



INTERIOR BOARD OF INDIAN APPEALS

Karen Spears v. Sacramento Area Director, Bureau of Indian Affairs

28 IBIA 161 (09/08/1995)

Related Board cases:

27 IBIA 93

28 IBIA 299



United States Department of the Interior

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

KAREN SPEARS

v.

SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-55-A

Decided September 8, 1995

Appeal from a decision concerning eligibility for payment of attorney fees under the Indian Child Welfare Act.

Vacated and remanded.

1. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally--Indians: Indian Child Welfare Act of 1978: Child Custody Proceedings

Where Bureau of Indian Affairs regulations provide for appeals of certain decisions to the Assistant Secretary - Indian Affairs, the Assistant Secretary may refer the appeal to the Board of Indian Appeals under 43 CFR 4.330(a)(2). Absent a referral, however, the Board lacks jurisdiction over such appeals.

2. Bureau of Indian Affairs: Administrative Appeals: Generally--Indians: Indian Child Welfare Act of 1978: Child Custody Proceedings

Under 25 CFR 2.7(a), it is the responsibility of a Bureau of Indian Affairs deciding official to give notice of the decision to all interested parties known to the official.

3. Bureau of Indian Affairs: Administrative Appeals: Generally--Estoppel--Indians: Indian Child Welfare Act of 1978: Child Custody Proceedings

Where a Bureau of Indian Affairs regulation requires that a decision be issued within a certain time, the Board of Indian Appeals will not find the Bureau estopped by its delay in issuing a decision where the party seeking estoppel had a regulatory right to appeal from the Bureau's delay but failed to exercise that right.

4. Attorney Fees: Generally--Indians: Indian Child Welfare Act of 1978: Child Custody Proceedings

The Bureau of Indian Affairs regulation implementing 25 U.S.C. § 1912(b) (1994) does not authorize Bureau payment of attorney fees in voluntary child custody proceedings in State courts. 25 CFR 23.13.

APPEARANCES: Margaret Crow Rosenfeld, Esq., Michael S. Pfeffer, Esq., Stephen V. Quesenberry, Esq., Jay B. Petersen, Esq., Leigh E. Lorry, Esq., and William H.D. Fernholz, Esq., Oakland, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Karen Spears seeks review of a November 23, 1994, decision of the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning eligibility for payment of attorney fees under the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 (1994). ^{1/} For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter to him for further consideration.

Background

Appellant is a member of the Cherokee Nation and the mother of two children. On May 12, 1992, she signed a California State form nominating Terry and Donna Sills as guardians of her children. She also signed the following statement: "WAIVER OF NOTICE AND CONSENT. I am entitled to notice in this proceeding. I waive notice of hearing of the petition for appointment of guardian of minor and consent to appointment of the guardian as requested." The Sills' guardianship petition was granted on August 27, 1992.

On November 30, 1993, the Shasta County Superior Court appointed Margaret Crow Rosenfeld, Esq., of California Indian Legal Services (counsel), as appellant's attorney in further proceedings in the guardianship matter. In addition to appointing counsel, the order stated:

2. The minors in this proceeding are Indian children within the meaning of [ICWA] in that they are the biological children of a tribal member and are eligible for membership.
3. California law does not provide for appointment of counsel in guardianship proceedings.
4. It has been determined that [appellant] is indigent.

On December 6, 1993, counsel sent a copy of the November 30, 1993, court order to the Sacramento Area Office, requesting certification of appellant's eligibility for payment of attorney fees in the guardianship

^{1/} All further references to the United States Code are to the 1994 edition.

proceeding. On January 13, 1994, at the request of the Area Social Worker, counsel furnished a copy of the guardianship petition, a copy of appellant's proof of tribal membership, and appellant's complete name and address.

On February 9, 1994, the Shasta County Superior Court issued another order appointing counsel as appellant's attorney in a second guardianship proceeding involving the same parties. 2/ On February 23, 1994, counsel submitted the second court order to the Area Office.

The Area Office transmitted appellant's request to the BIA Central Office in Washington, D.C. The Acting Deputy Commissioner of Indian Affairs (Deputy Commissioner), by memorandum of April 25, 1994, to the Area Director, stated that the request had been denied because the child custody proceeding at issue was a voluntary proceeding and thus did not fall within the scope of proceedings for which attorney fees could be paid under BIA guidelines published in the Federal Register in 1979. Further, he stated, appellant's request was incomplete because it did not include the information required by 25 CFR 23.13(d).

