



INTERIOR BOARD OF INDIAN APPEALS

Estate of George Swift Bird

10 IBIA 63 (08/16/1982)

Related Board case:
8 IBIA 281



United States Department of the Interior

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

ESTATE OF GEORGE SWIFT BIRD

IBIA 81-46

Decided August 16, 1982

Appeal from order by Administrative Law Judge Keith Burrowes denying petition for rehearing.

Dismissed.

1. Estoppel--Indian Probate: Appeal: Standing to Appeal

Failure to file timely appeal in conformity to Departmental regulations precludes appellant from obtaining review of Administrative Law Judge's initial decision as well as collateral orders.

APPEARANCES: Peter Swift Bird, Sr., appellant, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

This is an appeal by Peter Swift Bird, Sr., an Oglala Sioux Indian, from actions taken by Administrative Law Judge Keith L. Burrowes in the probate of the trust estate of appellant's father, George Swift Bird, who died on February 3, 1979. It is the consensus of a majority of the Board that the Administrative Law Judge's substantive disposition of decedent's estate must be upheld, notwithstanding certain procedural errors committed by the Administrative Law Judge in the proceedings below. A full review of the Department's probate of the subject estate is necessary to an understanding of the Board's action in this matter.

Following notice to all interested parties, Judge Burrowes held an evidentiary hearing regarding the probate of the estate of George Swift Bird on August 14, 1979, at Pine Ridge, South Dakota. The only parties appearing at the hearing were two of decedent's three surviving children, viz., Joseph Swift Bird and Peter Swift Bird, Sr., appellant herein. Judge Burrowes stated at the hearing that based on heirship data furnished him by the Bureau of Indian Affairs (BIA), it appeared that the decedent died intestate. Joseph and Peter Swift Bird, Sr., offered testimony to the effect that they thought their father had prepared a will under the supervision of BIA officials. In addition, the brothers challenged the correctness of a creditor's claim against the estate filed with Judge Burrowes prior to the hearing by the Sioux Nation Shopping Center in the amount of \$910.73.

On several occasions during the August 14 hearing, Judge Burrowes represented to the parties that he would "continue the hearing" or otherwise further investigate the validity of the shopping center claim and the allegation that decedent died possessed of a last will and testament. 1/ The Administrative Law Judge did apparently undertake some investigation into the above issues subsequent to the hearing. No supplemental hearing was held, however. Rather, the next action taken of a judicial nature was the issuance of an Order Determining Heirs signed by Judge Burrowes on November 13, 1980. The foregoing order states in relevant part:

At the hearing in this matter Peter Swift Bird stated that his father had made a will. No will had been furnished by the Agency so all information necessary for intestate distribution was obtained, with the understanding that I would make inquiry into whether or not there was or had been a will.

It is documented at the Agency that George Swift Bird did in fact have a will at one time. On December 15, 1978, George came to the Agency and wanted to make a new will. A new will was prepared and George himself then destroyed the previous will. George then signed the new will and the witnesses were ready to sign when George said to hold up, he would come back later.

George returned on December 15, 1978, and said he had changed his mind about a certain devise and that he wanted another will. He stated that he had to get the correct name of one person and would return later to have the will completed. He did not return and therefore had no valid will at the agency at the time of his death.

The Sioux Nation Shopping Center submitted a claim in the amount of \$910.73 for a revolving charge account that has been in existence since June of 1971. There were some questions raised about this claim and I said I would check on it.

The shopping center furnished copies of all charge sheets and credit slips. The total charges made were \$2,380.63 and total payments made were \$1,469.90, leaving a balance of \$910.73. Every single charge slip was signed by George Swift Bird. I find the claim to be valid and conclude that it should be allowed in the amount of \$910.73. I will not make the dozens of charge slips a part of the official record because of their bulk, but will retain them in the working file in this office.

In the Notice of Decision accompanying the above order, Judge Burrowes advised the parties that the decision would become final for the Department unless a petition for rehearing were filed within 60 days from the date of the notice, pursuant to the provisions of 43 CFR 4.241. A timely petition for rehearing was filed by Peter Swift Bird, Sr., on January 13, 1981. This

1/ See Tr. at 4, 6, 8, 12-15.

petition was denied by order dated January 21, 1981, in which Judge Burrowes stated:

The petition alleges that the decedent had a will. The order of November 18, [sic] 1980, explains what happened to the will that was at one time in existence. No new evidence is provided or alleged to exist concerning any other will.

The petition alleges error in allowing the creditor's claim of Sioux Nation Shopping Center. The order of November 18, [sic] 1980, explains that each and every charge slip supporting the claim is signed by George Swift Bird, the decedent. At the hearing the objection to this claim was because it was believed other persons were charging on this account. The evidence available shows otherwise, and no new evidence is provided in the petition for rehearing.

