INTERIOR BOARD OF INDIAN APPEALS

Estate of Willard Guy

13 IBIA 252 (09/23/1985)

United States Department of the Interior

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

ESTATE OF WILLARD GUY

IBIA 85-4 Decided September 23, 1985

Appeal from an order on remand issued by Administrative Law Judge Sam E. Taylor affirming an order determining heirs and decree of distribution in IP TU 114P 78, IP TU 200P 74.

Affirmed in part and reversed in part.

1. Indian Probate: Evidence: Weight of Evidence

   In establishing paternity in an Indian probate proceeding when testimony is conflicting, contemporaneous documents should be given great weight in determining the facts they are intended to memorialize unless there is persuasive evidence that the documents were falsified or are erroneous.

2. Indian Probate: Settlement

   Under the facts of this case, the Board of Indian Appeals will accept the appellant's statement that she does not wish to share in the decedent's estate as a compromise settlement under 43 CFR 4.207.

APPEARANCES: V. Burns Hargis, Esq., Oklahoma City, Oklahoma; Harry R. Sachse, Reid Peyton Chambers, and Louise Lynch, Esqs., Washington, D.C., for appellant; Houston Bus Hill, Esq., Oklahoma City, Oklahoma; W. Richard West, Jr., and B. Kevin Gover, Esqs., Washington, D.C., for appellees. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On November 27, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Justina Joyce Kelly (appellant). Appellant sought review of a September 28, 1984, order on remand issued by Administrative Law Judge Sam E. Taylor in the estate of Willard Guy (decedent), an Unallotted Caddo Indian. Judge Taylor's order affirmed an order determining heirs and decree of distribution entered on November 1, 1974, by Administrative Law Judge John Curran. On appeal, appellant challenges only the finding that decedent was not her father, disclaiming any interest in a redistribution of his estate. For the reasons set forth below, we reverse the orders of Judges

Curran and Taylor insofar as they find decedent was not appellant's father, but accept as a compromise settlement her disclaimer of any interest in his estate and, therefore, affirm the original distribution of the estate.

Background

Since the relevant facts were fully set forth in the Board's original decision in the Estate of Rena Marie Edge, 7 IBIA 53 (1978), they will be only summarized here. Appellant's mother, Rena Marie Edge, a.k.a. Rena Guy, (Edge) an Unallotted Caddo Indian, and decedent, Edge's former husband, died within a month of each other, on January 8 and February 2, 1974, respectively. Because the deaths occurred so close together and it initially appeared that the only heirs to both estates would be the children born of the marriage, Judge Curran held a combined hearing on August 23, 1974, to probate the two estates.

Decedent had died intestate. After the hearing, on November 1, 1974, Judge Curran issued an order in decedent's estate finding that he was survived by two children, Willard Jr., and Wildena (appellees). He ordered decedent's estate to be distributed equally to appellees. The order did not mention appellant. Appellant did not appeal the decision.

Edge died testate. Judge Curran retired before entering an order in this estate. Administrative Law Judge Jack M. Short, Curran's successor, entered an order on January 16, 1976, finding that appellant was born of an Indian custom marriage between Edge and decedent that predated their 1937 ceremonial marriage. He approved Edge's will, which left all of her property to appellant, and stated that in their divorce decree, she and decedent had agreed that he would leave his property to appellees, and she would leave hers to appellant. 1/ Accordingly, he ordered Edge's entire estate to be distributed to appellant. Appellees did not appeal this decision.

While the Edge estate was still pending, appellant sought and obtained from Justin Poolaw, a Kiowa Indian, an affidavit of paternity stating that he, rather than decedent, was her father. 2/ When Judge Short learned of Poolaw's affidavit, he reopened the Edge estate and, on August 5, 1977, modified his original order, finding that Poolaw rather than decedent was appellant's father. Appellant appealed the revised order, and the Board remanded the case for a determination of whether appellant was decedent's daughter, as she then claimed. Edge, supra.

The hearing on remand, which was held on May 10 and 14, 1979, before Judge Taylor, produced a lengthy record, reflecting the testimony of some

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1/ Appellant states that, under this arrangement, each individual received approximately equal shares.

2/ Appellant used this affidavit to apply for membership in the Kiowa Tribe. Her application was denied on the grounds that the affidavit conflicted with records of the Caddo Tribe.

