



INTERIOR BOARD OF INDIAN APPEALS

Estate of Frank Pays

10 IBIA 61 (07/30/1982)



United States Department of the Interior

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

ESTATE OF FRANK PAYS

IBIA 82-36

Decided July 30, 1982

Appeal from order denying petition for reopening by Administrative Law Judge Keith L. Burrowes. (Probate 44691-37 IP BI 135A 82.)

Affirmed.

1. Indian Probate: Evidence: Insufficiency of--Indian Probate: Reopening:

Reopening of estate closed for 45 years was properly denied where the petition to reopen and record of prior proceedings taken together established petitioner lacked evidence to show error in the determination of heirs made by the examiner in 1937.

APPEARANCES: Michael Masuda, Esq., for appellant Rita V. Iverson; Virgil E. Dugger, Esq., for appellee Frank P. Pays; appellee Betty Marie Pays White Montrail, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On December 21, 1981, appellant petitioned to reopen the estate of decedent Frank Pays in which a final order of distribution was entered on September 17, 1937. In support of the petition to reopen, denied by the Indian probate Administrative Law Judge on February 18, 1982, appellant offers a certificate of baptism dated August 31, 1981, showing that she is the daughter of decedent born on December 25, 1932. Appellant also offers an amended state certificate of live birth, which is based upon the affidavit of Mary Pays Martell, who is shown by the affidavit to be an aunt of appellant. The affidavit to amend birth certificate is dated November 23, 1981. The record on appeal indicates that the affiant is now dead, as is appellant's mother and, apparently, as are the witnesses who appeared in the original probate of this estate in 1937.

The petition to reopen recites that appellant was born following the rape of appellant's mother by decedent. Although appellees acknowledge the conviction of their father for the rape, they point out that decedent never

acknowledged appellant to be his child. They also contend that, in any event, although appellant admits that she knew her mother's husband was not her father for some time, perhaps as long as she can recall, 1/ she waited until after the death of those persons who might be able to testify concerning the circumstances of her birth before petitioning to reopen decedent's estate. The record indicates petitioner is now 50 years old. Why she did not petition to reopen earlier is not explained. The record affirmatively indicates that, except for the 1981 baptismal certificate, appellant has no proof to show that she is entitled to share in decedent's estate as a daughter.

In proceedings to reopen the probate of Indian trust estates administered by the Department, the burden of establishing that the initial order was in error is upon the petitioner. 2/ Departmental regulations published at 43 CFR 4.242 require that, on appeal from order denying petition to reopen, a petitioner shall present to the Board a showing of the evidence that will prove the claimed relationship at the sought-after evidentiary hearing on reopening. 3/ To merit relief, the offered evidence should show that petitioner has some likelihood of success upon reopening. 4/ Measured against this standard, the offered evidence is insufficient to justify reopening.

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order denying petition for reopening dated February 18, 1982, 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

1/ The Administrative Law Judge so found in his order Denying Petition for Reopening dated Feb. 18, 1982, at page 1. Appellant does not challenge the accuracy of his finding.

2/ Estate of Morin, 9 IBIA 188 (1982).

3/ Estate of Youngman, 10 IBIA 3, 6, 89 I.D. 291 (1982).

4/ Estate of Caye, 9 IBIA 196 (1982).