Peter Swift Bird, Sr., was advised of his right to appeal the order denying his petition for rehearing to the Board of Indian Appeals in a notice accompanying Judge Burrowes' order. The notice fully explained the procedures for the submission of an appeal as set forth in 43 CFR 4.250 and 4.291(a) and (b) (1980). Peter Swift Bird, Sr., subsequently filed an appeal with the Board on March 25, 1981. Because the appeal was not timely filed, it was incumbent on the Board to dismiss the matter for lack of jurisdiction. It was so ordered. See 8 IBIA 281 (May 14, 1981).

Prior to the above untimely appeal by Peter Swift Bird, Sr., Francis Swift Bird, another son of the decedent, filed a document with Judge Burrowes on March 17, 1981, objecting to the allowance of the shopping center's claim. Judge Burrowes treated the written submission of Francis Swift Bird as a petition for rehearing. By order dated May 1, 1981, Judge Burrowes denied the petition on grounds that it was not timely and because the validity of the claim was substantiated by records furnished by the creditor. In a notice accompanying the mailing of the foregoing order, Judge Burrowes explained the procedures for the filing of an appeal to the Board. It is from the order of May 1, 1981, that Peter Swift Bird's present appeal is taken.

Discussion, Findings, and Conclusions

As an initial matter, it must be addressed whether the Board has jurisdiction to decide this case on the merits. 2/

[1] The Board concludes that Peter Swift Bird, Sr., is now estopped from challenging Judge Burrowes' disposition of his father's estate inasmuch as he was furnished two opportunities to contest the matter, pursuant to Departmental procedures, and failed in the exercise of those privileges.

2/ In its Notice of Docketing dated Sept. 25, 1981, it was stated: "The parties are advised that the docketing of an appeal is not a Board determination that it has jurisdiction in the case."

Following the Administrative Law Judge's 1981 Order Determining Heirs, Peter Swift Bird filed a petition for rehearing with Judge Burrowes alleging procedural and substantive error. Although this petition failed to persuade Judge Burrowes a rehearing was required, Peter Swift Bird, Sr., was entitled to appeal its denial to this Board within 60 days. No timely appeal was taken. Peter now seeks to resurrect his objections to the Administrative Law Judge's actions by claiming he is a party adversely affected by Judge Burrowes' denial of an untimely petition for rehearing filed by Francis Swift Bird.

The above chronology gives rise to an estoppel by record. An estoppel by record is such "as arises from, or is founded on, the adjudication of a competent court." 31 C.J.S. Estoppel § 4 (1964). The records of a court (or, as here, a probate office presided over by an Administrative Law Judge), including the record of a judgment, import absolute verity, unless properly overturned in an appeals process, "and no one, whether or not a party to the proceeding in which they were made, may in a collateral proceeding impeach them by adducing evidence in denial of the facts of which they purport to be a memorial." Id. section 5. As a judgment, the record has the further effect of precluding a reexamination into the truth of the matters decided; "this further effect of the record considered as a judgment is otherwise known as estoppel by judgment, the matters adjudicated being termed *res judicata*." Id. section 7; see also Barr v. United States, 337 F.2d 693 (6th Cir. 1964).

In light of the above, it is held that the Board does not have jurisdiction to reach the merits of Peter Swift Bird, Sr.'s appeal. ^{3/} As dictum, the Board acknowledges that the Administrative Law Judge below did not conduct this proceeding in full accordance with the Administrative Procedure Act (APA), 5 U.S.C. §§ 554-557 (1976), which the Department regards as applicable

^{3/} The proposal in the dissent, to overlook appellant's failure to file a timely appeal from an adverse order of which he had notice, is not permitted under existing Departmental regulations which are binding upon this Board. Appellant not only received notice of all proceedings in this probate, but he was personally present at the hearing conducted into the matter by the Indian probate Administrative Law Judge. Earlier, appellant filed an untimely appeal which was dismissed pursuant to 43 CFR 4.320. To permit him now to prosecute another appeal would be possible only if he were an interested person who had not received notice of the probate. See 43 CFR 4.242, Reopening. The intimation in the dissent that Francis Swift Bird is a coappellant in the proceedings before the Board is without merit. Peter Swift Bird is the only appellant ever to come before the Board. While it may be true that Judge Burrowes, in his discretion, could or should have treated Francis' "petition for releasing" as a timely filed appeal for forwarding to the Board, this was not done. Francis had a full opportunity to raise this matter, or other dissatisfaction with the Administrative Law Judge's handling of his petition, with the Board, but the record shows that Francis did not object to the Judge's disposition of his petition. While simplification of the probate appeals procedure may be desirable, and might obviate some instances of filing late appeals, a substantial rule change of this sort cannot be accomplished in the informal manner suggested by the dissent but requires formal rulemaking.