Counsel was furnished with a copy of the Deputy Commissioner's memorandum. She wrote to the Area Office on May 13, 1994, disputing the conclusion that the proceeding was a voluntary proceeding and contending that the information required by 25 CFR 23.13(d) relates to the second stage of attorney fee requests, i.e., actual requests for payment, and is not relevant to the initial request for certification of eligibility for payment of attorney fees.

On September 22, 1994, October 11, 1994, and October 27, 1994, counsel wrote to the Area Office, requesting that a decision be made on appellant's request.

On November 23, 1994, the Area Director issued the decision on appeal here. He stated:

Your request for payment of attorney fees under [ICWA] for these two cases is denied on the basis that this case does not fall under the ICWA since this is a voluntary guardianship proceeding. Enclosed is a copy of [BIA's] guidelines published in the Federal Register, November 26, 1979, page 67587:

“(c) voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not covered by the Act. Where such placements are made pursuant to a written agreement that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand.”

2/ The Sills filed a second guardianship petition on Nov. 18, 1993, resulting in assignment of a second case number and appointment of counsel for the second time.

[Appellant] voluntarily requested this custody arrangement whereby her uncle and aunt would care for her two children until such a time as she was able to care for them. Enclosed is a copy of the original petition and nomination of guardianship signed by [appellant]. The enclosed petition does not include any language prohibiting the return of the children to [appellant].

(Area Director's Nov. 23, 1994, Decision). The Area Director's decision stated that it could be appealed to this Board. Appellant filed a notice of appeal with the Board.

[1] The Board found that it lacked jurisdiction over the appeal because, under 25 CFR 23.13(c), appeals from Area Directors' decisions concerning eligibility for payment of attorney fees under ICWA are appealable to the Assistant Secretary - Indian Affairs, rather than the Board. ^{3/} Accordingly, the Board transferred the appeal to the Assistant Secretary. 27 IBIA 93 (1994).

On January 23, 1995, the Assistant Secretary referred the appeal back to the Board under 43 CFR 4.330(a)(2), because of "an extreme staffing shortage and a tremendous backlog of work within [BIA's] Division of Social Services." The Board established a briefing schedule on February 22, 1995, following receipt of the administrative record. Only appellant filed a brief. On August 24, 1995, the Board granted appellant's request for expedited consideration.

Discussion and Conclusions

25 CFR 23.13 is titled "Payment for appointed counsel in involuntary Indian child custody proceedings in state courts." 25 CFR 23.13(a) sets out the requirements for notice to a BIA Area Director of the appointment of counsel. 25 CFR 23.13(b) provides:

The Area Director shall certify that the client is eligible to have his or her appointed counsel compensated by the BIA unless:

(1) The litigation does not involve a child custody proceeding as defined in 25 U.S.C. 1903(1);

(2) The child who is the subject of the litigation is not an Indian child as defined in 25 U.S.C. 1903(4);

(3) The client is neither the Indian child who is the subject of the litigation, the Indian child's parent as defined in 25 U.S.C. 1903(9), nor the child's custodian as defined in 25 U.S.C. 1903(6);

^{3/} By contrast, Area Directors' decisions concerning requests for payment of attorney fees, following certification of eligibility for payment, are appealable to the Board under 25 CFR 23.13(f).

(4) State law provides for appointment of counsel in such proceedings;

(5) The notice to the Area Director of appointment of counsel is incomplete; or

(6) Funds are not available for the particular fiscal year.

25 CFR 23.13(c) provides:

No later than 10 days after receipt of the notice of appointment of counsel, the Area Director shall notify the court, the client, and the attorney in writing whether the client has been certified as eligible to have his or her attorney fees and expenses paid by the BIA. If certification is denied, the notice shall include written reasons for that decision. [4/]

The Area Director failed utterly to meet the time requirement of paragraph 23.13(c). For this reason, appellant contends, the Area Director is now estopped from denying appellant's eligibility for payment of her attorney fees.

