



INTERIOR BOARD OF INDIAN APPEALS

Estate of Joseph Kicking Woman

15 IBIA 83 (01/14/1987)

Judicial review of this case:

Dismissed for lack of jurisdiction, *Kicking Woman v. Hodel*, Civ. No. 87-33-GF
(D. Mont. Sept. 18, 1987)

Affirmed, 878 F.2d 1203 (9th Cir. 1989)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF JOSEPH KICKING WOMAN

IBIA 86-38

Decided January 14, 1987

Appeal from an order denying rehearing issued by Administrative Law Judge Keith L. Burrowes in Indian Probate No. IP BI 517A 83.

Affirmed.

1. Indian Probate: Witnesses: Observation by Administrative Law Judge

Where evidence is conflicting, the Board of Indian Appeals normally will not disturb a decision based upon findings of credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor.

2. Indian Probate: Evidence: Newly Discovered Evidence--Indian Probate: Rehearing: Generally

Newly discovered evidence is not a basis for a rehearing unless it is shown that the evidence could not, with diligent effort, have been presented at the original hearing, and unless the evidence is relevant to the matter at issue.

3. Indian Probate: Children, Illegitimate: Generally

The required proof of paternity in an Indian probate proceeding is a matter of Federal law.

APPEARANCES: Larry D. Epstein, Esq., Cut Bank, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant George Kicking Woman seeks review of a March 25, 1986, order denying rehearing in the estate of Joseph Kicking Woman (decedent). For the reasons discussed below, the Board affirms that order.

Background

Decedent, Blackfeet Allottee No. 3014, was born on April 21, 1916, and died intestate on September 25, 1982, in Browning, Montana. Appellant is decedent's brother.

A hearing to probate decedent's Indian trust estate was begun at Browning, Montana, on May 22, 1984, and continued on September 11, 1984. Testimony was taken concerning whether decedent was the father of Leo Old Person, who was born on July 11, 1954. Appellant testified that he had never been told by decedent or anyone else that decedent was Leo's father. Leo's mother, Edith Old Person Young Running Crane, testified concerning her relationship with decedent and stated that she was certain decedent was Leo's father. Six witnesses in addition to Leo testified that decedent had told them he was Leo's father. The testimony of two other witnesses, while less specific, also tended to support decedent's recognition of Leo as his son. One witness testified that decedent had denied he was Leo's father. Another witness testified that Edith was involved with a man other than decedent around the time Leo was conceived. This statement was emphatically denied by Edith.

Judge Burrowes issued an order determining heirs on February 19, 1985, in which he held that Leo was entitled to inherit decedent's entire estate as his son. He based his conclusion that Leo was the son of decedent on the testimony at the hearing, including the credibility of the witnesses. He specifically stated that he was convinced Edith was being truthful and that appellant was not.

In his petition for rehearing, appellant disputed the Judge's findings on witness credibility. He also sought to introduce into evidence certain photographs, school and tribal documents, and other testimony. Further, he argued that provisions of a Blackfeet tribal enrollment ordinance and Montana State law concerning proof of paternity should have controlled the paternity determination.

In his order denying rehearing, issued on March 25, 1986, Judge Burrowes (1) reaffirmed his findings regarding witness credibility, (2) found that the petition for rehearing had not established why the evidence sought to be introduced could not have been discovered and produced prior to the second part of the continued hearing, and (3) held that paternity determinations in Indian probate proceedings are governed solely by Federal probate case law and not tribal or state law.

The Board received appellant's notice of appeal from Judge Burrowes' order on May 15, 1986. Only appellant filed a brief on appeal.

Discussion and Conclusions

On appeal to the Board, appellant raises the same issues he raised before Judge Burrowes. He disputes the Judge's findings on witness credibility; he seeks to introduce new evidence; and he argues for the application of tribal and state law.

[1] Appellant contends that, as the holder of a tribal medicine bundle, he is precluded from lying, and therefore Judge Burrowes' finding that he was not credible must be error. He also affords less credibility to the testimony of Edith Old Person Young Running Crane, and others, than did Judge Burrowes.

