



INTERIOR BOARD OF INDIAN APPEALS

Estate of Howard Good Elk (or Pacer)

9 IBIA 38 (07/20/1981)

Related Board case:
9 IBIA 41



United States Department of the Interior

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

ESTATE OF HOWARD GOOD ELK OR PACER

IBIA 80-42

Decided July 20, 1981

Appeal from order by Administrative Law Judge Frederick W. Lambrecht denying petition to reopen estate.

Affirmed.

1. Indian Probate: Reopening: Generally

Where appellant niece of decedent petitioned to reopen estate to offer proof of inconsistent statements by decedent's former wife concerning the paternity of appellee who had earlier been found to be a surviving child of decedent's marriage to appellee's mother, the petition was insufficient to support an order to reopen since assuming the offered evidence to have been admitted, it would not have changed the result in the heirship determination.

2. Indian Probate: Attorneys at Law: Fees

Attorneys fees are allowable as a charge against the administration of the estate based upon the record showing that work expended, complexity of issues presented and situation of successful party justified the fee billed in accordance with Departmental regulation.

APPEARANCES: Mike Figgins, Esq., and Anita Remerowski, Esq., for appellant Ruby Pacer; David H. Getches, Esq., for appellee Wanda G. Black Horse.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On March 7, 1978, a determination of heirship issued in the estate of decedent Howard Good Elk finding appellee, Wanda G. Black Horse, to be decedent's natural daughter. On October 5, 1979, a petition for rehearing filed by decedent's brother Matthew Good Elk or Pacer was denied by the Administrative Law Judge. No appeal was taken from the above order. On November 19, 1979, appellant Ruby Pacer, a niece of decedent, petitioned to reopen the estate to permit proof that decedent's former wife, the mother of appellee, had made statements under oath in a state court to annul her marriage to decedent which contradicted other testimony given in proceedings before this Department concerning the paternity of appellee. 1/ Assuming the offered evidence to be admissible, the record indicates that both decedent and his former wife had, at different times over many years, made inconsistent statements concerning appellee's paternity. In each instance, the statements made conformed to the apparent interest of the speaker at the time the statement was made: Thus, the decedent explained his failure to support appellee by disclaiming paternity, while he told appellee he was her father under circumstances where he sought to evince a friendly intent towards her. Similarly, his former wife denied that she was pregnant by decedent in testimony before the state court (the offered proof) where she sought to annul her marriage to decedent, but in a Departmental probate of a subsequent husband's estate later claimed that decedent was appellee's father, and thus not entitled to share in the pending estate.

[1] The record establishes that decedent was married to appellee's mother from March 26, 1936, until October 12, 1936. Appellee was born February 20, 1937. Although there are conflicting statements concerning appellee's paternity by both parties to the marriage, there is no other showing to contradict the presumption of legitimacy that permits an inference that a child born within 9 months of marriage is the child of the husband of the child's mother. 2/ The Administrative Law Judge below held appellee was decedent's natural child. There is no basis upon which to disturb his finding, even assuming that the evidence of appellee's conflicting statements before the state court were admissible here.

Since the receipt of the offered proof would have no effect upon the kinship determination made by the Administrative Law Judge, there is no basis for allowing a petition to reopen. 3/ The order denying reopening must therefore be affirmed.

1/ The testimony is, as appellee points out, internally inconsistent and does not support the state court's findings and conclusions. It is of doubtful value to prove any issue sought to be raised: However, for purposes of this decision it is assumed to be an inconsistent statement.

2/ This Board has previously recognized the permissible inference that children born during marriage or during the 9 months following marriage are legitimate. See Estate of Tim Tieyah, 7 IBIA 234 (1979).

3/ 43 CFR 4.242 (1980); Estate of Marksman, 5 IBIA 56 (1976).

[2] Pursuant to 43 CFR 4.281 (1980) the attorney for appellee seeks attorney's fees to be allowed to be paid from this estate in the amount of \$1,756 and allowable costs in the amount of \$106.90, in addition to attorney's fees previously allowed in the amount of \$1,143.75 and costs in the amount of \$21.82. The total value of the estate in probate is estimated at \$31,975.59. Appellee is currently at the Jefferson County Colorado Mental Health Center where she has been a patient since 1967. Considering the apparent effort involved, the complexity of the case, the value of the estate and the situation of the appellee, the fee is allowable as billed as a charge against the administration of the estate.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order denying reopening is affirmed.

This decision is final for the Department.

//original signed
Franklin D. Arness
Administrative Judge

I concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge