



INTERIOR BOARD OF INDIAN APPEALS

Estate of Milward Wallace Ward

46 IBIA 5 (10/09/2007)

Related Board case:
4 IBIA 97



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF MILWARD WALLACE WARD) Order Affirming Decision
)
)
) Docket No. IBIA 05-91
)
) October 9, 2007

Appellant Floyd William Marr seeks review of an Order Denying Petition for Reopening entered on June 22, 2005, by Administrative Law Judge Marcel S. Greenia in the estate of Milward Wallace Ward (Decedent), deceased Eastern Shoshone Indian of the Wind River Indian Reservation, Probate No. IP BI 543C 73.¹ The Order Denying Petition for Reopening let stand an Order Correcting Order Determining Heirs and Directing Distribution of Trust Estate, entered March 29, 1976, by Administrative Law Judge William E. Hammett. Appellant seeks to reopen Decedent’s estate for the purpose of establishing that Appellant is the son of Decedent and his sole heir. We affirm the Order Denying Petition for Reopening because Appellant has not met his burden of showing error in the decision.

Facts

Decedent was born in Wyoming on December 17, 1931, and died intestate in Wyoming on May 27, 1973. The hearing to probate Decedent’s estate covered two days, August 3 and 9, 1973. Several of Decedent’s relatives testified at the hearing, although only one relative addressed the issue of whether Decedent had ever been married or had had children. Decedent’s natural mother, Ina (Dumontier) Witt, testified that Decedent never married and died without issue. Transcript, Aug. 3, 1973, at 3. Accordingly, in the Order Correcting Order Determining Heirs and Directing Distribution of Trust Estate, Judge

¹ The Order Denying Petition for Reopening consists of an Order and a Memorandum of Law in support of the Order (Memorandum of Law).

Hammett concluded that Decedent died without issue and determined Decedent's heirs to be Witt and Witt's five natural children.²

Appellant was born February 11, 1957, in Montana. According to his birth certificate, he was born to Ronald Roger Herman and Cecilia Marie (Caufield) Herman. According to an Indian blood degree certificate submitted by Appellant, his mother is 1/16 Crow Indian. Appellant also submits an adoption decree from the State of Washington showing that he was adopted by his stepfather, John K. Marr, in December 1971, and henceforth became known as Floyd William Marr.

Appellant asserts that his mother went to the Wind River Indian Reservation in 1994 to establish his paternity by Decedent.³ Appellant explains that while his mother was at the reservation, she obtained an Order Establishing Paternity, dated May 16, 1994, from the tribal court that determined that "Millie Ward^[4] is the natural father of [Appellant]." *In the Matter of Floyd William Marr*, Civ. No. PA-94-041 (Shoshone and Araphoe Tribal Court May 16, 1994). According to the tribal court order, the court "considered the Petition and the Acknowledgment of Paternity of the parents," thus suggesting that some documentation was presented to the tribal court. The order does not identify what evidence was received or considered on the issue of Appellant's paternity. The tribal court order also states that "the state of Montana does show the father's name on the birth certificate."⁵ Finally, the tribal court order states that "[s]aid child shall henceforth be recognized in all

² Decedent's paternal aunts and uncle unsuccessfully sought rehearing of Judge Hammett's original order. The order denying rehearing was appealed to the Board of Indian Appeals (Board), which affirmed the order. *Estate of Milward Wallace Ward*, 4 IBIA 97 (1975). Thereafter, appellants sought review in Federal district court, where the action was dismissed for lack of jurisdiction. *Ward v. Frizzell*, Civ. No. C75-175 (D.Wyo. Jan. 8, 1976). On March 29, 1976, the final order determining heirs was entered in the estate. Order Correcting Order Determining Heirs and Directing Distribution of Trust Estate.

³ Appellant represents that he has been incarcerated in Washington State since 1977 and, hence, he presumably did not accompany his mother to the Wind River Indian Reservation.

⁴ Apparently, "Millie" was Decedent's nickname.

⁵ The birth certificate submitted by Appellant to the Board lists Herman as his father, not Decedent.

legal matters as the son of Millie Ward.” Appellant does not submit to the Board any of the evidence from the tribal court proceeding.

Appellant represents that he did not know Decedent was his father until May 1994. He does not state when he became aware that Decedent had died.

