ESTATE OF JAMES WERMY PEKAH

IBIA 82-57 Decided July 6, 1983

Appeal from a July 1, 1982, order denying rehearing issued by Administrative Law Judge Garry V. Fisher in IP BI 4B 81.

Reversed in part and remanded.

1. Indian Probate: Appeal: Standing to Appeal

A party to an Indian probate proceeding may file a notice of appeal with the Board of Indian Appeals under 43 CFR 4.320 from an order denying rehearing even though the petition for rehearing before the Administrative Law Judge was filed by another party.

2. Indian Probate: Adoption: Generally--Indians: Adoption

An adoption is not normally considered a testamentary act and is not subject to the rules governing the execution of testamentary instruments. An otherwise proper adoption decree showing that the requirements of the jurisdiction rendering it were met will be recognized.

3. Indian Probate: Appeal: Matters Considered on Appeal

Ordinarily the Board of Indian Appeals will not consider an issue raised for the first time on appeal. However, the Board has held that jurisdiction is a fundamental question and will be considered on appeal whether or not it was previously raised. This same reasoning will be applied whether it is the Department's jurisdiction that is being challenged or the jurisdiction of another judicial or

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quasi-judicial body upon whose decision the Department has relied.

4. Indian Probate: Secretary's Authority: Generally--Indian Probate: State Law: Generally--State Courts

The Secretary of the Interior, pursuant to the statutory duty to determine the heirs of deceased Indians for whom the United States holds property in trust, has the power to determine whether a state court had jurisdiction to enter a decree apparently affecting the determination of heirs and to disregard such a state court decree under appropriate circumstances.

5. Administrative Procedure: Administrative Law Judges--State Laws

When the Board of Indian Appeals finds that the decision in an appeal requires further extensive analysis of Federal and state law, the case will be remanded or referred to an Administrative Law Judge familiar with the legal issues.

APPEARANCES: F. Browning Pipestem, Esq., Norman, Oklahoma, for appellants; Thomas R. Crook, Esq., Tulsa, Oklahoma, for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On September 13, 1982, the Board of Indian Appeals received a notice of appeal from Ralph Wermy, Donald Wermy, Jr., Anna Harry Coffey, Edward Wermy, and Cynthia Wermy (appellants) seeking review of a July 1, 1982, order denying rehearing in the estate of James Wermy Pekah (decedent). The order denying rehearing let stand an April 15, 1982, order determining decedent's heirs. For the reasons discussed below, the Board reverses in part the order denying rehearing and remands the case for consideration of the questions discussed in this opinion and, if necessary, a redetermination of decedent's heirs.

Background

James Wermy Pekah, Comanche Allottee 2283, was born in 1894 and died intestate on June 8, 1980. Decedent died possessed of Indian trust property located on the Kiowa-Comanche-Apache Indian Reservation in Oklahoma.

Hearings to determine decedent's heirs were held on February 3 and November 17, 1981. Following those hearings, the Administrative Law Judge

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issued an order finding that decedent's entire estate should pass to his adopted son, John Marvin Wermy Pekah (appellee). Appellee, who was decedent's natural nephew, was found to have been adopted by decedent by decree of the District Court of Comanche County, Oklahoma, dated October 6, 1977. At that time, decedent was 82 years old and appellee was 52 years old. The adoption was challenged before the Administrative Law Judge on the grounds that decedent lacked the mental capacity to understand the legal effect of his action and that he was subjected to undue influence in procuring the adoption. The Administrative Law Judge found against these arguments and upheld the adoption.

Subsequently, appellants Ralph Wermy and Donald Wermy, Jr., filed petitions for rehearing pursuant to 43 CFR 4.241. Both petitioners sought rehearing on the grounds of discrepancies in the testimony at the hearings. Ralph Wermy additionally alleged that he had been in the hospital and was unable to attend the hearing. The Administrative Law Judge found that the petitions did not meet the requirements set forth in section 4.241 and denied rehearing.

All present appellants, represented by different counsel than before the Administrative Law Judge, joined in the appeal to the Board. On appeal, appellants argue that the alleged adoption of appellee by decedent was void because the State court issuing the decree lacked jurisdiction. Briefs were filed by both sides.

Standing

Appellee argues that three of the five appellants, Anna Harry Coffey, Edward Wermy, and Cynthia Wermy, lack standing before the Board because they waived their right to appeal by failing to file petitions for rehearing with the Administrative Law Judge. Standing before the Board in Indian probate cases is controlled by 43 CFR 4.320, which states in pertinent part: "A party in interest shall have a right to appeal to the Board of Indian Appeals from an order of an administrative law judge on a petition for rehearing, a petition for reopening, or regarding tribal interests in a deceased Indian's trust estate."

