[1] The Board is unable to follow the logic of the above recommended findings and conclusions. While it is true that the Klamath Termination Act, 25 U.S.C. §§ 564-564x (1976), rendered inapplicable to Klamath tribal members the Secretary's usual jurisdiction over Indian heirship determinations as set forth in 25 U.S.C. §§ 372-373 (1976) (see 25 U.S.C. § 564h), Congress, by the more recent Act of October 1, 1965, 79 Stat. 897, specifically empowered the Secretary of the Interior to determine the rightful heirs of deceased Klamath enrollees entitled to a share of certain judgment funds payable from the United States for the limited purpose of seeing that such funds are distributed to the heirs so determined by the Secretary. The relevant provisions of the Act of October 1, 1965, as codified in 25 U.S.C. state:

§ 565

The Secretary of the Interior is authorized and directed to distribute in accordance with the provisions of this subchapter the funds appropriated in satisfaction of a judgment obtained by the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, hereinafter called the Klamath Tribe for the purposes of the administration of this subchapter, from the Indian Claims Commission against the United States in docket numbered 100 * * *.

565a

* * * * *

(b) a share payable to a deceased enrollee shall be paid to his heirs or legatees upon the filing of proof of death and inheritance satisfactory to the Secretary of the Interior, whose findings and determinations upon such proof shall be final and conclusive * * *.

* * * * *

§ 565g

The Secretary is authorized to prescribe rules and regulations to carry out the provisions of this subchapter.

There is nothing ambiguous in the foregoing statutory provisions concerning the authority of the Secretary to determine heirs of deceased Klamath enrollees for the purpose of distributing judgment fund shares to those entitled thereto. Section 565a(b) clearly contemplates that the Secretary make "findings and determinations" regarding inheritance. Had Congress intended for the Secretary to merely defer to state court inheritance rulings, it could easily have done so. Of course, state probate determinations with respect to property of deceased Klamath Indians may be considered by the Secretary, along with other kinds of proof, in reaching an heirship decision under 25 U.S.C. § 565a(b).

In accordance with the statutory authority to promulgate appropriate rules to implement the Act of October 1, 1965, the Office of the Secretary delegated to the Area Director, Portland Area Office, Bureau of Indian Affairs, the authority to perform the functions vested in the Secretary by the 1965 Act. See 30 FR 14335 (Nov. 16, 1965);

10 BIAM 2.13A. Because administrative actions of area directors are appealable under Department regulations to the head of the Bureau of Indian Affairs and to the Board of Indian Appeals, it was not only appropriate but required by law that the Area Director's decision at issue in this case be considered an appealable action. See 25 CFR 2.19.

While this probate controversy is the first of its kind to reach the Board of Indian Appeals, the Board is no stranger to probate disputes. It is a regular function of the Board to review inheritance decisions made by Indian probate administrative law judges who probate the estates of Indians who die possessed of trust or restricted property. Pursuant to 25 U.S.C. § 348 (1976), the Department is required to apply state laws of descent and distribution in ascertaining the heirs of Indians who, as in the case at bar, die intestate. The hearing held in this case was conducted by the Indian probate judge most familiar with Oregon State law. All things considered, therefore, the procedural steps taken by the Department in this matter have followed a logical course, within the bounds of Departmental rules, to secure a fair and just result. 1/

1/ It would be preferable, in the Board's opinion, if special rules existed allowing for inheritance determinations in Klamath judgment fund cases which correspond to the Department's general Indian probate procedure codified at 43 CFR Part 4, Subpart D. Specifically, it would seem more desirable to have an evidentiary hearing in the first instance presided over by an Administrative Law Judge, not an area director, with a right of appeal to this Board from such heirship determination. However, the due process rights of the parties to this proceeding have not been violated where, as here, an area director's heirship ruling was appealed, an evidentiary hearing held, and a final decision entered following an opportunity for the submission of briefs by all concerned.

In accordance with the above discussion, Judge Snashall's opinion that the Board of Indian Appeals lacks jurisdiction in this appeal is rejected.

Findings and Conclusions Regarding Heirship

The Board has examined the complete record in this case, including the Acting Area Director's initial decision, the transcript of hearing held by the Administrative Law Judge, all exhibits of record, the recommended decision issued September 9, 1980, and comments of the parties subsequent thereto. Based on this review, we accept the recommended findings and conclusions of Judge Snashall to the effect that Gertrude E. Sherman, not Anna Nickels, is the lawful sole heir of Herman G. Sherman.

It was proven by Gertrude Sherman that she married the decedent on March 13, 1973, at a ceremony held in Vancouver, Washington (Exh. A-5, Tr. of Hearing). Based on evidence supplied by Anna Nickels, the Acting Area Director held that this marriage was invalid because of a showing that Gertrude Sherman was married to John R. Jordan at the time of her alleged marriage to the decedent. The foregoing holding was entered without any opportunity for appellant to refute the evidence submitted by appellee and relied upon by the Acting Area Director in reaching his decision. It was established at the hearing of April 16, 1980, that Anna Nickels had altered a certificate showing the marriage of one Gertrude L. Sherman to John R. Jordan on March 17,

1970, by changing the "L" to an "E." Anna Nickels admitted that she made the alteration of this significant piece of evidence (Tr. 94). But for the resourcefulness of appellant who tracked down Gertrude L. Sherman in California and brought her to the hearing, this incredible action of Anna Nickels might never have come to light. 2/

The Board hereby adopts as its own findings and conclusions all other recommended findings and conclusions of Administrative Law Judge Snashall regarding appellant's marital relationship with decedent.

[2] The Board specifically rejects the recommended findings and conclusions of Judge Snashall that costs incurred by appellee for the burial of her son may be reimbursed by the Bureau of Indian Affairs from the judgment fund share to be paid appellant. There is no basis for the payment of such claims in a proceeding of this type. 3/

2/ Anna Nickels attempted to justify her fraudulent action on grounds that she had not been able to obtain satisfaction on this probate dispute for over 6 years and that she had been told that Gertrude E. Sherman had, in fact, been married to John R. Jordan (Tr. 94). The record also reflects a bitter relationship between Anna Nickels and appellant which was no doubt aggravated when appellant was arrested for the shooting of Herman Sherman on December 25, 1974. Following a preliminary examination on March 13, 1975, in State of Montana v. Gertrude Harrington Sherman, Ravalli County, Montana, appellant was released without charge concerning this incident.

3/ This "probate" case stems from the narrow duty of the Secretary to see that certain judgment funds awarded members of the Klamath Tribe go to such members or their lawful heirs as determined by the Secretary. 25 U.S.C. §§ 372-373, which the Department has construed as allowing the payment of claims against the estates of deceased Indians (see Estate of John Joseph Kipp, 8 IBIA 30, 87 I.D. 98 (1980)) have no applicability to the probate of estates of Klamath Indians "who died 6 months or more after August 13, 1954." 25 U.S.C. § 564h.

The Area Director, Portland Area Office, Bureau of Indian Affairs, is directed to take whatever actions are necessary to effectuate the holdings of this opinion. Pursuant to the provisions of 43 CFR 4.1, this decision is final for the Department.

//original signed
Wm. Philip Horton
Chief Administrative Judge

I concur:

//original signed
Franklin D. Arness
Administrative Judge