



INTERIOR BOARD OF INDIAN APPEALS

Estate of Elmer James Whipple

15 IBIA 273 (09/01/1987)

Related Board case:
16 IBIA 225



United States Department of the Interior

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

ESTATE OF ELMER J. WHIPPLE

IBIA 87-27

Decided September 1, 1987

Appeal from an order after rehearing issued by Administrative Law Judge Vernon J. Rausch in Indian Probate Nos. IP TC 152S 85 and IP TC 255S 83.

Vacated and remanded.

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

Under the circumstances of this case, it was error not to seek testimony from the mother of a child born during a marriage when it was alleged that the mother's husband was not the child's father.

APPEARANCES: Shirley Mae Whipple, pro se.

OPINION BY ADMINISTRATIVE JUDGE LYNN

On March 5, 1987, the Board of Indian Appeals (Board) received a notice of appeal from Shirley Mae Whipple (appellant). Appellant sought review of a February 26, 1987, order after rehearing issued in the estate of Elmer J. Whipple (decendent) by Administrative Law Judge Vernon J. Rausch. That order affirmed the finding in Judge Rausch's June 22, 1984, order determining decendent's heirs that decendent was not appellant's father. For the reasons discussed below, the Board vacates that order and remands this matter for further consideration.

Background

Decendent, Santee Sioux No. 382-U01117, was born on February 17, 1906, and died on November 12, 1982. Judge Rausch held a hearing to probate decendent's trust or restricted estate on October 12, 1983. Only Caroline V. Whipple Stricker, Donald H. Whipple, and Theresa F. Whipple were present at the hearing. The uncontroverted testimony presented indicated decendent was survived by his wife, Pauline Thornton Whipple, and two children, Caroline and Donald. 1/

1/ Two other children, Rita K. Whipple and Smith Dale Whipple, predeceased decendent, leaving no issue.

The testimony further revealed that Pauline had two other children, appellant and Theresa, while she was married to decedent. Caroline, however, questioned whether decedent was the father of either of these women, stating that she had overheard conversations among her aunts and arguments between her parents that led her to believe that neither appellant nor Theresa were decedent's natural children. Caroline further testified that whenever she had asked her mother about this question, her mother changed the subject. Theresa did not contradict Caroline's testimony.

Based on the evidence presented, on June 22, 1984, Judge Rausch issued an order determining decedent's heirs. In that order he found that decedent was not the father of appellant or Theresa. 2/

Appellant filed a timely petition for rehearing, in response to which Judge Rausch held a second hearing on October 24, 1985. This hearing was specifically addressed to the question of whether decedent was appellant's father. Although the transcript of the 1985 hearing does not show who was present, only Caroline, Theresa, and appellant testified. Again, the testimony suggested that decedent may not have been appellant's father. It was further suggested that her father may have been a non-Indian named John Mock. Appellant testified that she had memories of her mother and John Mock being together. During the hearing Judge Rausch stated his observation that appellant lacked many physical characteristics normally associated with a person with strong Indian ancestry. 3/ Appellant agreed with this observation and volunteered that she had herself been aware of her physical differences.

By order dated February 26, 1987, Judge Rausch repeated his original determination that decedent was not appellant's father. This decision was based in part on appellant's physical characteristics.

The Board received appellant's appeal from this order on March 5, 1987. No briefs were filed in the appeal.

Discussion and Conclusions

Normally, the person challenging an Administrative Law Judge's decision in the probate of a deceased Indian's trust or restricted estate bears the burden of proving error. See Estate of Mary Standing Bull Curtis, 15 IBIA 213 (1987), and cases cited therein. 4/ This rule can be overcome, however, by a finding that manifest error or injustice occurred in the initial decisionmaking process. 43 CFR 4.320; Estate of Stella Red Star/Swift Bird, 14 IBIA 140 (1986).

2/ Theresa has not appealed the determination that decedent was not her father.

3/ The record indicates Pauline is 1/2 Yankton Sioux and decedent was 4/4 Santee Sioux.

4/ If this standard were strictly applied here, the Board would find appellant failed to meet her burden of showing error in the decision from which she is appealing.

The only testimony presented as to whether decedent was appellant's father came from appellant and her sisters. The source of their knowledge was family gossip and statements made in anger between their mother and decedent. Everyone testifying readily admitted that Pauline would not discuss the question of who was the father of appellant or Theresa.

The record clearly shows the people testifying had no direct knowledge of the matters about which they were testifying. It also shows Pauline was alive at the time of both hearings. The following exchange appears at page 7 of the 1985 transcript:

JUDGE RAUSCH: I believe earlier off the record, it was noted that your mother, Pauline, has been living in a nursing home for a period of time.

CAROLINE: Yes, 5 years.

JUDGE RAUSCH: And you have since taken her out of there and now have her at home?

CAROLINE: Yes.

JUDGE RAUSCH: And that she has had a stroke?

CAROLINE: Yes.

JUDGE RAUSCH: And that she does not speak very clearly or well?

CAROLINE: Yes.

The Judge immediately thereafter turned to other questions.

[1] It is possible Pauline was physically unable to attend the hearings, mentally unable to testify, or had specifically refused to testify. The record, however, does not disclose any reason for the apparent failure to seek testimony on the issue of appellant's paternity from Pauline, who may very possibly be the only person still living with personal knowledge of the facts. Although Pauline's testimony might not be sufficient in and of itself to prove paternity, ^{5/} under the circumstances of this case, it was error not to seek her testimony. This error arises because of the greater responsibilities resting on the Administrative Law Judge, as an agent of the trustee, when Indian parties in a probate proceeding are not represented by counsel. See, e.g., Estate of Charles Webster Hills, 13 IBIA 188, 92 I.D. 304 (1985), and cases cited therein. If Pauline was physically unable to attend the hearing, arrangements should have been made to take her testimony

^{5/} See, e.g., Ruff v. Portland Area Director, 11 IBIA 267 (1983), dismissed, Ruff v. Watt, No. 83-1329 (D. Or. Mar. 16, 1984), aff'd, 770 F.2d 830 (9th Cir. 1985).

elsewhere. If her testimony was sought and there was some other reason for her failure to testify, that reason should have been noted in the record.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Rausch's June 22, 1984, and February 26, 1987, orders in this estate are vacated and the matter is remanded for further consideration in accordance with this decision.

//original signed
Kathryn A. Lynn
Administrative Judge

I concur:

//original signed
Anita Vogt
Acting Chief Administrative Judge

6/ It is the Board's understanding that, because of a realignment of probate jurisdictions, this matter will go to Administrative Law Judge Sam E. Taylor, Oklahoma City, Oklahoma, on remand.