INTERIOR BOARD OF INDIAN APPEALS

Estate of Guo-La, a.k.a. Thomas Jones

7 IBIA 181 (08/28/1979)

United States Department of the Interior

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

ESTATE OF GUO-LA a/k/a/ THOMAS JONES

IBIA 79-16 Decided August 28, 1979

Appeal from an order affirming heirship determination after reopening.

Affirmed.

1. Indian Probate: Marriage: Indian Custom: Generally

A marriage contract between members of an Indian tribe in accordance with the customs of such tribe, where the tribal relations and government existed at the time of such marriage, and there is no Federal statute rendering the tribal customs invalid, will be recognized and upheld by the courts of this State (Oklahoma) as a regular and valid marriage for all purposes. Such marriages are not to be treated as common-law marriages, but as legal marriages, according to the custom of the tribe.

2. Indian Probate: Marriage: Common Law

To enter into a valid common-law marriage there has to be an actual and mutual agreement to enter into marital relationship, permanent and exclusive of all others, between capable persons in law making such contract, consummated by their cohabitation as man and wife or their mutual assumption openly of the marital duties and obligations.

3. Indian Probate: Evidence: Newly Discovered Evidence

Newly discovered evidence which is the same in nature as that previously considered does not present for consideration any new facts or evidence relative to petitioner's paternity and is merely cumulative of evidence already presented.

4. Indian Probate: Evidence: Hearsay Evidence

It has long been recognized that though hearsay evidence lacks certain guarantees of trustworthiness such as amenability to cross-examination, it may yet be relevant and have probative value. At any rate, we do not think the hearsay rule is applicable to administrative proceedings so long as the evidence upon which an order is ultimately based is both substantial and has probative value.

5. Indian Probate: Evidence: Hearsay Evidence

The requirement that the administrative findings accord with the substantial evidence does not forbid administrative utilization of probative hearsay in making such findings.

6. Indian Probate: Appeal: Administrative Law Judge as Trier of Facts

The weight and credibility of evidence are matters properly considered by an Administrative Law Judge (In this matter, Examiner of Inheritance, Assistant Commissioner, Assistant Secretary of the Interior) in the first instance. His findings, when in accord with the preponderance of the substantial and probative evidence adduced, will not be disturbed.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

Guo-la (aka Thomas Jones), hereinafter referred to as decedent, died intestate, February 11, 1973, leaving as his heirs at law, his wife, Tomah (Ella Two Hatchet), three daughters, Laura Jones, Hattie Jones, Helen Jones (posthumous), and a son, Frank W. Jones.

At the hearing held at Anadarko, Oklahoma, January 19, 1914, to determine heirs, one Anna Konad, asserted that decedent was the father of two of her children by Indian custom marriage, one of whom, Alice Jones Littleman, born February 8, 1910, is the appellant herein. Anna Konad was afforded an opportunity to substantiate these allegations.

E. B. Merritt, Assistant Commissioner, Office of Indian Affairs, found the evidence adduced at said hearing insufficient to warrant recognition of an Indian custom marriage or t hat decedent, Guo-la, was the father of Anna Konad's two children as alleged.

On October 22, 1976, the appellant, Alice Jones Littleman, filed a petition to reopen the estate of the decedent for the purpose of determining her to be a daughter and heir of the decedent. The Superintendent forwarded appellant's petition to Administrative Law Judge Sam E. Taylor on July 25, 1977. Several affidavits were submitted to Judge Taylor in substantiation of appellant's position.

The basic reason underlying the request of the appellant to be determined a daughter and heir of the decedent is to establish her to be a full blood Kiowa Indian, which would in turn favorably affect the rights and benefits to which her lineal descendants or grandchildren in this case would be entitled as enrolled members of the Kiowa Tribe. To be eligible for enrollment in the Kiowa Tribe an applicant is required to possess a minimum of one-fourth Kiowa blood.

