



INTERIOR BOARD OF INDIAN APPEALS

Estate of Richard Doyle Two Bulls

11 IBIA 77 (03/15/1983)



# United States Department of the Interior

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

## ESTATE OF RICHARD DOYLE TWO BULLS

IBIA 82-47

Decided March 15, 1983

Appeal from order by Administrative Law Judge Garry V. Fisher denying petition to reopen estate. IP BI 394C 76.

Affirmed in part; reversed in part; and remanded.

1. Indian Probate: Adoption: Generally--Indian Probate: Divorce: Generally--Indian Probate: Inheriting: Generally--Indian Probate: Marriage: Generally

The Board has consistently followed the rule that the status of an individual is determined by the law of the jurisdiction having the most significant contacts with the individual or in which the relationship at issue was created. Laws governing the status of an individual must be distinguished from laws governing inheritance.

2. Indian Probate: Evidence: Proof of Marriage--Indian Probate: Marriage: Common Law

Under Montana law, the burden of proving that a relationship illicit in its inception changed into a lawful common law marriage is on the person asserting the validity of the marriage. Where there is proof showing a couple entered into a valid common law marriage following the divorce of one of the parties, the Board will find a marriage.

3. Indian Probate: Children, Illegitimate: Right to Inherit: Child from Father

Under 25 U.S.C. § 371 (1976), an illegitimate Indian child is entitled to inherit from the person shown to be his father.

4. Indian Probate: Children, Adopted: Right to Inherit: Generally

The inheritance rights of an adopted child are determined by the law of the state in which trust real property is located.

APPEARANCES: Frances C. Elge, Esq., and Ann L. Smoyer, Esq., for appellant; Josie Sapien as guardian ad litem for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Appellant Donna Two Bulls Paul seeks to review an order dated May 7, 1982, issued by Administrative Law Judge Garry V. Fisher, denying a rehearing into the Indian trust estate of decedent Richard Doyle Two Bulls. The petition sought rehearing of a January 14, 1982, order determining decedent's heirs. Appellant alleges the Administrative Law Judge erred in finding that she was not decedent's common law wife at the time of his death. She further claims that error occurred when the Administrative Law Judge refused to grant a rehearing so she could present additional evidence on her marital status. For the reasons discussed below, the decision is affirmed in part, reversed in part, and remanded.

Background

Richard Doyle Two Bulls, an unallotted member of the Oglala Sioux Tribe, No. OSU-18960, was born on December 24, 1943, and died in an automobile accident in Billings, Montana, on January 30, 1976. Decedent, who was the beneficial owner of trust real property on the Pine Ridge Sioux Indian Reservation, South Dakota, did not leave a will. He was survived by potential heirs including appellant, who alleges she was decedent's common law wife; Robin, Richard, and Ronald Butler, the children of decedent's marriage to Marlene Havatone Two Bulls Butler; and Robert Steven Two Bulls, allegedly decedent's illegitimate son born to Josie Sapien.

Proceedings to determine heirship in decedent's estate were held on April 1, 1980, at Billings, Montana. Depositions had previously been taken of Donna Two Bulls by Administrative Law Judge Daniel S. Boos on September 9, 1976, and of Marlene Butler, decedent's ex-wife, by Administrative Law Judge William J. Truswell on July 19, 1977. These probate proceedings were protracted because the Bureau of Indian Affairs had only scanty information relating to decedent's potential heirs and those individuals were living in widely separated parts of the United States.

Three issues appear in this case: whether appellant and decedent had established a common law marriage; whether decedent's children, Robin, Richard, and Ronald, who had been adopted by their mother's second husband, Augustine Butler, by order of the Hualapai Tribal Court, Peach Springs, Arizona, on May 24, 1974, were entitled to share in their natural father's estate; and whether decedent was the father of Robert Steven Two Bulls. Because the four children were minors at the time of the hearing, the Administrative Law Judge appointed Marlene Butler as guardian ad litem for her three children and Josie

Sapien as guardian ad litem for her son. At the time of the Billings hearing, Marlene Butler and her children resided in Arizona, and Josie Sapien and her son resided in California. Neither Marlene Butler nor Josie Sapien appeared at the Billings hearing. 1/

Following the hearing, the Administrative Law Judge issued an order determining heirs on January 14, 1982. This order found that Donna Two Bulls had not established she was decedent's common law wife; that under South Dakota law in effect at the time of his death, decedent's three children with Marlene Butler were not his heirs because of their adoption; and that Robert Steven Two Bulls was decedent's son and was entitled to share in the estate under 25 U.S.C. § 371 (1976). Because of these findings, the Administrative Law Judge ordered that the entire estate be distributed to Robert Steven Two Bulls.

