



INTERIOR BOARD OF INDIAN APPEALS

Estate of Kelly (Buck) Freeman

38 IBIA 12 (07/22/2002)



United States Department of the Interior

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

ESTATE OF KELLY (BUCK) FREEMAN : Order Affirming Decision
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: Docket No. IBIA 02-13
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:
: July 22, 2002

This is an appeal from a September 28, 2001, Order Denying Petition for Rehearing issued by Indian Probate Judge George D. Tah-bone in the Estate of Kelly (Buck) Freeman (Decedent), Probate No. 001-301-203J. Judge Tah-bone's order let stand a March 31, 1998, Order Determining Heirs in which Administrative Law Judge James H. Heffernan found that Decedent's heirs were his two children, Preston Lee Hall and Kristen Ingrid Hall. IP TC 251 R 96. For the reasons discussed below, the Board affirms Judge Tah-bone's order.

Appellant Agnes Yellow Wolf is Decedent's mother. She filed a petition for rehearing of Judge Heffernan's March 31, 1998, order, in which she challenged the Judge's finding that Decedent was the father of Preston and Kristen. She also contended that, as a matter of law, Preston and Kristen were not entitled to inherit from Decedent because they were illegitimate. For this argument, she apparently relied on tribal law of the Three Affiliated Tribes of the Fort Berthold Reservation.

In denying rehearing, Judge Tah-bone held that Appellant had not shown error in Judge Heffernan's finding that Decedent was the father of Preston and Kristen. He also rejected Appellant's legal argument, holding that the right to inherit Indian trust property is determined by reference to Federal and state law, under which Preston and Kristen were entitled to inherit Decedent's estate.

On appeal to the Board, Appellant abandons her challenge to the paternity finding. However, she contends: (1) Judge Tah-bone deprived her of due process by failing to hold a hearing at which she could make her legal argument concerning the applicability of tribal law and custom to this probate; (2) he erred in failing to recognize that, under 25 U.S.C. § 2205,

tribal law and custom control in Indian probate proceedings; and (3) 25 U.S.C. § 371 is discriminatory and unconstitutional.

Judge Tah-bone was not required to hold a second evidentiary hearing ^{1/} so that Appellant could present her legal argument. Instead he properly considered her written argument after giving other parties an opportunity to respond. The Board rejects Appellant's contention that she was denied due process.

In her argument concerning 25 U.S.C. § 2205, Appellant indicates that she is referring to the present version of that section, which was enacted in November 2000. As enacted in 2000, section 2205 provides that, "[n]otwithstanding any other provision of law, any Indian tribe may adopt a tribal probate code to govern descent and distribution of trust or restricted lands that are—(A) located within that Indian tribe's reservation; or (B) otherwise subject to the jurisdiction of that Indian tribe." 25 U.S.C. § 2205(a)(1). The section further provides that a tribal probate code enacted under the section is subject to the approval of the Secretary of the Interior, 25 U.S.C. § 2205(b)(1); becomes effective "on the later of—(A) the date specified in section 2206(g)(5) of this title; [^{2/}] or (B) 180 days after the date of approval," 25 U.S.C. § 2205(b)(3); and "shall apply only to the estate of a decedent who dies on or after the effective date of the tribal probate code." 25 U.S.C. § 2205(b)(4)(A).

Decedent died in 1995. Thus there is no way a tribal code enacted and approved under the present section 2205 could apply to his estate. It is possible, however, that Appellant intended to argue that the previous version of section 2205 is applicable to Decedent's estate, as it was in effect at the time of Decedent's death. That version was enacted in 1984 and provided in part: "Notwithstanding any other provision of law, any Indian tribe, subject to approval by the Secretary, may adopt its own code of laws to govern descent and distribution of trust or restricted lands within that tribe's reservation or otherwise subject to that tribe's jurisdiction." Act of Oct. 30, 1984, Pub. L. No. 98-608, § 1(3), 98 Stat. 3172, 25 U.S.C. § 2205 (1994).

Decedent was evidently a member of the Three Affiliated Tribes of the Fort Berthold Reservation. At his death, however, he did not own any trust or restricted property on the Fort Berthold Reservation. Rather, his only trust interests were located on the Fort Totten (Spirit Lake) and Standing Rock Reservations in North Dakota and the Fort Peck Reservation in Montana. Appellant does not contend, let alone establish, that any of the tribes governing these reservations has a probate code enacted and approved under the earlier version

^{1/} Judge Heffernan held an evidentiary hearing during the initial proceedings in this estate.

^{2/} I.e., 365 days after the Secretary certifies that the notification requirements of 25 U.S.C. § 2206(g) have been met.

of 25 U.S.C. § 2205. 3/ Therefore, Appellant has failed to show that tribal law applies to any of Decedent's estate.

Appellant's final argument is that 25 U.S.C. § 371 is discriminatory and unconstitutional. Section 371 provides that, for Indian probate purposes, "every Indian child, otherwise illegitimate, shall * * * be taken and deemed to be the legitimate issue of the father of such child." Appellant contends that the section "deprives an Indian male of due process and equal protection of law." Appellant's Opening Brief at 4.

The Board has no authority to declare a Federal statute unconstitutional and therefore lacks jurisdiction to address this argument. E.g., Kansas v. Acting Southern Plains Regional Director, 36 IBIA 152, 154 (2001), and cases cited therein.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Tah-bone's September 28, 2001, Order Denying Petition for Rehearing is affirmed.

//original signed

Anita Vogt
Administrative Judge

//original signed

Kathryn A. Lynn
Chief Administrative Judge

3/ Although it would not matter in this case, Appellant also fails to contend or establish that the Three Affiliated Tribes of the Fort Berthold Reservation have a probate code enacted and approved under the earlier version of 25 U.S.C. § 2205.