Administrative Law Judge Sam E. Taylor found that a manifest injustice may occur if the petitioner was denied the opportunity to prove her paternity. A hearing was held on June 23, 1978, and testimony taken. On December 1, 1978, the Judge issued an order affirming heirship determination by Assistant Secretary of the Interior dated February 7, 1914. In his order Judge Taylor stated the following:

> A review of the entire record of this matter discloses that evidence of petitioner's paternity was first introduced and considered by the Examiner of Inheritance, Assistant Commissioner of Indian Affairs and the Assistant Secretary of the Interior in 1914 at the time the decedent's estate was originally probated . . . . The Examiner of Inheritance, the Acting Commissioner of Indian Affairs and the Assistant Secretary of the Interior all found and determined that the decedent was not the father of the petitioner . . . .
>
> The petitioner has introduced affidavits and testimony of additional witnesses that the decedent was her father. All of such affidavits and testimony however, are simply cumulative to that previously considered and do not present for consideration any new

> facts or evidence relative to her paternity. Accordingly, the decision of the Assistant Secretary of the Interior dated February 7, 1914 must be affirmed . . . .

A timely appeal was filed on January 29, 1979, wherein the appellant set forth the following grounds:

> 1. The order is contrary to the facts and the evidence.
>
> 2. The order of Administrative Law Judge Taylor ignores the Indian Custom Marriage and Tribal Law and impresses on the Kiowa Tribe the Anglo-Saxon rule of one man and one wife, which is contrary to the evidence and facts of record in this case.
>
> 3. Judge Taylor's Order does not apply the law that once a man publicly acknowledges a child to be his, said child is then no longer illegitimate but is in fact and law his natural child and said child is deemed legitimate for all purposes. The record shows that decedent did in fact acknowledge the appellant as his natural child. Witness, Ella Tomah, first wife of decedent, did testify to such acknowledgment by decedent in her presence.
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> 4. Appellant filed her disclaimer and does not desire to disturb the property of decedent but desires to establish her heritage as the natural child of decedent.
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> 5. The ruling of the Assistant Secretary of the Interior dated February 7, 1914 is based solely on hearsay evidence and does not rest upon all the evidence and therefore should be overturned.
>
> 6. The ruling of Judge Taylor is arbitrary and capricious and exceeds his statutory authority.
>
> 7. The order of Judge Taylor dated December 1, 1978, wherein he held that the additional affidavits and testimony was merely cumulative is arbitrary and capricious and exceeds his statutory authority.

The Board has reviewed the complete record in this matter and concludes that the findings and determination of E. B. Merritt, Assistant Commissioner, dated February 6, 1914, and approved by the Assistant Secretary of the Interior on February 7, 1914, are supported by a preponderance of the evidence.

The Board further finds that the evidence adduced at the December 1, 1978, hearing is cumulative to the evidence previously considered in arriving at the determination of the Assistant Commissioner and approved by the Assistant Secretary of the Interior, referred to, supra.

Appellant alleges that an Indian custom marriage existed between the decedent and her mother, Anna Konad.

[1] A marriage contract between members of an Indian tribe in accordance with the customs of such tribe, where the tribal relations and government existed at the time of such marriage, and there is no Federal statute rendering the tribal customs invalid will be recognized and upheld by the courts of this State (Oklahoma) as a regular and valid marriage for all purposes. Such marriages are not to be treated as common-law marriages, but as legal marriages, according to the custom of the tribe. Buck v. Branson, 34 Okl. 807, 127 P. 436; Cyr v. Walker, 29 Okl. 281, 116 P. 934.

The evidence is overwhelming that the decedent was married to Tomah (Ella Two Hatchet) and cohabited with her continuously to the time of his death on February 11, 1913.

A careful review of the record convinces us that the evidence of record was not supportive of an Indian custom marriage between the decedent and Anna Konad.

[2] Common law marriages are recognized in Oklahoma. To enter into a valid and mutual agreement there has to be an actual and mutual agreement to enter into marital relationship, permanent and exclusive of all others, between capable persons in law making such contract, consummated by their cohabitation as man and wife or their mutual assumption openly of marital duties and obligations. In re Graham's Estate, 37 P.2d (Sup. Ct. Okla. 1934); Thomas v. Thomas, 565 P.2d 722 (Okla. App. 1976).

As previously stated the decedent continued to cohabit with Tomah (Ella Two Hatchet) and was still married to her at the time of his death on February 11, 1913.

