



INTERIOR BOARD OF INDIAN APPEALS

Estate of Francis Rock

38 IBIA 297 (01/31/2003)

This decision has been redacted under 5 U.S.C. § 552(b)(6) by substituting initials for certain names.



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF FRANCIS ROCK : Order Vacating Order Denying Reopening
: and Remanding Case
:
: Docket No. IBIA 01-183
:
: January 31, 2003

M. P. P. (Appellant) seeks review of an order denying the reopening of the Estate of Francis Rock (Decedent) issued by Administrative Law Judge Robert G. Holt on July 31, 2001. For the reasons discussed below, the Board vacates the order and remands this matter to him for further consideration.

On February 12, 1965, Examiner of Inheritance David J. McKee issued an order determining Decedent's heirs and distributing his estate. The order determined that Decedent had three heirs: Clara Whitemanruns Rock (wife), George Francis Rock (son), and L. R. (adopted son).

On October 26, 1999, Appellant filed a petition to reopen this estate alleging that he learned that Decedent was his natural father in 1998, and that he is an omitted heir. On October 10, 2000, Arlo Stray Calf Dawes, Appellant's nephew and representative, filed a second petition to reopen this estate on the same grounds.

Judge Holt held a prehearing conference concerning Appellant's petition on February 20, 2001. On March 20, 2001, he issued an order denying Appellant's request for stay of distribution. In this order, the Judge found that Appellant had inherited as a son from the estate of Perry Pretty Paint, Case No. IP-BI-464B-77 (Sept. 22, 1977), and thus his petition affected Pretty Paint's estate as well as Decedent's estate.

Judge Holt held a hearing on July 11, 2001. On July 31, 2001, he issued an Order Denying Reopening of Decedent's estate. He found that Appellant failed to prove by a preponderance of the evidence at the hearing that Decedent was Appellant's father, that the confusion surrounding Appellant's birth records significantly detracted from their evidentiary

value, 1/ that the fact that Decedent did not acknowledge Appellant further diminished the probative value of the birth certificates, and that testimony of Appellant's wife was insufficient to corroborate Appellant's paternity. Order at 2-4. He found the record devoid of any proof of the cohabitation of Decedent and G. K. (Appellant's mother), id. at 6, and stated that he declined to consider Appellant's proffered testimony of Edith Shirley Rock Pickett and Mae House. Id. at 4. Lastly, he held that Appellant failed to exercise due diligence, lacked standing, and failed to carry his burden to prove manifest injury. Id. at 6-7.

Reopening of Indian probate estates that have been closed for more than 3 years is governed by 43 C.F.R. § 4.242(h), which provides in pertinent part:

If a petition for reopening is filed more than 3 years after the entry of a final decision in a probate, it shall be allowed only upon a showing that a manifest injustice will occur; that a reasonable possibility exists for correction of the error; that the petitioner had no actual notice of the original proceedings; and that petitioner was not on the reservation or otherwise in the vicinity at any time while the public notices were posted.

Under long-standing Departmental practice, a person seeking reopening must also show that he exercised due diligence. Estate of Herbert Bartlett Levering, 36 IBIA 192 (2001). See, e.g., Estates of Newton McNeer and Nancy McNeer, 33 IBIA 318 (1999); Estate of George Dragswolf, Jr., 30 IBIA 188, 196-200, modified in non-relevant part, 31 IBIA 228 (1997); Estate of George Dragswolf, Jr., 17 IBIA 10 (1988); Estate of Woody Albert, 14 IBIA 223 (1986).

After discussing the Board's cases concerning due diligence, Judge Holt stated:

Melvin was born in 1936. He testified that from a very early age, when he was approximately four years old, he was aware that Perry Pretty Paint was not his father. Therefore he "had the knowledge necessary to put him on inquiry—that is, knowledge sufficient to alert him to make inquiries[.]" Estate of Louise (Louisa) Mike Sampson, 29 I.B.I.A. 86, 88 (1996). Conspicuously absent from Melvin's testimony is any indication of an effort to determine the identity of his real father during the ensuing years. In fact, he testified that he accepted an inheritance from Perry's estate in 1977 even though he knew that he was only culturally and not legally adopted by Perry. He further testified that he used the birth certificate showing Perry as his natural father to obtain a driver's license in 1980. Moreover, Elsie, Melvin's wife, testified that she has known since 1955 that Francis was Melvin's father. Balanced against this evidence is the fact that Francis Rock's estate

1/ The record includes several birth certificates for Appellant, with conflicting information as to the identity of Appellant's father and the date of Appellant's birth. The most recent birth certificate, issued on Oct. 3, 2000, shows Decedent as Appellant's father and Appellant's birth date as Sept. 18, 1936. This certificate indicates that corrections were made pursuant to a court order, but does not specifically describe the corrections. The record does not include a copy of the court order.

has been closed and the other heirs have relied on the final order for more than twenty-five years. Given these circumstances, the undersigned finds that Melvin has not exercised due diligence in the pursuit of his claim.

Order at 7.

The Board decision cited by Judge Holt, Estate of Louise (Louisa) Mike Sampson, concerned a situation where, at the time of the original probate hearing, the appellant had been an adult, had known of the decedent's death and, as relevant here, had known of her own relationship to the decedent. The Board found that the appellant "had the knowledge necessary to put her on inquiry—that is, knowledge sufficient to alert her to make inquiries about [the] decedent's estate." 29 IBIA at 88.

