



INTERIOR BOARD OF INDIAN APPEALS

Larry E. Ruff v. Portland Area Director, Bureau of Indian Affairs

11 IBIA 267 (08/08/1983)

Judicial review of this case:

Dismissed, *Ruff v. Watt*, No. 83-1329 (D. Ore. Mar. 16, 1984)

Affirmed, 770 F.2d 839 (9th Cir. 1985)



# United States Department of the Interior

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

LARRY E. RUFF

v.

AREA DIRECTOR, PORTLAND AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 80-29-A

Decided August 8, 1983

Appeal from an heirship determination made by the Portland Area Director, Bureau of Indian Affairs, for purposes of distribution of judgment funds awarded to the Klamath Tribe.

Affirmed as modified.

1. Children, Illegitimate: Generally

The status of an Indian child as illegitimate and the required proof of paternity are questions of Federal law.

2. Administrative Procedure: Burden of Proof

The burden of proving the error of an initial Departmental Indian probate decision is on the party challenging the decision.

APPEARANCES: James L. Emerson, Esq., Portland, Oregon, for appellant; Bradford J. Aspell, Esq., Klamath Falls, Oregon, for respondents. Counsel to the Board: Kathryn A. Lynn.

## OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On April 18, 1980, an appeal filed with the Commissioner of Indian Affairs by Larry E. Ruff (appellant) was transferred to the Board of Indian Appeals (Board). The appeal sought review of a July 29, 1977, decision of the Portland Area Director, Bureau of Indian Affairs (BIA) (appellee), finding that appellant had not established that Warren Maximillian Ruff (decedent) was his father in order to be entitled to distribution of decedent's share of judgment funds awarded to the Klamath Tribe under P.L. 89-224, 79 Stat. 897, 25 U.S.C. § 565-565g (1976). For the reasons discussed below, the Board affirms that decision, as modified by this opinion.

### Background

Warren M. Ruff, Klamath Enrollee No. 1709, was born on September 28, 1928, and died in Klamath Falls, Oregon, on October 14, 1970. The Klamath

Termination Act (Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564-564x (1976)) had been passed prior to decedent's death, and consequently the Department of the Interior was not responsible for the probate of any part of decedent's estate. See 25 U.S.C. § 564h (1976). 1/

Because decedent was an enrolled member of the Klamath Tribe, his estate was entitled to a share of certain judgment funds awarded to the tribe. In accordance with 25 U.S.C. § 565a(b) (1976), the BIA determined on April 22, 1974, that decedent died intestate and that his heirs for the purpose of distribution of his share of the judgment fund were his sisters, half-sister, nieces, and nephews.

By letter dated September 27, 1976, appellant sought to participate in the distribution of any judgment funds due decedent on the grounds that he was decedent's son. On October 19, 1976, the Portland Assistant Area Director (Community Services) informed appellant that a determination of decedent's heirs had already been made and that the determination did not include him. The letter further stated at page 2:

This appears to be a case in which \* \* \* [you] must establish paternity \* \* \*. While the Secretary of the Interior is not obligated to follow state law in making his determination of the decedent's heirs, the Secretary frequently considers and applies the guidelines of state law in making his administrative decisions. Therefore, [in accordance with Oregon law, including ORS 112.105(2)(b),] clear and convincing evidence will be required to establish that Warren Ruff was your \* \* \* father.

Pursuant to the Assistant Area Director's letter, appellant submitted evidence in support of his claim to BIA. This evidence included appellant's birth certificate, a divorce decree for appellant's mother and Warren Ruff, and a petition requesting and decree granting change of appellant's name from Larry Ellis Bunch to Larry Ellis Ruff.

On April 21, 1977, the Assistant Area Director forwarded the file in this matter to the Department's Office of the Regional Solicitor in Portland. Following a complete review of the record, the Solicitor's Office furnished a recommendation to BIA on July 13, 1977. That recommendation, which was adopted as the BIA response to appellant's claim on July 29, 1977, found that appellant had failed to establish that decedent was his father.

