



INTERIOR BOARD OF INDIAN APPEALS

Estate of Emerson Eckiwardah

27 IBIA 245 (03/29/1995)



# United States Department of the Interior

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

## ESTATE OF EMERSON ECKIWAUDAH

IBIA 94-176

Decided March 29, 1995

Appeal from an order denying rehearing issued by Administrative Law Judge Richard L. Reeh in Indian Probate IP OK 41 P 91.

Affirmed in part; reversed in part; 11 IBIA 267 clarified.

1. Indian Probate: Children, Illegitimate: Generally--Indian Probate: State Law: Generally

Paternity in an Indian probate case is a question of Federal not state, law. State law evidentiary standards for determining paternity do not apply in Indian probate proceedings

2. Indian Probate: Children, Illegitimate: Generally--Indian Probate: Evidence: Weight of Evidence

The standard of proof of paternity in Indian probate cases is preponderance of the evidence.

3. Indian Probate: Administrative Law Judge: Generally--Indian Probate: Appeals: Generally--Indian Probate: Witnesses: Observation by Administrative Law Judge

If the Administrative Law Judge deciding a case is not the Judge who held the hearing, the Board of Indian Appeals will review witness credibility determinations de novo.

4. Indian Probate: Children, Illegitimate: Generally--Indian Probate: Evidence: Weight of Evidence

Absent strong extenuating circumstances, the mother's testimony at the probate hearing is not sufficient by itself to prove paternity by a preponderance of the evidence when no action consistent with the allegation of paternity has been taken during the putative father's lifetime beyond the mother's naming the putative father at the hospital and/or to the child.

APPEARANCES: F. Browning Pipestem, Esq., Norman, Oklahoma, for appellant; Richard W. Anderson, Esq., Oklahoma City, Oklahoma, for appellee.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Benita Eckiwady seeks review of a July 8, 1994, order denying rehearing issued by Administrative Law Judge Richard L. Reeh in the estate of Emerson Eckiwadah (decedent). Denial of rehearing let stand a November 19, 1993, order determining decedent's heirs. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the orders in part and reverses them in part.

Background

Decedent, an unallotted Comanche, died on July 20, 1990. Administrative Law Judge Sam E. Taylor held two hearings to probate decedent's trust estate on September 17, 1991, and June 17, 1992. Judge Taylor did not issue a decision before he retired in August 1992. The parties agreed that Judge Reeh could decide the matter on the evidence already submitted to Judge Taylor. <sup>1/</sup> The opposing parties presented proposed findings of fact and conclusions of law to Judge Reeh.

In his November 19, 1993, order, Judge Reeh found decedent's heirs to be his surviving spouse (appellant), and four children: Daryl, Paula Jean, Diane, and Kenneth (appellee). Appellant is the mother of Daryl, Paula Jean, and Diane. Appellee is the son of Lorene Cotanny Williams. Judge Reeh summarized the testimony concerning the relationship between decedent and Lorene, and the circumstances of appellee's birth:

Lorene \* \* \* testified that she lived with the decedent in California during 1954 and that [appellee] was conceived by virtue of that relationship. Lorene stated that she had not been married to the decedent, either ceremonially, by Indian custom, or by virtue of the common law. In early 1955, after learning that she was pregnant, Lorene returned to Oklahoma. Lorene stated that decedent, a U.S. Marine, had been assigned to a post in the Pacific but was planning a summer 1955 [<sup>2/</sup>] marriage to [appellant] in Texas.

[Appellee] was born to Lorene at the Indian Hospital in Claremore, Oklahoma. Lorene admitted herself to the hospital under the false name of Lorene Eckiwady for a number of reasons, including the fact that she feared her somewhat tyrannical mother. Her testimony indicated that she did not claim to be the decedent's wife and that the occasion of [appellee's] birth was the only time she had used the name Eckiwady. [Appellee's] Certificate of Live Birth was admitted as Exhibit 1. The decedent's name is shown thereon to be [appellee's] father, although this

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<sup>1/</sup> The parties acknowledge this agreement. See Appellant's Opening Brief at 11; Appellee's Answer Brief at 3.

<sup>2/</sup> Sic. The date should be 1954. See June 17, 1992, transcript at 12 and 17.

designation appears to be in violation of Oklahoma statute. See 63 O.S. § 8.

Lorene admitted that the decedent never visited either herself or [appellee]; that he never signed any document acknowledging his paternity of [appellee]; that she never later married the decedent; that [appellee] never lived with the decedent; that she never approached the decedent about support for [appellee] .

[Appellee] testified that he was told by Lorene that the decedent was his father; that the decedent had never acknowledged paternity; that [appellee] had a great deal of animosity toward the decedent; and that - while [appellee] had seen the decedent - the two had never really spoken to one another.

