



INTERIOR BOARD OF INDIAN APPEALS

Estate of Matthew Cook

9 IBIA 52 (07/29/1981)

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7 IBIA 62



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF MATTHEW COOK

IBIA 80-28

Decided July 29, 1981

Appeal from order determining heirs by Administrative Law Judge Robert C. Snashall.

Reversed.

1. Indian Probate: Divorce: Indian Custom

Where no evidence was received at probate hearing to show the customs of any Indian tribe concerning regulation of the domestic relations of members of the tribe, a ruling by an Indian probate Administrative Law Judge that he could officially notice the existence of divorce by Yakima tribal custom was error. Since no evidence was offered to show that decedent, who was of Nez Perce and Yakima ancestry, and appellee, of Alaskan Native descent, lived in tribal relations under the jurisdiction of the Yakima Tribe, it was error to conclude they were nonetheless married in accordance with Yakima customary law.

2. Indian Probate: Marriage: Common Law and Indian Custom
Distinguished

A holding that decedent and appellee were married by operation of tribal custom

based upon a conclusion that the birth of nine children to the couple required a finding they were married was erroneous where the record affirmatively showed decedent was married to another woman at the time of his cohabitation with appellee.

APPEARANCES: Tim Weaver, Esq., for appellant Mary Cook Jack; Kurt Engelstad, Esq., for appellee Sarah Peele Cook.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Following decision by this Board on May 5, 1978, 1/ a rehearing in the probate of decedent Matthew Cook's estate was held on June 21, 1979, to receive evidence concerning the marital status of decedent at the time of his death in 1976. On November 16, 1979, the Indian probate Administrative Law Judge affirmed his original order of June 27, 1977, declaring that appellee Sarah Peele Cook was married to decedent by operation of an Indian custom marriage established in 1946 and continuing until decedent's death.

Evidence taken at the rehearing, including testimony from appellee, establishes that appellee met decedent at Portland, Oregon, in 1945 (or possibly earlier) and they began to live together in Celilo Falls in 1945. From 1945 until 1953 they lived continuously together in Celilo Falls, and at Vancouver, Washington; Gresham, Oregon; and

1/ Estate of Matthew Cook, 7 IBIA 62 (1978).

Ketchikan, Alaska. Appellee bore decedent nine children. Appellee and decedent were separated intermittently for 4 years beginning in 1953, during which time appellee bore a child by another man. At the time of decedent's death appellee was living in Alaska and had been separated from decedent for about 3 years. Appellee testified that she was unfamiliar with the concept of marriage by tribal custom, but considered that she and decedent were married by operation of common law, since it was her belief that the State of Alaska recognized common law marriage.^{2/}

Decedent married Irene M. Bruno in a civil ceremony at The Dalles, Oregon, on September 24, 1943. The marriage was terminated by divorce decreed by an Oregon circuit court on January 7, 1957. (According to the decision below it was in fact terminated prior to 1946 by way of an "Indian custom" divorce.)

The testimony at rehearing establishes that no Yakima Indian wedding ceremony was celebrated for decedent and appellee. However, the record is silent concerning specific customs of the Yakima tribe concerning domestic relations. There is no dispute that on December 16, 1953, the Yakima governing body enacted a written law respecting

^{2/} Tr. 32-33. The record does not establish the dates when decedent and appellee lived in Alaska. It appears they were there for 11 months sometime after the birth of the child Elizabeth in 1952. Contrary to appellee's belief, the State of Alaska did not allow marriage by common law in the 1940's or 1950's, nor anytime thereafter. See Alaska Stat. § 25-05.011.

domestic relations. Neither party relies upon the December 16, 1953, tribal enactment, which, although not in the record, has been previously characterized by the Department as precluding marriage or divorce by Indian custom, and it appears that both parties take the position that whatever changes it made in the customary law are not relevant here.^{3/}

The record is also silent concerning actions indicating decedent's recognition of tribal jurisdiction over his domestic affairs or the degree of control exercised over him by the tribe. It appears decedent was born in Idaho, at some distance from the Yakima Reservation. Although decedent was an enrolled member of the Yakima tribe, agency