As the Board has previously held, where evidence is conflicting, a decision based upon findings as to credibility normally will not be disturbed when the Judge had an opportunity to hear the witnesses and to observe their demeanor. Estate of John Walter Few Tails, 13 IBIA 127 (1985). The Board finds that the record in this case is entirely consistent with Judge Burrowes' findings as to witness credibility, and that the decision does not directly contradict the weight of the evidence.

[2] Appellant sought in his petition for rehearing to introduce newly discovered evidence. He now contends that the Judge erred in refusing to admit the evidence.

43 CFR 4.241 (a) provides in relevant part:

If the petition [for rehearing] is based upon newly-discovered evidence, it shall be accompanied by affidavits of witnesses stating fully what the new testimony is to be. It shall also state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision.

Judge Burrowes held that appellant did not adequately justify his failure to present the evidence at the original hearing.

The evidence sought to be introduced on rehearing fell into four categories: (1) a statement from the Browning, Montana, Superintendent of Schools, concerning a search for records of Leo's school attendance, (2) loan applications evidently signed by decedent between 1959 and 1965, indicating that he had no children under 18, (3) photographs of a man other than decedent, whom appellant alleged was Leo's father, ^{1/} and (4) an offer of testimony by Blackfeet tribal members, which appellant stated would show that the terms "my boy" and "my son" were used as general greetings by Blackfeet elders to younger tribal members and were not restricted to relatives.

Appellant gave no reason at all for his failure to discover earlier the evidence in categories (2) and (3). He stated only that he discovered the loan applications while going through decedent's papers after the hearing but did not explain why he could not have performed this task earlier.

Appellant stated that he became aware of the existence of the school superintendent's evidence only after the superintendent came forward following Judge Burrowes' initial decision. The superintendent's statement shows only that he had been unable to locate records of Leo's attendance at Starr Elementary School either under the name "Old Person" or the name "Kicking Woman." This evidence is peripherally relevant, at best, to the question of Leo's paternity. If appellant considered Leo's school records relevant, however, he could have made efforts to obtain them prior to the hearing and should have explained his failure to do so.

^{1/} On appeal to the Board, appellant does not challenge the Judge's refusal to admit the photographs into evidence on rehearing.

Appellant states that he became aware of the need for testimony concerning the terms "my boy" and "my son" only after the decision was issued and, in appellant's view, erroneously interpreted those terms as used by decedent. From its review of the record, the Board is convinced that the context in which decedent used the terms makes it clear that decedent intended them to indicate a paternal relationships. The testimony offered by appellant is therefore not relevant to the question of Leo's paternity.

A rehearing on the grounds of newly discovered evidence is normally appropriate only if it is shown that the evidence could not, with diligent effort, have been presented at the original hearing. Estate of Benjamin Kent, Sr. (Ben Nawanoway), 13 IBIA 21 (1984). Moreover, in order to justify a rehearing, newly discovered evidence must be relevant to the matter at issue. Cf. Estate of George Tsalote, 7 IBIA 261 (1979). The Board holds that Judge Burrowes did not err in denying appellant's petition for rehearing on grounds of newly discovered evidence.

[3] Appellant argues that Judge Burrowes erred in finding that decedent was the father of Leo because the requirements of the Blackfeet tribal enrollment ordinance and Montana State law concerning proof of paternity were not met. As Judge Burrowes correctly held, it is Federal law, not tribal or state law, which controls the determination of paternity in Indian probate proceedings. Estate of Benjamin Kent, Sr., *supra*; Estate of James Howling Crane, 12 IBIA 209 (1984); Ruff v. Portland Area Director, 11 IBIA 267 (1983), petition dismissed, Ruff v. Watt, Civ. No. 83-1329 (D. Or. Mar. 6, 1984), aff'd sub nom. Ruff v. Hodel, 770 F.2d 839 (9th Cir. 1985).

Appellant has failed to show that Judge Burrowes' determination of paternity was erroneous under Federal law.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Burrowes' March 25, 1986, order denying rehearing is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Acting Chief Administrative Judge