INTERIOR BOARD OF INDIAN APPEALS

Estate of Frank Anasouk Topsekok

43 IBIA 236 (08/22/2006)

Related Decision:

Decision reversed by Director, Office of Hearings and Appeals, in Estate of Frank Anasouk Topsekok, 34 OHA 30 (2007)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF FRANK ANASOUK TOPSEKOK	:	Order Vacating Denial of Rehearing and Reversing Order Determining Heirs
	:	Docket No. IBIA 05-19
	:	August 22, 2006

William Topsekok (Appellant) seeks review of a September 17, 2004 denial of rehearing issued by Administrative Law Judge (ALJ) Harvey C. Sweitzer, in the Estate of Frank Anasouk Topsekok (Decedent), deceased Eskimo, Probate No. IP SL AK 978-019. The denial let stand a May 21, 2003 order distributing Decedent's estate to his four siblings. The May 21, 2003 decision recognized Appellant as Decedent's culturally adopted son, but did not recognize Appellant as Decedent's legally adopted son. For the reasons stated below, the Interior Board of Indian Appeals (Board) vacates the September 17, 2004 denial of rehearing and reverses the May 21, 2003 order determining heirs.

Background

Decedent, a member of the Native Village of Teller, Alaska, was born on September 14, 1931, and died intestate at Anchorage, Alaska on November 4, 2000. The ALJ held a probate hearing on March 12, 2003 at Nome, Alaska. On May 21, 2003, the ALJ issued a decision determining that Decedent was survived by Appellant, a step-daughter (Mary Iyahuk Herman), and four siblings (May Topsekok Keelick, deceased; Daisy Topsekok Rock; Edith Topsekok Olanna; and Fannie Topsekok Okpealuk). The ALJ further determined that under Alaska law, Decedent's heirs at law were his four siblings, and that although Appellant was culturally adopted by Decedent and his wife (Cecelia Topsekok, who died in 1992) 1/, there was no evidence to establish that Appellant

1/ Appellant was the biological child of Ethyl Kungesuk, a relative of Decedent's mother, Rachael Topsekok.

had been legally adopted. Therefore, the ALJ determined that Appellant was not entitled to inherit Decedent's estate. 2/

Appellant filed a petition for rehearing, claiming that he was the legal heir to Decedent's estate. In an order dated August 15, 2003, the ALJ granted Appellant's petition for rehearing to allow him to submit evidence to support his claim.

Appellant submitted to the ALJ a December 17, 2003 resolution passed by the Native Village of Teller/Teller Traditional Council (Traditional Council) recognizing and affirming Appellant's "customary adoption" by Decedent and his wife. The resolution explained that "the Alaskan Natives of Teller, in effecting a customary adoption, did not necessarily record such adoptions in writing. Even without written documentation, the familial bonds of an adoption were effected and recognized by the tribe." Resolution No. TR 12-17-03-01.

On January 16, 2004, the ALJ issued an Order to Show Cause, concluding that because Appellant's adoption apparently was not recorded in writing, the resolution was insufficient, under 25 U.S.C. § 372a, to allow Appellant's adoption to be formally recognized by the Department of the Interior (Department). 3/ The ALJ thus ordered Appellant to show cause why his customary adoption met the requirements of section 372a.

2/ Alaska Stat. § 13.12.103 provides, in relevant part, that where there is no surviving spouse, an intestate estate "passes in the following order to the individuals designated below who survive the decedent:

> (1) to the decedent's descendants by representation;
>
> (2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;
>
> (3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation; * * * .

3/ 25 U.S.C. § 372a, enacted by the Act of July 8, 1940, 54 Stat. 746, is the federal law governing the determination of heirs by adoption in probate matters under the exclusive jurisdiction of the Secretary of the Interior.

In relevant part, 25 U.S.C. § 372a provides:

> In probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption—
>
> (1) Unless such adoption shall have been—
> (a) by a judgment or decree of a State court;
> (b) by a judgment or decree of an Indian court;
> (c) by a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or
> (d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or
> (2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this section or in the distribution of the estate of an Indian who has died prior to that date: *Provided*, That an adoption by Indian custom made prior to the effective date of this section may be made valid by recordation with the superintendent if both the adopted child and the adoptive parent are still living, if the adoptive parent requests that the adoption be recorded, and if the adopted child is an adult and makes such a request or the superintendent on behalf of a minor child approves of the recordation.