[1] In Estate of George Swift Bird, 10 IBIA 63, 66 n.3 (1982), the Board indicated that a party to an Indian probate proceeding could file a notice of appeal from an order denying rehearing when the petition for rehearing was filed by another party. Section 4.320 requires that a petition for rehearing be filed with the Administrative Law Judge before an appeal may be brought to the Board. Once such a petition has been filed and a decision on it has been rendered, the regulation permits any party in interest in the proceeding to appeal from the Administrative Law Judge's order. Section 4.320 does not require identity of persons in those filing the petition with the Administrative Law Judge and those filing the notice of appeal with the Board. 1/

1/ The headnotes to several Departmental Indian probate decisions rendered under 25 CFR 15.19, the predecessor regulation to 43 CFR 4.320, appear to hold that the person bringing an appeal must personally have filed a petition

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Therefore, appellee's motion that this appeal be dismissed as to appellants Anna Harry Coffey, Edward Wermy, and Cynthia Wermy is denied.

Discussion and Conclusions

Appellants make two major arguments on appeal: (1) the Oklahoma decree of adoption should be disregarded because the State court lacked jurisdiction to render it; and (2) the adoption should not be upheld because the decedent did not understand its effect on the inheritance of his estate. The Board will consider the second issue first.

Appellants allege, as they did before the Administrative Law Judge, that this adoption should be treated as a testamentary act because it was a will substitute. Appellants object to the Administrative Law Judge's failure to make specific findings of fact as to decedent's testamentary capacity at the time of the adoption.

[2] With the benefit of hindsight and the knowledge that decedent ultimately died intestate, there is an inclination to characterize this adoption as a will substitute. However, an adoption is not normally considered a testamentary act and is not subject to the rules governing the execution of testamentary instruments. See 25 U.S.C. § 372a (1976); Estate of Mary Martin Mataes Andrew Caye, 9 IBIA 196 (1982); Estate of Victor Young Bear, 8 IBIA 254, 88 I.D. 410 (1981). Therefore, the Board will recognize an adoption, if otherwise proper, if it is shown to have met the requirements of the law of the jurisdiction rendering it.

Conflicting testimony was presented at the hearing as to the manner in which the adoption was accomplished (Tr. 37-40; Deposition of Judy K. Taha at 5-9). The decree itself, however, stands as evidence for the truth of the matters therein asserted. The Board, as a matter of comity, will not inquire into the facts and findings of the State court judge.

Therefore, the Board rejects appellants' second argument and finds that the petition for rehearing was properly denied with regard to this issue.

Appellants' remaining argument is that the State court decree should be disregarded in determining decedent's heirs on the grounds that the court was without jurisdiction to render the decree. The Board must initially determine whether this issue is properly before it, because the argument was not clearly presented to the Administrative Law Judge either before his order determining heirs or in a petition for rehearing. Although appellants argued before the Administrative Law Judge that the State court decree was not conclusive on the Department, it does not appear that they specifically argued lack of jurisdiction.

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fn. 1 (continued)
for rehearing. See, e.g., Estate of Ralyen or Rabyea Voorhees, IA-L-2 (1971); Estate of Jason Betzinez (Betzines), IA-1302 (1965). Examination of these cases, however, shows that no petition for rehearing had been filed with the Administrative Law Judge by any party.

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[3] Ordinarily, the Board will not consider an issue raised for the first time on appeal. Burns v. Anadarko Area Director, 11 IBIA 133 (1983); Estate of Jessie McGaa Craven, 1 IBIA 157 (1971) and cases cited therein. This rule is clearly set forth in 43 CFR 4.320, which states in pertinent part: "An appeal shall be limited to those issues which were before the administrative law judge upon the petition for rehearing." The Board, however, has held that jurisdiction is a fundamental question and will be considered on appeal whether or not it was previously raised. Estate of Louis Harvey Quapaw, 4 IBIA 263, 82 I.D. 640 (1975). This same reasoning will be applied whether it is the Department's jurisdiction that is being challenged or the jurisdiction of another judicial or quasi-judicial body upon whose decision the Department has relied. See Lane v. United States, 241 U.S. 201 (1916). 2/ The Board, therefore, holds that this issue is properly before it.

[4] Appellee throughout this proceeding has questioned the Department's authority to go behind an apparently final state court decree and investigate jurisdiction. This question was settled in Lane, supra. In Lane, which also involved a state court adoption decree, the Supreme Court held that there was

> no ground for preventing by judicial action the exercise by the Secretary of his [statutory] power to determine the legal heirs [of the deceased Indian for whom the United States holds property in trust] and in so doing to ascertain the existence of * * * [a relevant state court] judgment, the jurisdiction ratione materiae of the court by which it was rendered and the legal effect which it was entitled to receive under the law of * * * [the state].