In 1998, after Appellant received some paperwork relating to the probate of Decedent’s estate, Appellant wrote to Judge Hammett and requested information on how to reopen Decedent’s estate. It does not appear from the record that any response was made to Appellant’s request until the file was transferred to the Office of Hearings and Appeals in Rapid City, South Dakota, in 2005 where it was assigned to Judge Greenia.⁶

On June 22, 2005, Appellant’s request for information was treated as a petition to reopen the estate, *see* 43 C.F.R. § 4.242(h)(1978),⁷ and was denied. Judge Greenia determined that the only document submitted by Appellant that supports his allegation that Decedent is his natural father is the tribal court order. According to Judge Greenia’s decision, “[t]he Wind River Agency [of the Bureau of Indian Affairs (BIA)] and this Tribunal made diligent efforts to locate the tribal record on this matter as well as any additional information pertaining to the Order Establishing Paternity issued by the Tribal Court.” Memorandum of Law at 4. Apparently, the tribal record was not obtained. Judge Greenia observed that there was “no acknowledgment of paternity by the decedent in the record [of the probate proceedings in his estate] nor by the testimony provided at the hearing [in Decedent’s estate].” *Id.* at 2. Judge Greenia concluded that Appellant had not met his burden in his petition to reopen Decedent’s estate and denied the petition.

Appellant submitted a timely appeal to the Board. Appellant submitted a brief. No briefs were received from any other party.

⁶ Judge Hammett passed away in April 2005.

⁷ Subsection (h) of section 4.242 now appears as subsection (i). It has remained the same in substance since 1978.

Discussion⁸

Appellant submits no new evidence in support of his appeal⁹ and argues that Judge Greenia erred in not accepting the tribal court's determination of Appellant's paternity. He explains that his original birth certificate reflects the name of the person to whom his mother was married at the time of Appellant's birth because "in the 30's, 40's, [and] 50's a [m]arried woman did not have affairs, and then speak about them to the [hospital where she was giving birth]." Opening Brief at 2. Reviewing the record as a whole, including Decedent's original probate record from the 1970's, we find no error in Judge Greenia's decision denying reopening and we affirm.

It is well established that appellants bear the burden on appeal of establishing that an order denying reopening is erroneous. *Estate of Reginald Dennis Birthmark Owens*, 45 IBIA 74, 78 (2007). To reopen an estate that has been closed for more than three years, the petitioner must establish that (1) a manifest injustice will occur if the estate is not reopened, (2) it is reasonably possible to correct the error in the original proceeding, and (3) the petitioner had no actual notice of the original proceedings and was not in the vicinity of any public notices that were posted. 43 C.F.R. § 4.242(h) (1978). Where a putative omitted heir seeks to reopen an estate, "manifest injustice" is determined by balancing the interests and confidence of the public and heirs in the finality of long-closed probate proceedings against the interests of the putative omitted heir. *See Estate of George Dragswolf, Jr.*, 30 IBIA 188, 196 (1997). We need not balance these interests to review the order denying rehearing because it is evident that Appellant has not established that he is Decedent's son

⁸ At the outset, we address Appellant's assumption that the Federal Rules of Civil Procedure apply to his appeal. Appellant cites Rules 60 and 61, which govern, respectively, relief from a final judgment or order, and harmless error. These rules apply to civil actions filed in the Federal district courts. Fed. R. Civ. P. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature"). Appellant's appeal is not in Federal district court, therefore these rules do not apply. *Estate of George Hanson*, 25 IBIA 47, 48 (1993). The rules that govern Appellant's appeal are found at 43 C.F.R. Part 4 (2005), a copy of which was provided to Appellant with the Board's Pre-Docketing Notice and Order Concerning Service, dated August 23, 2005.

⁹ Appellant submits his mother's Certificate of Degree of Indian Blood, but this document does not address the issue of Appellant's paternity.

and heir. Thus, there is nothing to balance to determine whether Decedent's estate should be reopened.

In determining that Appellant has not established that he is Decedent's son, we first address Appellant's contention that the tribal court paternity order is binding on the Department of the Interior (Department) or this Board. It is not. Where the purpose of establishing paternity is to probate Indian trust assets, the determination of paternity is a question of Federal law, not tribal law or state law. *Estate of Anthony "Tony" Henry Ross*, 44 IBIA 113, 121 (2007). Through the enactment of 25 U.S.C. §§ 372-373,¹⁰

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 and conclusions of a state court. 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.

Estate of James Howling Crane, Sr., 12 IBIA 209, 211 (1984) (internal citations omitted). This reasoning also has been applied to tribal court orders. *Estate of Malcolm Muskrat*, 29 IBIA 208, 210-11 (1996); *Estate of Matthew Pumpkinseed*, 25 IBIA 98, 100-01 (1994). Thus, it is well-established that a tribal court paternity order is evidence of paternity for purposes of an Indian probate proceeding, but it is not binding on the Department or the Board any more than a state court order.

