



INTERIOR BOARD OF INDIAN APPEALS

Estate of Jonah Crosby

2 IBIA 289 (05/15/1974)

Also published at 81 Interior Decisions 279

Judicial review of this case:

Remanded, *Price v. Morton*, No. 74-0-189 (D. Neb. Dec. 16, 1975)



United States Department of the Interior

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

ESTATE OF JONAH CROSBY

(Deceased Wisconsin Winnebago Unallotted)

IBIA 74-40

Decided May 15, 1974

Petition to reopen.

Denied and dismissed.

Indian Probate: Generally

The Department of the Interior does not have authority to declare a state statute unconstitutional as being in violation of the Constitution of the United States.

APPEARANCES: Legal Aid Society of Omaha, by Patrick A. Parenteau, for Robert Price, petitioner.

OPINION BY ADMINISTRATIVE JUDGE WILSON

This matter comes before the Board on a petition filed by the Legal Aid Society of Omaha, Nebraska for and in behalf of Robert Price, hereinafter referred to as petitioner, requesting a reopening of the above-captioned estate for the purpose of allowing the petitioner to file a petition for rehearing on an order determining heirs entered by Administrative Law Judge Vernon J. Rausch on January 7, 1974.

In support of the petition the petitioner alleges:

(1) That petitioner has been aggrieved by the order determining heirs in the said estate in that he has been wholly barred from receiving any intestate distribution by operation of Nebraska Statutory Law § 30-109, Nebraska R.S. (1965) as found by the Administrative Law Judge in his decision dated January 7, 1974.

(2) That Nebraska R.S. (1965) § 30-109 is unconstitutional in that it violates the rights guaranteed to petitioner under the equal protection clause of the 14th Amendment to the United States Constitution, and, that the Administrative Law Judge's reliance upon such statute as a basis for determining that petitioner is

not entitled to share, as an heir at law, and any distribution of the intestate's estate herein is, therefore, erroneous.

The Nebraska statute in question reads as follows:

Every child born out of wedlock shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as an heir of his mother, and, shall inherit his or her estate in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried and had other children, and his father, after such marriage, shall have acknowledged him, as aforesaid, or adopted him into his family, in which case such child and all legitimate children shall be considered as brothers and sisters, and on the death of either of them intestate, and without issue, the other shall inherit his estate, and the heirs, as hereinbefore provided, in like manner as if all the children had been legitimate, saving to the father and mother respectively their rights in the estate of all such children as provided hereinbefore, in like manner as if all had been legitimate.

The petitioner assigns several reasons why a petition for rehearing was not filed in the matter under 43 CFR 4.21. However, those reasons need not be considered as it is quite apparent that the petitioner is attacking the Judge's decision of January 7, 1974, strictly

on the constitutionality of the Nebraska illegitimacy statute, supra.

A petition to reopen, under 43 CFR 4.242 requires that it be filed with the Administrative Law Judge for action from which an appeal may then be taken. This has not been done in the case at bar. However, since the basis for the petition involves only the constitutionality of a statute, it would be futile and certainly would serve no useful purpose to remand the petition to the Administrative Law Judge for his consideration and action since he is without authority to declare a statute unconstitutional. The Judge under the circumstances would have no alternative but to deny the petition and from which an appeal could then be taken. Accordingly, the Board, in order to expedite the matter will exercise its jurisdiction, which it holds concurrently with the Administrative Law Judge, in disposing of the petition herein.

This Board, like the Administrative Law Judge is without authority to declare a state statute unconstitutional. Only the Courts have the authority to do so. 3 Davis, Administrative Law Treatise, section 20.04; Public Utilities Commission of California v. United States, 355 U.S. 534, 539 (1958).

Moreover, it is the policy of the Department of the Interior to expedite the exhaustion of a petitioner's administrative remedy whenever the petitioner, in good faith, raises the issue as to the constitutionality of an act the Department is charged with following, so that he may pursue the proper relief in the Courts. Estate of Benjamin Harrison Stowhy, 1 IBIA 269, 79 I.D. 428 (1972) and Estate of Florence Bluesky Vessell, 1 IBIA 312, 79 I.D. 615 (1972). Such a policy not only affords prompt relief to the petitioner but also, assists Departmental officials in meeting their responsibilities.

Since no other grounds, other than the constitutional issue, are given in support of the petition herein, the petition must be denied and dismissed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, it is hereby ordered:

- (1) That the petition herein is DENIED and DISMISSED, and
- (2) That this decision shall be executed and distribution made thereof by the Administrative Law Judge in accordance with the provisions of 43 CFR 4.296.