19 witnesses who testified mainly about their recollections of personal and community impressions at the time of appellant's birth in 1932. The hearing also produced three affidavits and a deposition by or on behalf of Justin Poolaw, explaining and repudiating his earlier affidavit of paternity, and vigorously denying that he was appellant's father.

On September 28, 1984, Judge Taylor issued the order on remand now under appeal. Judge Taylor affirmed Judge Short's August 5, 1977, order, and found, in effect, that decedent had held himself out as appellant's father in her early years because of his sincere love of children and of his wife, all of which caused other people to assume that he was appellant's biological father. However, when decedent and Edge were divorced, Judge Taylor concluded, the truth was revealed when decedent sought custody only of appellees, and not of appellant, who was not mentioned in the divorce decree even though she was also a minor at the time. Other facts that Judge Taylor found probative included the hearsay nature of the early documentary evidence indicating that decedent's estate, and appellant's failure to appeal Judge Curran's November 1, 1974, decision finding that decedent's only heirs were appellees.

Appellant sought review of this order. Briefs were filed on behalf of both appellant and appellees.

Discussion and Conclusions

On appeal, appellant continues to assert that she does not seek any share in decedent's estate, inasmuch as she has already received the property that Edge and decedent agreed upon, rather, she seeks only a determination that decedent was her father. She states that she has been profoundly and adversely affected by the order of distribution in that it leaves her without any legal father and denies her children and grandchildren their Indian blood heritage. She says that when she sought a paternity affidavit from Justin Poolaw she was severely depressed by the almost simultaneous deaths of the two persons she had always regarded as her parents and by the subsequent suggestion that decedent was not her father. She states that she was hospitalized under psychiatric care and received outpatient treatment for anxiety and depression for some 18 months after her release. During this period she approached Justin Poolaw, who acknowledged that he might be her father and, accordingly, agreed to execute an affidavit to that effect.

Appellees' position has also been consistent throughout this proceeding. They state that their primary concern is to protect what they regard as their just inheritance of decedent's estate.

Both appellant and appellees, as well as Judge Taylor, recognize that virtually all of the testimony in this case is at best hearsay, and that it is based upon what the various witnesses were still able to remember of relationships and events that occurred some 50 years ago. This testimony is, as could be expected, conflicting.

In addition to the testimony, the record contains several pieces of documentary evidence: (1) appellant's apparently undated birth certificate listing decedent as her father (although this birth certificate is described by Judge Taylor, it is not included in the record); (2) appellant's birth listing in the BIA Register of Vital Statistics for June 1932, which also shows decedent as her father; (3) decedent's military records, including his October 14, 1944, induction form; his October 25, 1944, beneficiary form for his National Service Life Insurance application; and his October 2, 1945, discharge application--all of which show appellant as his child or dependent and contain his signature; (4) appellant's school records for the years 1947 through 1951, which show decedent as her father; and (5) decedent's 1946 divorce decree from Edge, which does not mention appellant but does mention appellees.

Judge Taylor, apparently finding the testimony inherently untrustworthy because of the conflicts and the passage of time, did not rely on it in reaching his decision. Instead, he based his decision primarily on the failure of the 1946 divorce decree to mention appellant, who was still a minor at the time. Because the decision is not based on testimony, the Board is not affected by the general rule restricting review of decisions based on witness demeanor. See, e.g., Estate of John Walter Few Tails, 13 IBIA 127 (1985); Day v. Navajo Area Director, 12 IBIA 9 (1983).

[1] Under the circumstances of this case, the Board agrees that the documentary evidence should be relied upon more heavily than the memory of witnesses. The Board disagrees, however, with the weight Judge Taylor ascribed to the documentary evidence. In general, in the absence of persuasive evidence of falsification or error, contemporaneous documents should be given great weight in determining the facts they are intended to memorialize.

Here, all early documents relating to appellant indicate that decedent was her father. There is no persuasive evidence that these documents were falsified or are erroneous. The birth certificate and BIA records, although by their very nature based on hearsay, were documents maintained in the regular course of business by disinterested parties, and are the kind of evidence normally relied upon to establish the type of facts at issue here. Decedent's military records constitute his acknowledgement of paternity. Appellant's school records, documents prepared after the divorce, continue to show decedent as her father.