(Nov. 19, 1993, Order at 2-3).

Judge Reeh acknowledged that there was no credible documentary evidence identifying decedent as appellee's father. He concluded, however, that "the testimony of Lorene \* \* \* was very persuasive. No evidence submitted in the case contradicted her sworn statement regarding the conception and birth of [appellee]. It is upon this credible testimony only that the finding of paternity is based" (Order at 4). <sup>3/</sup>

Judge Reeh denied appellant's petition for rehearing on July 8, 1994. Appellant appealed to the Board. Both appellant and appellee filed briefs on appeal.

#### Discussion and Conclusions

Appellant argues that 25 U.S.C. § 371 (1988) prohibits the finding that appellee was decedent's son. Section 371 states in pertinent part:

For the purposes of determining the descent of land to the heirs of any deceased Indian under the provisions of section 348 of this title, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child.

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<sup>3/</sup> In an effort to provide objective evidence on the paternity issue, Judge Reeh suggested that DNA testing could be used voluntarily, and paid for as a cost of administration of the estate. Some of the individuals who would need to be tested declined to participate. The Judge stated at page 3 of his Nov. 19, 1993, order that "the testing was not accomplished, and no inference has been taken relating to decisions" of whether or not to participate.

Lorene admits that she and decedent did not have an Indian custom marriage. However, appellee could still inherit under the second clause of section 371 if decedent were shown to be his father.

Appellant cites footnote 12 in Ruff v. Acting Portland Area Director, 11 IBIA 267 (1983), 4/ in support of a suggestion that paternity under section 371 should be determined with reference to state law. In Ruff, the Board held "that the status of an Indian child as illegitimate and the required proof of paternity are questions of Federal law" (11 IBIA at 273), but noted that "[t]his finding does not exclude the possibility of looking to state law or state court proceedings in reaching a Departmental decision on paternity. Such laws and decisions are, however, persuasive authority and are not binding upon the Department" (11 IBIA at 273 n.12).

[1] Appellant's argument for the application of state law and/or state law evidentiary standards is contrary to clear and consistent rulings that the determination of paternity in an Indian probate proceeding is a question of Federal, not state, law. See, e.g., Estate of Benjamin Kent, Sr. (Ben Nawanoway), 13 IBIA 21 (1984); Estate of James Howling Crane, Sr., 12 IBIA 209, recon. denied, 12 IBIA 257 (1984); Ruff, supra; Estate of Willis Attocknie, 9 IBIA 249, 89 I.D. 193 (1982); Estate of Harry Colby, 69 I.D. 113 (1962). Cf. Estate of Joseph Kicking Woman, 15 IBIA 83 (1987) (paternity determinations are not controlled by tribal law), dismissed, Kicking Woman v. Hodel, Civ. No. 87-33-GF (D. Mont. Sept. 18, 1987), aff'd, 878 F.2d 1203 (9th Cir. 1989). State court proceedings may be instructive in an Indian probate case when paternity was, or could have been, at issue in the state proceeding. However, reference to state laws is appropriate only when there is no Federal law, including Board precedent, on a particular issue. Federal precedent controls regardless of whether the law of a particular state, including the state's evidentiary standards, would yield a different result. In rejecting the application of state law in Ruff, the Board also rejected the application of state evidentiary standards, and Ruff is hereby clarified to show this. To the extent the Board's prior cases may not have nailed down the coffin lid on the question of whether state law, including state law evidentiary standards, apply in Indian probate paternity determinations, it does so now.

The Board affirms Judge Reeh's finding that state law had no application in this paternity determination.

Appellant contends that even if paternity is determined under Federal law, the Federal evidentiary standard for finding paternity should be clear and convincing evidence. She thus argues that Judge Reeh erred in finding paternity by the lower standard of preponderance of the evidence. Appellant asserts that there is a split in the Board's case law as to which standard of proof should be applied, citing two cases in which she states the clear

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4/ Dismissed, Ruff v. Watt, No. 83-1329 (D. Ore. Mar. 16, 1984) aff'd, 770 F.2d. 839 (9th Cir. 1985).

and convincing standard was applied, 5/ and four in which she states the preponderance of the evidence standard was used. Appellant asks the Board to rule that the proper standard of proof for paternity in Indian probate cases is clear and convincing evidence.

The Board agrees with appellant that the clear and convincing standard was applied in Estate of Ke-I-Ze, or Julian Sandoval, 4 IBIA 115, 82 I.D. 402 (1975). It cannot agree with her, however, that the Board applied that standard in Ruff. The issue in Ruff was whether an individual was a child of a deceased Klamath Indian for purposes of participating in the distribution of the decedent's share of judgment funds awarded to the Klamath Tribe. The initial decision was made by the Portland Area Director, who, being unaccustomed to making quasi-probate decisions, looked to Oregon State law, including the State's clear and convincing evidentiary standard, in finding that paternity had not been proven. When the case reached the Board, it ordered an evidentiary hearing by an Administrative Law Judge, who held that paternity had been shown "by a preponderance of clear and convincing evidence." 11 IBIA at 272. As discussed supra, the Board rejected the application of state law in Ruff. Although the Board did not explicitly reject the use of the clear and convincing evidentiary standard, it also did not endorse it.

