



INTERIOR BOARD OF INDIAN APPEALS

Estate of John Walter Few Tails

13 IBIA 127 (02/28/1985)



United States Department of the Interior

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

ESTATE OF JOHN WALTER FEW TAILS

IBIA 84-31

Decided February 28, 1985

Appeal from an order after rehearing issued on March 12, 1984, by Administrative Law Judge Elmer T. Nitzschke in Indian probate IP BI 700C 81 and IP RC 35Z 83.

Affirmed.

1. Administrative Procedure: Burden of Proof--Indian Probate:
Evidence: Generally

The burden of proving the error of an initial Departmental Indian probate decision is on the party challenging the decision.

2. Indian Probate: Witnesses: Observation by Administrative Law Judge

Where evidence is conflicting, the Board of Indian Appeals normally will not disturb a decision based upon findings of credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor.

APPEARANCES: Yvette Hall War Bonnet, Esq., Mission, South Dakota, and Diane M. Zephier, Esq., Batesland, South Dakota, for appellant; Steven P. Schwafel, Esq., Rapid City, South Dakota, for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

On May 14, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Theresa Red Cloud for and on behalf of Kevin Ray Red Cloud (appellant). Appellant sought review of a March 12, 1984, order after rehearing issued in the estate of John Walter Few Tails (decedent) by Administrative Law Judge Elmer T. Nitzschke. The March order confirmed a June 15, 1983, order issued by Administrative Law Judge Garry V. Fisher, finding that decedent's heirs were his wife, Ophelia Grace Few Tails, and his son, Jonathan Merrill Few Tails (appellees). For the reasons discussed below, the Board affirms Judge Nitzschke's order.

Background

Decedent, U-19004 of the Pine Ridge Indian Reservation in South Dakota, was born on January 5, 1951, and died intestate as the result of an accident on April 8, 1981. Hearings to probate decedent's Indian trust estate were held before Judge Fisher on December 2, 1981, and September 14, 1982. There was no dispute at those hearings that decedent was survived by a spouse and son, appellees here.

The parties did dispute whether decedent was also the father of appellant, who was born October 7, 1979, to Theresa Red Cloud. Judge Fisher found that the evidence presented to him did not support the conclusion that decedent was appellant's father and therefore held that decedent's trust estate should pass only to appellees.

Appellant timely sought rehearing. Because of Judge Fisher's retirement, the rehearing was held before Judge Nitzschke on October 27, 1983. Additional evidence was presented at the hearing regarding the relationship between Theresa Red Cloud and decedent and decedent's alleged acknowledgements of paternity of appellant. At this hearing, conflicting evidence was presented regarding whether decedent and Theresa Red Cloud were living together at the time when appellant would have been conceived, whether decedent was capable of fathering children because of excessive alcohol consumption, and whether decedent acknowledged appellant as his child. On March 12, 1984, Judge Nitzschke issued an order after rehearing in which he set forth the conflicting evidence regarding paternity, and found that the weight of that evidence was that decedent was not appellant's father.

Appellees' notice of appeal from Judge Nitzschke's order was received by the Board on May 14, 1984. Both parties have filed briefs on appeal.

Discussion and Conclusions

[1] On appeal, appellant bears the burden of proving the error in the decision from which he is appealing. Estate of Pearl Asepermy Werqueyah, 13 IBIA 49 (1984); Estate of Wilma Florence First Youngman, 12 IBIA 219 (1984). Appellant attempts to carry that burden by asserting that Judge Nitzschke did not properly weigh the evidence presented to him.

[2] The Board has thoroughly reviewed the probate record in this proceeding. As both Judges involved in this matter noted, the evidence as to decedent's alleged paternity of appellant is clearly conflicting. Because of this conflict, Judge Nitzschke specifically noted in his order that the decision was based in part on the demeanor of the witnesses appearing before him. In situations where evidence is conflicting, the Board has held that it will not normally disturb a decision based upon findings of credibility because the Judge who held the hearing had the opportunity to hear the testimony and observe the witnesses' demeanor. Estate of Youngman, *supra*. Such a decision will be overturned only when the record clearly shows that the decision directly contradicts the weight of the evidence.

In this case there is evidence that decedent acknowledged paternity to family members; there is evidence that he denied paternity. There is evidence that he was with Theresa Red Cloud approximately, or perhaps exactly, 9 months before her son was born; there is evidence that he was with Ophelia Few Tails at that time. There is evidence that decedent drank heavily, that at such times he could not engage in sexual intercourse, and that he had a low sperm count because of the effects of alcohol; there is evidence that he could and did engage in sexual intercourse with Theresa Red Cloud. It is suggested in the record that threats of physical violence were made by parties on both sides of this dispute. On the record before it, the Board finds that the evidence is quite evenly balanced. Appellant has not sustained his burden of showing that judge Nitzschke's decision is clearly against the weight of the evidence.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 12, 1984, order after rehearing issued by Administrative Law Judge Elmer T. Nitzschke is affirmed.

//original signed

Anne Poindexter Lewis
Administrative Judge

We concur:

//original signed

Bernard V. Parrette
Chief Administrative Judge

//original signed

Jerry Muskrat
Administrative Judge