^{3/} The authority of the tribe to regulate domestic affairs is recognized by the Department at 25 CFR 11.28, Tribal custom marriage and divorce. For an exposition of the principles involved in terms of congressional policy, see United States v. Quiver, 241 U.S. 602, 605-606 (1916). The trier of fact below, commenting upon the Board's prior decision upon remand, stated at the hearing (Tr.3): "If, however, their language that they used means what it simply states, that you have to prove in each case what the law of the Yakima Tribe was at the time when somebody supposedly went through one of these [Indian custom marriage or divorce] that's absurd because we've gone through probably two hundred thousand of these cases where there are Indian custom divorces on the Yakima Reservation and they are all of them quite explicit as to what has to be done to satisfy it." The Board's decision did, in fact, mean exactly what it said. Since Indian probate proceedings are required to conform to the strictures of the Administrative Procedure Act, Act of Sept. 6, 1966, 80 Stat. 378, 387 (5 U.S.C. § 557) (1976), concerning the perfection of a record sufficient to support the decision of the employee conducting the initial hearing, any decision determining heirship which is based upon a finding that there was an Indian custom marriage or divorce must be supported by a record which contains proof of the custom relied upon. It is not sufficient that the fact-finder be satisfied in his own mind that there is such a custom and that it was effectively relied upon by the parties in a particular instance.

If and when the Administrative Law Judge adjudicates a case in which proof of specific Yakima tribal customs regarding divorce or marriage is established, including the factor or factors commonly looked

records indicate he was "1/4 Yakima, 5/8 Nez Perce, 1/8 white." It is established that prior to 1945 he served in the U.S. Army and later worked for a railroad. His financial dealings were conducted with commercial banks in Vancouver, Washington, rather than with the Yakima tribe. He appeared in a child custody contest in a state court divorce action brought against him by Irene M. Bruno. The only evidence concerning decedent's conformity to tribal customs of the Yakima tribe was elicited from a witness who identified himself as a member of the "Shoshone-Bannock" tribe. He testified that tribal domestic custom was a "family affair" concerning which there was no consensus.

The Administrative Law Judge held that decedent had divorced Irene M. Bruno prior to 1953 according to customs of the Yakima tribe and had married appellee in 1946 by operation of tribal customary law and that this second marriage continued until decedent's death in 1976. Underlying the Administrative Law Judge's holding that appellee is decedent's widow is his opinion that "it would be absurd to hold that 30 years of living together and nine children are not substantial evidence of an intended marital situation." ^{4/} This conclusion rests upon

fn. 3 (continued)

upon by the tribe and tribal members as necessary to consummate a custom marriage or divorce, reliance on such an adjudication in other cases, when properly noticed to the parties, would not be objectionable.

^{4/} Order dated Nov. 16, 1979, page 2. The reported cases contain very little explanation or description of tribal customs. (Compare, in contrast, the unreported decision of Administrative Law Judge Patricia McDonald in the matter of the Estate of San Juanito Toledo, or Fatty, or Ush You Holy Wot, Indian Probate No. IP GA 21G 76 dated Aug. 10, 1979). One source for discovering tribal customs is found in anthropologic works such as The World of the American Indian, National Geographic Society (1974), where various marriage customs of different tribes are discussed (see pp. 90, 95, 104, 117, 124, 162, 169, 180, 227, 286, 291). The anthropologic studies reported indicate great variety in the marriage customs of the tribes. Tribal elders are also a source of such evidence.

a previous finding that "no showing is necessary as to what constitutes an Indian custom divorce (or marriage) under said tribal law as this forum takes judicial notice of the myriad cases defining and explaining what constitutes such actions under said tribal law * * *." This premise and stated conclusion are error which require reversal of the order determining appellee to be an heir of decedent. 5/ This reversal is not surprising inasmuch as the Board's prior order of May 5, 1978, expressly remanded this case to the Administrative Law Judge for, inter alia, failure to adduce "with any specificity what factors were regarded as necessary to effect an Indian custom divorce prior to December 16, 1953."

[1] While there are many cases, most of them old, 6/ which discuss the recognition which the Department must give to the customary

5/ The Nov. 16 order also recites that the evidence "on the question to be determined" was "at best equivocal and conflicting." Despite this finding, which requires a conclusion that there was a failure of proof, the order then finds that a continuing marriage was proved by a "preponderance of the evidence." Such a finding and conclusion are incorrect as a matter of law. (See Administrative Procedure Act, Act of Sept. 6, 1966, 80 Stat. 386, 5 U.S.C. § 556(d) (1976), as amended.)