The Board has found 11 cases in which it explicitly applied the preponderance of the evidence standard in paternity detendnations, 6/ and an additional 3 cases in which the decision shows that the Administrative Law Judge applied that standard, and the Board affirmed without discussion of the standard of proof. 7/ It found only one case, Sandoval,

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5/ Appellant also cites Estate of Matthew Cook, 7 IBIA 62 (1978). Cook did not deal with paternity, but rather with an Indian custom marriage.

6/ These cases are: Estate of Joseph Dupoint, 15 IBIA 59 (1986); Estate of Henry W. George, 15 IBIA 49 (1986); Estate of Woody Albert, 14 IBIA 223 (1986); Estate of Jason Crane, 12 IBIA 165 (1984); Estate of Victor Young Bear, 8 IBIA 130, 87 I.D. 311 (1980), rev'd on other grounds, 8 IBIA 254, 88 I.D. 410 (1981); Estate of Guo-La, a.k.a. Thomas Jones, 7 IBIA 181 (1979); Estate of Roland Loyd (Mobeadlema) Botone, 7 IBIA 177 (1979); Estate of Terrance Wayne White Bear, 7 IBIA 80 (1978), dismissed, White Bear Fredericks v. United States, Civ. No. A78-1080 (D.N.D. 1979); Estate of Albin (Alvin) Shemamy, 7 IBIA 70 (1978), aff'd, Longhat v. Andrus, No. CIV-78-0929-D (W.D. Okla. Dec. 31, 1979), aff'd, No. 80-1171 (10th Cir. Feb. 16, 1982); Estate of Alvin Hudson, 5 IBIA 174 (1976), dismissed, Hudson v. United States, No. C76-227T (W.D. Wash. Mar. 6, 1979), aff'd, No. 79-4305 (9th Cir. Feb. 26, 1981); and Estate of Crawford J. Reed, 1 IBIA 326, 79 I.D. 621 (1972), dismissed, Reed v. Morton, No. 1105 (D. Mont. June 14, 1973).

Appellant cited Dupoint, George and Albert.

7/ These cases are: Estate of Warren Lewis Lincoln, 19 IBIA 118 (1990); Estate of George Neconie, 16 IBIA 120 (1988); and Estate of Leon Levi

in which the Board clearly used the standard of clear and convincing evidence. The Board concludes that there is no split in its decisions concerning the correct standard of proof of paternity; rather there is one anomalous decision.

[2] The standard of proof of paternity in Indian probate cases is preponderance of the evidence. Accordingly, the Board affirms Judge Reeh's application of this standard.

Appellant contends that appellee failed to show paternity even by the lower preponderance of the evidence standard. Judge Reeh stated that his decision was based solely on Lorene's testimony. 8/ Appellant argues that this decision "is against the clear weight of authority contained in the body of case law developed by the \* \* \* Board \* \* \*. After thorough legal research no IBIA case has been found that would allow this result - a finding of paternity solely on self-serving information provided by the mother without a scintilla of other evidence" (Notice of Appeal at 4).

The Board is not aware of any prior case in which it found paternity solely on the basis of the mother's testimony. 9/ It has noted, however, that, under proper circumstances, it might find such testimony sufficient. In Ruff the Board stated:

In this regard [i.e., in determining how much weight should be given to the mother's testimony], Board decisions are more lenient than Oregon law, which requires that the testimony of the mother of an illegitimate child must always be corroborated by other evidence when the putative father denies paternity. Under the proper circumstances, the testimony of the mother might be sufficient in itself to establish paternity in Departmental heirship determinations.

(11 IBIA at 273 n.13). The Board similarly stated in Jason Crane:

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fn. 7 (continued)

Harney, 16 IBIA 18 (1987). The Board does not represent that this list is exhaustive.

Appellant cited Lincoln as a case in which the Board applied the preponderance of the evidence standard. Appellant also cites Estate of Louis Harvey Quapaw, 4 IBIA 263, 82 I.D. 640 (1975), and Kent, supra (Chief Administrative Judge Parrette concurring specially). The only reference to a standard of proof in Quapaw is the Board's statement of the appellant's argument that paternity had not been proven by "a fair preponderance of the evidence or conclusive facts" (4 IBIA at 272, 82 I.D. at 643). The special concurrence in Kent does refer to preponderance of the evidence.