A substantial portion of the delay in this case appears to have been the result of procedural confusion. It is not clear from the record why the Area Director sent appellant's request to the BIA Central Office. The transmission, however, resulted in the issuance of an apparent decision by the Deputy Commissioner. 5/ The Deputy Commissioner did not provide appeal instructions but instead asked the Area Director to inform appellant of the decision. It does not appear that either the Area Director or counsel interpreted the Deputy Commissioner's memorandum as a decision, even though the memorandum specifically stated that appellant's request was being denied. Seven months passed before the Area Director issued his own decision.

[2] 25 CFR 2.7(a) provides that a BIA "official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail." It was therefore the Deputy Commissioner's responsibility to give appellant notice of his decision and

4/ The Board quotes from the present version of section 23.13, which was included in the revision of 25 CFR Part 23 published in the Federal Register on Jan. 13, 1994, 59 FR 2248. These regulations became effective on Feb. 14, 1994, and thus were in effect at the time the Area Director issued his decision. They were not in effect when appellant submitted her request.

Except for the appeal provisions, the present version of section 23.13 is substantially identical to the previous version.

5/ Section 23.13(c) indicates that the Area Directors are the officials who are expected to issue decisions concerning certification of eligibility for payment of attorney fees. Presumably, however, because the Area Directors are under the supervision of the Deputy Commissioner, the Deputy Commissioner has authority to assume jurisdiction over such a case from an Area Director.

to provide appeal instructions. See, e.g., Parisian v. Acting Billings Area Director, 19 IBIA 109 (1990). Had the Deputy Commissioner provided appeal instructions in his April 25, 1994, decision, much confusion and 7 months' delay could have been avoided.

[3] There is no doubt that BIA's extended delay in issuing a decision constituted a serious violation of the regulations. However, 25 CFR 23.13(g) provides: "Failure of the Area Director to meet the deadline specified in paragraphs (c) and (f) of this section may be treated as a denial for purposes of appeal under paragraph (f) of this section." 6/ Thus, appellant had a right to appeal from the Area Director's failure to meet the deadline in paragraph (c). Because she had a right which she did not pursue, the Board cannot now conclude that the Area Director is estopped by his failure to meet the deadline. 7/

Appellant also contends that the Area Director erred in concluding that the guardianship proceeding at issue was a voluntary proceeding.

[4] 25 U.S.C. § 1912(b) provides:

In any case in which the [State] court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

BIA has interpreted ICWA, including the provisions for payment of attorney fees, as applying only to involuntary proceedings. Section B.3(c) of BIA's "Guidelines for State Courts: Indian Child Custody Proceedings," published on November 26, 1979, 44 FR 67584, 67587, was cited by both the Deputy Commissioner and the Area Director. It provides:

Voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand.

6/ As stated in footnote 3, supra, 25 CFR 23.13(f) provides for appeals to this Board. Thus, while an Area Director's decision denying certification of eligibility is appealable to the Assistant Secretary - Indian Affairs under paragraph 23.13(c), it appears that the failure of an Area Director to issue a decision concerning eligibility within the 10-day period is appealable to this Board under paragraph 23.13(f).

7/ Even so, the Board does not condone BIA's egregious delay in this matter.

The Guidelines also discuss voluntary proceedings in section E, 44 FR at 67593-94. Section E interprets 25 U.S.C. § 1913, quoted in footnote 9, infra. 8/

BIA's interpretation is reflected in the title of 25 CFR 23.13: "Payment for appointed counsel in involuntary Indian child custody proceedings in state courts" (Emphasis added). The voluntary nature of a child custody proceeding is not a specific basis for denial of certification under 25 CFR 23.13(b). However, given BIA's interpretation of the statute, the Board construes the Area Director's decision as having denied certification to appellant under paragraph 23.13(b)(1), "The litigation does not involve a child custody proceeding as defined in 25 U.S.C. § 1903(l)."

The ultimate question here is whether the proceeding for which appellant seeks certification is a voluntary proceeding. ICWA contemplates that a parent's or Indian custodian's consent to a temporary placement may be withdrawn at any time and that his/her consent to a more permanent removal and/or placement may be withdrawn until the time of the final decree and, in some cases, after entry of a final decree. 9/

8/ The introduction to the Guidelines explains that they were developed in accordance with the rulemaking procedures of the Administrative Procedure Act but were published as guidelines rather than regulations because BIA did not believe that it had the authority to impose its interpretation of the statute upon State courts.

9/ 25 U.S.C. § 1913 provides:

"(a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of an Indian child shall not be valid.

"(b) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

"(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

"(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law."

