



INTERIOR BOARD OF INDIAN APPEALS

Estate of Dennis Earlwin Sand

42 IBIA 83 (12/09/2005)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF DENNIS EARLWIN SAND : Order Affirming Decision
:
: Docket No. IBIA 04-79
:
: December 9, 2005

Caroline Sand (Appellant) seeks review of an Order Denying Petition for Rehearing entered in the estate of Dennis Earlwin Sand (Decedent), a deceased Cheyenne River Sioux Indian, Probate No. IP GP-340-0090, by Administrative Law Judge Marcel S. Greenia (ALJ) on February 5, 2004. Appellant is Decedent's daughter. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the ALJ's denial of rehearing.

Background

Decedent died intestate on April 23, 2002 at Sturgis, South Dakota. At the time of his death, he owned trust or restricted property on the Cheyenne River Reservation in South Dakota and on the Standing Rock Reservation in North and South Dakota. The ALJ held a hearing to determine the heirs on April 29, 2003 at Eagle Butte, South Dakota. Appellant was present at the hearing.

On September 9, 2003, the ALJ issued an Order Determining Heirs and Decree of Distribution. He also issued a Memorandum of Law in support of the order. The ALJ determined that Decedent had been married twice. The first marriage was to Catherine Catch the Bear in 1951. Catherine Catch the Bear predeceased Decedent. The ALJ found that eight children were born of that marriage, including Appellant, and that seven of the children were living at the time of Decedent's death. He also found that one of the children had been adopted out, and thus was not eligible to inherit any of Decedent's trust or restricted property. ^{1/} He determined that the marriage ended by divorce in 1969, the year

^{1/} The ALJ considered an apparent proposal by some of the interested parties to execute a "compromise settlement" in which the children of Catherine Catch the Bear and Decedent who were legally qualified as heirs would share their interests in the estate equally with their

that Decedent entered into his second marriage, with Darlene Two Hawks. Two children were born of that marriage, both of whom were still living when Decedent died.

The ALJ determined that, under the intestate succession laws of South Dakota, all of Decedent's trust or restricted property on the Cheyenne River Reservation in South Dakota would pass to Darlene Two Hawks Sand. He also determined that, under subsection 3(a)(1) of the Standing Rock Act of June 17, 1980, Pub. L. No. 96-274, 94 Stat. 537, one-half of Decedent's trust or restricted property located on the Standing Rock Reservation in North and South Dakota would pass to Darlene and the remaining one-half would be divided equally among Decedent's eight eligible children. Appellant thus received a 1/16 interest in Decedent's trust property on the Standing Rock Reservation.

On November 6, 2003, Appellant submitted a petition for rehearing to the BIA Realty Office in Eagle Butte, South Dakota, which transmitted it to the Office of Hearing and Appeals. Appellant asserted that she was submitting the petition "[b]ased on the new findings concerning my father's probate" and stated that she had attached "the documentation that is needed." Appellant attached responses to apparent requests by her for divorce records between Catherine Catch the Bear and Decedent from the Walworth County clerk of court, the Dewey County clerk of court, the Corson County clerk of court, the State of South Dakota, and the Cheyenne River Sioux Tribal Court. Appellant also attached a divorce complaint dated October 16, 1996, which was filed by Decedent against Darlene Two Hawks in the Cheyenne River Sioux Tribal Court.

On November 12, 2003, Appellant submitted a "formal letter to petition [for] rehearing" to the ALJ. She stated that the newly discovered evidence to be presented was "[e]vidence * * * that the marriage between Darlene Two Hawks and Dennis Sand was illegal. There is no evidence of a divorce between Catherine Catch the Bear and Dennis

adopted-out sister. The probate record includes a copy of such an agreement executed with regard to Catherine's previously-probated estate. The copy of the agreement submitted was dated June 1, 2001, and was signed by one of Appellant's sisters. The ALJ's decision states that each of Catherine's surviving children had signed and notarized separate, identical agreements during the probate of that estate. The ALJ refused to apply the previously-executed settlement to Decedent's estate because it was specifically drafted to govern the distribution of Catherine's, not Decedent's, estate. The ALJ also determined that, even if the agreement were drafted in reference to Decedent's estate, it could not overcome the rules on descent and distribution in the Standing Rock Act and would be void ab initio. The ALJ's decision regarding the apparent settlement proposal was not appealed.

Sand.” Accordingly, she “request[ed] that the probate be reopened to examine the above evidence.”

