



INTERIOR BOARD OF INDIAN APPEALS

Yvonne Weiser, et al. v. Portland Area Director, Bureau of Indian Affairs

9 IBIA 76 (09/29/1981)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

YVONNE WEISER ET AL.

v.

AREA DIRECTOR, PORTLAND AREA OFFICE,
BUREAU OF INDIAN AFFAIRS

IBIA 80-1-A

Decided September 29, 1981

Appeal from decision by Area Director declaring that decedent was the father of two illegitimate children who were his heirs and entitled to his share of judgment funds awarded to the Klamath Tribe.

Affirmed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally--
Indian Probate: Klamath Tribe--Indian Tribes: Judgment Funds

Although the Klamath Termination Act of Aug. 13, 1954, 68 Stat. 718, 25 U.S.C. §§ 564-564x (1976), rendered the Secretary's usual probate jurisdiction inapplicable to Klamath Indians, the Act of Oct. 1, 1965, 79 Stat. 897, 25 U.S.C. §§ 565-565g (1976), gave the Secretary limited jurisdiction to determine the heirs of deceased Klamath enrollees pursuant to his duty to distribute judgment funds.

APPEARANCES: Enver Bozgoz, Esq., for appellants Yvonne Weiser, et al.; Richard C. Whitlock, Esq., for appellees Carlissa Fawn Lotches and Carla Dawn Lugo; Vernon Peterson, Jr., Esq., for the Bureau of Indian Affairs. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

This appeal arises from a decision rendered on September 1, 1978, by the Area Director, Portland Area Office, Bureau of Indian Affairs, determining the heirs of Carlos Leyva Lugo, Jr., deceased Klamath enrollee No. 1331. This determination was made under authority

delegated by the Secretary who is required by the Act of October 1, 1965, 25 U.S.C. § 565a(b) (1976), to determine the heirs of any deceased Klamath enrollee entitled to a share of certain judgment funds awarded to the Klamath Tribe. Those persons determined by the Secretary to be the heirs are considered the legal successors to the decedent's distributive share of the fund.

Background

Carlos Leyva Lugo, Jr., was born on February 1, 1934, and died intestate on December 18, 1973, in an automobile accident in Klamath County, Oregon. On November 15, 1974, the Klamath County, Oregon, Circuit Court found that decedent's heirs at law were his seven living brothers and sisters and the three children of a deceased brother. The court ordered the decedent's estate to be distributed one-eighth to each living brother and sister and one-twenty-fourth to each child of the deceased brother.

On February 20, 1976, Dorothy E. Lotches contacted the Portland Area Office of the Bureau of Indian Affairs (Tribal Operations) by letter seeking a determination on whether her daughters, Carlissa Fawn and Carla Dawn (appellees), could be shown to be the decedent's children. Ms. Lotches indicated that although she had originally intended to actively participate in the earlier State court proceeding that determined decedent's heirs, she did not pursue the matter then because the amount of the estate was too small to justify the expense involved in presenting her children's case.

The Bureau of Indian Affairs (Tribal Operations) referred the letter to the Portland Office of the Regional Solicitor for the Department of the Interior. After reviewing the file and the documents Ms. Lotches had submitted, the Regional Solicitor determined on May 25, 1976, that there was sufficient evidence for a finding that the girls were the children of the decedent. Based on this opinion, the Tribal Operations officer informed Ms. Lotches on July 19, 1976, that her daughters had been determined to be the decedent's heirs for the purpose of the distribution of future Klamath judgment funds.

The decedent's brothers and sisters, appellants in this case, requested an opportunity to submit evidence showing that decedent was not the father of the appellees. The time given for the submission of evidence expired on November 12, 1977. The Regional Solicitor reviewed all of the evidence submitted, and, on January 27, 1978, advised the Tribal Operations Office that there was insufficient evidence to reverse the earlier decision. Accordingly, on February 2, 1978, the Tribal Operations Officer informed interested parties that judgment funds accruing to the decedent would be distributed to appellees.

Appellants appealed this decision to the Portland Area Director who affirmed it on September 1, 1978. This decision was appealed to the Assistant Secretary for Indian Affairs on October 26, 1978. The appeal was referred to the Board of Indian Appeals pursuant to 25 CFR 2.19(a)(2) on October 1, 1979. The Board docketed the appeal and

referred it to the Hearings Division of the Office of Hearings and Appeals for an evidentiary hearing and a recommended decision.

Administrative Law Judge Robert C. Snashall held a hearing on June 11, 1980. Appellants attempted to show that the decedent was not the only man with whom Ms. Lotches had sexual relations during the periods when appellees would have been conceived, that he was incapable of fathering children because he was sterile, and that he did not regard appellees as his daughters. Ms. Lotches, acting as guardian ad litem for her minor children, testified and presented documentary evidence tending to rebut each of these contentions.

Judge Snashall issued a recommended decision on September 18, 1980. That decision found first that the Board of Indian Appeals lacked jurisdiction to determine the decedent's heirs because the Klamath Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. §§ 564-564x (1976), withdrew Klamath probate matters from the application of general Indian probate laws. Under this recommended holding, decedent's heirs for the purpose of distributing his share of Klamath judgment funds would be determined by the State court. However, should the Board hold that it did have jurisdiction over this appeal, Judge Snashall further recommended that the Board uphold the Area Director's decision. Appellees filed objections to Judge Snashall's jurisdictional finding; appellants did not file objections. The Bureau of Indian Affairs through counsel, submitted a memorandum subsequent to Judge Snashall's decision arguing that the Board had jurisdiction.

Discussion, Findings, and Conclusions

[1] The Board has previously held that the Secretary has the authority to determine the heirs of deceased Klamath Indians for the limited purpose of distributing certain judgment funds. Gertrude E. Sherman v. Acting Area Director, Portland Area Office, Bureau of Indian Affairs, 9 IBIA 25, 88 I.D. 619 (1981). The Board noted that although the Klamath Termination Act rendered the Secretary's usual probate jurisdiction inapplicable to Klamath Indians, the Act of October 1, 1965, 79 Stat. 897, gave the Secretary limited jurisdiction to determine the heirs of deceased Klamaths pursuant to his duty to distribute judgment funds. See 25 U.S.C. §§ 565, 565a, and 565g (1976). Therefore, the Board rejects that portion of Judge Snashall's opinion recommending that it lacks jurisdiction in this case. 1/

The Board has examined the entire record in this case, including the Area Director's decision, the recommendations of the Solicitor's Office upon which that decision was based, the transcript of the hearing

1/ Accordingly, the Board also rejects appellants' argument that the State court heirship determination is binding on the Department. Judgment fund entitlements that are the subject of this proceeding were not within the jurisdiction of the State court. The determination of this matter, including the determination of heirship, is wholly within the jurisdiction of the Department. 25 U.S.C. § 565 (1976).

held by the Administrative Law Judge and the evidence submitted at the hearing, the recommended decision, and the comments submitted after the hearing. Based upon this review, we accept the recommended findings and conclusions of Judge Snashall that Carlissa Fawn Lotches and Carla Dawn Lugo are the lawful heirs of Carlos Leyva Lugo, Jr., for the purpose of inheriting decedent's share of Klamath judgment funds.

Ms. Lotches testified that she and the decedent lived together for more than 4 years, during which time the appellees were born (Tr. 16). She testified that appellees were decedent's natural children, that she had no sexual contacts with any other man during the time she cohabited with the decedent (Tr. 19, 24), and that the decedent acknowledged both girls to be his daughters (Tr. 21). Appellants attempted to show that Ms. Lotches did have sexual relations with other men during this time (Tr. 63-64). We hold that the trier of fact correctly found that appellants' evidence was insufficient to establish that the decedent was not appellees' father. As the parties adversely affected by the agency decision reviewed by the Administrative Law Judge, the burden of proof was on appellants to establish their claim. 2/

Appellants further contend that the decedent could not have been appellees' father because he was sterile. However, they presented only hearsay evidence on this critical issue. Ms. Lotches testified that the decedent was not sterile, but had a low sperm count because of an earlier illness that was aggravated by excessive consumption of alcohol (Tr. 85-86). Appellants conceded that the decedent had told them that this was his problem (Tr. 73). 3/ Ms. Lotches also testified that during the time they were together, the decedent stopped drinking almost entirely for 2 years (Tr. 85-86). 4/ Although appellants testified that the decedent never stopped drinking and was in fact "drunk when he died" (Tr. 73), there were long periods when appellants did not hear from the decedent and did not even know where he was (Tr. 65, 68-69). There is, therefore, no credible evidence that the decedent was incapable of fathering children.

Finally, Ms. Lotches presented letters written by the decedent in which he acknowledged the two girls as his daughters (Exh. A-1 through A-9). Appellants attempted to counter this evidence by showing

2/ Assuming arguendo that appellants' assertions about Ms. Lotches' sexual conduct were true, that fact at most raises the possibility that another man could have been the father; it does not prove that the decedent was not.

3/ The testimony further indicated that the decedent had previously been married. According to appellants, when no children were born of that marriage, both he and his wife underwent tests which disclosed that they were both sterile (Tr. 62-63). Appellants later corrected this statement to show that the decedent was not sterile, but only had a low sperm count (Tr. 73).

4/ Ms. Weiser testified for the appellants that the decedent had been told he would need to be bedridden and to stop drinking for a year in order for his sperm count to improve (Tr. 73).

that the decedent's behavior indicated to them that he did not accept the girls as his daughters (Tr. 65, 67-68, 71-72). The actions shown by appellants are at best ambiguous and are insufficient to overcome the explicit, written acknowledgments contained in the decedent's letters.

Based on our comprehensive review of the record, we agree with the conclusion reached by Judge Snashall that the decedent was the father of Carlissa Fawn Lotches and Carla Dawn Lugo.

The Area Director, Portland Area Office, Bureau of Indian Affairs, is directed to take whatever actions are necessary to effectuate the holdings of this opinion. Pursuant to the provisions of 43 CFR 4.1, this decision is final for the Department.

//original signed
Wm. Philip Horton
Chief Administrative Judge

We concur:

//original signed
Franklin D. Arness
Administrative Judge

//original signed
Jerry Muskrat
Administrative Judge