



INTERIOR BOARD OF INDIAN APPEALS

Estate of Levi Junnile Smith

49 IBIA 275 (06/18/2009)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF LEVI JUNNILE) Order Vacating Decision and Remanding
SMITH)
) Docket No. IBIA 08-25
)
)
) June 18, 2009

On behalf of herself, the Estate of Kenny Smith, Phoebe Smith, Eli Smith and Lansferd Smith, Cheryl Littlecharley (Appellant) appeals to the Board of Indian Appeals (Board), in her capacity as family representative, from a Modification of Order Determining Heirs and Decree of Distribution entered October 12, 2007 (Modification Order), by Administrative Law Judge Richard D. Hines (ALJ or Judge) in the Estate of Levi Junnile Smith (Decedent), deceased Salt River Pima-Maricopa Indian, Probate No. P000025798IP, amending an Order Determining Heirs and Decree of Distribution entered February 1, 2007 (Decree). Both the Modification Order and the Decree award Decedent’s estate to a putative daughter, Carmelita Mack (Mack), but the Modification Order amended the Decree to correct the applicable legal standard governing paternity determinations in Indian probate proceedings and to describe the evidentiary basis for the ruling.¹ Citing the standard of proof in a paternity proceeding as based on a “preponderance of the evidence,” Judge Hines concluded that the evidence “weigh[s] in favor of finding that Decedent is the father of Carmelita Mack.” Modification Order at 4.

In the appeal to this Board, Appellant submits evidence showing that the results of a paternity test ordered by the Salt River Pima-Maricopa Community Court (Community Court) showed unequivocally that Decedent and Mack are not related. Under the specific circumstances of this case, and pursuant to 43 C.F.R. § 4.318, we vacate the decision of the ALJ and remand for appropriate action to prevent manifest error.

¹ The Notice of Appeal purports to appeal from both the Modification Order and the Decree. Only the Modification Order, as an order on a petition for rehearing, is appealable to the Board. *See* 43 C.F.R. § 4.320. In the present case, though the Decree remains a part of the record, the Modification Order amended and superseded it even though the ALJ reached the same outcome. To raise challenges to the outcome, it is sufficient that the appeal challenges the Modification Order.

Background

Levi Smith was born June 24, 1918, and died January 12, 2002, after residing several years in a nursing facility in Phoenix, Arizona. He died without ever having married and without, according to the record, ever publicly acknowledging having fathered or adopted any children. He died intestate with an Individual Indian Money account in excess of \$3,000 and trust real estate interests valued in excess of \$128,000.

Upon his death, Mack claimed to be his daughter. She produced a birth certificate indicating that she was born on June 28, 1940, to Virginia Mack and Levi Smith. Members of the Smith family testified that they were surprised by Mack's claim, and averred that they knew Mack but that neither she nor Decedent had indicated a parent/child relationship during his lifetime.

Before the ALJ issued the Decree, four hearings were conducted on the following dates: February 21, 2002, July 19, 2005, March 2, 2006, December 18, 2006.² Of these, only the December 18, 2006, hearing has been transcribed and provided in the record before this Board. At the hearing and in declarations submitted into the record, Smith family members and disinterested friends testified that they knew both Decedent and Mack, that Decedent had specifically denied to them ever having fathered or adopted any child, and that he had never claimed Mack as his daughter. They also testified that they had not seen Decedent with Virginia Mack and had never heard of a relationship between the two. The Smith family pointed to errors on Mack's birth certificate. Levi Smith's age is off by a year and the birth certificate describes Smith as a farmer and as owning a farm, contentions that the Smith family averred were never true. On March 16, 2006, Kenny Smith (who died during the course of the proceedings) submitted a Petition to Establish Paternity in the Community Court (paternity proceeding).

At the December 18, 2006, probate hearing, Mack testified that she discovered that Smith was her father at some point when she was a pre-teen, and that he randomly visited her through the years, often drunk and unannounced. She claimed to have visited him at the nursing facility in his last years, while also making almost daily visits there to visit her stepfather. She claimed to have taken Decedent on trips outside the nursing facility to gather candy and cookies at his request. She had no documentary evidence to submit besides the birth certificate.

² The first two hearings were conducted by a different ALJ before the case was transferred to Judge Hines.

On behalf of the Smith family, the managing attorney for the Salf River Pima-Maricopa Indian Community sought visitation records from the Gila River Indian Care Center nursing facility. When that request was rejected, the attorney submitted a subpoena for the facility's records to the ALJ for his signature. Judge Hines never issued the subpoena.

