



INTERIOR BOARD OF INDIAN APPEALS

Estate of Malcolm Muskrat

29 IBIA 208 (06/25/1996)



## United States Department of the Interior

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

ESTATE OF MALCOLM MUSKRAT : Order Affirming Decision  
:  
: Docket No. IBIA 95-131  
:  
: June 25, 1996

Appellants Eleanor Muskrat and Faye Muskrat seek review of a May 12, 1995, order denying rehearing issued by Administrative Law Judge Vernon J. Rausch in the Estate of Malcolm Muskrat, IP TC 202R 91. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Decedent, an unallotted member of the Fort Peck Indian Tribe, died intestate on May 10, 1991. Judge Rausch held hearings to probate decedent's trust or restricted estate on August 8, 1991, and September 22, 1992. Conflicting evidence was presented during the hearings concerning whether decedent was the father of Edmund Ralph Bird, who was born to Faye Mead on August 18, 1962. In his March 11, 1994, order determining heirs, Judge Rausch found that Bird had proven by a preponderance of the evidence that he was decedent's son, and ordered distribution of decedent's entire estate to Bird.

Appellants, who are decedent's sisters, would have taken the estate but for the finding that Bird was decedent's son. They timely petitioned for rehearing. Judge Rausch denied rehearing on May 12, 1995. Appellants then appealed to the Board. Briefs have been filed on appeal by appellants and Bird.

Appellants argue that only decedent's relatives were competent witnesses on the issue of whether or not decedent was Bird's father, and that Judge Rausch therefore erred when he considered testimony from Bird's mother and her relatives and friends. Appellants base this argument on Blackburn v. Crawford's Lessee, 70 U.S. (3 Wall.) 175 (1866), and United States v. Mid-Continent Petroleum Corp., 67 F.2d 37 (10th Cir. 1933).

In Blackburn, the Supreme Court reaffirmed that hearsay statements made by a deceased declarant concerning family relationships are admissible as an exception to the hearsay rule when the declarant was related to the family whose relationships were at issue. Finding the exception inapplicable to the case before it, the Court excluded statements made by a deceased woman concerning whether her sister was married to the father of that sister's children, in a matter in which the children sought to inherit property from their paternal uncle. The Court held the hearsay evidence inadmissible because the maternal aunt was not related to the family which included the paternal uncle except through the marriage that was at issue.

Mid-Continent required the determination of the heirs to lands originally allotted to a member of the Creek Tribe of Indians. <sup>1/</sup> In addressing this issue, the court stated that "[t]he only competent declarants [on an issue of family relationships] are persons related by blood or affinity to the family, the pedigree of which is in issue" (67 F.2d at 45). In support of this statement, the court cited Fulkerson v. Holmes, 117 U.S. 389 (1886), and In re McDade's Estate, 95 Okla. 120, 218 P. 532 (1923). Fulkerson involved a statement of family relationship made in a deed executed approximately 60 years earlier. The Supreme Court stated: "The proof to show pedigree forms a well settled exception to the rule which excludes hearsay evidence. \* \* \* The rule is that declarations of deceased persons who were de jure related by blood or marriage to the family in question may be given in evidence in matters of pedigree" (117 U.S. at 397). In re McDade's Estate involved an heirship determination for a member of the Cherokee Nation. The court stated:

That pedigree may be proved by hearsay testimony is well settled, and evidence of declarations of particular facts, such as births, marriages, and deaths made ante litem motam, by persons since deceased, who from their situation were likely to know, are admissible when the person making the declaration was related by blood or affinity with some branch of the family, the pedigree respecting which was in question.

(218 P. at 537).

The Board has carefully read Blackburn, Mid-Continent, Fulkerson, and McDade's Estate, and concludes that none of these cases support appellants' legal argument. In each case, the court was seeking evidence of family relationships over an extended period of time, during which many--if not most--of the individuals with personal knowledge of those relationships had died. (Interestingly, paternity was not at issue in any of these cases.) Specifically, the courts were concerned with the admissibility of hearsay statements made by deceased individuals. As the cases make clear, the hearsay statements of a deceased member of the family whose relationships are at issue are admissible, while similar statements by deceased individuals who are not related to the family are not.

Appellants ask the Board to apply this hearsay rule to exclude live testimony given by persons who have personal knowledge of the relationship, merely because they are not related to the family whose relationships are

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<sup>1/</sup> Heirs of members of the Creek Tribe, one of the Five Civilized Tribes, are normally determined by the Oklahoma State courts, under Oklahoma law. See Act of June 14, 1918, c. 101, § 1, 40 Stat. 606, 25 U.S.C. § 375 (1994). In contrast, the heirship determination in the present case is made by the Department of the Interior, under Federal law. See 25 U.S.C. §§ 372-373 (1994).

at issue. The Board declines to do so. It concludes that the cases cited by appellants simply do not apply to the present situation. <sup>2/</sup>

Therefore, the Board concludes that Bird's maternal relatives and/or friends were not barred from testifying concerning their knowledge of the identity of Bird's father.