We turn next to a discussion of the legal "presumption of paternity." Where a child is conceived and/or born during the course of a marriage, the law presumes that the parents of a child conceived or born to the mother are the mother and her husband. *See Estate of Ross*, 44 IBIA at 120. As we explained in *Estate of Ross*, this "presumption of paternity" can be rebutted by a preponderance of the evidence. *Id.* Thus, where an appellant is born into a marriage but contends that his biological father is someone other than the husband in the marriage, the appellant must first establish that the husband did not father the child, either because he was not biologically able or because "the husband and wife did not have access to one another at the time of conception for the purpose of sexual relations." *Id.* For

¹⁰ Section 372 governs the probate of intestate estates and section 373 governs the probate of testate estates.

example, in *Estate of Ross*, the evidence established that the husband and wife were separated and not cohabitating at the time appellant was conceived, that the husband was in another state, and that the wife was cohabitating with the appellant's father. *Id.* at 122. Thus, in *Estate of Ross*, we determined that the presumption of paternity was rebutted.

Once the presumption of paternity is rebutted, an appellant then must establish by the preponderance of the evidence who his biological father is through the testimony of witnesses, statements of paternity by the biological father, DNA evidence, or other admissible evidence. *See id.* at 120-21, 123. In *Estate of Ross*, appellant produced favorable and detailed testimony from his mother's probate proceeding from 30 years before as well as the present-day testimony of his half-sister and paternal aunt. *Id.* at 123.

Turning now to Appellant's argument on the merits, we conclude that he has not met his burden of showing error in the order denying reopening because he has not rebutted the presumption of paternity nor has he proved that Decedent is his natural father. In arriving at this conclusion, we consider all of the evidence available to us as a whole, which consists of the following:

- Testimony in 1973 by Decedent's natural mother that Decedent died without children
- Copy of Appellant's certified birth certificate from the State of Montana, listing Herman as Appellant's father
- Appellant's statement that his mother was married to Herman at the time he was born
- Copy of a certified Washington State Court order of adoption for Floyd William Herman, showing that Appellant was adopted in 1971 by John K. Marr; the court order does not identify who fathered Appellant
- Copy of an uncertified tribal court order establishing paternity for Appellant that identifies Decedent as Appellant's father, but not identifying or otherwise providing the evidence on which the tribal court relied

- Statement in the Order Denying Petition for Reopening that BIA and Judge Greenia's staff unsuccessfully attempted to obtain the tribal record supporting the tribal court's order¹¹

Because Appellant's mother was married to Herman at the time Appellant was born, Appellant must rebut the presumption that Herman is his biological father. There is no evidence in the record that rebuts the presumption.¹²

Next, even assuming Appellant had rebutted the presumption of paternity, the evidence in support of Decedent as the biological father of Appellant is equivocal at best. On the one hand, we are presented with a copy of a purported tribal court determination of paternity that is not certified and for which none of the evidence in support of the tribal court's determination has been submitted to the Board. On the other hand, we have the sworn testimony of Decedent's mother in 1973 stating that Decedent died without issue. Upon consideration of this record as a whole, we are compelled to agree with Judge Greenia that Appellant fails to meet his burden of establishing that Decedent is his biological father. Thus, we affirm the Order Denying Petition for Reopening Decedent's estate because Appellant has not shown that the decision was in error.¹³

¹¹ Neither the file nor Judge Greenia's order identifies what efforts were made to obtain additional information or the results of those efforts. For example, we do not know whether the tribal court could not locate its records of Appellant's paternity proceeding, or whether the tribal court had no record of any paternity proceeding for Appellant, or whether the tribal court declined to release any copies from Appellant's paternity proceeding.

¹² It is possible that evidence was presented to the tribal court to rebut the presumption but the tribal court order does not reflect any such evidence and we have not been provided with any of the evidence that was provided to the tribal court in support of the tribal court's Order Establishing Paternity.

¹³ We observe that Appellant formally was adopted by John Marr in 1971. Even assuming that Appellant were to succeed in establishing that Decedent is his biological father, his adoption raises additional legal issues that have not been addressed, e.g., whether Appellant may inherit from his biological father in the wake of his adoption, whether any such right may be dependent upon whether the biological father consented to the adoption, etc. We have not been provided with any factual or legal record relating to these issues. However,
(continued...)

Conclusion

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 Board affirms the June 22, 2005, Order Denying Petition for Reopening.¹⁴

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

¹³(...continued)

given our disposition of the appeal, above, we need not address the implications of Appellant's adoption.

¹⁴ Even if Appellant could have established paternity and overcome the legal issues arising from his adoption, we would still need to address the second prong of the standard for reopening — whether there is a reasonable possibility of correcting the error after the passage of 30 years. With respect to the final prong of the standard, we presume that Appellant was unaware of the original proceedings, based on his averment that he did not know the circumstances of his paternity until his mother told him in May 1994.

In addition to the foregoing, the Board has a well established rule that an appellant must act with due diligence after discovering his or her claim. *Estate of Howling Crane*, 17 IBIA at 113. Appellant does not explain why he delayed four years before writing to Judge Hammett. It is his burden to account for his delay. *See Estate of Julius Benter (Bender)*, 17 IBIA 86, 90 (1989).