After noting that no BIA records indicated decedent was the father of a child, the decision stated that because there is no Federal law of descent and distribution, the Secretary normally looks to the law of the state in which a decedent resided at the time of death in determining heirs for the purpose of distributing Klamath judgment funds. In this case, that state was Oregon. Oregon law, found in ORS 112.105(2)(b), provided that an illegitimate child could establish paternity for the purpose of inheriting from his

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1/ The record in this case does not include any reference to state court proceedings probating decedent's estate.

father by proving that "[t]he father acknowledged himself to be the father in writing signed by him during the lifetime of the child." The decision found that "[t]here is no evidence that Warren Maximillian Ruff acknowledged himself to be the father of this child in a written instrument signed by him during the lifetime of the child" (Solicitor's memorandum at 2).

Furthermore, the decision found that the documentary evidence submitted in support of the claim failed to establish the date of the marriage between decedent and appellant's mother and failed to state that decedent was appellant's father. The decision then discussed the application of ORS 109.070(3), which provides that when the parents of a child born out-of-wedlock are subsequently married, the paternity of the child is established and the child is legitimate. The decision stated that under Oregon case law, there must be proof of the fact that it was the child's father who subsequently married the mother. See In re Gregoire's Estate, 156 Or. 111, 64 P. 2d 1328, 1330 (1937); Wadsworth v. Bingham, 125 Or. 428, 266 P. 875, 879 (1928). The decision found no evidence supporting the allegation that decedent was appellant's father. Therefore, BIA denied distribution of any part of decedent's share of the judgment fund to appellant.

Because of the unique nature of heirship cases arising under the Klamath Judgment Act and the lack of regulations specifically addressing these cases, the Portland Area Office was unsure how to proceed with the appeal of this decision, which was filed on August 10, 1977. <sup>2/</sup> Consequently, it was not until February 5, 1979, that the case record was forwarded to the Commissioner of Indian Affairs in accordance with regulations in 25 CFR Part 2. On April 18, 1980, the case was referred to the Board for resolution pursuant to 25 CFR 2.19(a)(2). The case was docketed by the Board and referred to the Hearings Division of the Office of Hearings and Appeals for an evidentiary hearing and recommended decision on May 5, 1980.

A hearing was held before Administrative Law Judge Robert C. Snashall on December 2, 1981. Testimony was given at the hearing by appellant, his mother, and several of decedent's relatives.

Appellant's mother, Lorene Bunch Ruff Paul, <sup>3/</sup> testified that she met a man whom she knew as Billy Carel <sup>4/</sup> at her sister's home in Louisville, Kentucky, sometime in 1946 (Tr. 19-20). She stated that she knew this man for a period of approximately 1-1/2 months (Tr. 43, 61), had intercourse with him and no other man during the period prior to appellant's birth (Tr. 20),

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<sup>2/</sup> Procedures for these cases were discussed in Sherman v. Acting Portland Area Director, 9 IBIA 25, 88 I.D. 619 (1981), the first Klamath Judgment Act case to be decided by the Board.

<sup>3/</sup> Appellant's mother is referred to in the record as Lorene Bunch, her maiden name; Lorene Ruff; Lorene Paul, a subsequent married name; and Lorraine Bennett. She testified that Lorraine Bennett is a frequent misspelling of her name (Tr. 19). The Board will use the name Lorene Paul.

<sup>4/</sup> Lorene Paul, who was the only person giving testimony relating to this person, said the name had never been spelled for her. The name usually appears in the record as Billy (Karol) Carel or Karol (Carel). The Board will use Billy Carel for purposes of this opinion.

and that appellant was subsequently born on January 19, 1947 (Tr. 20). Appellant's birth certificate listed his name as Larry Ellis Bunch and showed his father to be a white man named Billy (Karol) Carel (Exh. 1).

Lorene Paul testified that in 1949 or 1950, she received a letter from a man named Warren Ruff, who said he was Billy Carel (Tr. 21, 22). Warren Ruff subsequently came to her home in Corbin, Kentucky (Tr. 23), and allegedly told her that he had been using the name Billy Carel because he had gotten into some trouble and was traveling around the country under a different name (Tr. 86-87, 88). Lorene Paul indicated that Warren, or "Johnny," 5/ Ruff and Billy Carel were the same person (Tr. 20, 42, 54).