to Indian probate proceedings. See Estate of Lucille Mathilda Callous Leg Ireland, 1 IBIA 67, 78 I.D. 66 (1971). Specifically, it was contrary to the APA for the Administrative Law Judge to partly base his decision in this estate on personal conversations with BIA officials and on review of charge slips furnished him after the hearing by the shopping center. None of this evidence appears in the official record of this case and the parties were not afforded an opportunity to cross-examine the witnesses providing the post-hearing information. Had these matters been brought to the attention of the Board in a proper appeal, we would have had no recourse but to remand the case for further proceedings. However, it is further noted by dictum that based on evidence properly of record, it was not established at the hearing that the decedent died possessed of a will or that the amount of decedent's indebtedness as claimed by the shopping center was incorrect.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal of Peter Swift Bird, Sr., from Judge Burrowes' order of May 1, 1981, is hereby dismissed. This decision is final for the Department.

//original signed
Wm. Philip Horton
Chief Administrative Judge

I concur:

//original signed
Franklin Arness
Administrative Judge

ADMINISTRATIVE JUDGE MUSKRAT DISSENTING:

The misapplication in this instance of procedural rules by the majority and the Administrative Law Judge below results in the classic legal error of "putting form over substance." The purpose of the procedural rules established for Indian probate matters and posited in 43 CFR Subpart D is to insure justice--including not only a just result but the appearance of justice as well. Accordingly, this Board and the Department's Administrative Law Judges charged with the responsibility of applying these procedural rules must not only seek and secure a just result, but they must also assure the appearance of justice in the process. Unfortunately, with regard to the latter concern, the present case reflects the failure of the rules and those charged with their enforcement. What happened in the present instance may or may not be a just result--we shall never know, for a full and complete review has been precluded by the Administrative Law Judge below and the majority of this Board. I, for one, however, believe that what did happen, and what has been reviewed in the course of this appeal and may be found in the record before the Board, is unjust, unfair, and a denial of due process.

Appreciating that the appellants were representing themselves, pro sese, and that procedural rules are to serve as aids in the pursuit of justice and not as obstacles, the Administrative Law Judge below rather than characterizing the "Petition for Releasing" filed by Francis Swift Bird on March 17, 1981, as a petition for rehearing and concluding it was not timely filed and therefore denying the petition, said petition should more properly have been characterized and treated as a timely petition filed as an appeal by an interested party to the January 21, 1981, decision denying Peter Swift Bird, Sr.'s petition for rehearing. The appeal should then have been forwarded by the Administrative Law Judge to the Board of Indian Appeals for decision. Because this interpretation best comports with the letter and spirit of the procedural regulations and because it avoids dismissal on a technicality and grants the Board jurisdiction to decide the case on the merits, I would so hold.

Once the procedural errors committed below are corrected, those of substance may next be considered. The substantive errors of this case, as noted in the majority's dictum, are glaring. As a matter of law, the appellants were entitled, under due process and Departmental regulations, to a full and complete public hearing. Here they received neither a full and complete nor public hearing. As even the majority concludes, these substantive errors warrant a remand. In addition to these substantive wrongs experienced by the appellants, they also received far less than their legal entitlement as Indian beneficiaries of the Federal trust responsibility. See St. Pierre v. Commissioner of Indian Affairs, 9 IBIA 203, 89 1 I.D. 132 (1982). The United States and its agents--in this case the Administrative Law Judge--owe these individual Indians the highest of fiduciary duties. Here, an agent (the Administrative Law Judge) of the Trustee (the United States) issued a promise which was deliberately broken. 1/ Such, in my opinion, violates more than

1/ The Administrative Law Judge concluded the Aug. 14, 1979, hearing as follows:

just the trust responsibility to these individual Indians however, for in the words of Justice Hugo Black: "Great Nations, like great men, should keep their word." 2/

Consequently, I respectfully dissent from the majority and hold that with the proper characterization of appellants' petition, the Board has jurisdiction to review this case on the merits--and having done so, I would remand for further proceedings.

//original signed

Jerry Muskrat
Administrative Judge

fn. 1 (continued)

"Well, what I'm going to have to do is continue this further to determine whether or not there was a will and also to get the shopping center to document their claim. I going to continue this to a date uncertain in my office in Billings and then I'm going to write some letters. You don't have to come to Billings, but if I get some documents, then I'll send copies of those to you and I'll still be able to introduce them into evidence at a time. We might have to continue it from there back to a hearing here if I can't get sufficient documentation that satisfies you on the claim and find out something about a will. I am going to continue this until Monday, October 1, at 10:00 a.m. Now, you don't have to be there. That's just so that if I can get some documents I can mark, I will mark them and place them in evidence. I'll be back in touch with you people and see if we have to have another hearing here." (Tr. 14-15). Appellants' Brief asserts the Oct. 1 hearing was never held nor were they informed of its cancellation or reasons therefor.

2/ FPC v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (dissenting opinion).