



INTERIOR BOARD OF INDIAN APPEALS

Estate of Martha Matilda Bordeaux

53 IBIA 53 (02/28/2011)



United States Department of the Interior

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

ESTATE OF MARTHA MATILDA) Order Affirming Decision
BORDEAUX)
) Docket No. IBIA 09-054
)
) February 28, 2011

We affirm the Order Denying Rehearing, dated February 5, 2009, which left intact the February 20, 2008, Order Determining Heirs, in which Indian Probate Judge (IPJ) M. J. Stancampiano held that Appellant Jacqueline Bordeaux was adopted by Orville and Dorothy Krebs and, therefore, is not entitled to share in the estate of Appellant’s biological mother, Martha Matilda Bordeaux (Decedent), deceased Rosebud Sioux Indian, Probate No. P000040763IP. Appellant has not met her burden of showing error in the IPJ’s Order Denying Rehearing.

Facts

Appellant was born in 1959 in South Dakota, the 4th and middle child of 7 born to Decedent.¹ In May 1965, the State of South Dakota terminated Decedent’s parental rights over Appellant and two of her siblings, June Bordeaux (June) and Bryan John Bordeaux, a.k.a. John Allen Higgins, a.k.a. John Iyeska Higgins, a.k.a. John Allen Jumping Elk (John). Order Surrendering Children, *In the Matter of June Rose Bordeaux, Jacquelyn Bordeaux and Bryan John Bordeaux* (Mellette County Court, S.D., Juv. Div., May 11, 1965) (Order Surrendering Children).² The court appointed Lutheran Social Services (LSS) as Appellant’s guardian and authorized LSS to consent to Appellant’s legal adoption; different custodial arrangements were made for June and John. At or after this time, Appellant was placed with Orville and Dorothy (Kersten) Krebs who apparently raised her thereafter in their home as their daughter. Sometime in or before March 1967, South Dakota issued a second birth certificate for Appellant that identifies Orville R. Krebs and Dorothy M. Kersten as the parents of “Jacqueline Marie Krebs” and listed their residence as Lyman, Nebraska. A copy of the second birth certificate is found in the record and bears a certification date of March 22, 1967.

¹ Appellant’s original birth certificate does not identify her biological father.

² The Order Surrendering Children does not bear a docket number.

Decedent died intestate on March 9, 2006, in South Dakota, where she had been residing. At the time of her death, Decedent was possessed of trust assets primarily consisting of land or mineral interests in several allotments on the Rosebud and Crow Creek Reservations in South Dakota.³

The probate of Decedent's estate initially was referred to Diane Zephier, Attorney Decision Maker (ADM), pursuant to 43 C.F.R. § 4.211 (2006). Following an informal hearing,⁴ the ADM issued a Decision on August 21, 2007, in which she determined that Appellant and John had been adopted and were, therefore, ineligible under South Dakota law to inherit from the estate of their biological mother. Appellant sought a hearing de novo, which resulted in the transfer of this probate to the IPJ.⁵ The IPJ reviewed the documentary evidence in the record, and concluded that although no formal adoption papers appeared therein, the evidence was sufficient for him to find that Appellant had been legally adopted and, therefore, was barred under South Dakota law from inheriting from her biological mother. He based his findings of Appellant's adoption on Appellant's second birth certificate that lists a different set of parents than Decedent, a written statement by Appellant in which she referred to herself as "adopted," and a record of a conversation between BIA contractor Chickasaw Nation Industries⁶ and Appellant's adoptive father

³ According to the Title Status Reports in the record, the largest land interest owned by Appellant was a 29/540 (5.4%) interest in Allotment No. 2395-5; the smallest land interest was a 1/97200 (0.001%) interest in Allotment No. 1537. All of these allotments are located on the Rosebud Reservation. In addition, Appellant also owned mineral interests only in allotments on the Rosebud Reservation, each of which was less than 1% of the whole. Appellant also had an Individual Indian Money account. This account had a balance of \$511.82 at the end of October 2007.

⁴ Informal hearings are "meeting[s] convened by an attorney decision maker in which interested parties present relevant information on uncontested issues." 43 C.F.R. § 4.201 (2006) (definition of "informal hearing"). Informal hearings ordinarily are not recorded.

⁵ A hearing was scheduled for November 6, 2007, by the IPJ. Appellant apparently intended to participate in the hearing by telephone. According to the transcript, no one appeared in person or by telephone for the hearing, but Appellant asserts that she attempted to phone in, and we accept her assertion for purposes of this decision. We attach no significance to this hearing and the absence of any testimony.

⁶ Apparently, BIA contracted some or all of its probate-related work to the Chickasaw Nation Industries, which is owned by the Chickasaw Indian Nation of Oklahoma. *See* www.chickasaw.com/index.cfm?content=about/companyoverview; <http://www.chickasaw.com/index.cfm?content=customers/company/doi###>.

concerning Appellant's adoption. Order Determining Heirs, Feb. 20, 2008, at 2. In this conversation, Krebs told the contractor that Appellant "was adopted in 1965 [through] a Lutheran Adoption Agency in Omaha, NE. He also stated that he had a lawyer take care of the whole procedure, and that he never did get any document or adoption papers." Letter from Clint Sinkular to Lutheran Family Services, Sept. 26, 2006.

Thereafter, Appellant sought rehearing. In support, she submitted the sworn statement of her adoptive father in which he declares that he "never received any legal decree of [Appellant's] adoption." Krebs statement, Mar. 7, 2008. In his February 5, 2009, Order Denying Rehearing, the IPJ reaffirmed his prior decision. The IPJ did not question the veracity of Krebs' statement, but found that it did not assert that Krebs and his wife had *not* adopted Appellant, did not explain why the second birth certificate identifies Krebs and his wife as Appellant's parents, and left several other questions unanswered. In addition to the reasons set forth in his Order Determining Heirs, the IPJ also found that the following evidence supported his finding that the adoption took place: the 1965 order terminating Decedent's parental rights and granting LSS authority to consent to an adoption of Appellant; and a written statement by Appellant's biological half-brother, Casey Bordeaux (Casey), in which he stated that Appellant was adopted by a white couple.

Throughout the course of the various proceedings in this probate, BIA, the BIA contractor (Chickasaw Nation Industries), and Appellant contacted several agencies in their efforts to obtain a copy of Appellant's formal adoption papers. The record contains letters sent to and received from Lutheran Family Services, Nebraska's Department of Health and Human Services/Division of Children and Family Services, South Dakota's Department of Health/Office of Data, Statistics, and Vital Records, and South Dakota's Department of Social Services/Division of Child Protection Services. None were able to provide adoption papers for Appellant.⁷ The record does not reflect that LSS or any court in Nebraska was contacted to determine if one of these offices had any records of Appellant's adoption.

This appeal followed.

⁷ South Dakota's Department of Social Services informed Appellant that "[a]fter conducting a search of our system, it has been discovered that we do not have any of your adoption record[s] in our files." Letter to Appellant from Dept. of Social Services, Oct. 22, 2007. Nine months later, in response to an inquiry from BIA, the same individual in the Department of Social Services wrote BIA to say, "[a]fter conducting a search of our system, I can confirm that [Appellant] was adopted on December 21, 1966." Letter to BIA from Dept. of Social Services, July 2, 2008. A copy of a computer printout, reflecting this latter information, is found in the record.

Discussion

Appellant continues to maintain that she is eligible to share in Decedent's estate as her child because, in the absence of a copy of an adoption decree in the record, she cannot be determined to have been "legally" adopted. We disagree. The absence of a formal decree of adoption in the probate record does not, as a matter of law, compel a finding that no adoption occurred. Instead, we must look at the evidence to determine whether it is sufficient to establish that a legal adoption took place. We find that the evidence in the record is sufficient to find that Appellant was legally adopted by the Krebs and therefore we affirm the IPJ's Order Denying Rehearing.

I. Standard of Review

We review de novo both the sufficiency of the evidence and legal determinations. *Gray v. Great Plains Regional Director*, 52 IBIA 166, 172 (2010). Appellant bears the burden of establishing error in the Order Denying Rehearing. *Id.*; *Estate of Kathy Ann Bullchild*, 48 IBIA 235, 237 (2009).

II. Applicable Law of Intestate Distribution

For the estates of those Indian decedents who died before June 20, 2006, we look to state law to determine the heirs in an intestacy proceeding: The law of the state where the decedent resided at the time of death governs the distribution of trust personalty while the law of the state where the decedent's real property interests are located governs the distribution of real property interests, and any income from that property that accrues after the decedent's death. *Estate of Lucille Kingbird Owens*, 46 IBIA 306, 307 n.2 (2008).⁸ Whether a child may inherit through intestacy from a biological parent after parental rights have been terminated and the child has been adopted also is determined according to the substantive law that governs the distribution of the assets. *See Estate of Bull Child*, 48 IBIA at 238; *Estate of Richard Doyle Two Bulls*, 11 IBIA 77, 82-84 (1983). Appellant does not dispute the application of state law to these proceedings.

South Dakota provides the substantive law for the distribution of Decedent's trust assets because she resided in South Dakota at the time of her death and because her trust

⁸ With certain exceptions, the American Indian Probate Reform Act of 2004 (AIPRA) governs the probate of trust assets for Indians who died on or after June 20, 2006. *See* 25 U.S.C. § 2206; *Estate of Reginald Paul Walkingsky*, 52 IBIA 233, 233 n.1, *recons. denied*, 52 IBIA 270 (2010).

real property interests are found in that state. Under South Dakota law, the property of an intestate decedent who dies without a surviving spouse descends in equal shares to her surviving descendants by representation. *See* S.D. Codified Laws § 29A-2-103(1). South Dakota law also provides in relevant part that “[f]or purposes of intestate succession by, from, or through a person, an adopted individual is the child of that individual’s adopting parent or parents *and not of that individual’s birth parents.*” *Id.* § 29A-2-114(b) (emphasis added).

III. Analysis

1. Can a Legal Adoption be Proven When a Formal Decree has not been Produced?

Appellant argues that, without the production of a formal decree of adoption, she must be found not to have been adopted as a matter of law, and therefore entitled to share in the distribution of Decedent’s estate. She argues that adoption may only be established (1) in accordance with 25 U.S.C. § 372a, or, notwithstanding § 372a, (2) only through production of the adoption decree itself. We disagree.

We begin with 25 U.S.C. § 372a. By its terms, § 372a applies only in those situations in which a putative heir maintains that he or she was adopted by the Indian decedent. *See* 25 U.S.C. § 372a (“no person shall be recognized as an heir of a deceased Indian by virtue of an adoption” unless certain requirements are met). As we explained in *Estate of Richard Crawford*, 42 IBIA 64, 68 (2005), a decision cited by Appellant, § 372a “applies *when an individual seeks to inherit from an Indian decedent based on having been adopted into the decedent’s family.*” Emphasis added). Here, Appellant is not attempting to inherit as Decedent’s adopted child, but as Decedent’s biological child. As a result, § 372a has no applicability here.⁹

To the extent that Appellant argues, apart from § 372a, that adoption may only be established by production of a formal decree of adoption, we disagree. Appellant cites no

⁹ Because § 372a does not apply to this case, the remaining decisions cited by Appellant to show “[t]he weight given by the . . . Board of Indian Appeals [Board] to the requirements of 25 U.S.C. § 372a,” Opening Brief at 2, are likewise irrelevant. In each of the cited decisions, the Board was asked to review decisions concerning adoptions *by* the Indian decedent. We note, however, that although § 372a sets forth various substantive requirements for establishing a valid adoption by an Indian decedent, it does not address the sufficiency of evidence necessary to prove that a relevant requirement is satisfied.

law in support of this position. Rather, we hold that a formal adoption may be established by a preponderance of the evidence. *See* 2 C.J.S. Adoption of Persons § 132 (1972).

2. Is the Evidence of Appellant's Adoption Sufficient?

We have conducted a *de novo* review of the evidence to determine whether it is sufficient to support the IPJ's determination that Appellant was adopted, and we conclude that it is. In particular, viewing the record as a whole, and in the absence of contrary evidence that Appellant was not formally adopted, we find the following evidence sufficient:

1. Decedent's parental rights to, for, and over Appellant were terminated in 1965 when the state court entered its Order Surrendering Children. A legal adoption may not take place without the termination of the rights of the biological parent(s), either voluntarily or involuntarily. The Order Surrendering Children specifically terminated the parent-child relationship, and also expressly authorized LSS to consent to Appellant's adoption.¹⁰

2. According to a computer entry in the records of the South Dakota Department of Social Services, Appellant was adopted on December 21, 1966.

3. Appellant's second birth certificate identifies the Krebs as her parents, and not Decedent. This birth certificate was certified in 1967, after the Order Surrendering Children issued and after the date recorded with the Department of Social Services as the date of Appellant's adoption. The dates of the above three documents are consistent with one another.

¹⁰ In some, but not all, jurisdictions, an order terminating parental rights also terminates the right of the child to inherit from the parent whose rights have been terminated. *See, e.g.*, Standing Rock Heirship Act (Standing Rock Act), Pub. L. No. 96-274, § 3(c), 94 Stat. 537, 538; Mich. Comp. Laws § 700.2114(3) *but see* Mont. Code Ann. § 41-3-611 (where parental rights are involuntarily terminated and no adoption has occurred, all rights and obligations ordinarily flowing from the parent-child relationship are terminated *except* the right of the child to inherit from the parent). South Dakota law apparently is silent on whether an order terminating parental rights also terminates any right the child may have to inherit from that parent. Therefore, we do not hold that the severance of parental rights *ipso facto* renders Appellant ineligible to share in Decedent's estate, only that termination of such rights, as an expected corollary to a child's adoption by others, was evidence to support a finding that Appellant was adopted.

4. The statement of Appellant’s adoptive father confirming to the BIA contractor that the Krebs retained an attorney to finalize Appellant’s adoption and that Appellant “was adopted in 1965.”¹¹

In addition to the foregoing, we also note that both Appellant and Casey submitted sworn statements attesting to Appellant’s adoption, which are consistent with the above evidence of record. These statements, however, are of limited probative value and we discount them accordingly. Appellant left the date of her adoption blank and now argues that when she made the statement, she was unaware of what constituted a “legal” adoption. And neither Casey nor Appellant identify any foundation for their belief that Appellant was legally adopted. Therefore, we give these statements little or no weight, and find the government records identified above to be sufficient.

Appellant makes five arguments, none of which we find persuasive. First, Appellant argues that all of the evidence is “circumstantial.” Opening Brief at 2. Circumstantial evidence is indirect evidence, and may be relied upon to establish certain facts where, as here, direct evidence such as Appellant’s adoption decree is missing. Thus, the IPJ did not err by considering circumstantial evidence. Rather, his task, as is ours, was to determine if the circumstantial evidence was probative, and, if so, what weight to give the evidence. For example, we give greater weight to the independent records of government agencies, such as the courts and the Department of Social Services, and less weight to conclusory statements by witnesses who do not necessarily have firsthand knowledge of whether an adoption decree was entered, e.g., statements by Appellant and Casey. Taking the evidence as a whole, we conclude that the evidence is sufficient to support the IPJ’s finding that Appellant was adopted.

Second, Appellant urges us not to rely on the second birth certificate because she was sent a copy of her original birth certificate when she wrote to South Dakota’s Office of Vital Record and it “brings into question the authenticity of the birth certificate (amended?).” Opening Brief at 4. It is Appellant’s burden to prove that the second birth certificate is fraudulent or is not authentic and, therefore, lacking in probative value. The fact that she was able to obtain a copy of her original birth certificate does not, without more, undermine the authenticity of the second birth certificate. Appellant does not show that, where a child has been adopted, the child’s original birth certificate is destroyed or is no longer available. Moreover, we have examined the second birth certificate to determine

¹¹ Although the year that Krebs asserts as the year of adoption (1965) is at odds with the year reflected in South Dakota’s records (1966), we do not find that the one year difference affects the significance of his testimony that the adoption did occur.

whether it reflects any alteration of the original, and we find no such evidence. Therefore, we find no merit in Appellant's attempt to challenge the authenticity of the second birth certificate.¹²

Third, Appellant challenges the "great evidentiary weight" that the IPJ gave to the second birth certificate and his conclusion that "States do not make changes on birth certificates absent court order or statutor[il]y authorized procedures." Opening Brief at 5. We agree with the IPJ, and note that South Dakota law requires its Department of Health, following the formal adoption of a child born in that state, to issue a new birth certificate bearing the adopted child's new name and the names of the adopting parents unless specifically requested not to do so. S.D. Codified Laws § 34-25-16.1. Appellant offers no reasonable explanation for how the State of South Dakota could have issued the second birth certificate without sufficient evidence of a legal adoption. Thus, we are not convinced that the IPJ erred in giving significant weight to the second birth certificate as evidence that a legal adoption occurred.

Fourth, Appellant contests the assignment of any weight or probative value to the sworn statements, one written by her and one written by her half-brother, Casey Bordeaux, in which both state that Appellant was adopted. Appellant argues that the statements are not dated, there is no context provided for them, and at the time she made her statement she was not aware of what was necessary for showing a legal adoption. Both statements were handwritten on the reverse side of the Family History Affidavit form that Appellant and Casey separately completed for probate of Decedent's trust estate. The forms were certified as true to the best of the signers' knowledge, and notarized on September 19, 2006. As the IPJ noted, both Casey and Appellant asserted in the course of this probate proceeding that she was adopted out of Decedent's family, and that evidence is consistent with the IPJ's conclusion. We agree with Appellant, however, that neither statement should be given much probative value because, while both may have *believed* that Appellant was adopted, neither affiant identifies the foundation for that belief, nor did either affiant assert that Appellant was validly and legally adopted.

Finally, Appellant argues that, if, as the IPJ suggested, the adoption took place in Nebraska where the Krebs at one point resided, "one would expect a plethora of legal

¹² We note that the copy of Appellant's original birth certificate in the record is stamped "NOT FOR LEGAL IDENTIFICATION PURPOSES," but we cannot determine whether it was so stamped when the second birth certificate (which is not similarly stamped) was issued or whether only the copy provided to Appellant in 2008 was stamped, and not the original.

documents and correspondence” to appear in the record before the Board. Opening Brief at 5. She contends, and we agree, that the record reflects some effort by Appellant and by BIA to locate Appellant’s adoption records in South Dakota and in Nebraska. But, there is no evidence in the record reflecting contact with any courts in the State of Nebraska or with LSS.¹³ Moreover, although the IPJ stated that the evidence indicated that the adoption occurred in Nebraska, we cannot, in fact, determine in which state it actually occurred. The fact remains that no adoption decree has been produced, and the evidence of an adoption comes from South Dakota state records. As unsatisfactory as this result may be to Appellant, we cannot conclude that the *absence* of records from Nebraska somehow outweighs the evidence that a legal adoption did occur. In the 45 years since Appellant went to live with the Krebs and since the second birth certificate was created, the adoption documents inadvertently may have been lost or destroyed, but that does not mean Appellant was not legally adopted.

Conclusion

Appellant has not carried her burden of showing error in the IPJ’s denial of rehearing. In our de novo review of the law and the sufficiency of the evidence supporting the IPJ’s determination that Appellant was, in fact, adopted, we agree that his finding is well-supported.

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 IPJ’s February 5, 2009, Order Denying Rehearing.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

¹³ The BIA contractor contacted Lutheran Family Services of Nebraska, Inc., which apparently provided a copy of the Order Surrendering Children but did not provide any other information. *See* fax from Lutheran Family Services, Oct. 3, 2006. It does not appear from the record that LSS was contacted.