



INTERIOR BOARD OF INDIAN APPEALS

Estate of Alvin Hudson

5 IBIA 174 (09/02/1976)

Judicial review of this case:

Dismissed, *Hudson v. United States*, No. C76-227T (W.D. Wash. Mar. 6, 1979)

Affirmed, No. 79-4305 (9th Cir. Feb. 26, 1981)



# United States Department of the Interior

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

## ESTATE OF ALVIN HUDSON

IBIA 76-32

Decided September 2, 1976

Appeal from a decision denying Petition for Rehearing.

Reversed.

1. Indian Probate: Evidence: Generally

In order for an administrative law judge's finding to be upheld or sustained, the finding must be supported by a preponderance of the evidence.

APPEARANCES: Ziontz, Pirtle, Morriset, Ernstoff & Chestnut, Attorneys for Appellants, Lois Saxton, Vernadine Stearns, Mildred Anderson, and Ivan Cleveland; Bitar & Morgan, Attorneys for Appellee, David Russell Hudson.

### OPINION BY ADMINISTRATIVE JUDGE WILSON

The above-entitled matter comes before the Board on an appeal taken from an administrative law judge's decision denying Petition for Rehearing.

Pertinent facts relative to the matter herein are as follows:

Alvin Hudson, Quinault Allottee No. 1139, hereinafter referred to as decedent, died intestate on January 13, 1949.

On December 30, 1949, after proper proceedings, an Order Determining Heirs was issued wherein Lois Saxton, Vernadine Stearns, Mildred Anderson and Ivan Cleveland, Appellants herein and hereafter referred to as such, were found to be the heirs of the decedent.

Under date of August 21, 1968, David Russell Hudson, hereinafter referred to as Appellee, filed a Petition to Reopen the estate with the late Hearing Examiner, Richard J. Montgomery, who

had probate jurisdiction of the estate. The petition was denied by the Examiner on August 27, 1968, for untimely filing as provided by the regulations in effect at that time, 25 CFR 15.18(a).

The Appellee filed an appeal from the denial with the Regional Solicitor, United States Department of the Interior, Portland, Oregon, who thereafter on May 29, 1969, reversed the Examiner's denial and remanded the matter for further hearing.

Two hearings were held subsequent thereto by Examiner Montgomery on April 13, 1972, and April 24, 1973, wherein oral testimony and documentary evidence were presented.

Based on the record, Administrative Law Judge Robert C. Snashall on April 9, 1975, issued an order wherein he found the Appellee to be the son of the decedent and the sole heir of the decedent's trust estate. Accordingly, the Judge modified the Order Determining Heirs of December 30, 1949, by deleting therefrom the original four heirs as determined and substituted the Appellee as sole heir.

The Appellants on July 7, 1975, after a duly authorized extension of time granted by the Judge, filed a Petition for Rehearing and Reconsideration setting forth in support thereof the following grounds:

1. Allowing a late petition to reopen the estate, and entering an order reversing the original decision of the Department of Interior and determining a new heir of Alvin Hudson is illegal and unconstitutional as more fully set out in the memorandum in support of this petition attached hereto, all parts of which are incorporated herein by reference.
2. A new trial is necessary in that the Administrative Law Judge who heard the evidence did not make the final decision.
3. The order of April 9, 1975, is not supported by the evidence adduced thus far in this matter.
4. The Administrative Law Judge erred in not applying substantive state law to determine who was entitled to take as heirs of Alvin Hudson.
5. New and additional evidence which has come to light since the original hearing should be heard. This evidence goes to two material facts involved in the case, i.e., whether or not David Paskas Hudson is, in fact, an

Indian and a member of the Quinault Tribe and the character of the decedent which is directly relevant to the paternity of Alvin Hudson.

A review of the record indicates the need to address at this time only the Appellants' contention set forth in above Item 3 to the effect that the Order of April 9, 1975, is not supported by the evidence.

The Appellee's case as we see it rests and depends entirely on the testimony of his mother, Helen Paskas Jenna, that she was raped by the decedent and that the Appellee was a result thereof. The birth certificates naming the decedent as the father of the Appellee and the court order changing Appellee's name to Hudson are likewise based on the mother's word.

It is to be noted that the subject of rape was not mentioned in the Petition to Reopen and came to light only after the petition had been granted by the Solicitor.

It was at the hearing of April 18, 1972, that the claim was first made by Mrs. Jenna that the Appellee was the result of the crime of rape. Her only reason for not reporting the alleged rape before was that she was ashamed. According to her testimony, she never divulged the incident to anyone. Not only was the alleged crime never reported or made known to anyone, the fact that she was pregnant as a result therefrom was also never made known to anyone including the decedent.

The testimony of Mrs. Jenna given some 23 years after the alleged crime raises a serious question regarding the credibility of her testimony. This is particularly true in the absence of any corroboration.

The Judge in his decision of April 9, 1976, held that the paternity of the Appellee had been established by a "preponderance of the evidence." The Board does not agree and finds to the contrary.

[1] An examination of the record indicates the Appellee has not established his paternity by the preponderance of the evidence as found by the Judge. The Judge's finding regarding Appellee's paternity appears to have been premised or based entirely on the uncorroborated and somewhat conflicting word or testimony of Mrs. Jenna that the Appellee was the result of an alleged rape. This we do not feel meets the preponderance of the evidence standard. Lacking such preponderance, the Judge's finding to that effect cannot be upheld or sustained.

Under the circumstances attendant in this case, it does not appear that further proceedings would contribute in any substantial manner to the evidence already presented in the two proceedings held in the matter. At most, any evidence that could possibly be presented hereafter in support of the Appellee's paternity would merely be cumulative and repetitious of the evidence heretofore presented.

In view of our finding that the Judge's finding of April 9, 1975, regarding the paternity of Appellee is not supported by the evidence, we need not, as indicated elsewhere herein, consider or rule on Appellants' other contentions including the applicability of 25 U.S.C. § 371.

For the reason herein set forth, the decision of the Administrative Law Judge, dated April 9, 1975, should be reversed and the Order Determining Heirs of December 30, 1949, reinstated.

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 Order of April 9, 1975, is REVERSED and VACATED, and,
- (2) That the Order Determining Heirs of December 30, 1949, is REINSTATED.

This decision is final for the Department.

Done at Arlington, Virginia.

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//original signed  
Alexander H. Wilson  
Administrative Judge

I concur:

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//original signed  
Mitchell J. Sabagh  
Administrative Judge