On February 1, 2007, Judge Hines issued the Decree finding Mack to be Decedent's daughter and sole heir. In reaching this conclusion, he relied on a rebuttable presumption of legitimacy to place the burden on the parties challenging paternity, under Arizona State law. He cited no evidence in support of his conclusion that Mack is Decedent's daughter.

The Smith family timely submitted a Petition for Rehearing. They argued, *inter alia*, that the ALJ applied the law incorrectly and they asserted that paternity in an Indian Probate matter is decided by Federal, not Arizona, law. Petition for Rehearing at 6. Citing *Estate of Emerson Ekiwaudah*, 27 IBIA 245 (1995), they claimed that the testimony of the putative child is insufficient to establish paternity where the Decedent never acknowledged the child during his or her lifetime. They also challenged Judge Hines' failure to issue the requested subpoena to the nursing facility, so that they could prove what they alleged to be true — that Mack never visited Decedent in the nursing facility and never signed him out for trips to purchase foods the family claimed would never have been permitted a diabetic patient. Finally, they argued that they were in the process of seeking to establish paternity in the Community Court, and that, should the DNA evidence produced as a result of that paternity proceeding prove the parental relationship or lack of one, the ALJ's decision could ultimately constitute manifest error. Petition for Rehearing at 12-13.

The ALJ conducted two more hearings, one on July 24, 2007, and the other on September 20, 2007. The first of these is transcribed and contained in the record. At that hearing, the Smith family discussed the paternity proceeding. They advised the ALJ that they were seeking to exhume Smith's body and that they were still requesting a DNA test of Mack. July 24, 2007, Transcript (Tr.) at 6-7. At this hearing, the ALJ stated that he had additional evidence from a 1970 hearing involving Decedent's father, Harry Smith, and from Decedent's military records, but stated that he would not issue any order for records from the nursing facility "[b]ecause at this point, I don't even know if the nursing home has those documents. That's the reason I [inaudible] them. We've never confirmed it one way or the other whether those documents even exist." *Id.* at 8. He noted that the Smith family could try again to subpoena them, but refused to provide assistance.

In submitting transcripts for this appeal, the ALJ's office advised the Board that the recorded testimony for the September 20, 2007, hearing is not available. Thus, the Board is unable to review the record of those proceedings. Appellant claims, however, that both Mack's advocate and the Smiths' counsel agreed to a continuance to await the outcome of the

paternity proceeding, but Judge Hines denied that request. We cannot confirm this assertion.

Judge Hines issued his Modification Order on October 12, 2007. He amended the Decree to recognize that Federal law controls the evidentiary standard for determining paternity in an Indian probate proceeding, and asserted that paternity must be shown by a preponderance of the evidence. He concluded that the evidence was insufficient to give rise to any presumption of paternity, finding that there was a “dearth of evidence” that Decedent acknowledged Mack as his daughter. Modification Order at 2, 4. He acknowledged that the errors on Mack’s birth certificate “tend to prove that Ms. Mack’s mother probably provided the information for the record of birth.” *Id.* at 3. He concluded, however, that the Smith family members’ assertions were “self-serving and speculative,” and dismissed their assertions of Decedent’s disavowals to them of fathering or adopting children as “hearsay.” As best we can determine, his conclusion that the evidence “weigh[s] in favor of finding” paternity derives from his inference that Mack and Decedent “shared a residence” because both Decedent and “Carmelita Bell” appeared at Decedent’s father’s probate hearing in 1970, and were listed by the same contact information.³ The ALJ concluded that the matter of issuing a subpoena to the nursing facility is “moot” because the “petitioner made no attempt to obtain a subpoena for hospital records that was previously denied.”

This timely appeal followed. In the Appellate Brief submitted for Appellant as Smith family representative, the attorney for the Salt River Pima-Maricopa Community submits follow-up documents from the Community Court paternity proceeding. They show the following: On October 2, 2007, Kent Harman, President of Genetic Technologies, Inc., issued a Final Certificate of Analysis setting forth the results of genetic testing of DNA samples taken from Mack and from Decedent’s exhumed tissues. Harman concluded that “Levi Junnile Smith is excluded as the biological father of Carmelita Mack as determined by the absence of the obligate paternal allele at D18S51 and FGA,” and that the probability of

³ This conclusion is difficult to justify. Mack did testify that she had married a man named Bell. Dec. 18, 2006, Tr. at 77. But she never testified or even implied that she resided with Decedent. The record contains a typed transcript of a 1970 hearing prepared by a hearings officer or representative that lists both of their addresses as the same. Neither Mack nor Decedent set forth an address on this document. The address listed is a route and a box number, and the January 30, 1970, Notice of Hearing was addressed to Levi Smith on the same route but at a different box number. In the hearing transcript available, neither Decedent nor Mack indicated or described a relationship with the other. *See Estate of Harry Smith*, Tr., Feb. 25, 1970, at 1-4. The ALJ’s inference of cohabitation appears to go beyond the available evidence.