On November 24, 2003, the ALJ apparently issued a Notice to Show Cause Why Petition for Rehearing Should Not Be Granted. 2/

Darlene Two Hawks responded to the notice. She submitted a marriage license and certificate of marriage, which stated that she and Decedent had been married in Hughes County, South Dakota, on July 1, 1969. Darlene also submitted a letter dated December 24, 2003 from the Chief Judge of the Cheyenne River Sioux Tribal Court stating that the court, without dismissing the action, had refused to grant the divorce between her and Decedent because the parties had failed to provide testimony supporting grounds for divorce. The court had recommended that the parties seek the assistance of legal counsel, and the case remained pending.

On February 5, 2004, the ALJ issued an Order Denying Petition for Rehearing, as well as a Memorandum of Law in support of the order. The ALJ found that Appellant had failed to present new evidence sufficient to overcome the presumption in favor of the validity of Decedent’s marriage to Darlene Two Hawks.

Appellant filed a timely notice of appeal. She also submitted an opening brief.

Discussion

Appellant contends that Decedent’s second marriage to Darlene Two Hawks was a “bigamous marriage.” She asserts that Catherine Catch the Bear had assumed that Decedent had filed divorce papers and obtained a divorce because Decedent had told her he was going to do so. According to Appellant, Catherine never knew that she was still married to Decedent.

Appellant states that she decided to research whether Catherine Catch the Bear and Decedent ever divorced during the preparation of funeral papers for Catherine in March 2001 but was unable to find any paperwork on the divorce. She explains that she called the Dewey and Walworth County clerk of court offices in March 2001, and the Cheyenne River Sioux Tribal Court and Corson County clerk of court in 2003. Appellant submitted

2/ The notice is not included in the record before the Board but is referenced in the ALJ’s memorandum of law attached to the denial of rehearing.

to the Board the same letters from these sources that she submitted to the ALJ in her petition for rehearing. ^{3/}

Appellant also submitted a copy of the record of marriage between Decedent and Catherine Catch the Bear, a copy of the marriage certificate and license for Decedent and Darlene Two Hawks, and a copy of the divorce complaint filed by Decedent against Darlene on October 16, 1996, but she makes no argument with respect to these documents.

As a preliminary matter, the Board observes that Appellant failed to comply with the requirements of 25 C.F.R. § 4.241 (2003). Subsection 4.241(a), which governs petitions for rehearing, provides in pertinent part that a petition based on newly-discovered evidence “must [] state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision.”

A rehearing on grounds of newly-discovered evidence is normally appropriate only if it is shown that the evidence could not, with diligent effort, have been presented at the original hearing. Estate of George Asepermy, Sr., 28 IBIA 50, 51 (1995) (citing Estate of Howard Little Charley, 18 IBIA 335, 336 (1990)); Estate of Joseph Kicking Woman, 15 IBIA 83, 86 (1987), dismissed, Kicking Woman v. Hodel, Civ No. 87-33-GF (D. Mont. 1987), aff'd, 878 F.2d 1203 (9th Cir. 1989). The purpose of this rule is to require a claimant to present all information available to him or her at the earliest possible stage of the proceeding. Estate of Warren Lewis Lincoln, 19 IBIA 118, 121 (1990).

In the instant case, Appellant did not offer any reasons for her failure to discover and present her evidence at the April 29, 2003 probate hearing. Appellant was present at the hearing and did not object to Darlene Two Hawk’s testimony that she was Decedent’s wife even though she states that she first questioned the validity of Decedent’s second marriage and had obtained two of the letters from court clerks attesting to the lack of divorce records for Catherine Catch the Bear and Decedent more than two years earlier. Appellant’s failure to raise the arguments about the validity of Decedent’s marriage to Darlene is particularly puzzling in light of her assertion in her notice of appeal to the Board that she first questioned the validity of Decedent’s second marriage while completing the paperwork for

^{3/} Appellant argues for the first time on appeal that the South Dakota officials that issued the marriage certificate for Decedent and Darlene Two Hawks erred in not verifying whether Decedent had actually divorced his first wife. The Board declines to consider this argument. See Estate of Phillip Quaempts, 41 IBIA 252, 256 (2005) (“the Board ordinarily does not consider arguments or evidence raised for the first time on appeal”).

Catherine's funeral. The Board sees no justifiable reason why Appellant did not present the argument that Decedent never divorced Catherine at the original probate hearing.

In any event, the Board concludes that the ALJ correctly found that Appellant has failed to present evidence sufficient to overcome the presumption of validity of Decedent's second marriage. Marital status is determined by the laws of the jurisdiction in which the relationship was created. See Estate of Phillip Quaempts, 41 IBIA at 254; Estate of Henry Frank Racine, 13 IBIA 69, 71 (1985). Under South Dakota law, "[a] subsequent marriage contracted by any person during the life of a former * * * wife of such person with any person other than such former * * * wife, is null and void from the beginning, unless the former marriage has been annulled or dissolved * * * ." S.D. Codified Laws § 25-1-8 (2002).

