INTERIOR BOARD OF INDIAN APPEALS

Estate of Duke Hawley Tsoodle, Sr.

32 IBIA 108 (03/23/1998)

Overruling:

12 IBIA 253
13 IBIA 6

United States Department of the Interior

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

ESTATE OF DUKE HAWLEY TSOODLE, SR.

IBIA 97-91, 97-94 Decided March 23, 1998

Appeal from an Order on Reopening and Modification issued by Administrative Law Judge Richard L. Reeh in Indian Probate IP OK 005 P 95.

Vacated; original Order Approving Will reinstated.

Estate of Edward (Agopetah) Bert, 12 IBIA 253, 91 I.D. 235 (1984), and Estate of Joseph Dupoint, 13 IBIA 6 (1984), overruled.

1. Indian Probate: Reopening: Generally--Indians: Enrollment/Tribal Membership

   Under 43 C.F.R. § 4.206, an Administrative Law Judge may reopen a closed Indian estate to determine the Indian status of an heir "where the right and duty of the Government to hold property in trust depends thereon." Neither this provision nor any other provision in 43 C.F.R. Part 4, Subpart D, authorizes Administrative Law Judges to make determinations concerning the Indian status of individuals in cases where such determinations are sought only for purposes of eligibility for tribal membership.

APPEARANCES: Gloriette Tsoodle Miles, pro se; Eugene S. Tsoodle, pro se and on behalf of Duke H. Tsoodle, Jr., Alta D. Tsoodle, Angeline Tsoodle Cabaniss, and Ursula Drobot; Vena Joyce Tsoodle Waters, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Gloriette Tsoodle Miles (IBIA 97-91); and Eugene S. Tsoodle, Duke H. Tsoodle, Jr., Alta D. Tsoodle, Angeline Tsoodle Cabaniss, and Ursula Drobot (IBIA 97-94) seek review of a December 20, 1996, Order on Reopening and Modification issued by Administrative Law Judge Richard L. Reeh in the estate of Duke Hawley Tsoodle, Sr. (decedent). For the reasons discussed below, the Board vacates that order and reinstates Judge Reeh's original order in this estate.

Background

Decedent, Kiowa Allottee No. 3058, died testate on November 28, 1993. Judge Reeh held a hearing in the estate on March 28, 1995, and issued an Order Approving Will on June 28, 1995. While determining that decedent's estate was to be distributed in accordance with his will, Judge Reeh also determined that Appellants were decedent's heirs-at-law and that, had there been no valid will, each would have been entitled to receive one-sixth of decedent's trust estate.

In October 1995, Vena Joyce Tsoodle Waters filed a petition for rehearing in which she claimed to be a child of decedent. Judge Reeh found that the time to petition for rehearing had expired. He further found, however, that Waters' filing should be treated as a petition for reopening. He gave the parties an opportunity to respond to the petition and, upon receiving

responses from Gloriette Tsoodle Miles and Eugene S. Tsoodle, scheduled a hearing for the purpose of considering the matter further.

The hearing was held on May 3, 1996, and May 7, 1996. On December 20, 1996, Judge Reeh issued an Order on Reopening and Modification, in which he held that Waters had established by a preponderance of the evidence that she was decedent's child. He modified his previous order to show Waters as one of decedent's heirs-at-law but observed that this modification did not change the distribution of decedent's estate in any way.

These appeals followed.

Discussion and Conclusions

Waters stated in her petition for rehearing/reopening that she sought "recognition as the child of [decedent] for blood quantum degree only" and to "[e]ntitle [her] children's children to be eligible for enrollment with the Kiowa Tribe of Oklahoma." At the hearing on reopening, she confirmed that she had no interest in sharing in decedent's estate but sought only to assist her grandchildren to enroll in the Kiowa Tribe. E.g., Tr. of May 3, 1996, Hearing at 11.

In Estate of Edward (Agopetah) Bert, 12 IBIA 253, 91 I.D. 235 (1984), and Estate of Joseph Dupoint, 13 IBIA 6 (1984), the Board announced a rule governing cases such as this one, where an individual seeks reopening of a closed Indian estate solely for the purpose of establishing that individ-

ual's blood quantum. Under the Board's rule, Administrative Law Judges have been required to permit reopening in such cases without regard to the restrictions usually imposed upon reopening. The Board explained:

> The Government's right and duty to hold property in trust for an individual may depend upon whether that individual has Indian status under the enrollment rules adopted by his or her tribe. Such status may, in turn, depend upon the individual's Indian blood quantum, often as determined as a result of probate proceedings. Like nationality, Indian status is a fundamental right. When reopening of a closed Indian estate is sought for the sole purpose of determining nationality or Indian status, and not for the purpose of altering the distribution of the decedent's estate, the Board holds that reopening should be permitted under 43 CFR 4.206 without regard to the restrictions set forth in 43 CFR 4.242 and in previous Board decisions interpreting that regulation. [1/] Those restrictions are intended to permit the finality of administrative determinations of the status of property, not to foreclose consideration of fundamental issues relating to personal status.

Bert, 12 IBIA at 255, 91 I.D. at 237.

In this case, reopening was sought shortly after the original probate decision was issued. Therefore, the regulatory restrictions of which the Board spoke in Bert, and to which its specific holding was directed, are not implicated here. Yet, the circumstances of this case demonstrate that the Board in Bert and Dupoint might have taken an overly broad view of the purpose of Departmental probate proceedings.

