



INTERIOR BOARD OF INDIAN APPEALS

Estate of Josephine Bright Fowler

8 IBIA 201 (12/03/1980)



United States Department of the Interior

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

ESTATE OF JOSEPHINE BRIGHT FOWLER

IBIA 80-19

Decided December 3, 1980

Appeal from order by Administrative Law Judge Robert C. Snashall denying petition to reopen estate.

Affirmed.

1. Indian Probate: Reopening: Standing to Petition for Reopening

The regulatory entitlement to seek reopening of an estate closed for more than 3 years has been consistently interpreted by the Department as precluding petitions which are patently dilatory. It has thus been held that a petition to reopen an estate under authority of 43 CFR 4.242(h) must be filed within a reasonable time after the petitioner knew or should have known of the facts or law upon which such petition is based. In this case, it was not error for the Administrative Law Judge to deny appellant's petition for reopening for lack of timeliness where she waited 11 years after final departmental approval of her mother's will to challenge a specific devise made thereunder.

APPEARANCES: Gosta E. Dagg, Esq., Everett, Washington, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Eleanor Heriquez Wheeler Kaikaki, through counsel, appeals from an order denying a petition to reopen decedent's estate, entered by Administrative Law Judge Robert C. Snashall on November 20, 1979.

Josephine Bright Fowler, deceased Quinault allottee, died testate on October 6, 1965. Her last will and testament, dated February 3, 1965, was approved by the Department on December 5, 1967, following a probate hearing held October 18, 1967. The will devised all of decedent's property to her grandson, John A. Wheeler. Nominal bequests of \$1 were made to her surviving husband and her daughter by a former marriage, appellant herein. Appellant filed a petition to reopen the subject estate on March 5, 1979, pro se, alleging as grounds therefor that John Wheeler, who is appellant's son, did not qualify as an eligible devisee of the testatrix based on provisions of section 4 of the Indian Reorganization Act of 1934 (25 U.S.C. § 464 (1976)). According to appellant, John Wheeler (who died intestate on January 4, 1977), was not a member of the tribe upon whose reservation the land is located (the Quinault Tribe) at the time of decedent's death. Appellant submits that her son became a member of the Quinault Tribe on March 31, 1973, more than 7 years after testatrix died. Assuming John Wheeler was eligible to inherit decedent's interests in Quinault land, appellant contends it was error for the Examiner of Inheritance (now Administrative Law Judge) to allow decedent's devise to him of certain property allegedly located on the Quileute Reservation.

Discussion, Findings, and Conclusions

Departmental rules permit estates closed for more than 3 years to be reopened, but strict standards govern when such petitions are allowable. The requirements are set forth in 43 CFR 4.242(h) as follows:

(h) If a petition for reopening is filed more than 3 years after the entry of a final decision in a probate, it shall be allowed only upon a showing that a manifest injustice will occur; that a reasonable possibility exists for correction of the error; that the petitioner had no actual notice of the original proceedings; and that petitioner was not on the reservation or otherwise in the vicinity at any time while the public notices were posted.

The Administrative Law Judge denied appellant's petition on the basis that competent evidence was presented before the Examiner of Inheritance at the 1967 hearing on which the finding was made that John Wheeler was a member of the Quinault Tribe at the time of testatrix's death. The evidence referred to was the uncontradicted testimony of Mr. Wheeler that he was a member of said tribe (Tr. of October 18, 1967, Hearing at 1).

In addition, the Administrative Law Judge denied appellant's petition on grounds that it was not timely filed. Judge Snashall stated:

[T]he petition for reopening was filed in excess of eleven years following the closure of the estate. The record

reflects petitioner was approximately 44 years of age at the time of the hearing, was not under any apparent disability at that time, nor does she now contend any intervening disability which would account for the eleven-year delay in petitioning against the alleged error in the record. The petition is legally not timely filed since it is in the public interest to require Indian probate proceedings be concluded within some reasonable time in order that property rights of heirs and devisees in Indian allotments be stabilized. Estate of Hah-tah-e-yazza (Navajo Allottee No. 011358, Deceased), 2 IBIA 93, 80 I.D. 709 (1973).

