INTERIOR BOARD OF INDIAN APPEALS

Estate of Mary Cecilia Red Bear

48 IBIA 122 (11/20/2008)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF MARY CECILIA RED BEAR	)	Order Affirming Decision as Modified; Order Determining Distribution of Interests on Fort Totten Reservation
	)	Docket No. IBIA 07-76
	)	November 20, 2008

James A. Hardy, also known as Marvin Joseph Red Bear (Appellant or Hardy), appeals to the Board of Indian Appeals (Board) from an Order Denying Petition for Rehearing entered January 16, 2007, by Indian Probate Judge P. Diane Johnson (Judge Johnson or IPJ), in the estate of Mary Cecilia Red Bear (Decedent), Deceased Standing Rock Sioux Indian, Indian Probate No. P000030102IP. Judge Johnson's Order Determining Heirs and Decree of Distribution (Order Determining Heirs), dated August 31, 2006, distributed Decedent's interests in land held in trust for her on the Standing Rock Sioux and Fort Peck Reservations and funds in an Individual Indian Money (IIM) account in equal 50% shares to two children, Vera Mae Fryer and Mark L. Red Bear. Appellant claims that he is Decedent's biological child and should be entitled to a one-third interest in all or a portion of Decedent's estate, even though he was subsequently adopted. Because we find that Judge Johnson's conclusion is correct, we affirm, but we modify the Order Denying Petition for Rehearing to correctly cite applicable law. We also order the distribution of Decedent's land interests on the Fort Totten Reservation, which were omitted from the Order Determining Heirs.

Background

Decedent was born in South Dakota on December 21, 1935, and died intestate on June 13, 2005, in McIntosh, South Dakota. Decedent was an enrolled member of the Standing Rock Sioux Tribe (Tribe). She was once divorced, and widowed by the death of her second husband. She bore four children, each of whom was an enrolled member of the Tribe, but one child predeceased her without issue. According to the Order Determining Heirs, one child, born Marvin Red Bear on January 9, 1957, was legally adopted outside

the family and his name was changed to James A. Hardy.[1] Decedent's other surviving children are Vera Mae Fryer, born in 1950, and Mark L. Red Bear, born in 1952.

The IPJ conducted a hearing on August 18, 2006. Hardy was not present. His biological siblings, did, however, identify him, and recounted their efforts to communicate with him. Decedent owned interests in Indian trust lands on the Standing Rock Reservation (located in North Dakota and South Dakota), on the Fort Totten Reservation (in North Dakota), and on the Fort Peck Reservation (in Montana). At the time of the hearing, the value of Decedents' land interests on the reservations exceeded $48,000, and her IIM account contained $1,408.25. At the time of Decedent's death, the IIM account had a zero balance.[2] The Order Determining Heirs distributed all of the estate in equal shares to Vera Mae Fryer and Mark L. Red Bear, though it did not mention the land interests on the Fort Totten Reservation. The IPJ explained her decision to exclude Hardy from the distribution, as follows:

> Adopted individuals are the children of their adoptive parents and not of their natural parents. Therefore, James A. Hardy is barred from inheriting any trust property interests from his natural mother, the decedent herein. [Mont. Code Ann. § 72-2-124(2) (2003)]; and, the Standing Rock Heirship Act, [Pub. L. 96-274, 94 Stat. 537, 538, Sec. 3(c) (1980)].

Order Determining Heirs at 1 ¶ 2. The Order Determining Heirs was served on Hardy.

---

[1] The Order Determining Heirs identifies Hardy as formerly Joseph Red Bear, but his birth certificate indicates that his birth name was Marvin Red Bear. The record contains a document entitled "Letters of Guardianship," dated June 25, 1958, which appointed Velma L. Hardy as the "guardian of the Estate and Person of Marvin Red Bear." Although the record does not include any adoption papers, Appellant does not dispute that, or raise any issue regarding whether, he was legally adopted outside Decedent's family.

[2] Funds that have accumulated in an IIM account or were due and owing on the date of death constitute personal property in a decedent's estate and are subject to the laws governing the distribution of personal property. *Estate of Samuel R. Boyd,* 43 IBIA 11, 21-22 (2006). According to a 19-page transaction history for Decedent's IIM account, between June 27, 2005, and August 31, 2005, several deposits were made totaling $92.81; this income derived from farm pasture and range leases issued for Decedent's trust lands. We cannot determine whether this income was due and payable on or before the date of Decedent's death. *See* 43 C.F.R. § 4.201 (definition of "trust cash assets"). For this reason, we decline to dismiss the appeal on mootness grounds.

On October 23, Hardy timely served a document, construed by the IPJ as a Petition for Rehearing pursuant to 43 C.F.R. § 4.241(a), identifying himself as "Marvin Joseph Red Bear, (birth name), James Allen Hardy (adoption name)." He claimed to be the son of "Mary Cecelia Red Bear" (sic), and brother to her surviving children. He claimed to attach an April 16, 1985, "Certification of the 'Real Property Management Enrollment', issued to [him] by the Bureau of Indian Affairs . . . as proof that I am entitled, as a legitimate heir, to be included in the judgements of my mother's probate case." Petition for Rehearing, dated Oct. 19, 2006. What he attached was a BIA document certifying that "James A. Hardy AKA Marvin Joseph Red Bear is an enrolled member of the Standing Rock Sioux Tribe." The document is silent as to his parentage or any entitlement to inherit as Decedent's son.