The only conflict in the documentary evidence consists of an inference drawn from the failure of the court to mention appellant in the divorce decree. Appellant notes that under Standridge v. State, 441 P.2d 419 (Okla. 1968), Oklahoma does not consider a divorce decree's listing of children of the marriage to be dispositive for the purposes of establishing paternity. There are many reasons why the decree might not have mentioned appellant. The Board declines to engage in speculation, and rather finds that the failure of the decree to mention appellant is not determinative that decedent was not her father.

Accordingly, based on the documentary evidence available, the Board holds that decedent was appellant's father.

After so holding, the next question is whether the distribution of decedent's estate must be altered to include appellant. The briefs on appeal note that several Board decisions, including Edge, have suggested that a new decision on paternity requires a redistribution of the decedent's estate. Recently, recognizing the fundamental nature of paternity and nationality determinations made in the context of Departmental Indian probate proceedings, the Board has permitted the reopening of closed estates when the sole issue raised is an alleged error in the determination of paternity or nationality, and no redistribution of property is sought. See In re Status of Gladys Rose Charles Whims, 13 IBIA 94 (1985); Estate of Edward (Agopetah) Bert, 12 IBIA 253 (1984). In each of these cases reopening was sought by individuals who would normally not have had standing to seek reopening under 43 CFR 4.242. The Board noted that fundamental rights were determined in the Departmental probate proceeding; that a trust responsibility was owed to the individuals seeking review of the facts found in those proceedings; and that the restrictions placed upon reopening by section 4.242 were not intended to preclude review of these fundamental rights. Accordingly, the Board allowed reopening for the sole purpose of reviewing the nationality or paternity decision, but precluded any redistribution of the underlying estates.

[2] Whims and Bert are illustrative of current attitudes toward paternity and nationality determinations in Departmental probate proceedings. In this case, appellant has stated that she has no interest in receiving any of decedent's Indian trust estate. Appellees agree that the distribution of the estate should not be disturbed. The Board will consider the parties' concurrence in this matter as a proposed compromise settlement under 43 CFR 4.207.

Section 4.207 allows the approval of a compromise settlement when:

> (1) All parties to the compromise are fully advised as to all material facts;
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> (2) All parties to the compromise are fully cognizant of the effect of the compromise upon their rights; and
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> (3) It is in the best interest of the parties to settle rather than to continue litigation.

Here, appellant is a mature adult; she has consistently manifested her desire to give effect to the original agreement between her parents as to the distribution of their estates; she has already received what she has always regarded as her fair share of the combined estates; she has made clear throughout these proceedings that she is interested only in a redetermination of the issue of paternity; and she has been represented at all times by counsel. Under these circumstances, the requirements of section 4.207 are met. 3/

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3/ In the Estate of Charles Red Breath Bear, 6 IBIA 36 (1977), the question of permitting a relinquishment of an inherited interest as a compromise

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 28, 1984, order of Administrative Law Judge Sam E. Taylor and the November 1, 1974, order of Administrative Law Judge John Curran are reversed insofar as they found that Justina Joyce Kelly was not the daughter of Willard Guy, but those portions of the order decreeing the distribution of Willard Guy's Indian trust estate are affirmed. To the extent that the Bureau of Indian Affairs may have altered its records as a result of these previous orders, it should reinstate them in order to show Willard Guy as appellant's father.

//original signed
Bernard V. Parrette
Chief Administrative Judge

We concur:

//original signed
Jerry Muskrat
Administrative Judge

//original signed
Anne Poindexter Lewis
Administrative Judge

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fn. 3 (continued)
settlement under section 4.207 was discussed. The settlement was not permitted in that case. There, however, the principal heir, who had initially volunteered to allow her three sisters to share equally with her in their father's estate, formally repudiated her agreement before the order distributing the estate was issued.

Because it is unnecessary under the facts of this case, we express no opinion as to whether, in an appropriate case, the Board might decide to overrule past decisions suggesting that an Indian cannot renounce an inheritance of trust property. We are, however, sympathetic with the modern view set forth in comments applicable to section 2-801 of the Uniform Probate Code, which reads in part as follows:

"Although present law in all states permits renunciation of a devise under a will, the common law did not permit renunciation of an intestate share. There is no reason for such a distinction, and some states have already adopted legislation permitting renunciation of an intestate share. Renunciation may be made for a variety of reasons, including carrying out the decedent's wishes not expressed in a properly executed will." (Emphasis added.)