



INTERIOR BOARD OF INDIAN APPEALS

Estate of Paul Greenwood

38 IBIA 121 (09/23/2002)



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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ESTATE OF PAUL GREENWOOD : Order Affirming Decision as Modified  
:   
: Docket No. IBIA 02-19  
:   
: September 23, 2002

Appellants Effie C. Greenwood Hill, Phoebe Greenwood Mott, and Fannie Frances Greenwood Van Etten seek review of a September 28, 2001, order denying rehearing issued in the estate of Decedent Paul Greenwood by Administrative Law Judge Harvey C. Sweitzer. IP RC 447Z 93. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision as modified here.

Decedent, a member of the Rosebud Sioux Tribe, died on February 20, 1993. Hearings to probate Decedent's trust estate were held on January 28, 1994, and September 26, 1995. In an order dated April 20, 2001, Judge Sweitzer found that Decedent died intestate and was survived by an estranged spouse, Marion Ruth Traversie, and by a son, Marlin Wayne Greenwood. He ordered Decedent's estate distributed 1/2 to Marion and 1/2 to Marlin.

Appellant Hill petitioned for rehearing, contending that Decedent might have executed a will, Decedent and Marion were not validly married, and Decedent was not Marlin's father. By order dated September 28, 2001, the Judge denied rehearing, finding that Appellant Hill lacked standing to petition for rehearing. In addition, he noted that Appellant Hill had failed, in the seven years this probate was pending, to produce any will; Decedent's marriage was evidenced by a marriage certificate; Decedent and Marion were never divorced although they were separated; and Marlin's paternity was supported by a birth certificate, two affidavits of paternity from Decedent, and Marion's testimony against her own interest that Decedent was Marlin's father (Marion is not Marlin's mother).

Appellants appealed to the Board. Among other things, they contended that Decedent was incapable of fathering children, Marion was underage at the time she and Decedent were supposedly married, and Marion's parents did not sign a consent for a marriage. In a January 8, 2002, order, the Board found that, if Appellants prevailed in their arguments against the finding that Decedent was survived by both a spouse and a child, they would be presumptive heirs of

Decedent. It therefore concluded that Appellants had standing to bring this appeal. See Estate of George Fishbird, 36 IBIA 269, 272-73 (2001).

Although they made several filings, Appellants did not file an opening brief. No one else has filed a brief in this matter.

Appellants were advised that they bore the responsibility of proving the error in the decision under appeal. On appeal, Appellants contend that Marion (whom they call Ruth) was 15 or 16 years old at the time she married Decedent, and that Marion's parents did not sign a consent for the marriage. Marion admitted at the September 26, 1995, hearing that she was 15 in 1951 when she married Decedent. In one filing before Judge Sweitzer, Marion asserted that, under state law at the time she married, a woman of twelve could legally marry without signed parental consent. She did not, however, provide any evidence in support of this contention.

This marriage was extensively discussed at the hearing. Judge Sweitzer stated that there was a prima facie showing of a marriage, and that he did not have authority to "nullify" a marriage. Transcript of Sept. 26, 1995, Hearing at 12. However, despite the discussion, no party offered any proof of the relevant South Dakota law.

Judge Sweitzer has the responsibility to determine the status of persons who may be the heirs of an Indian decedent. That includes the responsibility to determine whether relationships such as marriages, divorces, and adoptions should be recognized for purposes of inheritance of trust property. In terms of marriages, the Board has held that whether a marriage is to be recognized for probate purposes depends upon whether the marriage was valid in the jurisdiction where it was took place. See, e.g., Estate of Richard Doyle Two Bulls, 11 IBIA 77 (1983); Estate of Edward Lockwood, Jr., 7 IBIA 271 (1979); Estate of Phillip Tooisgah, 4 IBIA 189, 82 I.D. 541 (1975); Estate of Lloyd Andrew Senator, 2 IBIA 102, 80 I.D. 731 (1971). The Judge failed to make any such determination here. Although the Board does not condone the Judge's failure to make this determination, it also sees no real purpose in delaying final resolution of this case by a remand to Judge Sweitzer.

Evidence and testimony presented at the September 26, 1995, hearing indicated that Decedent and Marion were married in South Dakota in 1951, when Marion was 15 years old. Appellants do not dispute these facts. According to information provided to the Board by South Dakota Legislative Service, SDC 14.0109 was in effect in 1951. The statute provided: "Any \* \* \* unmarried female of the age of fifteen years or upwards and not otherwise disqualified, [is] capable of consenting to and consummating a marriage." The legal age for marriage for a woman was not raised until 1961. Thus, Marion was capable of entering into a marriage without the consent of her parent or parents, and her marriage to Decedent was valid. The Board modifies Judge Sweitzer's order to show that the marriage between Decedent and

Marion was valid. Because Decedent and Marion were not divorced, Marion was Decedent's surviving spouse. <sup>1/</sup>

As to Decedent's relationship to Marlin, Appellants argue that Decedent "had a severe case of the mumps as a child and the folks decided he was not able to father any children on account of that disease." Notice of Appeal at 1. However, they present no evidence--and in particular, no medical evidence--that Decedent was incapable of fathering children.

Appellants submit a letter they received from the Veterans Administration (VA) stating that Decedent had informed the VA that he had no children. While this is some evidence that Decedent, later in life, denied he was Marlin's father, it does not overcome the explicit evidence acknowledging paternity.

Appellants request that Marlin be required to submit to a blood test to establish paternity. As it advised Appellants in a January 8, 2002, order, the Board lacks authority to order blood or DNA testing. See, e.g., Estate of Herbert Bartlett Levering, 37 IBIA 89 (2001). If an individual voluntarily submits to blood or DNA testing, the test results can be submitted in a Departmental probate proceeding. In this case, however, Marlin has not indicated that he would voluntarily submit to a blood test. The Board cannot order him to do so.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Sweitzer's September 28, 2001, order denying rehearing is affirmed as modified in this opinion.

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Kathryn A. Lynn  
Chief Administrative Judge

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//original signed  
Anita Vogt  
Administrative Judge

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<sup>1/</sup> Interestingly, in an undated letter to Marlin's mother that is included in the probate record, Appellant Hill objected to any claim that Marlin might make against Decedent's estate. She stated: "My brother [Decedent] had only 14 acres which should go to Ruth Traversie Greenwood his wife."