On January 16, 2007, Judge Johnson denied the Petition for Rehearing. Recognizing Hardy's claim to be a biological child of Decedent and biological sibling of her heirs, as well as an enrolled member of the Tribe, she explained that the "Standing Rock Heirship Act provides, in part, that a child may *not* inherit from or through a parent whose parental rights with respect to said child have been terminated. [Standing Rock Heirship Act, Pub. L. 96-274, 94 Stat. 538, Sec. 3(c) (1980)]" (Standing Rock Heirship Act). Order Denying Petition at 1 (emphasis added).

Hardy appealed the Order Denying Petition to this Board. Hardy repeats the allegations made to the IPJ, but claims that she misconstrued the Standing Rock Heirship Act. He complains that the cited statute only "pertains to land" and therefore asks to be included "in regards to the remaining assets of [Decedent's] estate."

On December 20, 2007, Hardy submitted another document in support of his appeal to "repeat [his] opening statement." This document repeats Hardy's assertion that he seeks only to share in the IIM account. He again concedes his "adoption" but alleges nevertheless that he is "entitled, as a legitimate heir, to be included in the judgments of [his] mother's probate case" by virtue of his certificate of enrollment in the Tribe, and that his enrollment is a "certificate of entitlement [which] qualif[ies him], as one of [Decedent's] heirs and it is the division of my mother's estate, *outside of the land*, that I am claiming heirship to." Opening Brief (emphasis added). Further, he asserts that the Standing Rock Heirship Act does not apply because he was born before the "date of the Amendment" and because he is not attempting to "relocate to Standing Rock Reservation." *Id.* No other pleadings or briefs were filed.

Discussion

Appellant does not seek to inherit any of Decedent's interests in trust lands, but believes he is entitled to share in her personal assets. Although we agree with Appellant

that the IPJ cited the wrong law in denying the petition for rehearing, the IPJ nevertheless reached the correct legal conclusion and, therefore, we affirm.

A. Appellant's Right to Inherit Personal Trust Assets Belonging to Decedent.

The Board reviews legal determinations de novo. *Estate of Celestine S. White*, 47 IBIA 73, 80 (2008). Appellant bears the burden of showing that the denial of rehearing was in error. *Estate of Verna Mae Pepion Hill Hamilton*, 45 IBIA 58, 63 (2007).

Appellant is correct that the Standing Rock Heirship Act pertains only to "the inheritance of trust or restricted land on the Standing Rock Sioux Reservation, North Dakota and South Dakota," and not to personalty. Thus, the IPJ properly relied on the statute to determine the intestate descent of Decedent's real property on the Standing Rock Reservation. In addition, the IPJ correctly cited Montana law with respect to Decedent's interests on the Fort Peck Reservation. Thus, the IPJ correctly ordered the distribution of Decedent's interests in lands held in trust to Vera Mae Flyer and Mark L. Red Bear. *See Estate of Lyle T. Callous Leg*, 46 IBIA 205, 207 (2008).

Appellant is also correct that the Standing Rock Heirship Act did not directly address Decedent's interest in her IIM account, because it is not an interest in land.[3] Under 25 U.S.C. §§ 348 and 373, inheritance rights in lands, including those of an adopted child, are determined by the law of the state in which the trust or restricted real property is located. *Estate of Richard Crawford*, 42 IBIA 64, 68 (2005). With respect to an IIM account, this Board has relied on these statutes to conclude that the same rule applies:

> An IIM account is best characterized as "intangible" personal property — *i.e.*, "property [that] has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificate of stocks, bonds, promissory notes, copyrights, and franchises." Black's Law Dictionary 809 (6th ed. 1990). The United States Supreme Court has ruled that intangible personal property is found "at the domicile of its owner." *Delaware v. New*

[3] Appellant claims that the Standing Rock Heirship Act cannot apply to divest him of rights he had before it was enacted in 1980, because he was born in 1957. As we held in *Estate of Norman Steele (Steal),* 31 IBLA 12, 15 (1997), "section 5 of that statute settles any question that might arise concerning the statute's application to decedent's estate. It provides: 'The provisions of this Act shall apply only to estates of decedents whose deaths occur on or after the date of enactment of this Act.'" Accordingly, in his argument, Appellant misconstrues the statute's applicability. But we address this argument no further because it only applies to interests in land which Appellant does not seek in his appeal.

> *York*, 507 U.S. 490, 503 (1993) (quoting *Texas v. New Jersey*, 379 U.S. 674, 680 n.10 (1965)). Therefore, applying the rule stated in [25 U.S.C. §] 373, and consistent with the Supreme Court's ruling, *IIM account funds that are part of the estate of a decedent would pass in accordance with the law of the state where the decedent was domiciled*.