In his response to the show cause order, Appellant argued that his adoption satisfied subsections 372a(1)(b) and 372a(1)(d) because the adoption was: (1) recognized by a resolution and an order of the Traditional Council, and (2) recorded in a book kept by the Native Village of Teller for the purpose of recording tribal adoptions. With his response to the show cause order, Appellant submitted a March 5, 2004 order by the Traditional Council clarifying that the December 17, 2003 resolution was a "judgment or decree of an Indian court" because under Inupiaq law and custom, resolutions passed by the Traditional Council have the same legal force and effect as decisions in the form of court orders. March 5, 2004 Traditional Council Order at 2. The Traditional Council's order also concluded that Appellant's adoption had "occurred in substantial conformity with tribal law and custom," id. at 3, and therefore, Appellant was the legally adopted son of Decedent and his wife and "has all the legal rights and responsibilities that a biological child * * * would

have," id. at 4. Appellant's response further noted that his adoption had been "duly recorded in a book kept by the tribe for the purpose of the recording of tribal adoptions." Id. at 9. 4/

Appellant further asserted that the fact that his adoption was memorialized after Decedent's death "neither invalidates that adoption nor makes it any less worthy of credit from this Court." Id. at 5. In support of his position, Appellant made several arguments. First, Appellant noted that section 372a was enacted to address the unreliability of oral testimony concerning adoptions at probate proceedings where the Department was the fact finder. Appellant argued that where, as here, the fact finder is the tribe, "the unreliability of oral testimony ceases to be of such concern." Id. at 10. Second, Appellant argued that "[p]ublic policy also favors recognizing customary adoptions even after the adoptive parents have died," and that "[f]or the Department of Interior to refuse to recognize [cultural] adoptions and fail to transfer restricted property to culturally adopted heirs would lead to victimization of many innocent people who were legitimately adopted according to tribal law and custom." Id. at 10-11. Third, Appellant argued that the plain language of section 372a does not require that adoptive parents be living at the time the adoption is formally recognized by the tribe. Finally, Appellant argued that his interpretation of section 372a is consistent with the canon of construction that requires statutes to be construed liberally in favor of Indians. Appellant argued: "If there were any uncertainty concerning whether or not an adoption may be formally recognized by traditional council or tribal court after the adoptive parents, or one of them, has died, that uncertainty should be resolved in favor of the Indians by allowing such recognition." Id. at 12.

On September 17, 2004, the ALJ denied Appellant's petition for rehearing. The ALJ concluded that even if the Traditional Council's resolution or order satisfied 25 U.S.C. § 372a(1)(b) or (1)(d), the Department still could not recognize Appellant's adoption because "the alleged adoptive parents died prior to the passage and recordation of this Resolution" and "[r]ecognizing this adoption would be contrary to the intentions of Congress and purpose of the statute as revealed in the Act's legislative history." Sept. 17, 2004 Order at 2. Relying on a February 8, 1940 report submitted by then-Secretary of the Interior Harold L. Ickes to the House and Senate requesting approval of the draft legislation that became 25 U.S.C. § 372a, the ALJ found that the legislative

---

4/ Appellant submitted with his response a supporting affidavit by Dolly Kugzruk, the Indian Child Welfare Act worker of the Village of Teller, stating that the resolution recognizing the cultural adoption of Appellant was recorded in the book kept by the Native Village of Teller for the purpose of recording such adoptions.

history of section 372a "indicates that Congress intended to only validate adoptions that were recorded during the lifetime of the parties." Id. The ALJ further concluded that recognizing Appellant's adoption would be contrary to one of the purposes of the statute — to resolve problems in probate proceedings associated with the unreliability of oral testimony related to alleged cultural adoptions presented after the death of at least one of the principals involved. Id. at 3 (citing Estate of Jacob William Nicholai, 29 IBIA 157, 166 (1996)). The ALJ also concluded that, based on the language in subsection 372a(2), which provides that an adoption made prior to the effective date of the statute could be made valid by recordation with the superintendent only if both the adoptive child and the adoptive parent were still living, it was clear that Congress "favored the recognition of cultural adoptions where the adopting parents, and adopted child, are alive to speak for themselves." Id.

