



INTERIOR BOARD OF INDIAN APPEALS

Estate of Gordon Lee Ward

51 IBIA 88 (01/21/2010)



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 GORDON LEE WARD) Order Affirming Decision
)
) Docket No. IBIA 08-105
)
) January 21, 2010

Inez Star Coffee (Appellant) has appealed the May 30, 2008, Order Denying Rehearing issued by Indian Probate Judge (IPJ) Albert C. Jones in the Estate of Gordon Lee Ward (Decedent), deceased Three Affiliated Tribes Indian, Probate No. P000026048IP. The Order Denying Rehearing rejected Appellant's challenge to a January 9, 2008, decision by the IPJ, which found that Decedent was the father of Dustin John Ward (Dustin) and that Dustin was Decedent's sole heir. Appellant, who is Decedent's mother, disputes Decedent's paternity of Dustin, and asserts that the IPJ erred by (1) discounting the affidavits she provided stating that Decedent had told the affiants that paternity testing had shown that he was not Dustin's father; (2) refusing to order DNA testing to definitively determine Dustin's paternity; and (3) denying her due process.

We find that the IPJ did not err in according greater weight to the notarized Acknowledgment of Paternity signed by Decedent on July 13, 1982, 4 months after Dustin's March 5, 1982, birth, and to Dustin's birth certificate identifying Decedent as Dustin's father than to the January 30, 2008, affidavits attached to the Petition for Rehearing, which asserted that Decedent had told the affiants that paternity testing done around 1994 had shown that he was not Dustin's father. We further conclude that the IPJ correctly determined that he had no authority to order DNA testing, and that his refusal to order that testing did not violate Appellant's due process rights. We therefore affirm the IPJ's Order Denying Rehearing.

Background

Decedent was born on January 1, 1956, resided in North Dakota, and died intestate on March 20, 2004.¹ Decedent never married but the Data for Heirship Findings and Family History (Form OHA-7) compiled by the Bureau of Indian Affairs (BIA) indicated that Decedent had one child, Dustin, born on March 5, 1982. Decedent's family members (his mother and his siblings), however, disputed Dustin's paternity and alleged that Decedent was not, in fact, Dustin's father.

Decedent's probate was originally assigned to IPJ P. Diane Johnson, who conducted an initial hearing in the matter on July 20, 2007, to determine the heirs and settle Decedent's trust and restricted estate. Decedent's family members challenged Dustin's paternity at the hearing, and IPJ Johnson continued the matter for 60 days to allow the submission of evidence concerning the paternity issue.² Dustin submitted a certified copy of the Acknowledgment of Paternity signed by Decedent on July 13, 1982, and a copy of his birth certificate identifying Decedent as his father; Decedent's family apparently filed no additional information.

In August 2007, responsibility for Three Affiliated Tribes's probates was transferred to the Billings, Montana, Office of Hearings and Appeals, and Decedent's probate was reassigned to IPJ Jones, who notified potential interested parties that another hearing would be held on November 8, 2007. On November 7, 2007, the day before the scheduled hearing, counsel for the family filed a motion for DNA testing and for continuance; however, due to the proximity of the hearing, counsel was informed that the hearing could not be postponed and that he should appear and present his motion at the hearing.³ The

¹ Decedent's name at birth was Gordon Lee Grady, but on April 2, 1966, his name was legally changed to Gordon Lee Ward.

² No transcript or other documentation from this hearing, other than the notice of hearing, is included in the record. Our recitation of these facts is gleaned from IPJ Jones's January 9, 2008, decision. None of the parties has suggested, nor does the record indicate, that testimonial evidence relevant to this appeal was received at the initial hearing.

³ Counsel stated that he represented Decedent's sister Connie Lien and family members. As the IPJ pointed out in his January 9, 2008, decision, the only family member who qualifies as an interested party under 43 C.F.R. § 4.201 is Decedent's mother, Inez Star Coffee, who was identified in the decision as Inez Ward Ashes. *See* 43 C.F.R. § 4.201

(continued...)

IPJ conducted the scheduled hearing on November 8, 2007, at which both Dustin and Decedent's family were represented by counsel. Decedent's family again raised the question of Dustin's paternity, and presented their request that the IPJ order paternity (DNA) testing. The IPJ orally denied the request for DNA testing, asserting that, in accordance with Board precedent, he had no authority to order such a test. Counsel for Decedent's family did not dispute the evidence presented by Dustin, but averred that the best evidence would be a DNA test. *See* Transcript at 13, 15. He asked for additional time to locate the results of the paternity test the family alleged had been conducted while Decedent was alive. Although Dustin objected to the request for continuance, the IPJ granted the family 30 days to produce the results from the alleged paternity test.

Decedent's family did not provide the results of the alleged paternity test or any additional information to refute the evidence submitted by Dustin that Decedent was his father. Instead, counsel for the family asked the IPJ to reconsider his oral denial of the request for DNA testing and to issue his decision on the renewed request in writing.

In his January 9, 2008, decision, the IPJ again denied the family's request for DNA testing, citing Board precedent holding that neither the Board nor, by extension, an IPJ has the authority to order blood or DNA testing. He also found that he and IPJ Johnson had allowed ample time for the family members to produce evidence discrediting the Acknowledgment of Paternity executed by Decedent recognizing Dustin as his son and the birth certificate identifying Decedent as Dustin's father, but that the family had failed to provide such evidence and thus had failed to meet its burden of proof. Accordingly, he rejected the family's objection to Dustin's recognition as Decedent's son, and concluded that Dustin was Decedent's sole heir under applicable North Dakota (real and personal property) and Montana (real property) laws of intestate succession.

Appellant timely filed a Petition for Rehearing. She alleged that Dustin had the burden of proving paternity by a preponderance of the evidence and that he had failed to meet that burden because (1) Decedent and Dustin's mother were not married; (2) Decedent did not hold Dustin out as his own child; and (3) Decedent had later recanted the 1982 Acknowledgment of Paternity and had told others that paternity testing had shown that he was not Dustin's father. She attached two January 30, 2008, affidavits, one that she had signed and the other signed by Ronald Eagle, one of Decedent's friends, attesting that Decedent had told them that paternity testing done in 1994 had indicated that

³(...continued)

(2008) (interested party includes any "probable or actual heir"), *as amended*, 73 Fed. Reg. 67,256, 67,288 (Nov. 13, 2008) ("[a]ny potential or actual heir").

Dustin was not his child. Citing *Estate of Anthony “Tony” Henry Ross*, 44 IBIA 113 (2007), Appellant also contended that the refusal to order DNA testing should be reconsidered and that DNA testing should be required because no law prohibited such tests and modern science supported their use. She further maintained that, given the acceptance of DNA testing as a valid method to prove paternity, the lack of other objective data supporting paternity, and the evidence of non-paternity, the IPJ’s refusal to order DNA testing violated her constitutional right to due process by denying her access to the courts.

Dustin opposed the petition. He argued that the affidavits were inadmissible hearsay entitled to no weight because they were unsupported by any hard evidence and thus had no probative value. He also contended that *Estate of Ross* did not support the request for DNA testing because that case was absolutely silent as to whether a probate judge could order DNA tests. In contrast, he cited other Board precedent, including *Estate of William Hayes Wheeler*, 41 IBIA 106 (2005), and *Estate of Paul Greenwood*, 38 IBIA 121 (2002), which explicitly held that the Board cannot order an individual to submit to DNA testing. Dustin also asserted that the Tribe’s statute of limitations to seek DNA testing, TAT Law & Order Code sec. 5-17-06, had long since expired.

In the Order Denying Rehearing, the IPJ noted that Appellant, as the party seeking rehearing, had the burden of proving that Decedent was not Dustin’s father, and therefore that she had the obligation to submit proof sufficient to dispute the documentary evidence of paternity, i.e., the Acknowledgment of Paternity and the birth certificate. He found that, rather than introducing the results of the paternity test she had continually referenced, Appellant had provided the two affidavits stating that Decedent had told the affiants in around 1994 that the results of a paternity test had proved that Dustin was not his child. The IPJ concluded that the affidavits were hearsay at best, which while admissible in administrative proceedings, were insufficient to rebut documentary evidence. He also noted that, despite allegedly knowing in 1994 that Dustin was not his son, Decedent never did anything to remove his name from Dustin’s birth certificate. Given the insufficiency of the affidavits to overcome the evidence acknowledging paternity and the lack of the results of the purported paternity test, the IPJ concluded that Appellant had failed to meet her burden of showing that Decedent was not Dustin’s father.

The IPJ again rejected Appellant’s request for DNA testing. He discounted Appellant’s reliance on *Estate of Ross* as support for such testing, pointing out that the Board did not reach the question of its authority to order DNA testing in that case. He further found that the Board’s cases that had squarely addressed the issue had uniformly held that it and IPJs lacked the authority to order blood or DNA testing, citing *Estate of Greenwood* and *Estate of Herbert Bartlett Levering*, 37 IBIA 89 (2001). The IPJ therefore concluded that,

regardless of court precedent and modern science, he had no authority to disregard Board holdings.

Finally, the IPJ found no merit in Appellant's contentions that she had been denied an opportunity to have her claims adjudicated and that due process mandated that she be allowed to obtain DNA testing. He determined that, although both he and IPJ Johnson had allowed her and her family members ample time to produce evidence contravening the legal documents establishing Dustin's parentage, they had been unable to provide evidence of the paternity testing Decedent purportedly had undergone. Since he had no authority to order DNA testing, the IPJ concluded that Appellant's due process argument failed. Accordingly, he denied Appellant's petition for rehearing.

This appeal followed.

