



INTERIOR BOARD OF INDIAN APPEALS

Estate of Benjamin Kent, Sr. (Ben Nawanoway)

13 IBIA 21 (08/29/1985)



United States Department of the Interior

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

ESTATE OF BENJAMIN KENT, SR. (BEN NAWANOWAY)

IBIA 83-41

Decided August 29, 1984

Appeal from an order denying rehearing issued in IP OK 152 P 83 and IP TU 106 P 81 by Administrative Judge Sam E. Taylor.

Affirmed.

1. Indians: Generally--Practice Before the Department: Persons Qualified to Practice

When an Indian tribe or member of an Indian tribe appears before the Board of Appeals represented by a person not qualified to appear before the Department of the Interior under 43 CFR 4.1, the party will be informed that the unqualified person may not appear, but will not be penalized for choosing an unqualified representative. Once informed that the chosen representative is unqualified, the Indian party must choose a qualified representative or appear pro se in order for filings to be accepted.

2. Administrative Procedure: Burden of Proof

The burden of proving the error of an initial Departmental Indian probate decision is on the party challenging the decision.

3. Indian Probate: Rehearing: Generally

Rehearings in Indian probate proceedings are intended to allow consideration of alleged errors made by the Administrative Law Judge and to permit the introduction of evidence that could not, with diligent effort, have been discovered prior to the original hearing. They are not a means for presenting evidence and arguments that were known at the time of the original hearing but simply not introduced.

APPEARANCES: Edgar B. Kent, pro se; F. Browning Pipestem, Esq., Norman, Oklahoma, for appellees. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On August 4, 1983, the Board of Indian Appeals (Board) received a notice of appeal from Edgar B. Kent (appellant), through his chosen representative,

Will T. Nelson (Nelson). Appellant sought review of a June 8, 1983, order denying rehearing issued in the estate of Benjamin Kent, Sr. (decedent), by Administrative Law Judge Sam E. Taylor. The denial of rehearing let stand a February 1, 1983, order determining decedent's heirs to be appellant, Benjamin Kent, Jr., Darlene Kent, Jerral Christine Kent Zuffante (Jerral Zuffante), and the 11 children of Mary Rose Kent DesJarlait Lieb (Mary Rose Lieb). Jerral Zuffante and the children of Mary Rose Lieb are the appellees in this matter. For the reasons discussed below, the Board affirms the previous decisions issued in this case.

Background

Decedent, an unallotted Iowa-Citizen Band Potawatomi, was born on August 9, 1911, and died intestate on December 6, 1980, at the age of 69. When he died, decedent owned fractional interests in Indian trust land under the jurisdiction of both the Shawnee and the Pawnee Agencies, Bureau of Indian Affairs. A hearing to probate decedent's trust estate was held by Administrative law Judge Vernon J. Rausch on August 12, 1981. When it appeared that an additional hearing was required, the matter was transferred to Judge Taylor. ^{1/} Judge Taylor held a second hearing on August 6, 1982.

Evidence presented at these hearings showed that decedent was survived by three legitimate children, Edgar Blaine Kent, Benjamin Kent, Jr., and Darlene Kent. Other evidence tended to show that decedent had two illegitimate daughters, Jerral Zuffante and Mary Rose Lieb, and that decedent's legitimate children were aware of the allegation that these girls were their father's daughters. Mary Rose Lieb had predeceased decedent, leaving 11 children. Based upon the evidence and demeanor of the witnesses, Judge Taylor found on February 1, 1983, that decedent's heirs under Oklahoma laws of intestate succession, as modified by 25 U.S.C. § 371 (1982), were his 3 legitimate children, Jerral Zuffante, and the 11 children of Mary Rose Lieb.

Appellant filed a petition for rehearing with Judge Taylor on March 28, 1983. This petition was denied by order dated June 8, 1983. Appellant sought review of this decision by the Board. Both parties have filed briefs on appeal.

Appearances Before the Board

On August 4, 1983, the Board issued an order accepting representation of appellant by Nelson. The Board stated at pages 1-2 of that order:

As an initial matter, the Board notes that appellant's representative does not fall within any of the categories of persons eligible to appear before the Department under 43 CFR 1.3. An appeal brought by a person who does not fall within any of the categories of persons authorized by the regulation to practice before the Department is normally subject to dismissal. Although this regulation may occasionally penalize a

^{1/} Judge Rausch was on temporary assignment to assist with a backlog of cases in the Oklahoma area.

particular appellant, its enforcement is necessary to protect those who do business with the Department against the risk of inadequate representation by persons untrained in the law. J. C. Trahan, 74 IBLA 15 (1983); Pierce and Dehlinger, 22 IBLA 396 (1975).