Estate of Boyd, 43 IBIA at 20-21 (footnotes omitted; emphasis added). Under the cited authorities, the IIM account would pass in accordance with the law of South Dakota where Decedent was unequivocally domiciled at the time of her death.

South Dakota's probate code contains provisions which apply to "decedents dying on or after July 1, 1995, to their estates, and to the identification and rights of their successors." S.D. Codified Laws § 29A-8-101. A provision entitled "Parent and child relationships," provides, with exceptions not relevant here: "For purposes of intestate succession by, from, or through a person, an adopted individual is the child of that individual's adopting parent or parents and not of that individual's birth parents[.]" S.D. Codified Laws § 29A-2-114(b). This Board has held, pursuant to S.D. Codified Laws § 29A-8-101, that section 29A-2-114(b) applies to adoptions that occurred before July 1, 1995, in estates where the Decedent died on or after that date. *See Estate of Crawford*, 42 IBIA at 70. Accordingly, South Dakota law is clear: where a decedent domiciled in South Dakota dies intestate, funds in Decedent's IIM account will not pass to her biological child if that child has been adopted by other parents.

We find that Appellant has not shown error in the IPJ's legal conclusion that Hardy is not entitled to a share of Decedent's estate. Although Appellant correctly points out that, with respect to Decedent's IIM account, the IPJ erroneously cited only the Standing Rock Heirship Act in the Order Denying Petition for Rehearing, we find this error to be harmless given that the denial of the petition was the correct outcome. Accordingly, we affirm the Order Denying Petition for Rehearing and modify it to reflect that the laws of the State of South Dakota would preclude distribution of Decedent's IIM account to Appellant.[4]

B. Distribution of Decedent's Interests on the Fort Totten Reservation.

According to the probate record, Decedent died possessed of a 1/96 interest in Fort Totten Allotment No. 759, including mineral rights on the allotment (Allotment No.

---

[4] This Department is authorized only to probate the trust or restricted assets of an Indian; it may not probate non-trust assets. *Estate of Pansy Jeanette (Sparkman) Oyler,* 16 IBLA 45, 47 (1988). If Appellant seeks to share in Decedent's non-trust assets, if any exist, such assets would be subject to probate in tribal or state court and not by the Department. *Id.*

M759), located on the Fort Totten Reservation in North Dakota. The original Order Determining Heirs omitted mention of Decedent's Fort Totten interests and it appears that no order has been entered to distribute these interests. Therefore, pursuant to the Board's plenary authority under 43 C.F.R. § 4.318 to correct manifest injustice or error, the Board now orders the distribution of Decedent's interests on the Fort Totten Reservation (Allotment Nos. 759 and M759).

Because the Fort Totten interests are real property interests located in the state of North Dakota, we turn to the laws of that state to determine the intestate descent of these interests. 25 U.S.C. § 348; *Estate of Boyd*, 43 IBIA at 16. The law of the state where real property is located also determines the rights of an adopted child to inherit from his or her biological parents. *See Estate of Crawford*, 42 IBIA at 68-69.

Pursuant to the North Dakota Century Code (NDCC) § 30.1-04-03(1), in the absence of a surviving spouse, an intestate estate passes in equal shares "[t]o the decedent's descendants by representation." North Dakota law decrees that, for purposes of intestate succession, "[a]n adopted individual is the child of an adopting parent or parents *and not of the natural parents*." NDCC § 30.1-04-09(1) (emphasis added); *see also* NDCC § 14-15-14(1)(a) (a final decree of adoption severs "all legal relationships between the adopted individual and the individual's relatives, including the individual's biological parents, so that the adopted individual thereafter is a stranger to the individual's former relatives for all purposes, including inheritance"). North Dakota's probate law was enacted in 1971 and was made applicable to probate proceedings pending or commenced on or after July 1, 1975. NDCC § 30.1-35.01.

Based on North Dakota law, we conclude that Appellant is not entitled to share in decedent's interest in Fort Totten Allotment Nos. 759 and M759. Decedent's interests in said allotments shall pass in equal shares as follows:

TO:

Daughter Vera Mae Fryer	50% (1/192)
Son Mark L. Red Bear	50% (1/192)

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, and for the reasons discussed in this decision, we affirm the January 16, 2007, Order Denying Petition for Rehearing as modified, to add the citation to S.D. Codified Laws 29A-2-114(b), after the IPJ's comment that "a child may not inherit from or through a parent whose parental rights with respect to said child have been terminated. [Standing Rock Heirship Act, Pub. L. 96-274, 94 Stat. 538, Sec. 3(c) (1980)]." Order Denying Petition at 1. We also order the distribution of Decedent's interests on the Fort Totten Reservation as instructed herein.

I concur:

// original signed	// original signed
Lisa Hemmer	Debora G. Luther
Administrative Judge*	Administrative Judge

*Interior Board of Land Appeals, sitting by designation.