Appellant filed an appeal with the Board and filed a brief.

Discussion

The sole issue before the Board can be stated simply: whether subsection 372a(1) requires adoptive parents to be alive at time an adoption decree is entered by a tribal court or recorded by a tribe in a book kept for that purpose. No interested party contends that the Traditional Council's order does not qualify as a tribal court decree under section 372a, or that Appellant's adoption has not been duly recorded by the Tribe in a book kept for that purpose. Moreover, Decedent's half-sister, Decedent's three surviving siblings, and two children of one of Decedent's non-surviving siblings all filed affidavits attesting to Appellant's adoption by Decedent and his wife, and expressing willingness to waive their rights to inherit any portion of Decedent's estate, if necessary.

On appeal, Appellant advances the same arguments that he made in his response to the ALJ's show cause order. Appellant argues first that the plain meaning of subsection 372a(1) does not preclude Departmental recognition of Indian custom adoptions where the tribal court judgment or recordation occurs after the death of one or more of the parties. Appellant further argues that the language in subsection 372a(2), which applies to adoptions occurring before the effective date of the statute, supports his view. Subsection 372a(2) provides, in relevant part, "[t]hat an adoption by Indian custom made prior to the effective date of this section may be made valid by recordation with the superintendent if both the adopted child and the adoptive parent are still living * * * ." (Emphasis added.) Appellant contends that, unlike subsection 372a(2), subsection 372a(1) does not include a proviso that requires that the parties be living at the time a tribal court issues a judgment or the adoption is recorded.

Appellant further argues that subsections 372a(1) and 372a(2) must be read together, and that "where a provision is included in one section of a statute and excluded in another, that provision should not be implied where excluded." Appellant's Brief at 11-12. Appellant contends that subsections 372a(1) and 372a(2) apply to two different types of adoptions — adoptions occurring after the effective date of the statute and adoptions that occurred prior to the effective date of the statute, respectively — and that if Congress had wanted to include a requirement that the parties to an Indian custom adoption occurring after the effective date of the statute must be living at the time the adoption is recognized by a tribal court or recorded in a tribal book, Congress would have done so. Therefore, Appellant contends that Congress did not intend to include a requirement in subsection 372a(1) that the parties be alive when an adoption decree is entered by a tribal court or recorded in a tribal book.

Appellant additionally argues that the legislative history of the statute supports his interpretation of the statute's plain language 5/; that public policy favors recognizing customary adoptions even after the adoptive parents have died because many cultural adoptions in Alaska "have never been memorialized in court orders or in other written records," id. at 16; and that under the canon of construction construing any ambiguity in a statute liberally in favor of Indians, section 372a(1) should be interpreted to recognize Indian custom adoptions where the tribal court order or tribal recordation relating to the adoption occurs after one or more of the parties have died.

5/ Appellant argues that the legislative history indicates that the problem Congress was trying to solve when it enacted 25 U.S.C. § 372a was the often confusing and conflicting evidence presented at probate proceedings before the Department, and the resulting difficulty Department officials had "resolving questions about cultural adoptions based on oral testimony, particularly when an adoptive parent had died." Id. at 18. Appellant contends that the problem "was not that tribal courts were unsuitable forums for taking oral testimony and interpreting tribal customs," id. at 17, and that the statute's goal was simply to require and specify the types of "written evidence of an adoption" that would be sufficient in probate proceedings before the Department to prove that a cultural adoption had taken place, id. at 16.

Appellant also contends that the statement made by then-Secretary Ickes and relied upon by the ALJ — i.e., that Indian custom adoptions can be validated by recordation during the lifetime of the parties — "concerns only those adoptions that occurred before the effective date of the act, not adoptions such as in the present case that occurred after the effective date of the act." Id. at 15.

