



INTERIOR BOARD OF INDIAN APPEALS

Estate of Earl Cheyenne

48 IBIA 205 (01/12/2009)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
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ESTATE OF EARL CHEYENNE) Order Affirming Decision
)
) Docket No. IBIA 07-96
)
) January 12, 2009

Thomas Earl Cheyenne (Appellant or Thomas) appeals to the Board of Indian Appeals (Board) from an Order Denying Petition for Rehearing entered March 26, 2007, by Administrative Law Judge Marcel S. Greenia (Judge Greenia or ALJ), in the Estate of Earl Cheyenne (Decedent), deceased Oglala Sioux Indian, Probate No. IP GP 344 0189. Judge Greenia’s Order Determining Heirs and Decree of Distribution (Decree), dated July 26, 2005, distributed Decedent’s trust assets, including interests in land held in trust for him on the Pine Ridge and Rosebud Reservations, in equal 1/3 shares to three children, Thomas, Janet Lee Tobacco (Janet), and Gary Manuel Cheyenne (Gary). The ALJ rejected Appellant’s Petition for Rehearing, in which Thomas claimed that Janet is not the biological daughter of Decedent and should therefore be denied any right to share in Decedent’s estate until she verifies her biological relationship to Decedent by taking a DNA test. The ALJ denied the Petition for Rehearing based in part on various proceedings in the Oglala Sioux Tribal Court, as well as the ALJ’s lack of authority to compel such testing. Because Appellant does not demonstrate error in the ALJ’s conclusion, we affirm the Order Denying Petition.

Background

Decedent was born on September 7, 1932, resided in the State of South Dakota, and died intestate on May 15, 2003. He remained unmarried, but fathered two children (Gary and Thomas) who he undisputedly recognized as his sons, and for whom he signed paternity affidavits in 1959 and 1961, respectively. Janet was born on September 13, 1955, and her mother Doris Dreaming Bear instituted a proceeding in 1957 in the Oglala Sioux Tribal Court to establish that Decedent was Janet’s biological father. *Oglala Sioux Tribe v. Lott E. Cheyenne*, OST-6. In this proceeding, Chief Judge Moses Two Bulls of the Oglala Tribal Court issued a Judgment Order dated February 4, 1958,¹ finding Decedent to be

¹ The Tribal Court Order recites that a trial was held on Dec. 23, 1957, and that findings were made on Dec. 30, 1957. The probate record contains only a copy of the Judgment (continued...)

Janet's father. On that same date, Chief Judge Two Bulls bore witness to Decedent's signature on an Acknowledgment of Paternity Affidavit.²

During the probate proceedings with respect to Decedent's trust property, Thomas opposed distribution of any part of his father's estate to Janet and requested that Janet be ordered to submit to blood testing to establish paternity. Judge Greenia conducted a hearing on November 30, 2004, at which Thomas appeared with five witnesses. Janet was notified of the hearing but did not appear. The various witnesses submitted declarations asserting that Decedent had denied that Janet was his daughter.

Judge Greenia issued his Decree on July 26, 2005, with an attached Memorandum of Law determining Janet to be Decedent's daughter for purposes of inheriting trust property from the estate. He explained that the Hearings Division of the Office of Hearings and Appeals lacks authority to compel Janet to submit to DNA testing. Memorandum of Law at 3, citing *Estate of Herbert Bartlett Levering*, 37 IBIA 89 (2001). Judge Greenia explained his weighing of the evidence as follows:

Written acknowledgments of paternity, especially those signed at a time reasonably contemporaneous with the child's birth, are persuasive evidence of paternity and are generally to be given greater weight than the recollections of witnesses. . . .

Tom Cheyenne in effect, alleges falsification of the Janet Tobacco paternity affidavit. However, he offers only the most general allegations and otherwise contends that doubt is cast upon the paternity affidavit by some of decedent's

¹(...continued)

Order. Appellant sought to obtain additional records from the Tribal Court proceedings but was unsuccessful.

² The copy of the Affidavit in the probate record is not a photocopy of the original, but instead is identified as a "copy," on which the signatures of Decedent, two witnesses, and the judge are indicated by their typed names, preceded by "sgd." A handwritten note states that the signed original is on file but, as stated in note 1, additional documents from the Tribal Court proceedings are absent from the probate record for this case. Decedent is identified on the Affidavit and on military service documents as Lott Earl or Lott E. Cheyenne. He signed Affidavits acknowledging paternity of his sons as Earl Cheyenne. He is identified elsewhere in the record, including by Judge Greenia, as Earl Lott Cheyenne. His birth certificate identifies him as Cheyenne Earl.

later statements. Tom Cheyenne[']s] concerns and witnesses' declarations are not persuasive evidence that decedent falsified the paternity affidavit. In fact, a situation such as this is an example of the reason why documentary evidence is normally preferred over the memory of witnesses.