Appellant filed a petition for rehearing on the grounds that the Administrative Law Judge erred as a matter of law in finding that she was not decedent's common law wife. The petition was denied by order dated May 7, 1982, which stated:

Neither the petition nor the briefs lay claim to the need of further evidence. They consist of argument on case made. The respective positions are so polarized that further discussion of the issues by the undersigned would do nothing to achieve finality of decision. Parties would be better served by pursuing their argument at the appellate level. The petition for rehearing is hereby denied because there is no apparent need for further evidence.

The present appeal was taken from this denial of rehearing.

#### Discussion and Conclusions

This case is complicated only because more than one state and tribe had or may have had jurisdiction over issues relating to decedent's affairs. This fact raises concerns over the proper choice of laws. The initial question on review, therefore, is whether the Administrative Law Judge applied the substantive law of the appropriate jurisdiction in determining the status and inheritance rights of decedent's potential heirs. The second question is whether that substantive law was correctly interpreted.

[1] Although choice of law is frequently guided by considerations of comity rather than by hard and fast rules, in general, the status of an individual is determined by the law of the jurisdiction having the most significant contacts with the individual or in which the relationship at issue was created. The Board has consistently followed this rule. See, e.g., as to

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1/ The Administrative Law Judge stated at the hearing that he had informed both Marlene Butler and Josie Sapien that if anything occurred adverse to the interests of the children, they would be given an opportunity for an additional hearing (Tr. 3).

adoption: Estate of George Green, 1 IBIA 148, 78 I.D. 281 (1971); as to divorce: Estate of Thomas Edward Lumpmouth, 8 IBIA 275 (1981); Estate of Mark Turtle, Sr., 8 IBIA 272 (1981); as to marriage: Estate of Edward Lockwood, Jr., 7 IBIA 271 (1979); Estate of Phillip Tooisgah, 4 IBIA 189, 82 I.D. 541 (1975); Estate of Lloyd Andrew Senator, 2 IBIA 102, 80 I.D. 731 (1971).

Laws governing the status of an individual, however, are distinct from laws governing intestate succession. See Arenas v. United States, 197 F.2d 418 (9th Cir. 1952); Gatchell v. Curtis, 134 Me. 302, 306-07, 186 A. 669, 671 (1936) (right of legislature to change inheritance rights of adopted children). The general rules of inheritance developed in the state courts are that the devolution of personal property is governed by the laws of the jurisdiction in which the decedent was domiciled and the inheritance of real property is governed by the laws of the jurisdiction in which the real property is located. See, e.g., In re Zaepfel's Estate, 102 Cal. App. 2d 774, 228 P.2d 600, 602 (1951); In re Grace's Estate, 88 Cal. App. 2d 956, 200 P.2d 189, 192-93 (1949). Under preempting Federal law found in 25 U.S.C. § 373 (1976), inheritance of both real and personal property held in trust by the United States for an Indian is made subject to the laws of the state in which the property is located.

The order determining heirs in this case found that appellant and decedent were not married at the time of decedent's death. Appellant testified at the hearing and offered documentary evidence to show that she and decedent began living together as husband and wife at Ashland, Montana, in 1973. Appellant stated that she was still married to another man at that time and did not receive a divorce until December 1975. Appellant and decedent continued living together following her divorce until decedent's accidental death on January 30, 1976. The evidence shows that both parties held themselves out to be husband and wife in the community where they lived continuously from 1973 until January 1976. They held property together as husband and wife. Appellant used the name "Two Bulls" for all purposes and apparently considered herself to be decedent's common law wife. They had planned to solemnize their marriage in a formal ceremony, but decedent died before the planned date of the ceremony.

The Administrative Law Judge applied Montana law to determine whether decedent and appellant had established a common law marriage prior to decedent's death. This choice of law was made after a showing that during the entire period of their relationship, decedent and appellant resided in Ashland, Montana, just off the Northern Cheyenne Reservation. Because the couple was not on the reservation and therefore not subject to the tribe's jurisdiction, the Administrative Law Judge did not apply Tribal Resolution No. 3(57), which prohibits common law marriages. The Board affirms this choice of law.

The Administrative Law Judge found that despite ample evidence that decedent and appellant considered themselves husband and wife between 1973 and December 1975, appellant was married to another man during that period and was not competent to enter into a marriage with decedent. He further found no evidence of any reaffirmation of the relationship following appellant's divorce. He found at most that the couple continued living together, did not end their joint financial involvements, and intended to have a wedding ceremony. The Administrative Law Judge, therefore, concluded that appellant had not shown the existence of a common law marriage.