Discussion

Standard of Proof

Appellant bears the burden of showing that an order on rehearing is in error. *Estate of Earl Cheyenne* 48 IBIA 205, 208 (2009). Disagreement with, or bare allegations concerning, a challenged decision are insufficient to satisfy this burden of proof. *Id.* Appellant has not met her burden here, and we affirm the IPJ's Order Denying Rehearing.

Analysis

On appeal, Appellant renews her three basic arguments: (1) that the IPJ erroneously disregarded the evidence of Decedent's later denial of paternity; (2) that the IPJ improperly refused to order the requested DNA test; and (3) that the IPJ's refusal to order DNA testing violated her due process rights. We find none of these arguments to be persuasive.

Appellant contends that the IPJ erred in considering Decedent's later denials of paternity as hearsay and worthy of no great weight, and asserts that those statements showed Decedent's later state of mind and should have been accorded more probative value than the earlier documentary evidence of paternity. The IPJ, however, did not refuse to consider those statements because they were hearsay; rather, he considered them and determined that, given the totality of the circumstances — including Board precedent and Decedent's failure to take any action officially disavowing his Acknowledgment of Paternity — the statements were insufficient to undermine the documentary evidence establishing that Dustin is Decedent's son. The IPJ's determination is amply supported by Board precedent holding that “[w]ritten acknowledgments of paternity, especially those signed at a time

reasonably contemporaneous with the child's birth, are persuasive evidence of paternity and are generally to be given greater weight than the recollections of witnesses." *Estate of Charles Running Bird*, 24 IBIA 136, 139 (1993); *see also Estate of Henry W. George*, 15 IBIA 49, 52 (1986); *Estate of Willard Guy*, 13 IBIA 252, 255 (1985) (where there is conflicting testimony concerning paternity, "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."). Appellant has neither alleged nor shown falsification, through alteration, of the Acknowledgment of Paternity or Dustin's birth certificate.

Instead, Appellant asserts that, given the affidavits, the documentary evidence is insufficient to meet *Dustin's* burden of proving paternity. Appellant's attempt to use the affidavits to challenge the sufficiency of Dustin's evidence to establish paternity rests on a misapprehension of the burden of proof in this case. Although Dustin had the burden of proof at the hearing, he met his burden by providing the Acknowledgment of Paternity and birth certificate, which were sufficient evidence to support the IPJ's initial decision. When Appellant sought rehearing, it was her burden, not Dustin's, to show error in the IPJ's paternity determination. *See Estate of Cheyenne*, 48 IBIA at 208; *Estate of Running Bird*, 24 IBIA at 139. The IPJ, after considering the affidavits, concluded that they did not outweigh Dustin's evidence. And on appeal, Appellant has not met her burden to demonstrate that the IPJ erred. Although Decedent and Dustin's mother were not married and Decedent did not hold Dustin out as his child, Decedent did, in fact, acknowledge his paternity of Dustin. And, despite Decedent's alleged later repudiation of his paternity of Dustin, there is no evidence that he took any steps to rescind the written paternity acknowledgment or to have his name removed from Dustin's birth certificate. We therefore find no error in the IPJ's decision to accord greater weight to the reasonably contemporaneous documents than to the later submitted testimonial affidavits.

Appellant continues to maintain that the IPJ erroneously refused to order Dustin to submit to DNA testing. Board precedent, however, firmly establishes that the Board lacks the authority to order DNA (or blood) testing to determine paternity. *See Estate of Levi Junnile Smith*, 49 IBIA 275, 280 (2009); *Estate of Cheyenne* 48 IBIA at 208; *Estate of Louis Williams*, 39 IBIA 99 n.1 (2003); *Estate of Greenwood*, 38 IBIA at 123. Appellant has not convinced us that this precedent should be revisited. We therefore find that she has failed to show error in the IPJ's refusal to order DNA testing.

Finally, Appellant insists that the failure to order DNA testing violated her constitutional right to due process because it denied her access to the court and a meaningful opportunity to have her claims adjudicated. We disagree. Appellant had ample opportunity to submit proof to support her allegations: the hearing was continued twice to

allow her to obtain evidence documenting the results of the alleged blood test showing that Decedent was not Dustin's father or to produce other evidence contravening the Acknowledgment of Paternity and Dustin's birth certificate, and the IPJ also granted her additional time to provide any information procured through her belated discovery requests. Despite this expanded opportunity to furnish supplemental evidence, Appellant was unable to find information about the alleged blood test and relied instead on affidavits attesting to Decedent's subsequent disavowal of paternity. Although Appellant cites *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982), for the proposition that short time lines bar access to the courts, that case is inapposite here because Appellant had sufficient time to produce evidence supporting her claims. And the IPJ's refusal to order DNA testing, comporting as it does with Board precedent, does not change that conclusion. Accordingly, we find that Appellant has not shown that her due process rights were violated.

Conclusion

Appellant has not met her burden of showing error in the IPJ's Order Denying Rehearing.

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 affirms the May 30, 2008, Order Denying Rehearing.

I concur:

// original signed
Sara B. Greenberg
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.