If a person has entered into two marriages, however, a presumption arises in favor of the second marriage. See In re Scott's Estate, 248 N.W. 247, 249 (S.D. 1933); see also Estate of Ramon Clifford Moreno, 15 IBIA 73, 75 (1986). The burden is upon the party attacking the validity of the second marriage to prove the first marriage had not been terminated by annulment, divorce, or death prior to the second marriage. See Estate of Moreno, 15 IBIA at 75 (citing Estate of Phillip Tooisgah, 4 IBIA 189, 194 (1975), dismissed, Tooisgah v. Kleppe, 418 F. Supp. 913 (W.D. Okla. 1976)). The evidence necessary to overcome the presumption must be strong and distinct. See In re Scott's Estate, 248 N.W.2d at 249 (strong presumption of legality of second marriage, not only casting the burden of proof on the party objecting, but requiring plain and particular showing).

To determine whether a party has overcome the presumption that a prior marriage has been dissolved by divorce, courts have looked to factors such as testimony by the first wife or husband that he or she did not get a divorce and had never been served with divorce papers; testimony by an individual familiar with the party alleged to have obtained the divorce that the party had stated he or she never obtained a divorce; the resumption of relations by the parties to the first marriage; and searches of the official records of all the counties or states where the individual might reasonably have been expected to pursue a divorce. See, e.g., Grey v. Heckler, 721 F.2d 41, 47-48 (2d Cir. 1983) (presumption overcome where record searches of every jurisdiction in which decedent would have been likely to seek a divorce turned up no evidence of a divorce, the first wife testified that she was never served with divorce papers, and decedent's sister testified that a year before decedent's death decedent had told her that he still needed to get a divorce from his first wife); Metropolitan Life Insurance Co. v. Jackson, 896 F. Supp. 318, 323 (S.D.N.Y. 1995) (presumption overcome where first wife searched court records in all counties in which decedent and first wife resided and first wife stated that she neither obtained a matrimonial

judgment against deceased husband nor was she sued by husband in any matrimonial action); In re Estate of Herman Felix Grauel, 425 P.2d 644, 645-46 (Wash. 1967) (presumption overcome where first wife of decedent testified without contradiction that she had not obtained a divorce from decedent and introduced answers to interrogatories from clerks of all counties of the states where witnesses testified that decedent had spent time, and decedent's sister, friend, and second wife all testified that they had no knowledge of a divorce); Patillo v. Norris, 65 Cal. App. 3d 209, 215-16 (1976) (presumption overcome where first wife of decedent testified that there had been no divorce, she had written him a note referring to herself as his wife seven or eight years after they had separated, and decedent had welcomed her back into his home after a twenty-year separation and for certain period reconciled with her). See also Presumption as to Validity of Second Marriage, 14 A.L.R.2d 7 (1954, 1987 Supp.) (describing numerous cases).

Appellant has the difficult task of proving a negative: that Decedent never divorced Catherine Catch the Bear. Appellant has attempted to accomplish this by requesting a search of the records of several courts in South Dakota and South Dakota's vital records. Although courts have recognized that record searches are useful in showing that a first marriage had not been terminated by divorce, a record search is still only one factor to be considered. A thorough record search may be considered determinative "[i]n the absence of some affirmative reason to believe in the existence of a divorce." Grey, 725 F.2d at 47. In cases where parties have successfully challenged the presumption in favor of the validity of the second marriage using record searches, the record search generally has been coupled with other evidence showing there was never a divorce including, for example, testimony from the first wife that she had never pursued a divorce or received divorce papers. See, e.g., Grey, 721 F.2d at 47-48; Metropolitan Life, 896 F. Supp. at 323; Lott v. Toomey, 477 So. 2d 316, 318, 320-21 (Ala. 1985); Estate of Grauel, 425 P.2d 645-46.

In this case, there is an affirmative reason to believe in the existence of the divorce. Catherine Catch the Bear told Appellant that she thought she was divorced and said that Decedent told her that he was going to get a divorce. There is no testimony or evidence presented to the contrary except for the record search. The Board concludes that under these circumstances the record searches conducted by Appellant, without more, fail to rebut the heavy presumption in favor of the validity of Decedent's second marriage. 4/

4/ In addition, the Board observes that Appellant herself appears to have previously attested that the marriage between Decedent and Catherine Catch the Bear ended by divorce. According to the ALJ's memorandum of law, Appellant signed a notarized copy of the compromise settlement for Catherine's estate, which expressly states that "[t]he marriage of Catherine Evelyn Catch the Bear and Dennis Sand ended by divorce in 1969."

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the ALJ's February 5, 2004 Order Denying Petition for Rehearing is affirmed.

I concur:

 // original signed
Katherine J. Barton
Acting Administrative Judge

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Steven K. Linscheid
Chief Administrative Judge