Concerning the question of appellant's paternity, Judge Taylor at the hearing held June 23, 1978, elicited testimony from Lillie Ahbeahbo, Lottie High, Sarah Haumpy (aka Jennie Tsatoke), Hattie Jones Aspermy, Sarah Ataumbi Big Eagle, Irene Lane, Frank W. Jones and the appellant.

The Board has reviewed this evidence, and agrees with Judge Taylor that the evidence adduced at said hearing is cumulative to the evidence previously considered in arriving at the findings and decision of the Assistant Commissioner and approved by the Assistant Secretary, referred to, supra.

Moreover, the affidavits of Hattie Jones Aspermy and Sarah Big Eagle, are not supported by their own testimony. Apparently Hattie and Sarah were possessed with a desire to assist appellant to establish a four-fourths Kiowa blood quantum for the purpose of benefiting appellant's lineal descendants, i.e., grandchildren.

[3] A Hearing Examiner (Administrative Law Judge) may properly deny a petition for rehearing based upon newly discovered evidence which is the same in nature as that previously considered and if heard would be merely cumulative of evidence already presented. Estate of Rosalind No Ear (L. S. Buffalo or Brooks) Brown, IA-T-2 (Mar. 31, 1967).

Estate of Rosalind No Ear Brown, supra, is supportive of the case at bar and to Judge Taylor's finding that the affidavits and testimony presented at the June 23, 1978, hearing are simply cumulative to that previously considered and do not present for consideration any new facts or evidence relative to her paternity.

Appellant further argues that the ruling of the Assistant Secretary of the Interior dated February 7, 1914, is based solely on hearsay evidence and does not rest upon all of the evidence.

Appellant fails to support this contention with the evidence that allegedly was excluded.

[4] We cannot agree with appellant's contention that the Assistant Secretary's ruling is based solely on hearsay evidence. However, assuming the truth of the contention for the sake of argument, it has long been recognized that though hearsay evidence lacks certain guarantees of trustworthiness such as amenability to cross-examination, it may yet be relevant and have probative value. At any rate, we do not think the hearsay rule is applicable to administrative proceedings so long as the evidence upon which an order is ultimately based is both substantial and has probative value. Montana Power Co. v. Federal Power Commission, 185 F.2d 491, 498 (9th Cir. 1950), cert. denied, 340 U.S. 947, 71 Sup. Ct. 532 (1950).

[5] The requirement that the administrative findings accord with the substantial evidence does not forbid administrative utilization of probative hearsay in making such findings. Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th. Cir. 1949), cert. denied, 338 U.S. 860, 70 S. Ct. 101 (1949).

Finally, appellant argues that the record shows that decedent did in fact acknowledge appellant as his child through witness, Ella Tomah, decedent's first wife, who testified to such acknowledgment by decedent in her presence.

The record shows that on January 3, 1914, Tomah testified in the presence of Anna Konad that decedent told her while they were down town and while in a drunken state, that appellant was his daughter. Tomah further testified that when Tomah and the decedent got home she asked decedent again and he denied that appellant was his daughter.

We conclude that Tomah's statement is of little worth by itself but must be considered together with all of the evidence and the whole record.

[6] The weight and credibility of evidence are matters properly considered by an Administrative Law Judge (in this case, Examiner of Inheritance, Assistant Commissioner and Assistant Secretary of the Interior) in the first instance. His findings, when in accord with the preponderance of the substantial and probative evidence adduced, will not be disturbed. United States v. Humboldt Placer Mining Company and Del De Rosier, 8 IBLA 407, 79 I.D. 709, 722 (Dec. 20, 1972).

We find no merit to the other contentions raised by the appellant.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board concurs in the findings and decision of Judge Taylor dated December 1, 1978, and AFFIRMS the findings and determination of Assistant Commissioner E. B. Merritt dated February 6, 1914, approved by the Assistant Secretary of the Interior, February 7, 1914, and this appeal is DISMISSED.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Mitchell J. Sabagh
Administrative Judge

We concur:

//original signed
Frank Arness
Administrative Judge

//original signed
Wm. Philip Horton
Chief Administrative Judge