Here, the only evidence concerning the point at which Appellant learned that he might be related to Decedent was Appellant's own testimony and that of his wife. Appellant testified that he learned of the relationship in 1998, and Appellant's wife testified that she told him of the relationship in 1997. Judge Holt recognized that Appellant had exercised due diligence since 1998. Tr. at 66.

Appellant's knowledge that Pretty Paint was not his father is not evidence that he knew, or had reason to know, about his relationship to Decedent. Given the lack of any evidence that Appellant had information concerning a relationship to Decedent prior to 1997, the Board concludes that it was error for Judge Holt to find that Appellant "had knowledge sufficient to alert him to make inquiries" about Decedent's estate, with respect to any period before 1997. The Board further concludes that, upon the evidence in this case, Appellant must be presumed to have exercised due diligence and to have standing to petition for reopening.

As stated above, Judge Holt also found against Appellant on the merits. His finding was based in part upon an erroneous interpretation of the law concerning the rights of illegitimate children to inherit Indian trust property. He concluded that, even if Decedent was Appellant's father, Appellant would not be entitled to inherit from Decedent, either under Montana law or under 25 U.S.C. § 371.

Montana law is inapplicable here. The inheritance rights of illegitimate children in Indian probate proceedings are determined by Federal, not state, law. E.g., Estate of Emerson Eckiwaudah, 27 IBIA 245, 248 (1995).

25 U.S.C. § 371 provides:

For the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of section 348 of this title, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue

of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child.

Judge Holt stated: “The record is devoid of any proof that [Decedent] and Grace Killsboy cohabited together as man and wife. Therefore 25 U.S.C. § 371 does not legitimize [Appellant].” Order at 6.

The Board has stated on several occasions that 25 U.S.C. § 371 “allows inheritance under two circumstances: (1) when a child is born from an Indian custom marriage, and (2) when the child is illegitimate, but the identity of the father can be proven.” Estate of Woody Albert, supra, 14 IBIA at 226. ^{2/} It is not necessary for purposes of section 371 to prove cohabitation. Therefore, Judge Holt’s interpretation of 25 U.S.C. § 371 as requiring such proof was incorrect.

Judge Holt also held that Appellant failed to carry his burden of proving that Decedent was his father. Although he allowed Appellant to describe, by means of a “proffer,” the anticipated testimony of Edith Shirley Rock Pickett and Mae House, after they did not appear at the hearing, ^{3/} he ultimately determined not to consider the proffered testimony. Both anticipated witnesses had signed affidavits which, according to Appellant, had been offered, but not accepted, at the February 20, 2001, prehearing conference. No copies of the affidavits appear in the record that was before Judge Holt. Nor is there any mention of them in the transcript of the July 11, 2001, hearing. It is clear that the Judge did not have an opportunity to consider them.

Appellant has submitted the affidavits to the Board. Both are dated September 15, 2000, and thus were clearly in existence at the time of the prehearing conference. The prehearing conference was apparently not recorded, as there is no transcript of it in the record. Nothing before the Board contradicts Appellant’s statement that he attempted to introduce the affidavits at the prehearing conference. Therefore, the Board accepts his statement as accurate.

^{2/} The Board’s interpretation of section 371 was discussed and explicitly affirmed in Osborne v. Babbitt, 61 F. 3d 810, 813-14 (10th Cir. 1995), which involved an appeal from the Board’s decision in Estate of Abbie (Effie) Little Eagle Osborne, 22 IBIA 142 (1992).

^{3/} At the hearing, Judge Holt explained:

“I will allow you to submit what the law calls a “proffer” of evidence. That means I will allow you to tell me what these witnesses would have said if they were present. * * * [N]ow I will tell you that the law doesn’t allow me to give it the same weight as their actual testimony, because they are not subject to cross examination by anyone.”

Tr. at 78.

Appellant should have at least attempted to place the affidavits into evidence at the hearing, after his witnesses failed to appear. He did not do so. However, it is apparent from the hearing transcript that neither he nor his lay representative was familiar with hearing procedures. Where an individual participating in an Indian probate proceeding is not represented by an attorney, the Administrative Law Judge bears a greater burden of ensuring that all relevant facts are brought out at the hearing. Estate of Wesley Emmett Anton, 12 IBIA 139 (1984). Under the particular circumstances of this case, where Appellant attempted to submit the affidavits prior to the hearing, the Board finds that Appellant should have been advised that he could submit the affidavits when his witnesses failed to appear.

The Board is unable to determine how Judge Holt would balance the facts in this case, once he excludes the erroneous interpretation of law discussed above and takes the affidavits into consideration. Therefore, it returns this matter to the Judge. He shall take the affidavits into consideration after giving the opposing parties an opportunity to comment on them. The Board does not determine what weight he should give the affidavits, only that he must consider them.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Holt's July 31, 2001, order is vacated and this matter is remanded to him for further consideration as discussed in this order.

//original signed
Kathleen R. Supernaw
Acting Administrative Judge

//original signed
Anita Vogt
Administrative Judge