



INTERIOR BOARD OF INDIAN APPEALS

Estate of Duane Imus Cuch

39 IBIA 92 (07/08/2003)



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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ESTATE OF DUANE IMUS CUCH : Order Vacating Decision and  
: Remanding Matter  
:  
: Docket No. IBIA 03-39  
:  
: July 8, 2003

Appellant Nadine C. Auld seeks review of a November 4, 2002, order denying rehearing issued by Administrative Law Judge James H. Heffernan in the estate of her brother, Duane Imus Cuch. IP SL 123F 00. For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision, and remands this matter to Judge Heffernan for further consideration.

Two hearings were held to probate Decedent's trust property: one on May 9, 2001, and the second on January 30, 2002. No will was presented for probate. Therefore, Decedent's estate passed under the laws of intestacy. Flora Mountain Lion attended the second hearing and presented evidence that she was Decedent's surviving common law wife. Members of Decedent's family challenged the alleged common law marriage on the grounds that marriage was prohibited between Decedent and Mountain Lion because they were relatives within the fifth degree of consanguinity; that common law marriage was prohibited under Ute Tribal law; that a court order was required to establish a common law marriage and none was entered into evidence; and that Mountain Lion was married to another man while she resided with Decedent.

In an October 15, 2002, order determining Decedent's heirs, Judge Heffernan found that, as third cousins, Decedent and Mountain Lion were within the eighth degree of consanguinity, not the fifth; that Ute Tribal law recognizes as valid marriages that are valid where contracted and Utah State law recognizes common law marriages; that his order in Decedent's probate was "one of the appropriate vehicles through which to establish a common law marriage," Oct. 15, 2002, Decision at 3; and that Mountain Lion had proven that she was not married to another man at the relevant times. Judge Heffernan therefore held that Mountain Lion was Decedent's surviving spouse.

Appellant sought rehearing. Judge Heffernan denied rehearing on November 4, 2002, stating that Appellant was incorrect in identifying third cousins as within the third degree of consanguinity and that her other objections had been addressed in his October 15, 2002, order.

Appellant appealed to the Board. On appeal, she continued her consanguinity argument and also contended that Judge Heffernan's decision here conflicted with his February 5, 1996, decision in Estate of James Doolittle Cuch, IP AL 115L 95, and his December 2, 2002, decision in Estate of David Nehat Cuch, Probate #22849-38. The Board received a letter in support of Appellant's appeal from Dennis Cuch. No other briefs were filed.

In reviewing the record, the Board finds that it must vacate the Judge's November 4, 2002, order and remand this matter for further consideration. The Board does so under 43 C.F.R. § 4.318, which allows it to exercise the inherent authority of the Secretary of the Interior to correct a manifest injustice or error.

Judge Heffernan cited both Ute Tribal law and Utah State law in finding that Decedent and Mountain Lion had entered into a common law marriage. The Ute Domestic Relations Code, Title V, I. Marriage, § 5-1-2, as quoted by Judge Heffernan, provides:

(1) All marriages performed other than as provided for in this Domestic Relations Code, which are valid under the laws of the jurisdiction where and when performed, are valid within the jurisdiction of the Ute Indian Tribe.

(2) All marriages performed on the Reservation prior to the effective date of this Code, including those perfected according to Tribal Custom, are declared valid for all purposes under this Code. Parties to such marriages may obtain a marriage certificate upon proof to the Clerk by affidavit or otherwise of the validity of their marriage, and payment of a \$2.00 fee.

Utah Code Ann., § 31-4.5, Validity of marriage not solemnized, again as quoted by the Judge, provides:

(1) A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order establishes that it arises out of a contract between two consenting parties who:

(a) are capable of giving consent;

(b) are legally capable of entering into a solemnized marriage under the provisions of this chapter;

(c) have cohabited;

(d) mutually assume marital rights, duties, and obligations; and

(e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

(2) The determination or establishment of a marriage under this section must occur during the relationship described in Subsection (1), or within one year following the termination of that relationship. Evidence of a marriage recognizable under this section may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

In his decisions, Judge Heffernan makes no finding of fact as to the jurisdiction in which the alleged common law marriage between Decedent and Mountain Lion occurred. In order to make this finding of fact, the Judge was required to determine where the couple cohabited. The location of the cohabitation must be determined because that location determines the political entity with jurisdiction over the alleged common law marriage. If the cohabitation was on the reservation, then Tribal law applies. However, if the cohabitation was in the State of Utah, then Utah State law applies. It is also necessary to determine during what time periods the couple cohabited within that jurisdiction in order to determine what Tribal or State law was in effect during that time period.

From other information before the Board, it appears that if the couple cohabited on the reservation after 1975, then they could not enter into a valid common law marriage.

If the couple cohabited in the State of Utah and the statute quoted above was in effect at that time, then it further appears that the Judge's decision fails to consider the effect, if any, of subsection (2) of the State statute. This subsection provides that the determination of a common law marriage must be made "during the relationship \* \* \* or within one year following the termination of that relationship." Judge Heffernan found that his order was "one of the appropriate vehicles through which to establish a common law marriage." The Judge's order was not entered during the relationship. The relationship was terminated, at the latest, as of January 1, 2000, the date of Decedent's death. The Judge did not enter his order until October 15, 2002, which is more than one year following the termination of the relationship.

Judge Heffernan's decision is vacated, and this matter is remanded to him for a finding of fact as to the location and time of the couple's alleged cohabitation. After making that finding of fact, the Judge shall determine what law applies, and shall discuss whether the particular facts of this case show that a common law marriage was created under the relevant law.

In addition, if the Judge again finds that a common law marriage existed, he shall discuss the two cases cited by Appellant in support of her assertion that such a holding in this case is contrary to his holdings in other cases.

In regard to Appellant's consanguinity argument, the Judge's orders merely state that third cousins are not within either the third or the fifth degree of consanguinity. It is clear that Appellant either does not agree with this statement or does not understand how to determine degrees of consanguinity. Although the Board might not have remanded for only this reason, it requires that, on remand, Judge Heffernan shall include information in his decision showing

how he computed the degree of consanguinity between Decedent and Mountain Lion and shall direct Appellant to a reputable source of information on the determination of degrees of consanguinity that supports his computation.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. §§ 4.1 and 4.318, Judge Heffernan's November 4, 2002, order denying rehearing is vacated, and this matter is remanded to him for further consideration.

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Kathryn A. Lynn  
Chief Administrative Judge

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Kathleen R. Supernaw  
Acting Administrative Judge