[1] The regulation interpreted by the Board in Bert and Dupoint, 43 C.F.R. § 4.206, provides:

1/ In addition to the restrictions stated in the regulation, the Board has interpreted section 4.242 to require that a petitioner for reopening exercise due diligence in pursuing his/her claim. See, e.g., Bert, 12 IBIA at 254, 91 I.D. at 236.

> In cases where the right and duty of the Government to hold property in trust depends thereon, administrative law judges shall determine the nationality or citizenship, or the Indian or non-Indian status, of heirs or devisees, or whether Indian heirs or devisees of U.S. citizenship are of a class as to whose property the Government's supervision and trusteeship have been terminated (a) in current probate proceedings or (b) in completed estates after reopening such estates under, but without regard to the 3-year limit set forth in § 4.242.

It is clear from this provision that the reason for making a determination concerning the Indian status of an heir in an Indian probate proceeding is to ascertain whether the inherited interest will be held in trust by the United States or will pass to the heir in fee status. 2/

In this case, Waters was a potential heir of decedent. However, she expressly disclaimed any interest in decedent's estate. Accordingly, there was no need to determine, for probate purposes, whether she was entitled to inherit from decedent.

There was also no need to determine whether Waters has Indian status. Waters is an enrolled member of the Kiowa Tribe and is certified by the Tribe as possessing 1/2 degree Kiowa blood. There can be no doubt as to her Indian status. In any event, because Waters had disclaimed any interest in decedent's estate, there was no need to know whether land could be held in trust for her.

2/ This is information needed, not only by the parties, but by the Bureau of Indian Affairs, which is responsible for managing interests in property which are held in trust for Indians, but which has no authority or responsibility for managing interests owned by individuals in fee status.

While the Indian status of Waters' grandchildren might be affected by a determination that Waters was or was not a child of decedent, the grandchildren are not heirs of decedent. 3/ Thus, the grandchildren do not fall within the class of persons, i.e., heirs, for whom Indian status determinations are to be made under 43 C.F.R. § 4.206.

As this case illustrates, the Board's rulings in Bert and Dupoint have led to a situation in which Departmental probate proceedings are invoked for purposes entirely unrelated to the probate of trust property. Although the Board in Bert and Dupoint did not consider any jurisdictional issues, there is a serious question as to whether the Department's Administrative Law Judges have jurisdiction to make paternity determinations when those determinations are sought only for the purpose of eligibility for tribal membership.

25 C.F.R. § 4.202, "General authority of administrative law judges," provides in its entirety:

> Administrative law judges shall determine the heirs of Indians who die intestate possessed of trust property, except as otherwise provided in §§ 4.205(b) and 4.271; approve or disapprove wills of deceased Indians disposing of trust property; accept or reject full or partial renunciations of interest in both testate and intestate proceedings; allow or disallow creditors' claims against estates of deceased Indians; and decree the distribution of trust property to heirs and devisees, including the partial distribution to known heirs or devisees where one or more poten-

3/ If Waters is a child of decedent, her grandchildren are not decedent's heirs because Waters was alive when decedent died. If Waters is not a child of decedent, the grandchildren clearly have no claim to be decedent's heirs.

> tial heirs or devisees are missing but not presumed dead, after attributing to and setting aside for such missing person or persons the share or shares such person or persons would be entitled to if living. They shall determine the right of a tribe to take inherited interests and the fair market value of the interests taken in appropriate cases as provided by statute. They shall hold hearings and issue recommended decisions in matters referred to them by the Board [of Indian Appeals] in the Board's consideration of appeals from administrative actions of officials of the Bureau of Indian Affairs.

The provisions immediately following this section, 25 C.F.R. §§ 4.203-4.208, define more specific authorities of the Administrative Law Judges in connection with the probate of Indian estates. Section 4.206, quoted above, is the only provision touching on the subject at issue here. As discussed above, however, that provision authorizes the determination of the Indian status of heirs only "[i]n cases where the right and duty of the Government to hold property in trust depends thereon." Nothing in the regulations specifically authorizes Administrative Law Judges to determine the Indian status of individuals when such a determination would have no bearing on the title status of property in an Inian estate but only upon the rights of the individuals, or their descendants, to apply for tribal membership.

The Board recognizes that tribes may rely on paternity determinations made in the course of Departmental probate proceedings for the purpose of determining eligibility for tribal membership. This is certainly a legitimate secondary use of a Departmental probate determination. But an

individual's or a tribe's need for such a determination does not vest jurisdiction in the Department that it would not otherwise have. 4/

The Board concludes that it erred in Bert and Dupoint in recognizing any authority in Administrative Law Judges to make Indian status determinations where no probate function of the Department of the Interior is served thereby. Moreover, that error was compounded by the Board's requirement that Administrative Law Judges reopen old probates for the purpose of making such Indian status determinations "without regard to the restrictions set forth in 43 CFR 4.242 and in previous Board decisions interpreting that regulation."

The Board therefore overrules Bert and Dupoint.

Given the conclusion just reached, the Board finds that it must vacate the December 20, 1996, Order on Reopening and Modification in this estate.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Reeh's

4/ Given that there can be no guaranty that a relevant probate will arise at the time a tribal membership determination is to be made, the Board presumes that the Kiowa Tribe allows for other ways in which an applicant for tribal membership may prove paternity, perhaps through a proceeding in a tribal forum or in state court.

December 20, 1996, Order on Reopening and Modification is vacated, and his June 28, 1995, Order Approving Will is reinstated as originally issued. 5/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

5/ The Board reaches no conclusion on the question of Waters' paternity.

Waters should consult the Kiowa Tribe to determine what other avenues she may pursue to prove her paternity for the purpose of enrolling her grandchildren in the Tribe.