The order does not fully disclose the legal reasoning behind this decision. Specifically, the order does not show whether the application of the Montana statutory "disputable presumption" which holds "that a man and a woman depicting themselves as husband and wife have entered into a lawful contract of marriage" was considered. Mont. Code Ann. § 26-1-602(30) (1981). Under Montana law, this presumption has the force of evidence and is sufficient to establish the presumed fact unless controverted. Spradlin v. United States, 262 F. Supp. 502, 504 (D. Mont. 1967); State v. Rice, 329 P.2d 451, 455 (Mont. 1958). In general, any person attacking a marriage has the burden of proving its invalidity. Estate of Swanson, 502 P.2d 33, 37 (Mont. 1972).

This presumption has been extensively construed by the Montana courts. In Stevens v. Woodmen of the World, 71 P.2d 898, 905 (Mont. 1937), the court stated:

One of the disputable presumptions in this state is that a man and woman holding themselves out as husband and wife have entered into a contract of lawful marriage. Section 10606, subd. 30, Rev. Codes [now Mont. Code Ann. § 26-1-602(30)]; Elliott v. Industrial Acc. Board, 101 Mont. 246, 53 P.(2d) 451, 454. In the case last cited we said: "The so-called 'common-law marriage' is recognized as valid in this state, but, to be effective, there must be mutual consent of parties able to consent and competent to enter into a ceremonial marriage, and the assumption of such relationship, by consent and agreement, as of a time certain, followed by cohabitation and repute." \* \* \* We are mindful, however, that the rule is that where the relations between a man and a woman are illicit in their inception and such a condition is shown to exist, it is presumed that their relations continue illicitly until the contrary is shown, and the burden rests upon the party asserting the validity of the marriage to show that the illicit relations changed to a lawful one by marriage. [2/]

[2] In this case, the relationship between appellant and decedent was shown to be illicit in the beginning through appellant's admission that she was lawfully married to another man when she began living with decedent. Therefore, under Montana law, appellant had the burden of proving that this illicit relationship changed into a lawful marriage following her divorce. Appellant's evidence establishes that, following the removal of the sole

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2/ See also Estate of Swanson, 502 P.2d 33 (Mont. 1972); Welch v. All Persons, 254 P. 179, 182-83 (Mont. 1927). Contrary to appellant's arguments, Shepherd & Pierson Co. v. Baker, 81 Mont. 185, 262 P. 887 (1927), relied upon by the Administrative Law Judge, is exactly on point and is in accord with the rules stated in the cited cases. In Baker a married woman began living with another man before the dissolution of her first marriage either by death or divorce. An attempt was made to prove a common law marriage. The court stated "that the prior marriage was still in existence at the time Rose Trottier went to live with Simon Pepin, and therefore their relations were, in their inception, illicit. Such a relation being shown, it is presumed to continue until the contrary is shown, and the burden rests upon the party asserting the validity of the second marriage to show that the illicit relation changed to a lawful one by a remarriage after the prior marriage has been dissolved." Id. at 891.

impediment to her consensual marriage to decedent, she continued to live with him as his wife, and that their relationship, earlier described as that of husband and wife in all respects, continued until his death. Under the circumstances described, the Board finds there was sufficient evidence to show a consensual marriage between appellant and decedent.

There has been no challenge to the conclusions that Robert Steven Two Bulls is decedent's illegitimate son and is entitled to inherit from his father or that Robin, Richard, and Ronald Butler were rendered ineligible to inherit their father's real property by their adoption. Because they involve complex conflict of laws questions, however, the Board takes this opportunity to review the legal standards for choosing the appropriate law.

[3] The Administrative Law Judge found as a factual matter that Robert Steven Two Bulls was the illegitimate son of decedent and Josie Sapien. Therefore, he applied Federal law contained in 25 U.S.C. § 371 (1976), which states that "every Indian child, otherwise illegitimate, shall for \* \* \* [the descent of land] be taken and deemed to be the legitimate issue of the father of such child," in concluding that Robert Steven Two Bulls was entitled to share in decedent's estate. The Administrative Law Judge was correct both as to the factual determination and the choice of law. Federal law is preeminent on the question of the inheritance rights of illegitimate Indian children. Estate of Willis Attocknie, 9 IBIA 249, 89 I.D. 193 (1982).

The extent of Robert's participation in his father's estate is determined in accordance with the descent and distribution laws of South Dakota, the state in which the trust real property is located. See 25 U.S.C. § 348 (1976). This participation would be affected by a finding that any other individual was also an heir. In such case, the laws of South Dakota would again determine the amounts of the estate to which Robert and the other heir or heirs were entitled.

The finding that Robin, Richard, and Ronald Butler were not entitled to inherit from their natural father was made by applying the law of South Dakota in effect at the time of decedent's death. See Estate of George Green, supra. The choice of law issue here is whether the inheritance rights of adopted children are determined by the jurisdiction granting the adoption or by the jurisdiction in which the real property is located.

