



INTERIOR BOARD OF INDIAN APPEALS

Estate of Albin (Alvin) Shemamy

7 IBIA 70 (07/03/1978)

Judicial review of this case:

Affirmed, *Longhat v. Andrus*, No. CIV-78-0929-D (W.D. Okla. Dec. 31, 1979)

Affirmed, No. 80-1171 (10th Cir. Feb. 16, 1982)

Related Board case:

13 IBIA 258



United States Department of the Interior

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

ESTATE OF ALBIN (ALVIN) SHEMAMY

IBIA 78-9

Decided July 3, 1978

Appeal from an Order Denying Petition for Rehearing.

Affirmed.

1. Indian Probate: Appeals: Administrative Law Judge as Trier of Facts

An Administrative Law Judge's finding based on that part of the evidence which printed words do not preserve are not ordinarily reviewable by the agency, and the Administrative Law Judge's findings on veracity must not be overturned without very substantial preponderance in testimony as recorded.

APPEARANCES: Justus Hefley, James H. Ivy, Amos E. Black III, for appellants Alice Longhat, Clara Longhat and Edward Longhat.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This is an appeal from an order denying petition for rehearing.

Albin (Alvin) Shemamy, Unallotted Caddo, died testate on February 16, 1976, possessed of certain trust and restricted property.

Subsequent to a hearing held at Anadarko, Oklahoma, on April 14, 1977, Administrative Law Judge Jack M. Short issued an Order and Decree of Distribution on July 22, 1977. Judge Short found among other things--

1. Decedent's mother and father to be Bessie Shemamy and Tom (Thomas) Bird.
2. Tom (Thomas) Bird was the father of Donald Bird and Donald Bird was decedent's half-brother.

3. Decedent's will bequeathing all of his property to his brother, Donald Bird, was valid. Donald Bird was also the named residuary.

4. Donald Bird married and divorced was survived by a daughter, Gayla Michell Bird.

5. Donald Bird predeceased decedent Albin Shemamy.

6. Under the "Anti-Lapse" provision of the Code of Federal Regulations (43 CFR 4.261) Gayla Bird is the only lineal descendant of Donald Bird and is the sole beneficiary of all of decedent's (Albin Shemamy) trust or restricted property.

Alice Longhat, Clara Longhat and Edward Longhat, cousins of the decedent, petitioned for rehearing contending--

1. The findings of the Administrative Law Judge were contrary to and directly conflict with the evidence.

2. The findings of the Administrative Law Judge were contrary to law.

3. Administrative Law Judge erred in finding Tom Bird to be the actual and natural father which is contrary to Oklahoma law involving an illegitimate child.

4. Administrative Law Judge erred in restricting the contestors' cross-examination of Tom Bird.

5. Administrative Law Judge erred in entering his Order and Decree of Distribution of July 22, 1977, for the reason that it was arbitrary and capricious.

6. Petitioners have found additional witnesses whose testimony would establish that Bessie Shemamy was never married to Tom Bird or to anyone else during her lifetime.

7. Witnesses were not known to the petitioners prior to the April 14, 1977, hearing.

Administrative Law Judge Sam E. Taylor 1/ on November 25, 1977, issued an order denying the petition for rehearing. His reasons are included in said order, consequently they are not herein repeated.

1/ Judge Taylor succeeded Judge Short who subsequent to the issuance of his July 22, 1977, Order and Decree of Distribution resigned to accept employment elsewhere.

The petitioners filed a timely appeal of Judge Taylor's order starting as their reasons the identical contentions included in their petition for rehearing referred to, supra.

It appears that the underlying issue here is whether or not Albin Shemamy was the son of Bessie Shemamy and Tom Bird.

We have made a thorough review of the record in this matter, including the transcript and documents, and find the evidence is substantial and preponderates the fact that Albin Shemamy was the son of Bessie Shemamy and Tom Bird.

In making his finding Judge Short gave great weight to the testimony of Tom Bird. In his Order Approving Will and Decreeing Distribution, the Judge stated--

The evidence that persuaded me that Thomas or Tom Bird is the father of this decedent is the testimony of Tom Bird, himself. Even at his advanced age, he was mentally alert, testified without equivocation and I am convinced he was telling the truth when he said he lived with Bessie off and on for about four years-- that she was his friend and (in a sense) his wife until her death and that he is the father of this decedent.

The appellants produced several witnesses who testified that it was physically impossible for Tom Bird to be the father of decedent because he had no access to Bessie Shemamy, who was away at Chilocco Indian School or under close scrutiny while visiting her parents between terms.

Judge Short further stated in his order of July 22, 1977, "* * * Their (witnesses) testimony that they knew of Bessie's whereabouts at all times is just not credible to me."

It has been consistently held that an examiner's (presently Administrative Law Judge) finding based on that part of the evidence which printed words do not preserve are not ordinarily reviewable by the agency, and examiner's findings on veracity must not be overturned without very substantial preponderance in testimony as recorded. Allentown Broadcasting Corp. v. Federal Communications Commission, 1954, 222 F.2d 781, 94 U.S. App. D.C. 353, cert. denied, 348 U.S. 910.

Upon review we find no substantial preponderance in testimony to allow the Board to overturn Judge Short's finding on veracity.

Moreover, the testimony of Tom Bird is corroborated by Elsie H. Worcester, the Register of Vital Statistics for the Kiowa Agency for

fiscal year 1920. The decedent himself who at the time of making the will of November 14, 1966, was 46 years of age and found to be of sound and disposing mind and recognized Donald Bird to be his half-brother.

A review of the affidavits offered in support of the Petition for Rehearing discloses the testimony to be cumulative and we so find.

Furthermore, a review of the transcript does not sustain appellants' contention that Judge Short restricted them in their cross-examination of Tom Bird. The appellants were represented by able counsel at the hearing held on April 14, 1977. The record shows ample opportunity was given counsel to cross-examine Tom Bird. Judge Short asked at page 21 of the transcript "is that all the questions you have of this witness." Mr. Hefley responded in the affirmative. Mr. Ivy also representing appellants had equal opportunity to cross-examine Tom Bird, but chose not to do so. We find that appellants were not restricted in their cross-examination of Tom Bird.

The Board has reviewed with some interest the case of In the Matter of the Estate of John H. Benson, Okl. 558 P.2d 384, and finds that it is not relevant to the case at bar. For this reason the contention that it is contrary to the case law decided in the State of Oklahoma is rejected.

Consequently, the order denying petition for rehearing issued November 25, 1977, should be affirmed.

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 order denying petition for rehearing is AFFIRMED and the appeal herein is DISMISSED.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Mitchell J. Sabagh
Administrative Judge

I concur:

//original signed
Alexander H. Wilson
Chief Administrative Judge