Lorene Paul and Warren Ruff were married by a District Judge in Reno, Nevada, on August 15, 1951 (Tr. 26; Exhs. 2, 3). The couple resided together with appellant as a family in Corbin, Kentucky, for 5 years (Tr. 26-27). She testified that she and decedent saw a lawyer about changing appellant's name to Larry Ellis Ruff in 1951 (Tr. 27-28, 53-54, 58-59). 6/

In the mid-1950's, the family moved to decedent's home in Chiloquin, Oregon (Tr. 27, 69). After a few months, appellant and his mother returned to Corbin because appellant's mother could not accept decedent's life-style in Oregon (Tr. 35, 65, 66). Lorene Paul obtained a divorce from decedent by order of the Whitley, Kentucky, Circuit Court on January 29, 1957 (Tr. 36; Exh. 7). 7/ She testified that she did not seek child support from decedent, although he had offered to provide her with \$500 per month, because she did not wish to agree to the visitation terms with which he conditioned such payments (Tr. 37).

Appellant testified that his earliest recollections were of living with his mother and "Johnny" Ruff in Corbin, Kentucky (Tr. 5, 13-15). Appellant considered decedent to be his father and used his name (Tr. 5). It was not until 1963, when appellant attempted to get a driver's license, that he discovered his name was listed on his birth certificate as Larry Ellis Bunch,

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5/ There is no dispute that decedent used the nickname "Johnny."

6/ Appellant sought corroboration of this fact from the attorney consulted, who had since retired. In an affidavit submitted after the hearing, the attorney could state only that his records indicated he had drawn up some papers for Lorene Paul in 1951. The attorney's notes did not show the subject matter of the papers and did not indicate whether decedent was also a participant in the meeting and/or on the papers.

7/ The decree states in its entirety:

"This action having been submitted and heard, and the Court having been sufficiently advised thereon, it is considered, ordered, and adjudged by the Court that the plaintiff, Lorene Ruff, be, and she is hereby divorced from the bonds of matrimony with the defendant, Warren M. Ruff, and each party to this action is hereby restored to all rights and privileges of single and unmarried persons.

"It is further considered, ordered, and adjudged by the Court that the plaintiff be, and she is hereby restored to her maiden name of Lorene Bunch.

"The costs having been fully paid in this action, it is now stricken from this court's docket."

his mother's maiden name (Tr. 5). At that time, Lorene Paul petitioned the court on behalf of her minor son to have his name legally changed to Larry Ellis Ruff (Tr. 6; Exh. 10). 8/ She testified that she was surprised that this change had not been made in 1951 (Tr. 59).

Decedent's relatives testified generally that they had never known decedent to use the name Billy Carel (Tr. 100, 106, 109) and that he had not informed them that the boy he brought back to Oregon was his son or that he had a son (Tr. 106, 110-11).

Documentary evidence presented at the hearing included appellant's birth certificate and school records, 9/ the marriage license and divorce decree for decedent and appellant's mother, the decree changing appellant's name, and two photographs of decedent 10/ that were in the possession of appellant.

Following the hearing, the Administrative Law Judge issued a recommended decision of July 21, 1982, which stated at pages 1-2:

I find completely in accordance with the appellant's findings and conclusions in his brief and therefore find it unnecessary to make any additional findings of fact or conclusions of law. I adopt appellant's brief, attach it to the original hereof, and by this reference make it the findings and conclusions herein as if specifically set forth.

However, I am not unmindful of the fact certain elements of evidence or omissions thereof which appear to be of a critical nature were not addressed by either appellant or respondent parties in interest. Exhibit seven, a copy of the Judgment of Divorce between Lorene Ruff and Warren M. Ruff is notable in that it makes no reference whatsoever to the purported child of the decedent; exhibit ten, the judgment by which appellant's name was

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8/ The petition to change appellant's name, filed on Jan. 21, 1963, and granted the same day, states in its entirety:

"Lorene Bunch Ruff states that she is a resident citizen of Whitley County, Kentucky, and has been all her life and that she is the mother of Larry Ellis Bunch who was born in Corbin, Kentucky, on January 19, 1947 out of wedlock and that later she was married to Warren M. Ruff and that her son has been going by the name of Ruff all the time since her marriage and now she asks the court to change his name to Larry Ellis Ruff. She states that all his school records show the name of Ruff and her son joins her in this petition making the request."