[4] The Administrative Law Judge correctly determined the inheritance rights of adopted children are controlled by the law of the jurisdiction in which the trust real property is located. The children's legal status, i.e., whether they were properly adopted and the effect of adoption, is determined by the jurisdiction granting the adoption; in this case, the Hualapai Tribe. See, e.g., In re Grace's Estate, supra. Their right to inherit from their natural father, however, should be determined by the laws of the jurisdiction in which the real property is located. The separate question of the children's legal status must be distinguished from the issue of their rights to inherit from their natural father. See, e.g., In re Grace's Estate,

supra; Annot., 73 A.L.R. 964 (1931), supplemented by Annot., 154 A.L.R. 1179 (1945). 3/

According to the Administrative Law Judge, the Uniform Probate Code was in effect in South Dakota in January 1976. Under the terms of this code, an adopted child is generally no longer considered the child of the natural parents for inheritance purposes. The Board is aware, however, that the Uniform Probate Code provides an exception to this rule when the child is adopted by the spouse of one of its natural parents. Under this exception, the parent-child relationship with the second natural parent is not affected by the

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3/ The cited annotations show the confusion over this rule. The general rule is stated in Annot., 154 A.L.R. at 1179-80.

"The general rules, as stated in the original annotation, and as recognized in the later cases decided since the publication of that annotation, appear to be that (a) the status of adoption validly acquired under the law of a state will be recognized and given effect in another state where the property is located or the decedent was domiciled, in determining the question whether the child is an adopted child for purposes of inheritance of local property, even though under the adoption law of the situs of the property or the decedent's domicile he would not have been regarded as an adopted child had the formalities for adoption taken place there; and that by the better view and weight of authority (b) the rights of inheritance of the child, as an adopted child, in the property in question will be determined by the law of the state where the property is located or the decedent was domiciled, so that, if a child locally adopted had no rights of inheritance, a child adopted under the foreign law and having rights of inheritance under that law will have no rights of inheritance in local property, and if a child locally adopted had under the local law limited or restricted rights of inheritance, a child adopted under the foreign law and having under that law unlimited rights of inheritance will have no greater rights of inheritance in local property than does a locally adopted child; and, conversely, if a locally adopted child had under the local law unlimited rights of inheritance in local property, a child adopted under the foreign law and having under that law limited or restricted rights of inheritance, will be accorded the same unlimited rights of inheritance in local property as is a child locally adopted."

Confusion has arisen apparently because some courts state this rule as the adopted child will be given inheritance rights received from the adopting state "if, and only to the extent that, such rights are not inconsistent with those incident to the status of adoption created in \* \* \* [the state in which the property is located or in which the decedent was domiciled], or with the laws of such state." Annot., 73 A.L.R. 964, 968. On careful examination, it is apparent that this statement means that the law of the adopting state will be applied if and only if it does not conflict with the law of the second state. If there is conflict, the apparent result is that the law of the second state is to be applied. As the Annotation notes, "[a] situation creating the necessity for the application of the principles of conflict of laws always presupposes conflict in the laws of the jurisdictions concerned. Hence, when those laws are in harmony in respect to rights acquired thereunder it is useless to speak of the application of one law in preference to another." Id.

adoption and the child can inherit from both natural parents and the adopting parent. Uniform Probate Code § 2-114.

The provisions of the South Dakota law incorporating the Uniform Probate Code are not part of the administrative record in this case. These provisions are also not readily available to the Board through other sources. Therefore, the Board cannot determine whether the Uniform Probate Code as enacted in South Dakota contained the exception for a child adopted by the spouse of a natural parent. Because it is possible that Robin, Richard, and Ronald Butler remained eligible to inherit from their natural father under South Dakota law despite their adoption, this case must be remanded for a determination of this question. The Board remands this case despite the fact that no objection has been raised to this finding through the exercise of the inherent power of the Secretary to correct a potential manifest injustice. 43 CFR 4.320. 4/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from is affirmed in part, reversed in part, and remanded. The decision of the Administrative Law Judge on remand shall be final unless review is sought under the provisions of 43 CFR 4.241 and 4.320.

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Franklin D. Arness  
Administrative Judge

We concur:

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//original signed

Wm. Philip Horton  
Chief Administrative Judge

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//original signed

Jerry Muskrat  
Administrative Judge

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4/ In addition the Board notes that the record does not show that Marlene Butler was given an opportunity to respond to this determination, which is adverse to the interests of her minor children, in accordance with the representations made to her by the Administrative Law Judge. Although this is technically a legal determination, not apparently requiring the presentation of additional evidence, such an opportunity may have supplemented the record by requiring the inclusion of the appropriate South Dakota statutes. Furthermore, the belief that she would still have such an opportunity may have caused Marlene Butler not to file an independent notice of appeal.