The United States Supreme Court has repeatedly stated that the plain language of a statute is the starting point in interpreting the statute. See Ardestani v. Immigration and Naturalization Serv., 502 U.S. 129, 135 (1991); United States v. James, 478 U.S. 593, 604 (1986). If the statutory language is unambiguous, no further inquiry is necessary to ascertain the meaning of the statute. See Connecticut National Bank v. Germain, 503 U.S. 249, 254 (1992). Indeed, except in the rare circumstance where there is a "clearly expressed legislative intention to the contrary," the language of the statute "must ordinarily be regarded as conclusive." See James, 478 U.S. at 606 (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)); see also United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989); Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987).

We agree with Appellant that the plain language of subsection 372a(1) does not require that the parties to an Indian adoption be alive at the time of the Indian court decree or at the time the adoption is recorded in order for the Department to be permitted to recognize such adoption in a probate proceeding. Moreover, we agree that the statute must be read as a whole and in accordance with the principle of statutory construction that, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Gozlon-Peretz v. United States, 498 U.S. 395, 404-05 (1991). Thus, read together, the two subsections of section 372a are evidence that Congress intended to require the parties to an Indian custom adoption occurring prior to the effective date of the statute to be alive when the adoption was recorded, but that Congress did not intend to repeat that requirement for Indian custom adoptions occurring after the effective date of the statute. 6/

Our analysis of the statute's plain language is consistent with our analysis in Estate of Jacob William Nicholai, where the Board decided that section 372a applied to Alaska. There, the Board noted that "[o]n its face, section 372a does not contain any language that would obviously exclude its application in Alaska. To the contrary, the statutory construction principle of expressio unius est exclusio alterius (the expression of one thing is the exclusion of others) would suggest that, because Congress specifically excluded the Five Civilized Tribes and the Osage Indian Tribe from the statute, it did not intend for there to be any other exclusions." 29 IBIA at 163.

6/ We disagree with the ALJ's conclusion that the proviso in subsection 372a(2) indicates a Congressional preference for the recognition of cultural adoptions when all of the parties are living that must be read into subsection 372a(1).

Here, because we conclude that section 372a is unambiguous and does not require that adoptive parents be living at the time an Indian custom adoption is recognized through a tribal judgment or recordation in a tribal book, we also conclude that there is no need to examine the legislative history of the statute. In his September 17, 2004 order denying rehearing, the ALJ did not analyze the language of the statute. Instead, the ALJ began his analysis with the statute's legislative history. Although the ALJ did not explicitly conclude that section 372a represented one of the "rare circumstances" in which a statute's language conflicted with clear legislative intent to the contrary, we assume that this was the ALJ's view. We therefore will look to the legislative history of section 372a for any such contrary intent.

In Estate of Victor Young Bear, 8 IBIA 254, 262-264 (1981) (finding that section 372a does not provide a superintendent with authority to judicially "grant" an adoption), the Board quoted at length from a February 8, 1940 report submitted to Congress by Secretary Ickes. The Board also quoted from this report in Estate of Irene Theresa Shoots Another Butterfly, 16 IBIA 213, 217 (1988) (finding that subsection 372a(2) applies to all adoptions, not just Indian custom adoptions). We repeat much of that language below:

> The proposed bill provides that * * * no person shall be held to be an heir of a deceased Indian by virtue of an adoption unless the adoption is evidenced by a judgment of a State or tribal court; or is a written adoption approved and recorded by the superintendent of an agency, an adoption by Indian custom made prior to the effective date of the act and recorded with a superintendent, or a recorded adoption made pursuant to a procedure established by tribal authorities. * * * The broad purpose of the bill is to require that there be a written record of each adoption. The several methods recognized for making such an adoption are those which the administration of Indian affairs has shown to be desirable. The Department now recognizes the decrees of State courts and the bill would continue this practice. Another presently recognized method of adoption is by tribal court action and this jurisdiction of tribal courts is continued. However, the expense attendant upon an action in a State court frequently compels an Indian to forego a court proceeding and some tribes have not yet established tribal courts; these difficulties the bill would meet by recognizing a third method of adoption, that of adoption by written recordation with the superintendent of an agency. Recorded adoptions made in accordance with procedures established by recognized tribal authorities would also be valid under the provisions of the bill.

> It is the present practice of this Department to recognize the so-called "Indian custom" adoption whenever sufficient evidence of the decedent's intention exists. At one time Indian custom adoptions were by formal ceremonies, but in most tribes this ancient practice has been relaxed and it is difficult to determine whether or not an adoption was actually made in a particular case. In none of the Indian custom adoptions is there a written record and the available evidence is often confusing, conflicting and of dubious character. If the bill becomes law, adoptions made in accordance with present practices by persons who died prior to the effective date of the act will be recognized by the Department. Indian custom adoptions made prior to the effective date of the act and participated in by persons who are still living can be validated by recordation with a superintendent. Since it will take some time to inform the Indians of the necessity to record Indian custom adoptions before the death of one of the parties, the act will become effective 6 months after the date of its approval.
>
> * * * The proposed act is similar to the "Crow" Act [7/] and in addition recognizes decrees of tribal courts and adoptions made pursuant to tribal procedures, and provides for the validation of Indian custom adoptions by their recordation during the lifetime of the parties.

H.R. Rep. No. 76-1694, at 2 (1940); S. Rep. No. 76-1525, at 2 (1940).

We conclude that the legislative history of section 372a does not demonstrate a "clearly expressed legislative intention" that is "contrary" to the plain language of the statute. See United States v. James, 478 U.S. at 606. We are not convinced that the statement in the 1940 report relied upon by the ALJ — that the statute would "provide[]

7/ The Crow Act was enacted by the Act of March 3, 1931, 46 Stat. 1494, and governs adoptions by Crow Indians of Montana. The Act provides:

> [H]ereafter no person shall be recognized as an adopted heir of a deceased Indian of the Crow Tribe of Indians of Montana unless said adoption shall have been by a judgment or decree of a State court, or by a written adoption approved by the superintendent of the Crow Indian Agency and duly recorded in a book kept by him for such purpose: *Provided*, That adoption by Indian custom made prior to the date of approval hereof involving probate proceedings now in process of consummation, shall not be affected by this Act.

for the validation of Indian custom adoptions by their recordation during the lifetime of the parties" — is evidence that Congress intended all Indian adoptions to be decreed or recorded during the lifetime of the parties. First, the statement re-iterates earlier language in the report referring specifically to subsection 372a(2), which applies only to adoptions made prior to the effective date of the statute: "Indian custom adoptions made prior to the effective date of the act and participated in by persons who are still living can be validated by recordation with a superintendent." The statement appears to be simply repeating the proposed statute's treatment of such adoptions. Second, we note that the statement uses the word "recordation" and does not refer to an Indian court judgment or decree. This supports the conclusion that the statement refers only to post-effective date adoptions, and not to adoptions governed by subsection 372a(1), which allows the Department to recognize adoptions supported by a judgment or decree of an Indian court.

As quoted above, the "broad purpose" of section 372a was "to require that there be a written record of each adoption." The legislative history does not show a clearly expressed intent that this written record must occur during the lifetime of the parties for all adoptions occurring after the statute's effective date. Thus, we reject the ALJ's conclusion that a tribal court decree or tribal recordation of an adoption completed after one or more of the parties has died may never be given effect, based on Congress's goal of eliminating unreliable oral testimony presented in Departmental probate proceedings. 8/

We therefore conclude that the ALJ's decision was in error and that the Traditional Council order recognizing Appellant's cultural adoption satisfies the requirements of 25 U.S.C. § 372a(1)(b) and (d). Appellant's cultural adoption should therefore be recognized as a legal adoption for purposes of the probate of Decedent's estate. As the sole legal child of Decedent, Appellant is the sole heir of Decedent's estate under 25 U.S.C. § 372a and Alaska law.

8/ As noted above, the sole issue in this case is whether the Department is precluded from recognizing Appellant's adoption because the operative tribal events occurred after the death of his parents. The evidence of Appellant's adoption is undisputed, and there is no contention of any irregularity associated with either the Traditional Council's resolution and order, or the recordation of Appellant's adoption in a book kept for that purpose. Therefore, we need not address Appellant's argument that the Department was required, as a matter of law, to give full faith and credit to the Traditional Council's resolution and order.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the September 17, 2004 denial of rehearing and reverses the May 21, 2003 order distributing Decedent's estate to his four siblings. BIA shall distribute Decedent's estate to Appellant.

I concur:

// original signed
Amy B. Sosin
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge