



INTERIOR BOARD OF INDIAN APPEALS

Estate of Theodore Shockto

2 IBIA 224 (04/12/ 1974)

Also published at 81 Interior Decisions 177



United States Department of the Interior

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

ESTATE OF THEODORE SHOCKTO

(Deceased Unallotted Prairie Band Potawatomi Indian)

IBIA 74-1

Decided April 12, 1974

Appeal from an Administrative Law Judge's decision denying petition for rehearing.

Reversed and remanded.

Indian Probate: Divorce: Indian Custom: Generally

A divorce in accordance with Indian custom may be accomplished unilaterally by either of the parties to a marriage. The fact of a separation, plus an intention on the part of at least one of the parties that the separation shall be permanent, established by competent evidence is sufficient to terminate a marriage.

An Indian custom divorce dissolves a ceremonial marriage as well as an Indian custom marriage.

Before an intention on the part of at least one of the parties that the separation shall be permanent can be inferred, the basis for it must be established by convincing evidence because public policy favors the continuity of the matrimonial relationship.

Indian Probate: Marriage: Indian Custom: Generally

In the absence of controlling federal legislation or formal tribal action, marriages of Indians living in tribal relation may be contracted and dissolved in accordance with Indian custom.

Indian Probate: State Law: Applicability to Indian Probate, Intestate Estates:
Generally

The Department is required to apply the laws of state in which the allotment is located in determining the heirs of deceased allottees.

Indian Probate: Secretary's Authority: Generally

The Secretary of the Interior in the absence of specific legislation, has exclusive jurisdiction to determine the heirs of an Indian who dies intestate before the expiration of the trust period of the decedent's land.

APPEARANCES: John E. Kruschke, Esq., for appellant, Mary Jane Shockto.

OPINION BY ADMINISTRATIVE JUDGE WILSON

This appeal filed by Mary Jane Shockto through her attorney, hereinafter referred to as appellant, is from an order denying

petition for rehearing duly made and entered on January 11, 1973, by Administrative Law Judge Vernon J. Rausch.

Theodore Shockto, hereinafter referred to as the decedent, an unallotted Prairie Band Potawatomi Indian, died intestate December 5, 1970, a resident of the State of Wisconsin, possessed of inherited trust interests situated in the State of Kansas. A hearing was held and concluded by Administrative Law Judge Vernon J. Rausch on September 16, 1971. Thereafter, on January 11, 1973, an order determining the heirs of decedent was duly made and entered by the Judge. The appellant in said order was found not to be an heir.

The appellant on March 8, 1973, timely filed a petition for rehearing from the order of January 11, 1973, supra. Although not alleging any newly discovered evidence which would alter the findings of fact set forth in the decision of January 11, 1973, the appellant requested a rehearing on the ground that the Judge erred in finding that an Indian custom divorce existed between the decedent and appellant. The following assertions were made as basis therefor:

1. Although for many years prior to the death of Theodore Shockto, this petitioner, his wife by civil ceremony, had not resided with Theodore Shockto, she continued as his wife and to

her knowledge her husband did not at any time take on another wife by Indian custom, and she, the petitioner, considers herself to be the wife of Theodore Shockto, deceased, by virtue of their civil ceremony.

2. Although Margaret Thunder claims to be the wife of Theodore Shockto by Indian custom, they did not reside on the reservation, but did in fact reside in Monico, Oneida County, State of Wisconsin.

3. There was testimony in the hearing by this affiant [sic] to the effect that she and her husband had planned to move to Kansas shortly before his death, and she had seen and talked to him and been with him prior to his death which would eliminate a presumption that separation was permanent.

The Judge denied the petition on April 30, 1973 and affirmed his prior order of January 11, 1973, wherein, among other things, he had found:

(1) That the ceremonial marriage between the decedent and the appellant had been terminated by an Indian custom divorce, and

(2) That a valid Indian custom marriage existed between the decedent and Margaret Thunder notwithstanding the Act of August 1953, Public Law 280, 67 Stat. 588, 28 U.S.C. § 1360 (1970), and

(3) That Margaret Thunder as the surviving spouse was entitled to an undivided one-half interest in the decedent's estate under the Kansas Laws of Intestate Succession.

It is from the foregoing decision of April 30, 1973, that the appeal herein has been taken.

In support of her appeal, the appellant in effect contends:

(1) That no Indian custom divorce was accomplished between the appellant and decedent prior to the effective date of Public Law 280, supra.

(2) That no Indian custom marriage could have taken place subsequent to the passage of Public Law 280, supra, and

(3) That the appellant by virtue of Public Law 280, supra, was the surviving spouse of the decedent and entitled in such capacity to share in the decedent's trust estate.

There appears to be only two issues in this case which need resolving, viz:

(1) Was an Indian custom divorce accomplished between the decedent and appellant prior to August 15, 1953, the effective date of Public Law 280?

(2) Could an Indian custom marriage be accomplished subsequent to August 15, 1953, the effective date of Public Law 280?

