ESTATE OF WILMA FLORENCE FIRST YOUNGMAN

IBIA 83-47 Decided April 4, 1984

Appeal from a June 27, 1983, order denying rehearing issued by Administrative Law Judge Daniel S. Boos. IP-BI-400B-83, IP-BI-698B-82, IP-BI-517D-81, IB-BI-198D-81, and IP-BI-D-674-55.

Affirmed.

1. Indian Probate: Evidence: Insufficiency of--Indian Probate: Reopening: Generally

   The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was incorrect is on the person seeking reopening.

2. Indian Probate: Marriage: Proof of Marriage

   A common-law marriage must be established by the one alleging such a marriage.

3. Indian Probate: Marriage: Generally

   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.

4. Indian Probate: Witnesses: Observation by Administrative Law Judge

   Where testimony is conflicting, the Board normally will not disturb a decision based upon findings as to credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor.

APPEARANCES: Francis X. Lamebull, Esq., and Andrew M. Small, Esq., Billings, Montana, for appellant; Steven R. Marks, Glasgow, Montana, for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On August 29, 1983, the Board of Indian Appeals received a notice of appeal filed by Warren C. Youngman (appellant) from a June 27, 1983, order

WWWVersion

denying rehearing issued by Administrative Law Judge Daniel S. Boos. The order let stand a March 18, 1983, order determining the heirs of Wilma Florence First Youngman (decedent) after the reopening of her estate. For the reasons discussed below, the Board affirms the determination of heirs.

Background

Decedent, Fort Peck Allottee No. 3879, was born on February 10, 1931, and died in an automobile accident near Poplar, Montana, on May 25, 1955. At the time of her death, decedent's Indian trust holdings on the Fort Peck Reservation were valued for probate purposes at $3,888.97. 1/ A hearing to probate decedent's Indian trust estate was held on November 21, 1956. Decedent's mother testified at the hearing that decedent had no children and that decedent and appellant were married on May 6, 1955. Appellant's father testified that this marriage occurred in Green Bay, Wisconsin. The Summary of Family History and Inventory of trust property, prepared by the Department's Office of the Solicitor, listed appellant as decedent's common-law husband as of May 6, 1955. On January 31, 1957, the Examiner of Inheritance found that appellant was entitled to decedent's entire trust estate as her surviving spouse.

On January 20, 1981, Patricia First McBride (appellee) petitioned the Department to reopen decedent's estate. Appellee alleged that she was decedent's daughter and that decedent and appellant were not married. Appellant did not oppose appellee's claim to one-half of the estate, apparently because decedent had told him that she had a daughter. On March 17, 1981, Administrative Law Judge Alexander H. Wilson reopened the estate and modified the original order determining heirs to award one-half of the estate to appellee. The order denied reopening of the question whether appellant was decedent's surviving spouse.

Appellee sought review by the Board of that part of the order which denied reopening on the question of decedent's marital status. On June 4, 1982, the Board affirmed the finding that appellee was entitled to one-half of decedent's estate and reversed that part of the order denying reopening. The case was remanded to an Administrative Law Judge for an evidentiary hearing and decision. Estate of Wilma Florence First Youngman, 10 IBIA 3, 89 I.D. 291 (1982).

A hearing on remand was held on January 7, 1983, by judge Boos. Depositions were taken from additional witnesses on January 12, 1983. The Judge's March 18, 1983, order determining heirs held that appellant had failed to show that he was decedent's common-law husband. On April 5, 1983, the Judge granted appellant's motion to reconsider this decision because the issuance of the order had inadvertently foreclosed a promised opportunity to submit final arguments and briefs. Briefs were submitted by both parties. Appellant requested rehearing on May 20, 1983. In a June 27, 1983, order, the Judge denied rehearing and affirmed the March 18, 1983, order determining heirs.

1/ Because of a subsequent oil and gas lease on the property, as of Dec. 1, 1981, the estate Individual Indian Money Account contained approximately $173,000.

WWWVersion

Appellant sought review of this order by the Board. Briefs were filed by both parties. During the course of briefing, appellee submitted a petition for attorney fees, a motion for partial distribution, and a motion for expedited consideration. The Board assigned the petition for attorney fees docket number IBIA 84-13-F and referred the matter to Judge Boos by order dated January 25, 1984. An order to show cause why partial distribution should not be permitted was also entered on January 25, 1984. No opposition to the motion was timely received. A combined order granting partial distribution and expediting consideration of this case was entered on February 23, 1984. 2/

Discussion and Conclusions

[1] The burden of proving that the initial decision in the probate of a deceased Indian's estate was erroneous is on the person seeking reopening. Estate of Joseph Wyatt, 11 IBIA 244 (1983); Estate of Frank Pays, 10 IBIA 61 (1982). In this case, appellee sustained her burden of demonstrating error.

The initial probate decision was apparently based exclusively on the testimony of decedent's mother and appellant's father to the effect that decedent and appellant were married on May 6, 1955, in Green Bay, Wisconsin. Appellee has shown through documentary evidence from the State of Wisconsin that there is no record of any such marriage. Appellant admits that he and decedent falsely told their parents that they had been married in Green Bay. See, e.g. Tr. at 41, Exh. 5. This proof sustains the finding that appellant and decedent were not married at the time and place previously alleged. Therefore, the prior probate decision was in error.

[2, 3] Because of the error in the original decision, a new heirship determination must be made. In this new determination, appellant has the burden of proving that a common-law marriage existed between himself and decedent at some time before or after May 6, 1955. See Estate of Matthew Cook, 7 IBIA 62 (1978). Because the status of an individual with respect to an Indian decedent 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, see Estate of Richard Doyle Two Bulls, 11 IBIA 77 (1983), appellant must show that a common-law marriage was entered into under the laws of the State of Montana. 3/ He must, therefore, show mutual consent, cohabitation, and repute. See Miller v. Sutherland, 131 Mont. 175, 309 P.2d 322 (1957). Appellant must also show that:

> The consent which is the foundation and essence of the [marriage] contract * * * [was] given at the same time, and it * * * [was

---

2/ On Mar. 5, 1984, the Board received a motion from appellant for an extension of time to respond both to appellee's motions for partial distribution and for expedited consideration and to appellee's answer brief. Because this motion was untimely under 43 CFR 4.310(d)(2), it was denied by order dated Mar. 16, 1984.

3/ Although appellant suggests May 6, 1955, and Green Bay, Wisconsin, as one date and place for the commencement of his marriage to decedent, Wisconsin abolished common-law marriage in 1917. See Estate of Van Schaick, 256 Wis. 214, 40 N.W.2d 588 (1949).

WWWVersion

> not] attended by an agreement that some intervening thing shall be done before the marriage takes effect, or that it be publicly solemnized. That is to say, it must contemplate a present assumption of the marriage status, in distinction from mere future union.

State v. Newman, 66 Mont. 180, 213 P. 805, 807 (1923). See also Welch v. All Persons, 78 Mont. 370, 254 P. 179, 183 (1927).

The evidence on the existence of a common-law marriage is conflicting. Appellant testified that he and decedent intended to assume married status immediately; decedent's family members testified that she intended to have a ceremonial wedding. 4/ There was testimony both that appellant and decedent lived together at decedent's home, and that they did not. Likewise, there was testimony that they were reputed to be married, and that they were not.

Appellant's statements concerning the existence of a common-law marriage are themselves conflicting. At the hearing, appellant testified to three possible dates for the commencement of the marriage: sometime in January 1955 when decedent allegedly first agreed to marry him; May 6, 1955, in Green Bay, Wisconsin; and by Indian custom later in May 1955 when appellant's grandmother allegedly blessed their marriage. 5/

[4] In his March 18, 1983, order determining heirs, the Judge considered the conflicting evidence and appellant's explanations for his apparently inconsistent statements. 6/ His decision was based largely upon observation of the witnesses and his determination of their credibility. The Board has held that where evidence is conflicting, it normally will not disturb a decision based upon findings as to credibility when the Judge had an opportunity to hear the witnesses and to observe their demeanor. See Estate of Joshua Stone Arrow, 10 IBIA 104 (1982). In this case, the Judge found both appellant

---

4/ Appellant suggests that only his testimony should be credited because he is the only one with direct knowledge of his own and decedent's actions and intents, and that all of the testimony against the common-law marriage was given by persons interested in the outcome of the case, primarily by their alleged desires to deprive him of what he considers his rightful inheritance. However, appellant himself fails to qualify as a disinterested witness in this matter.

5/ Although appellant continues to argue in his brief on appeal that this blessing, which only he reported, constituted a solemnization of his marriage to appellant by Indian custom, he introduced no evidence showing that such a blessing did, in fact, constitute an Indian custom marriage under tribal law or that the tribe recognized Indian custom marriages at that time. See Estate of Frances Acres Primeaux Stabler Iron Roubedeaux, 7 IBIA 254 (1979); Estate of Lloyd Andrew Senator, 2 IBIA 102, 80 I.D. 731 (1973). Indian custom marriage and common-law marriage are not equivalent. See Roubedeaux, supra.

6/ Much evidence was introduced concerning appellant's actions and statements relating to his marital status from the time of decedent's death until his subsequent marriage in 1957. This evidence is not conclusive of whether a common-law marriage had, in fact, existed in 1955.

WWWVersion

and one of appellee's witnesses to lack credibility. Based on its examination of the record and reading of the transcript, the Board agrees with these conclusions. There being no other uncontradicted evidence supporting the existence of a common-law marriage, the Board finds that appellant has failed to prove the existence of such a relationship. 7/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 18, 1983, order of Administrative Law Judge Boos finding that appellee was entitled to inherit decedent's entire estate is affirmed. Appellee's petition for attorney fees will be addressed in a separate opinion following consideration by Judge Boos and the Board.

Bernard V. Parrette
Chief Administrative judge

We concur:

Jerry Muskrat
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

7/ Appellant argues that the Judge's Mar. 4, 1983, denial of his motion to take depositions from two additional witnesses prejudiced his case by denying him the opportunity to bolster his own testimony and refute the testimony of other witnesses. Especially when an individual appears without counsel, the Board is frequently lenient in interpreting the normal rules under which all evidence must be presented in the initial hearing. See, e.g., Cook, supra. Appellant was actively represented throughout the remand by counsel. Appellant appeared and testified at the hearing. No explanation was offered for his failure to produce the new witnesses at the Jan. 7, 1983, hearing; to take their depositions with those of other witnesses on Jan. 12; or even to indicate their existence on one of those occasions. Appellant and his counsel knew that the nature of appellant's relationship with decedent was the precise question under review, and they had from at least June 4, 1982, the date on which the Board remanded this case for a hearing, until Jan. 7, 1983, to prepare the case. Furthermore, appellant knew that the relationship was being questioned as early as Jan. 20, 1981, the date appellee filed her petition for reopening. Under these circumstances, the Board declines to find reversible error in the Judge's denial of the admission of further testimony. See Estate of Eugene Patrick Dupuis, 11 IBIA 11, 13 n.1 (1982).

WWWVersion