6/ For example, Cohen's Handbook of Federal Indian Law (1941), notes at page 138 and fn. 121 that:

"Recognition of the validity of marriages and divorces consummated in accordance with tribal law or custom is found in numerous cases:

Johnson v. Johnson, 30 Mo. 72 (1860); Boyer v. Dively, 58 Mo. 510 (1875); Earl v. Godley, 42 Minn. 361, 44 N.W. 254 (1890); People ex rel. LaForte v. Rubin, 98 N. Y. Supp. 787 (1905); Ortley v. Ross, 78 Nebr. 339, 110 N.W. 982 (1907); Yakima Joe v. To-is-lap, 191 Fed. 516 (C.C. Ore. 1910); Cyr v. Walker, 29 Okla. 281, 116 Pac. 931 (1911); Buck v. Branson, 34 Okla. 807, 127 Pac. 436 (1912); Butler v. Wilson, 54 Okla. 229, 153 Pac. 823 (1915); Carney v. Chapman, 247 U. S. 102 (1918); Hallowell v. Commons, 210 Fed. 793 (C.C.A. 8 1914); Johnson v. Dunlap, 68 Okla. 216, 173 Pac. 359 (1918); Davis v. Reeder, 102 Okla. 106, 226 Pac. 880 (1924); Pompey v. King, 101 Okla. 253, 225 Pac. 175 (1924); Proctor v. Foster, 107 Okla. 95, 230 Pac. 753 (1924); Unussee v. McKinney, 133 Okla. 40, 270 Pac. 1096 (1928); and cf. Connolly v.

laws of the various tribes, there are few cases which discuss the actual laws of the tribes themselves. The questions which arise in cases where it is asserted that there has been a marriage or divorce by tribal customary law are questions of conflict of laws, as Cohen points out in the Handbook of Federal Indian Law at page 120:

[T]he state has no power over the conduct of Indians within the Indian country, whether or not the conduct is of special concern to the Federal Government. Thus Indian marriage and divorce * * * are matters over which the state cannot exercise control, so long as the Indians concerned remain within the reservation. [Footnotes omitted.]

The discussion of tribal regulation of domestic relations appearing at page 137 of the Handbook considers the nature of Indian custom marriage and divorce, observing in a pertinent analysis that:

The Indian tribes have been accorded the widest possible latitude in regulating the domestic relations of their members. Indian custom marriage has been specifically recognized by federal statute, so far as such recognition is necessary for purposes of inheritance. [Act of Feb. 28, 1891, 26 Stat. 794, 795 (25 U.S.C. § 371 (1976))] Indian custom marriage and divorce has been generally recognized by state and federal courts for all other purposes. Where federal law or written laws of the tribe do not cover the subject, the customs and traditions of the tribe are accorded the force of law, but these customs and traditions may be changed by the statutes of the Indian tribes. In defining and punishing offenses against the marriage relationship, the Indian tribe has complete and exclusive authority in the absence of legislation by Congress upon the subject. No law of the state controls the domestic relations of Indians living in tribal relationship, even

fn. 6 (continued)

Woolrich, 11 Lower Can. Jur. 197 (1867). See, also, Parr v. Colfax, 197 Fed. 302 (C.C.A. 9 1912); Porter v. Wilson, 239 U.S. 170 (1915); and see Wharton, Conflict of Laws (3d ed. 1905), vol. 1, sec. 128a.”

though the Indians concerned are citizens of the state. [Footnotes omitted.]

Prior decisions by the Department uniformly hold that the burden to prove a marriage or divorce by operation of Indian custom is on the proponent of the claimed marriage or divorce. To satisfy established evidentiary requirements there must be proof offered to show the customs of the tribe concerning the domestic relations of its members (especially so, where, as here, a party has requested an opportunity to show evidence contradicting an agency decision which rests on official notice of Indian customs). ^{7/} It must also be shown that the marriage partners were "living in tribal relations," that is, a sufficient connection between the parties and a particular tribe must be shown to have existed in order to give the tribal government an interest in, and control over, the marriage and the parties to the marriage, much in the same way that a divorce action in a state court must be based upon an alleged and proved jurisdiction over the subject matter and the parties to a divorce proceeding. ^{8/} As was the Administrative Law Judge, appellee in this case and her counsel were on notice through the Board's remand order that any party intending to prevail as an heir of the decedent based on evidence of an Indian custom marriage or divorce should be prepared to establish the existence of the customs in question and compliance therewith. This the appellee failed to do.