An examination of the record clearly indicates the lack of evidence to substantiate an Indian custom divorce prior to the passage of Public Law 280. No clear intent on the part of the decedent to permanently separate from the appellant prior to August 15, 1953 appears in the record. On the contrary, from the testimony it appears that the intent on the part of the decedent to permanently separate from appellant took place after the effective date of Public Law 280.

The Board is not unmindful that a divorce by Indian custom may be accomplished by one of the parties to the marriage by the separation plus an intention on the part of at least one of the parties that the separation shall be permanent. Estate of Hugh Sloat, IA-74 (April 10, 1952). Moreover, this result is also

accomplished even though the parties concerned had gone through the form of a ceremonial marriage. Estate of Noah Bredell, 53 I.D. 78 (April 12, 1930).

However, before an intention on the part of at least one of the parties that the separation shall be permanent can be inferred, the basis for it must be established by convincing evidence, because considerations of public policy favor the continuity of the matrimonial relationship. Estate of Sarah Bruner, IA-2 (September 28, 1949).

There appears to be no question in the case at bar that an Indian custom divorce could have been accomplished between the decedent and appellant in the absence of special statutory authorization. However, such does not follow in this case because of an intervening statute [Public Law 280] which in essence required marriages among Indians in Wisconsin to be accomplished and terminated in accordance with state law subsequent to its passage on August 15, 1953.

The statute in question or in issue herein is the Act of August 15, 1953, 67 Stat. 588, codified in 28 U.S.C. § 1360 (1970), whereby Congress vested in five states - California, Oregon, Minnesota,

Nebraska, and Wisconsin and Alaska by later amendment - jurisdiction, civil and criminal, over Indians without any further required legislative action on the part of the respective states.

Only sections 4(b) and (c) of the Act appear relevant and applicable to the issues before this Board. The foregoing sections of the Act provide:

4(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

4(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

The Judge in his decision apparently takes the position that 4(b) of the Act quoted above reserves to the Department of the Interior exclusive jurisdiction in such matters, among which, includes the right to recognize Indian custom marriages and divorces for

inheritance purposes. Apparently the Judge is of the further opinion that under 4(c) of the Act recognition of Indian custom marriages and divorces is not inconsistent with the civil law of Wisconsin.

We are not wholly in agreement with the Judge in his conclusions. We agree fully that the right to adjudicate in probate proceedings rests with the Department of the Interior pursuant to the Act. We, however, do not agree that the Act in the adjudicatory process precludes the Department from applying state law relative to the issue of marriage or divorce. Application of state law in no way vests or attempts to vest jurisdiction in the state over such matters. It merely sets forth a standard or criteria to be applied in resolving questions of marriage and divorce. Furthermore, we do not agree with his conclusion that the recognition of Indian custom marriage and divorce are not inconsistent with the civil law of Wisconsin relative to domestic relations.

The legislative history of Public Law 280 appearing in Vol. 2 U.S.C., Congressional and Administrative News (83rd Congress, 1st Sess., 1953) indicates that the legislation had two coordinate aims: first, withdrawal of federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to federal laws applicable to Indians as such. We find nothing therein that would lead us to conclude that Indians were intended to be exempt from state laws regarding domestic relations.

The purpose of Public Law 280 is set forth quite clearly and succinctly in Rincon Band of Mission Indians v. San Diego County, 324 F. Supp. 371 (D.C. Calif. 1971) wherein the Court stated:

It appears that the purpose of Congress in passing Public Law 280 was to permit the Indians to become full and equal citizens of their respective states and to terminate the wardship of the federal government over their affairs. * * *

Section 4(c) of the Act gives recognition to any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community, provided such are not inconsistent with any applicable civil law of the state. (Emphasis supplied.)

In the case at bar, giving recognition to Indian customs regarding divorces and marriages, subsequent to August 15, 1953, would be clearly inconsistent with the civil law of the State of Wisconsin. Accordingly, we must conclude that by virtue of section 4(c) of the Act that the purported Indian custom marriage between the decedent and Margaret Thunder Shockto cannot be recognized for inheritance of the decedent's trust property.

In view of the reasons hereinabove set forth, our answer to the two questions hereinabove posed, must be in the negative. Accordingly, the Board finds:

(1) That no Indian custom divorce was accomplished between the decedent and appellant, both residents of Wisconsin, prior to the effective date of Public Law 280, and

(2) That by virtue of Public Law 280 the purported Indian custom marriage between decedent and Margaret Thunder Shockto, also a resident of Wisconsin, cannot be recognized, and

(3) That the appellant was the legal surviving wife of the decedent and therefore entitled to inherit in his estate in such capacity.

Accordingly, it follows that the decision of the Administrative Law Judge dated April 30, 1973, denying the appellant's petition for rehearing should be reversed and remanded to him for entering an order consistent with the views and findings set forth herein.

NOW, THEREFORE by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Administrative Law Judge's decision of April 30, 1973, is hereby REVERSED and the matter is hereby REMANDED to the said Judge for the purpose of entering an order consistent with the findings herein.

This decision is final for the Department.

//original signed
Alexander H. Wilson
Administrative Judge

I concur:

//original signed
Mitchell J. Sabagh
Administrative Judge