241 U.S. at 210. Cf. Weiser v. Portland Area Director, 9 IBIA 76 (1981).

It is therefore clear that the Department, which has been entrusted with the responsibility to determine heirs to Indian trust property, has the power to determine whether a state court had jurisdiction when it entered a decree apparently affecting the determination of a deceased Indian's heirs. Furthermore, the Department has the power to disregard such a state court decree under appropriate circumstances. 3/ Weiser, supra at 78 n.l.

Appellant's argument on lack of jurisdiction is based on the fact that both decedent and appellee resided on decedent's Indian trust allotment in Oklahoma at the time of the attempted adoption. Appellee does not dispute

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2/ Furthermore, section 4.320 continues "the Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate." If appellants' jurisdictional arguments are correct, a manifest injustice or error will occur if decedent's estate is distributed to appellee.

3/ Such a decision would in no way affect the validity of the State court adoption decree for any purpose except the Departmental determination of the heirs to decedent's Indian trust property. The Department has no authority to overturn a state court decision.

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this assertion. Appellants argue that Indian trust allotments, as well as Indian reservations, are defined by 18 U.S.C. § 1151 (1976) as Indian country. 4/ Appellants contend that exclusive authority to govern the affairs of Indians residing in Indian country lies with the Federal Government and the tribe, unless and until the state in which such allotments or reservations are located is granted authority by Congress to exercise its jurisdiction within Indian country. In the present case, appellants argue that Oklahoma could have acquired civil jurisdiction within Indian country under the provisions of P.L. 280, 5/ but failed to do so. In support of their argument, appellants cite Fisher v. District Court, 424 U.S. 382 (1976), and Ahboah v. Housing Authority of the Kiowa Tribe of Indians, No. 53646 (Okla. Mar. 1, 1983). 6/

The Board finds that the following facts and legal arguments have been established in the record of this case: (1) Both appellee and decedent were Indians and resided on an Indian trust allotment at the time of the attempted adoption, (2) under 18 U.S.C. § 1151 (1976) appellee and decedent resided within Indian country at the time of the attempted adoption, (3) tribal civil jurisdiction pertains to Indians residing within Indian country, (4) Oklahoma could have extended its civil jurisdiction to Indians residing within Indian country under P.L. 280 or Title IV of the Civil Rights Act of 1968, (5) Oklahoma did not act to assume such jurisdiction under P.L. 280 before the passage of the Civil Rights Act, and (6) Oklahoma has not acquired civil jurisdiction over some kinds of causes or over the Kiowa Tribe under the Civil Rights Act.

[5] These findings are insufficient to allow the Board to determine whether the Comanche Tribe has consented to Oklahoma's civil jurisdiction under the Civil Rights Act or whether Oklahoma otherwise has acquired jurisdiction over adoption actions by Indians residing within Indian country. Such a determination cannot be made without a more extensive examination of Federal and state law in accordance with the guidelines set forth by the Oklahoma Supreme Court in Ahboah, supra, which the Board believes properly defines the necessary inquiry. Therefore, the case will be remanded to an Administrative Law Judge in order that a thorough and complete examination of these legal issues may be perfected. See In re Estate of John Ignace, 3 IBIA 221 (1975). Cf. Estate of Richard Doyle Two Bulls, 11 IBIA 77 (1983).

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is remanded to an

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4/ Although section 1151 relates to criminal jurisdiction, the Supreme Court has recognized its similar applicability to civil jurisdiction. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 177-78 n.17 (1973); Kennerly v. District Court of Montana, 400 U.S. 423, 424-25 n.1 (1971).

5/ P.L. 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 589, as amended by Title IV of the Civil Rights Act of 1968, P.L. 90-284, Act of Apr. 11, 1968, 82 Stat. 80, 18 U.S.C. § 1162, 25 U.S.C. § 1321, and 28 U.S.C. § 1360 (1976).

6/ This decision, which has not yet been officially reported, was printed in Oklahoma Bar Journal, Vol. 54, p. 581.

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Administrative Law Judge to be designated by the Hearings Division of the Office of Hearings and Appeals for a determination of whether the District Court of Comanche County, Oklahoma, had jurisdiction to render a decree of adoption involving appellee and decedent, and, if it did not, for a redetermination of decedent's heirs. The decision of the Administrative Law Judge on remand will be final unless appealed in accordance with the provisions of 43 CFR 4.241 and 4.320.

Jerry Muskrat
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Franklin D. Arness
Administrative Judge

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