9/ Appellant's school records list Warren Ruff as his father. Report cards were signed with "Mr. and Mrs. Warren Ruff." According to appellant's mother, two of the signatures are those of decedent (Tr. 31; Exh. 5).

10/ Writing on the back of one of the photographs says "To Mom and Pop. From Johnny," and on the other "To my son. From me. Johnnie Ruff." Both of these photographs were allegedly received in the mail by appellant's maternal grandparents (Tr. 39; Exhs. 8-9).

changed to Larry Ellis Ruff markedly fails to assert the said Warren M. Ruff was the father of the child; and finally there is the failure to assert the paternity of the child during the lifetime of decedent Ruff. But I am satisfied, given the apparent intellectual level, evidenced educational record and life styles of the principal participants, these atypical evidentiary facts are perhaps understandable in the context of this estate and are not such as to overcome the circumstantial evidence produced by appellant upon which it can reasonably be concluded the paternity has been established by a preponderance of clear and convincing evidence. Thom v. Bailey, 257 Ore. 572, 481 P.2d 355, 358 (1971), In re Marriage of Gridley, 28 Ore. App. 145, 558 P.2d 1277 (1977).

Exceptions to this recommended decision, filed by Richard Harrington and by Diane Switzler Ibarra and Sherry Harrington Zahler (respondents), were received by the Board on August 23 and August 30, 1982, respectively. A briefing schedule was established and briefs were filed by appellant and respondents.

#### Discussion and Conclusions

Initially the Board must determine what law applies to the determination of appellant's paternity. After noting that there was no Federal law of descent and distribution, appellee looked to the laws of Oregon, the state in which decedent resided at the time of his death, for guidance in making the initial decision. Appellant argues that 25 U.S.C. § 564h (1976) requires that Oregon law be applied. <sup>11/</sup> Although not developing this argument, respondents suggest that conflicts of law rules might require the application of Kentucky law, because Kentucky was the state in which appellant was conceived and born, and appellant's mother and decedent established a home and were divorced.

The Board has previously noted that laws governing the status of an individual must be distinguished from laws governing inheritance. A person's

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<sup>11/</sup> Contrary to appellant's argument, this case is governed by 25 U.S.C. § 565a (1976). Section 564h is part of the Klamath Termination Act, the Act terminating Federal supervision over the Klamath Tribe. In accordance with that termination, section 564h provides that the estates of deceased Klamath Indians will be determined by the appropriate state court and under state law. The section recognizes that, because of the termination of Federal supervision, the Department of the Interior no longer holds land or other property in trust for members of this tribe and, therefore, has no probate jurisdiction.

Subsequent to termination, judgment funds were awarded to the Klamath Tribe. Under 25 U.S.C. § 565a(b) (1976), the Secretary of the Interior is given limited jurisdiction to determine the heirs of Klamaths who were on the tribal roll but had died before distribution. See Sherman, supra. Consequently, the determination of decedent's heirs for the purpose of the distribution of judgment funds is to be made under 25 U.S.C. § 565a(b) (1976).

status with respect to a decedent may thus be determined under the laws of one jurisdiction before the laws of a second jurisdiction are applied to determine the inheritance rights of a person having that status. The Board has consistently followed the rule that an individual's status is determined under the laws of the jurisdiction having the most significant contacts with the individual or in which the relationship at issue was created. See Estate of Richard Doyle Two Bulls, 11 IBIA 77 (1983), and cases cited therein.

Appellee was therefore correct in applying the laws of Oregon to determine appellant's inheritance rights, but erred in also applying Oregon law to determine paternity. Absent other considerations, this determination should have been made under Kentucky law. Because of the Board's further findings, however, this error is harmless.