Appellants also contend that a tribal court finding that Bird was not decedent's son should have been res judicata in the Departmental probate proceeding. The Board has previously rejected this argument, holding that the Department is not bound by state or tribal court decisions in making an heirship determination. In Estate of James Howling Crane, Sr., 12 IBIA 209, 211 (1984), the Board stated that

under 25 U.S.C. §§ 372-373 (1976), [<sup>3/</sup>] the Department \* \* \* has been entrusted with the responsibility of determining the heirs to Indian trust property, and consequently has full authority to make an independent determination of heirs. Under appropriate circumstances, this authority includes the power to reject the findings or conclusions of a state court. Lane v. United States, 241 U.S. 201 (1916); Estate of James Wermey Pukah, 11 IBIA 237 (1983); Weiser v. Portland Area Director, 9 IBIA 76, 78 n.1 (1981). However, a state court decision is at least evidence which may be considered in reaching an heirship determination, and in some cases may directly affect the Department's determination. Ruff v. Portland Area Director, 11 IBIA 267, 273 n.12 (1983); dismissed, Ruff v. Watt, No. 83-1329 (D. Ore. Mar. 16, 1984), aff'd, 770 F.2d 839 (9th Cir. 1985)].

In Estate of Matthew Pumpkinseed, 25 IBIA 98 (1994), the Board applied the same reasoning to a tribal court decision, rejecting an argument that the tribal court decision should have been given full faith and credit in the Departmental proceeding, or should have been dispositive through res judicata, comity, or some other lesser grounds.

The Board finds that appellants have raised no arguments which cause it to reconsider its consistent holdings that the Department is not bound by either state or tribal court decisions in making heirship determinations.

Appellants object to the weight Judge Rausch gave to the evidence, including both testimony and documents. Specifically, they contend that the Judge should have given more weight to the fact that the family history data sheet prepared by BIA for Judge Rausch's use at the probate hearing did not

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<sup>2/</sup> Appellants' reference to Annotation, Admissibility, on issue of child's legitimacy or parentage, of declarations of parents, relatives, or the child, deceased or unavailable, 31 A.L.R.2d 989, 1010 et seq., is also inapposite for the same reason.

<sup>3/</sup> Section 372 concerns probate of intestate cases, while section 373 concerns probate of testate cases.

list Bird as decedent's son; Bird's birth certificate did not show decedent as his father; a clinic record showing decedent as Bird's father was not a business record under Rule 803(6) of the Federal Rules of Evidence because the clinic was under no legal obligation to maintain paternity records and did not verify Bird's mother's statement of paternity; although Bird's application for enrollment in the Tribe listed decedent as his father, Bird's blood quantum determination was made using only his mother's blood quantum; and Bird's withdrawal of his claim in tribal court that decedent was his father constitutes an admission that decedent was not his father under Federal Rule of Evidence 801(d)(2)(A).

Bird apparently raised the issue of paternity in the tribal court probate of decedent's non-trust property. He states that he withdrew the claim because he was under the mistaken belief that he was required to prove paternity by clear and convincing evidence. The probate record shows that Bird attempted to obtain such evidence through DNA testing, but that the genetic testing laboratory told him the sample provided was insufficient. Bird argues that his attorney and the tribal court were responsible for his incorrect understanding of the burden of proof, and that he should not be penalized for withdrawing his claim under these circumstances.

Although the tribal court held that decedent was not Bird's father, it provided no basis for this holding. The Department is not bound by the tribal court decision. Under the circumstances present here, including the evidence of the letter from the laboratory, the Board concludes that the tribal court holding should not be given weight in this heirship determination.

Appellants' remaining arguments in this area each contest the weight Judge Rausch gave to pieces of documentary evidence. The Board has reviewed each document, appellants' objections, and Bird's responses, and finds no reason to disturb Judge Rausch's conclusion as to the weight each document should be given.

Appellants also contend that, although Judge Rausch stated that Federal law applied to his decision, he in fact relied on court decisions from states other than Montana. Appellants contend that either Montana or Tribal law should have been applied.

In Estate of Emerson Eckiwaudah, 27 IBIA 245 (1995), the Board extensively reexamined its cases concerning paternity in Indian probate proceedings. It there reaffirmed, inter alia, that paternity in a Departmental probate case is a question of Federal, not state, law. Although the Judge cited state court cases in support of his decision, his conclusion is in accord with the Federal law of Indian probate as developed by this Board and the Federal courts. To the extent Judge Rausch should be faulted for apparently ignoring the decisions of this Board and/or the Federal courts, the Board finds that any such error is harmless under the circumstances of this case.

Finally, appellants contest the weight Judge Rausch gave to the testimony of the various witnesses. The Board has repeatedly stated that it defers to witness credibility determinations made by an Administrative Law

Judge based on her/his opportunity to observe witness demeanor at the hearing. See, e.g., Estate of Donald Paul Lafferty, 19 IBIA 90 (1990). Cf. Eckiwaudah, in which the Board held that it would review witness credibility determinations de novo when the Judge deciding the case was not the Judge who conducted the hearing. The Board finds no reason in appellants' arguments to depart from this long-established rule.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Administrative Law Judge Rausch's orders of March 11, 1994, and May 12, 1995, are affirmed. 4/

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

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//original signed  
Anita Vogt  
Administrative Judge

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4/ Any arguments not specifically addressed were considered and rejected.