8/ The Judge did not consider appellee's birth certificate because of the circumstances surrounding its creation.

9/ The closest it has come to such a decision appears to be Jason Crane, in which it upheld a finding of paternity when the mother's otherwise

The Board, as presumably are other judicial or quasi-judicial forums concerned with questions of paternity, is hesitant to base a finding of paternity upon the uncorroborated testimony of the mother. Unlike many states, however, there is no Federal statute or regulation prohibiting a finding of paternity on such evidence in Indian probate cases.

(12 IBIA at 170). The Board concludes that a finding of paternity based solely on the testimony of the mother is not against the clear weight of authority set forth in its prior decisions, but rather is a logical extension of statements made in those decisions.

Appellant argues that Judge Reeh had no basis upon which to conclude that Lorene's testimony was credible because he did not conduct the hearings and therefore had no opportunity to observe the witnesses as they testified. She argues that the agreement that the case could be decided on the record “[did] not grant [Judge] Reeh the freedom to make arbitrary and capricious inferences concerning the credibility of a witness he never observed” (Opening Brief at 11).

Judge Reeh based his credibility determination on Lorene's testimony, not on her demeanor. Appellant's argument suggests that no credibility determination can ever be made except by a judge who has actually seen an individual testify. Considering the fact that many judicial and quasi-judicial decisions are entered in which no live testimony is taken, yet credibility is an issue, the Board declines to accept this argument.

[3] Appellant also argues that Judge Reeh's credibility determination is subject to review *de novo*. The Board has frequently stated that it will defer to witness credibility determinations made by an Administrative Law Judge based on his/her opportunity to observe witness demeanor at the hearing. *See, e.g., Estate of Donald Paul Lafferty*, 19 IBIA 90, 93 (1990), and cases cited therein. Obviously, if the judge deciding a case did not hold the hearing, such deference is not appropriate. Judge Reeh's determination of witness credibility will be reviewed *de novo*.

At page 4 of her Opening Brief, appellant argues that Lorene totally lacks credibility because Lorene

purposefully, knowingly, and falsely appropriated the decedent's name for herself by entering the hospital under the false name of “Lorene Eckiwardy.” She further falsely and without the consent of Emerson Eckiwardy appropriated the decedent's name for her child born out of wedlock by entering his name on the birth certificate as “Kenny Eckiwardy.”

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fn. 9 (continued)

uncorroborated testimony was supported by a statement of the decedent's sister to the effect that the decedent had told her he was supposed to have a daughter somewhere.

The Board disagrees. Considering the attitudes prevalent in 1954-55, it finds Lorene's testimony both consistent and credible. Furthermore, documentary evidence presented by appellant, *i.e.*, decedent's military records, verified that decedent was stationed in California in 1954. While this fact does not support a finding of paternity, it does support Lorene's credibility.

The question, however, is whether Lorene's credible testimony is or should be, as a matter of Federal law, sufficient in itself to prove that decedent was appellee's father. Two prior Board cases support appellant's position that it is not. In Hudson, *supra*, an order determining heirs was entered on December 30, 1949. A petition to reopen the estate was filed on August 21, 1968, by an individual who alleged he was Hudson's son. On reopening, the Administrative Law Judge held that paternity had been proven. The Board reversed, stating that proof was based solely on the testimony of the petitioner's mother that the petitioner was conceived as the result of a rape of the mother by Hudson. The mother testified that she had never told anyone that she had been raped, or that her son was conceived through a rape. The Board concluded that this testimony, given 23 years after the incident, and without any corroboration, "raise[d] a serious question regarding the credibility of [the mother's] testimony." 5 IBIA at 176.

In Lincoln, *supra*, an individual claiming to be Lincoln's son submitted the testimony of his mother and various documents stating that Lincoln was his father. The Administrative Law Judge concluded that the evidence was insufficient to prove paternity. The Board affirmed, noting that the claimant had proven that his mother believed Lincoln was her son's father and had so stated on the documents submitted in support of the claim, and had once attempted unsuccessfully to get Lincoln to admit paternity so she could obtain financial support for the child. However, the Board concluded that Lincoln's actions during his lifetime were "not consistent with even an implicit acknowledgement of paternity." 19 IBIA at 122.

[4] Based on its prior cases and the facts of this case, the Board concludes that, absent strong extenuating circumstances, which it does not find here, a mother's testimony by itself is not sufficient to prove paternity by a preponderance of the evidence when no action consistent with the allegation of paternity has been taken during the putative father's lifetime beyond the mother's naming the putative father at the hospital and/or to the child. 10/

Judged by this standard, the Board must reverse Judge Reeh's finding that decedent was shown to be appellee's father by a preponderance of the evidence

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10/ Extenuating circumstances might include, for example, a situation in which the putative father died before, or shortly after, the birth of the child.