In view of the fact that the Department's regulations authorize the reopening of estates closed for more than 3 years, in appellant's behalf it must be conceded that a petition filed 11 years after an estate has been closed cannot be summarily dismissed for untimeliness. The principal regulatory requirement for standing to seek reopening under 43 CFR 4.242(h) appears technically satisfied in the case at bar. Petitioner apparently had no actual notice of the original probate proceeding, nor, apparently, was she on the reservation or otherwise in the vicinity at any time while the public notices were posted. ^{1/}

It does not appear in doubt, however, that appellant learned of the will now contested at least by early December 1967. On December 5, 1967, she was mailed a copy of the Department's order approving her deceased mother's will at her address in Honolulu. On March 5, 1979, appellant is first heard from when she wrote the Superintendent, Western Washington Agency, claiming that decedent's will was improperly probated. No explanation is given in this correspondence concerning why appellant waited until 1979, 11 years after receipt of the departmental order approving her mother's will, to object to such approval. In none of the other pleadings filed by appellant or appellant's counsel since March 5, 1979, has there been any attempt to explain the foregoing delay, notwithstanding the specific ruling of Administrative Law Judge Snashall denying appellant's petition to reopen the subject

^{1/} Notice of the October 18, 1967, hearing to probate will was mailed to known interested parties on September 26, 1967. Appellant's copy of this notice was mailed to an address in Pearl City, Oahu, Hawaii. Her actual residence at the time, however, appears to have been in Honolulu, Hawaii. Testimony of John Wheeler, October 18, 1967, hearing at 2. (John Wheeler's copy of the notice of hearing was also mailed to Pearl City, Oahu, Hawaii, but at the hearing he stated he had moved to Clearwater, Washington, in 1966.) Copies of the notice of hearing were posted in various public places including the Pearl City Post Office. In light of the foregoing, it is questionable whether appellant may even be charged with constructive notice of the October 18, 1967, hearing.

estate for failure, among other things, to "account for the eleven-year delay in petitioning against the alleged error in the record."

[1] The regulatory entitlement to seek reopening of an estate closed for more than 3 years has been consistently interpreted by the Department as precluding petitions which are patently dilatory. It has thus been held that a petition to reopen an estate under authority of 43 CFR 4.242(h) must be filed within a reasonable time after the petitioner knew or should have known of the facts or law upon which such petition is based. See Estate of David Marksman, 5 IBIA 56 (1976). The case before us bears resemblance to the Estate of Enoch Abraham, 5 IBIA 89 (1976). There, a petition to reopen an estate closed for more than 3 years was filed by a party who had no notice of the original probate proceeding which was concluded 12 years prior to the filing of the petition. Notwithstanding the possible validity of petitioner's assertion that he was improperly denied a share of the decedent's estate, the petition for reopening was denied by the Department because of petitioner's failure "to show by compelling proof that the 12-year delay in asserting his claim was not occasioned by his lack of diligence" (5 IBIA 89, 90).

We hold in the case at bar that Eleanor Kaikaki, daughter of the testatrix, either knew or should have known in December 1967, the period of time when the Department gave approval to the will of the testatrix, whether or not her late son, John A. Wheeler, sole devisee of his grandmother's trust property, was eligible to inherit under the will. Appellant has yet to provide any justification why she waited until March 1979 to protest decedent's will. Under these circumstances and in accordance with departmental practice and policy, it was not error for the Administrative Law Judge to deny appellant's petition for reopening on grounds that it was not timely.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals under 43 CFR 4.1, the order of Administrative Law Judge Robert C. Snashall, dated November 20, 1979, denying the petition of Eleanor Kaikaki to reopen the estate of Josephine Bright Fowler is sustained. This decision is final for the Department.

//original signed
Wm. Philip Horton
Chief Administrative Judge

I concur:

//original signed
Frank Arness
Administrative Judge