However, 43 CFR 1.3(a) further states that the regulations regarding eligibility to practice before the Department "shall not be deemed to restrict the dealings of Indian tribes or members of Indian tribes with the Department." The Board can only interpret this regulation to mean that Indians should be given greater freedom in choosing representatives than other persons appearing before the Department. The Board recognizes that in many cases Indians appearing before it do not have the financial resources to obtain legal counsel (although many free legal assistance programs are available) and do not feel competent to represent themselves. The risks of inadequate representation, however, still exist, and appellants choosing such representatives should do so with care because they will be bound by the actions of those representatives.

In accordance with 43 CFR 1.3(a), the Board accepts representation of appellant by Mr. Nelson.

Appellees ask for reconsideration of the Board's acceptance of Nelson's representation of appellant because the above construction of the regulation "establish[es] a peculiar 'Indian' rule that says the manner in which one becomes absolutely entitled to practice before the Department, irrespective of knowledge, training, or character, is to allege that one represents an Indian tribe or an Indian. The standards contained in the rule become no standards at all" (Answer Brief at 6).

The Board was aware of the potential problems involved in allowing representation by Nelson when it issued its order. It was concerned, however, that under its trust responsibility and the clear language of 43 CFR 1.3(a), it was required to give special consideration to Indian tribes and members of Indian tribes in their appearances before the Department.

[1] In response to appellees' request, the Board has reconsidered this holding. Appellant's representative is not qualified to appear before the Department under 43 CFR 1.3. In order, however, to give meaning to the proviso in section 1.3, and with due consideration to its trust responsibilities, the Board holds that when an Indian tribe or member of an Indian tribe appears before the Board represented by a person not qualified under 43 CFR 1.3, the party will be informed that the unqualified person may not appear, but the party will not be penalized for choosing an unqualified representative. Therefore, if the first filing made on the Indian party's behalf by the unqualified representative is timely, it will be accepted as fulfilling the time requirement for the filing of that document. The Board will, thereafter, give the Indian party a reasonable time under the circumstances in which either to adopt the filing made by the unqualified representative as his or her own, or to choose a qualified representative. After the Indian

party is informed that a representative is not qualified, no additional filings submitted by that representative will be accepted. 2/

Therefore, the Board accepts Nelson's filing of a notice of appeal on behalf of appellant as fulfilling the time requirements for the filing of a notice of appeal. In this case only, because the Board initially accepted Nelson's representation, it has considered all of his filings on behalf of appellant.

By order dated May 14, 1984, appellant was given an opportunity to supplement Nelson's filings. Both appellant and appellees filed additional statements in response to this order.

Discussion and Conclusions

Appellant argues that the burden of proof of paternity in this appeal is on appellees. It is true that in the hearing before Judge Taylor, appellees had the burden of proving paternity. See, e.g., Estate of Joshua Stone Arrow, 10 IBIA 104 (1982). The Judge found that they met this burden of proof and therefore issued a decision in their favor.

[2] On appeal to the Board, the burden is on appellant, as the person challenging the Judge's order, to show that the decision was incorrect. See Ruff v. Portland Area Director, 11 IBIA 267 (1983), dismissed, Civ. No. 83-1329 (D. Or. Mar. 16, 1984); Estate of Willis Attocknie, 9 IBIA 249, 89 I.D. 193 (1982). This shift in the burden of proof can clearly be seen in Estate of Wilma Florence First Youngman, 12 IBIA 219 (1984).

Appellant alleges that the Judge erred in finding that decedent was the father of Jerral Zuffante and Mary Rose Lieb because decedent did not accept them as his daughters in accordance with Oklahoma law, which he argues governs this case. See Okla. Stat. tit. 84, § 215.

The Judge specifically addressed this issue in denying rehearing:

The Petition for Rehearing filed by Edgar B. Kent, Sr., is premised upon his contention and belief that the law of Oklahoma relative to the legitimatizing of children by their natural father, 84 O.S. 215, is applicable here. This contention is erroneous for the reason that the United States Congress has heretofore provided that:

“ . . . and every Indian child, otherwise illegitimate, shall for such purpose [determination of Heirs] be taken and deemed to be the legitimate issue of the

2/ This holding would not prevent a party from seeking assistance in the preparation or drafting of documents from an individual who is not qualified to appear before the Board. The documents must, however, be signed by the party. Free legal assistance may also be available to parties through such sources as legal services organizations or the pro bono programs of local bar associations.

Furthermore, this ruling is not intended to exclude representation by tribal court advocates, who are admitted to practice by the tribes, which are sovereign entities within the Federal system.

father of such child . . .” (25 U.S.C. 371); Greg v. McKnight, 183 P. 489 (Okla. 1919).

The Judge's analysis of this issue is correct. Indian children, otherwise illegitimate, can inherit Indian trust property from the man shown to be their father. Federal law, not state law, controls the determination of paternity. See, e.g., Ruff and Attocknie, cited above; Estate of Richard Doyle Two Bulls, 11 IBIA 77 (1983). Appellant has failed to show that the Judge's determination of paternity was erroneous under Federal law.