[1] The Board finds that the status of an Indian child as illegitimate and the required proof of paternity are questions of Federal law. In 25 U.S.C. § 371 (1976), Congress established Federal policy for inheritance by an illegitimate Indian child from the person shown to be the father. In its decisions under this section, the Board has developed a body of Federal law on the determination of paternity. Although by its terms, section 371 applies in determining heirs for distribution of Indian trust or restricted property, the Board finds that this congressionally mandated Federal policy should apply in all circumstances in which the Department is called upon to determine the heirs of a deceased Indian. This holding has been implicitly recognized in prior Board decisions determining heirs of deceased Klamath Indians under 25 U.S.C. § 365a(b)(1976). See, e.g., Holcombe v. Portland Area Director, 9 IBIA 192 (1982); Weiser v. Portland Area Director, 9 IBIA 76 (1981). Therefore, the Board will apply its case law in considering the question of appellant's paternity. 12/

Appellant's evidence concerning his paternity is based almost exclusively upon the testimony of his mother. The circumstances of each case, including, if available, such factors as corroborating testimony, documentary submissions, prior consistent or inconsistent statements and actions, the actions and statements of the alleged father, and witness demeanor and credibility, must determine how much weight can be given to a mother's testimony concerning paternity. 13/

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12/ This finding does not exclude the possibility of looking to state law or state court proceedings in reaching a Departmental decision on paternity. Such laws and decisions are, however, persuasive authority and are not binding upon the Department. Weiser, supra at 78 n.1.

13/ In this regard, Board decisions are more lenient than Oregon law, which requires that the testimony of the mother of an illegitimate child must always be corroborated by other evidence when the putative father denies paternity. See In re Marriage of Gridley, supra. Under the proper circumstances, the testimony of the mother might be sufficient in itself to establish paternity in Departmental heirship determinations.

In this case, both decedent and appellant's mother took numerous actions inconsistent with the assertion that decedent was appellant's father. Decedent was on the roll of Klamath Indians compiled for the purpose of distribution of judgment funds. He failed, however, to acknowledge appellant as his son by listing him as a member of the tribe, although such an action would not have diminished his share of the fund. Decedent also failed to assert paternity to any of his Oregon relatives, even though it appears he intended that he, appellant, and Lorene Paul would remain in Oregon as a family. 14/

On two occasions, appellant's mother obtained assistance of legal counsel in actions in which appellant's paternity could or should have been an issue. On neither occasion did she allege that decedent was appellant's father. First, appellant is not mentioned in his mother's divorce decree. Even if Lorene Paul were not seeking child support payments, it would be expected that the decree would mention custody of a child of the couple. *Cf. Estate of Robert M. Morin*, 9 IBIA 188 (1982). There is also no allegation of paternity in the petition to change appellant's name to that of decedent. Instead the petition recites only the fact of a marriage subsequent to the birth of an illegitimate child and the use of the name of the husband by that child. In addition, Lorene Paul never sought to correct the name and race of the father on appellant's birth certificate after she allegedly learned the true identity of the man she knew as Billy Carel. *Cf. Estate of Frank Pays*, 10 IBIA 61 (1982). These omissions, although perhaps explainable as found by the Administrative Law Judge, are too significant to be overlooked, especially when they were made with the assistance of legal counsel.

Other documentary evidence presented at the hearing is similarly inconclusive as to paternity and the extent to which decedent felt he was appellant's father. It appears that decedent took some responsibility as appellant's "father" through the signing of appellant's school records and in referring to appellant as his son. These actions do not prove actual paternity, but merely show that decedent acted in a paternal manner toward appellant.

[2] The burden of proof is on the person challenging a Departmental Indian probate decision to show that the initial decision was in error. *Weiser, supra*; *Morin, supra*. In this case, although it appears possible from the evidence of record that decedent was appellant's father, appellant has failed to carry his burden of proof. 15/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the recommended

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14/ The failure to acknowledge an illegitimate child is not in itself conclusive on the question of paternity. *See, e.g., Estate of Harry M. Johnson*, 10 IBIA 1 (1982).

15/ Because of this conclusion, respondents' petition to reopen the evidentiary hearing is denied.

decision of the Administrative Law Judge is not accepted and the July 29, 1977, decision of the Bureau of Indian Affairs is affirmed.

//original signed

Jerry Muskrat  
Administrative Judge

I concur:

//original signed

Franklin D. Arness  
Administrative judge