While there is much conflicting testimony regarding this issue, after evaluating the briefs, evidence and testimony, the preponderance of the evidence establishes Janet Tobacco as the decedent's daughter.

July 26, 2005, Memorandum of Law at 2-3, citing *Estate of Henry W. George*, 15 IBIA 49, 52 (1986); *Estate of Willard Guy*, 13 IBIA 252, 255 (1985).

Thomas timely submitted a Petition for Rehearing. He explained that he had instigated proceedings regarding Janet's paternity in Tribal Court.

Thomas submitted a Petition for DNA Testing in the Oglala Sioux Tribal Court, offering his own blood for comparison with Janet's to ascertain the accuracy of that tribunal's 1958 finding that Decedent was Janet's father. The Tribal Court conducted a hearing on this motion, with both Janet and Thomas and their separate counsel present, on March 23, 2006. On March 31, 2006, the Oglala Sioux Tribal Court issued an Order Denying Petition for DNA Testing. The Tribal Court found that it was without jurisdiction to address Decedent's trust estate, that the Office of Hearings and Appeals had made a final determination of trust asset distribution, in the Decree, and that Thomas was collaterally estopped from seeking to re-litigate the issue of the determination of Decedent's heirs in the Oglala Sioux Tribal Court. Mar. 31, 2006, Order at 2.

Judge Greenia issued his Order Denying Petition for Rehearing on March 26, 2007. In it, he explained that Appellant was effectively contesting Decedent's affidavit of paternity and the 1958 Tribal Court Judgment Order, but that the only factual basis for the challenge was that no transcript of the Tribal Court proceedings had been prepared. Judge Greenia also explained that, in the most recent Tribal Court proceeding, the court had refused to order Janet to consent to a blood test and he reiterated that the Office of Hearings and Appeals does not have authority to require such testing. He conceded the existence of "much conflicting testimony regarding this issue," but concluded that a preponderance of the evidence established that Janet is Decedent's daughter.

Thomas submitted a Notice of Appeal. He claims that his rights were violated by the March 31, 2006, decision of the Oglala Sioux Tribal Court. He argues that as administrator of the estate he cannot distribute Janet's share of the estate until she proves

that Decedent was her father by taking a DNA test. In a brief dated December 26, 2007, he repeats his request for Janet to comply with his request for a DNA test.

No other briefs were submitted.

Discussion

Appellant bears the burden of showing that an order on rehearing is in error. *Estate of Verna Mae Pepion Hill Hamilton*, 45 IBIA 58, 63 (2007). Disagreement with or bare assertions concerning a challenged decision are insufficient to carry this burden of proof. *Id.* Appellant has not met his burden and thus we affirm.

Appellant's Notice of Appeal and subsequent brief seek relief that we cannot grant. At this time the Board has no authority to compel Janet to comply with a DNA testing request. *Estate of Foster Gregorio Marruffo*, 45 IBIA 149, 150 (2007). Nor does this Board have authority to consider an appeal of the Tribal Court order denying Thomas's request that it order DNA testing. All that is before us is Judge Greenia's Order Denying Petition for Rehearing in which, as between the documentary evidence of Decedent's paternity status from the Oglala Sioux Tribal Court in 1958 and the 2004 hearing declarations submitted decades later by third parties regarding Decedent's subsequent representations to them, Judge Greenia found the documentary evidence to be more persuasive and to preponderate on the issue of whether Janet is Decedent's daughter for purposes of the probate proceeding. Appellant has not alleged, let alone shown, that this weighing of the evidence was in error.³

³ We are not unmindful of the dilemma presented in this case, in which Appellant believes that medical science may now prove whether the 1958 Tribal Court's conclusion about Decedent's paternity was accurate. Whether or not such facts may be ascertained today, we have no power to order Janet to submit to such testing. It was, however, in Decedent's power to control the descent of his property by creating a will to accomplish what Thomas wants to happen now – to disinherit Janet. Decedent did not do so, though he was well aware that Janet had been adjudicated to be his child.

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, we affirm the March 26, 2007, Order Denying Petition for Rehearing.

I concur:

// original signed
Lisa Hemmer
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.