[3] Appellant also attempts to introduce new evidence on appeal in the form of Nelson's testimony on the conduct of Indian funerals in the area and on decedent's family relationships. All evidence in a case should be presented to the Administrative Law Judge conducting the hearing. A rehearing before the Administrative Law Judge in order to present additional evidence is normally appropriate only if it is shown that the evidence could not, with diligent effort, have been presented at the original hearing. Estate of Alice Mae Sasse, 12 IBIA 281 (1984). The Board will not consider additional evidence that could have been presented at the hearing, but is introduced for the first time on appeal. See White Sands Forest Products, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 299, 307 n.6 (1983).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 1, 1983, order determining decedent's heirs and June 8, 1983, order denying rehearing are affirmed.

//original signed
Jerry Muskrat
Administrative Judge

I concur:

//original signed
Anne Poindexter Lewis
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE PARRETTE CONCURRING SPECIALLY:

The Board has no practical alternative but to uphold the decision of the Administrative Law Judge in this case. However, since I am not entirely satisfied with the result of the contest, and am reasonably sure that appellant will not be satisfied with it either, I would like to add a few words suggesting where and how appellant's case may have gone awry.

There is an old saying among lawyers that, "If the facts are against you, argue the law. If the law is against you, argue the facts." Here, appellant's case, if he had one, was based on the facts--that is, on his personal belief that his father was not really the father of Mary Rose Lieb or Jerral Zuffante. However, appellant never established the relevant facts in support of that proposition; instead, he waited until the Administrative Law Judge had made his decision on the facts and then tried (erroneously) to argue the law. The real issue in this case is not the admission of hearsay evidence by the judge, which is permissible in an administrative hearing, or the decedent's failure to acknowledge his illegitimate daughters publicly, which Oklahoma law may require but which Federal law does not, but rather whether there was a preponderance of evidence (not argument) establishing the disputed paternity. The Administrative Law Judge obviously decided there was such a preponderance, and this Board does not have a sufficient basis to overturn that judgment.

As to burden of proof: At the two hearings, held a year apart on August 12, 1981, and on August 6, 1982, appellant and appellees were on an equal footing. Both sides had an equal opportunity at that point to convince the Administrative Law Judge of the merits of their side of the case. However, once the Administrative Law Judge had made his determination, appellant's burden of proof was substantially increased. At that point he had to show either that new evidence had been discovered (i.e., evidence not available at the time of the hearing) or that the Administrative Law Judge had drawn an incorrect conclusion as a matter of law before he could prevail in his petition for rehearing or in this appeal. The next step, if appellant decides to attempt it, will be even harder: In order to succeed in a petition for reopening, appellant must show, in effect, that a manifest or obvious injustice will result if the case is not reopened; in other words, that there is virtually conclusive new evidence that the conclusion reached by the Administrative Law Judge at the time of the hearing was not correct. Obviously, such a burden of proof is difficult to sustain. The reason for the difficulty is that it is both necessary and desirable to put probate matters to rest as quickly and expeditiously as possible, and to encourage the presentation of all relevant facts at the original hearing.

In this appeal, the Board can only speculate as to whether all of the relevant facts were presented at the time of the two hearings. Certainly, it would be interesting to know why the minister, John L. Stonerod of Pawnee, Oklahoma, who allegedly knew the facts of the decedent's relationship with Agnes Pipestem, was not called by appellant as a witness at either hearing (I Tr. 8, 11, and 13). It clearly also would have been helpful to us if Javonne McIntosh, who allegedly publicly introduced Benjamin Kent, Sr., at Mary Rose Lieb's wake as Mary Rose's father, had been called to either corroborate or deny Robert Zuffante's testimony at the second hearing (II Tr. 8).

And surely appellant's case would have been strengthened immensely if he had been able to establish at either hearing that Benjamin Kent, Sr., could not have been the father of Mary Rose Lieb because he was in jail during the period when Mary Rose was conceived (appellant's rehearing affidavit at 3). Finally, although there was testimony at the second hearing that there were other Kents living in Red Rock who could have been Jerral Zuffante's father, and there was further testimony that appellant and the two girls went to school together (II Tr. 11-12), no school records were obtained to determine who was recorded as the girls' father during those early years.

It is not the function of the Board to remand a case for rehearing simply because the record raises numerous unanswered questions. We do not hear the case; we simply review the record. It may well be that, during the full year between the two hearings, appellant checked out all of these matters and determined that all of the potential evidence mentioned above, if introduced, would have been unfavorable to him. Or he may have had some other valid reason for not introducing it. The point is, the Board may wish intellectually that the record contained more information, but it is not always our function to order a rehearing in such circumstances. Our job is primarily to review the evidence that is there, not the evidence that we wish was there. Again, only if new evidence comes to light, or there is insufficient evidence to support the conclusion of the Administrative Law Judge, or there is other serious legal error, does the Board become involved in the question of the quality of the evidence.

Here, we decided that the Administrative Law Judge was justified in concluding as he did. Therefore, we have no basis for overturning his decision.

//original signed

Bernard V. Parrette
Chief Administrative Judge