paternity was “0.0000%.” Appellate Brief Ex. C. On February 13, 2008, the Community Court judge issued a decision decreeing that “Levi Junnile Smith is not the biological father of Carmelita Mack.” Appellate Brief Ex. D, at 2. In this decision, the judge explained that a hearing was convened at which Harman testified and laid a proper foundation for his conclusion, and that Mack and her advocate “were duly noticed and failed to appear.” *Id.* at 1; *see also* Appellate Brief Ex. B (curriculum vitae, Kent Harman). In addition, the judge explained that Mack had, at some point, volunteered to produce her own consultant to conduct genetic testing to refute Harman’s conclusion, but had never followed through on this proffer.

In her brief, Appellant argues that the ALJ’s decision to go forward with an October 12, 2007, Modification Order, despite being fully aware that the paternity proceeding was underway, was both a violation of the Smith family’s due process and also constituted manifest error which will lead to manifest injustice. In addition, she argues that his conclusion that she should have sought another subpoena after the nursing facility refused to comply with the family’s first subpoena, coupled with the ALJ’s refusal to assist her by signing and forwarding the subpoena provided for his signature, constituted a violation of due process and regulations requiring the Department to gather appropriate information for the proper determination of heirs in Indian probate proceedings. All pleadings and evidence were served on Mack and on her advocate. No response has been filed.

Discussion

The record raises several concerns for this Board. First, four of the six hearings, including the most recent September 20, 2007, hearing at which, Appellant alleges, both parties sought a continuance to await the outcome of the Community Court paternity proceeding, are not transcribed or otherwise provided in the record. Second, though the ALJ cited the standard for determining paternity as the “proponderance of the evidence,” his only references to relevant evidence were his description of self-serving remarks of both parties, of which he discounted only those of the Smith family, and the single 1970 document from which he overstated a conclusion about Decedent’s living situation. Third, the Modification Order does not adequately explain or justify the ALJ’s failure to assist the Smith family in gathering documentation from the nursing facility that it needed to verify or refute Mack’s unverified assertions. Judge Hines’s conclusion that the Smith family “chose not to utilize the process available under the regulations” to obtain those records does not follow from the facts that they submitted (1) a request to the nursing facility, which it ignored, and (2) a subpoena for the signature of the ALJ, which he rejected. Because it would be manifest error to proceed with this case without allowing full consideration of the evidence available from the paternity proceeding in the Community Court, we turn to that

information without rendering any holding regarding the process before the ALJ or the conclusion in the Modification Order.

This Board may exercise its inherent authority to correct manifest error or manifest injustice. 43 C.F.R. § 4.318 (2007). This rule provides that

[a]n appeal will be limited to those issues that were before the administrative law judge or Indian probate judge upon the petition for rehearing However, . . . the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

“Manifest” injustice or error arises when the injustice or error is obvious. *Estate of Anthony “Tony” Henry Ross*, 44 IBIA 113, 119 (2007); *Estates of Walter George and Minnie Racehorse George Snipe*, 9 IBIA 20, 22-23 (1981). Although the language of section 4.318 vests authority in the Board to “correct” manifest error or injustice, such language necessarily vests authority in the Board to avoid committing manifest error or injustice in rendering a final decision of the Secretary, and thus includes the authority to prevent it as well.

We find that it would be manifest error in this case not to permit full consideration of the DNA evidence, and related proceedings, before a final Departmental decision is issued. The Community Court has issued a determination that Decedent is not Mack’s father, based on DNA testing. Mack was provided an opportunity to cross-examine the scientist and oppose his findings at a Community Court hearing, but she chose not to appear. We do not know whether she has appealed the February 13, 2008, decision of the Community Court, but Mack and her advocate were served all pleadings in this appeal and have remained silent. Nonetheless, Judge Hines has ruled that, as Decedent’s daughter, Mack is the sole recipient of Decedent’s estate. While we agree with Judge Hines that the Office of Hearings and Appeals does not have the authority to order DNA testing, *Estate of Earl Cheyenne*, 48 IBIA 205, 208 (2009), our authority to order it and our authority to consider results of DNA testing ordered at paternity hearings conducted by tribal courts are entirely different matters. Without determining ourselves whether to accept the DNA evidence provided, we vacate the Modification Order and remand the decision for appropriate consideration of the evidence from the Community Court paternity proceeding.

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 vacate and remand the Modification Order.

I concur:

// original signed
Lisa Hemmer
Administrative Judge*

// original signed
Steven K. Linscheid
Administrative Judge

*Interior Board of Land Appeals, sitting by designation.