^{7/} See Act of Sept. 6, 1966, 80 Stat. 387, 5 U.S.C. § 556(e) (1976). The pertinent part of the statute provides: "When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." (The APA controls Indian probate proceedings. Estate of Ireland, 1 IBIA 67, 78 I.D. 66 (1971).)

^{8/} Estate of Humpy, 7 IBIA 118, 86 I.D. 213 (1979).

Finally, decedent's known conduct of his affairs is inconsistent with a finding that he intended to live according to tribal custom. He married according to state law, and sought to obtain child custody benefits from a divorce action involving his marriage to Irene M. Bruno by active intervention in a state divorce proceeding. Nothing in the record indicates that he gave similar credence to the customary domestic relations laws of the Yakima tribe, or that he knew what the tribal customs were. ^{9/}

[2] The opinion below confuses Indian custom marriage with common law marriage. The Administrative Law Judge states the issue before him concerning the marital status of decedent to be (Tr. 9-10): "What we need to establish here is whether there was a common law or Indian custom marriage or an actually Anglicized-type marriage here." Common law marriage is a creature of state law, as is the civil marriage apparently referred to by the trier of fact. Indian custom marriage is a creature of tribal law: Thus, one cannot presume that a tribe recognized marriage based simply upon a projection of current America domestic relations law without proof of the mechanics of that recognition. ^{10/} There is an unstated reasoning by analogy to

^{9/} Implicit in the decision below is an assumption that a general and uniform Indian custom marriage or divorce custom prevails throughout North America. Contrary to this assumption, each tribe that regulates domestic relations matters is exclusive to itself, in the same manner as the states of the United States exercise exclusive jurisdiction over domestic relations in their respective jurisdictions. Thus, the customs of a tribe said to control a particular marriage must be proved to support a finding of marriage (or divorce). Estate of Humpy, above n.6.

^{10/} Estate of Roubedeaux, 7 IBIA 254 (1979); Estate of Tooisgah, 4 IBIA 189, I.D. 541 (1975).

principles of American domestic relation law present in the fact-finder's conclusion that a marriage should be presumed from the birth of nine children which is without foundation in fact in the record. Since decedent was still married to another at the time he fathered appellee's children, neither a presumption that there was a marriage based upon common law principles nor an inference that unknown Yakima custom would have reached a similar result can support the findings made by the Administrative Law Judge. Decedent was married in 1943 to another woman from whom he was not divorced until 1957. The record fails to show that decedent and appellee took any action to enter into a marriage after decedent's 1957 divorce. While it is conceivable that, in a given instance, a tribe's customs may result in recognition of marriage in situations identical to those which the common law of a state recognized to result in marriage, such a concordance needs to be proved. 11/ It was not proved in this case. Nor can appellee be found to be the surviving spouse of decedent by virtue of a common law marriage. None of the states in which decedent and appellee cohabited (Oregon, Washington, and Alaska) allow marriage by common law. 12/

The facts of record suggest decedent was a contemporary member of American society who generally lived in the state community by which

11/ Estate of Senator, 2 IBIA 102, 80 I.D. 731 (1973). In Senator, this Board reversed an order containing language almost identical to that used by the fact-finder below. The Board held there, as it does here, that a showing of "mere cohabitation" may not be equated to marriage.

12/ Alaska Stat. § 25-05-011; Or. Rev. Stat. § 106.041; Wash Rev. Code § 26-04.120.

he was surrounded. He and appellee, while they had some contacts with the Yakima tribe, and were both of Indian descent, were not proved to be so immersed in the Yakima culture and society that they could be said to have been living in "tribal relations" as that term has been used to define persons controlled and affected by tribal customary law. No evidence tending to show either decedent's divorce from Mrs. Bruno prior to 1957 or marriage by Indian custom to appellee was offered at the probate hearing. It is concluded appellee was not married to decedent at the time of his death.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed. The Administrative Law Judge is directed to amend the order determining heirs by deleting the name of appellee from the list of persons eligible to inherit.

This decision is final for the Department.

//original signed
Franklin D. Arness
Administrative Judge

I concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge