



INTERIOR BOARD OF INDIAN APPEALS

Estate of Woody Albert

14 IBIA 223 (08/08/1986)



United States Department of the Interior

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

ESTATE OF WOODY ALBERT

IBIA 85-48

Decided August 8, 1986

Appeal from an order determining heirs on reopening entered by Administrative Law Judge Patricia McDonald in Indian probate Nos. IP GA 1G 83 and 10822-57.

Affirmed.

1. Indian Probate: Children, Illegitimate: Right to Inherit: Child from Father

Under 25 U.S.C. § 371 (1982), an illegitimate Indian child is entitled to inherit trust property from the person shown to be the father.

2. Indian Probate: Reopening: Generally

The omission of an heir is the type of manifest injustice contemplated in the reopening provisions of 43 CFR 4.242(h).

3. Indian Probate: Reopening: Generally

Petitions to reopen Indian probates closed for more than 3 years require compelling proof that the petitioner has acted with due diligence.

4. Indian Probate: Reopening: Waiver of Time Limitation

The Secretary of the Interior, acting through the Board of Indian Appeals and Administrative Law Judges (Indian Probate) pursuant to authority delegated in 43 CFR 4.242(h), has discretionary authority to reopen a closed Indian probate at any time under appropriate circumstances.

5. Indian Probate: Reopening: Generally

The appellant bears the burden of proving the error of the decision from which the appeal is taken.

APPEARANCES: Rudy Martin, Esq., Albuquerque, New Mexico, for appellants; Joel Jasperse, Esq., Gallup, New Mexico, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

On September 18, 1985, the Board of Indian Appeals (Board) received a notice of appeal from Irene Rose Begay Albert, Annie McDonald, Frank Albert, Jimmy Albert, Kee Woody, Jr., Ernest William Albert, Emerson Clarence Albert, Earl Marvin Albert, Elsie Rose Albert, Emma Rose Albert, and Edison James Albert (appellants). Appellants sought review of a July 16, 1985, order determining heirs on reopening issued in the estate of Woody Albert (decendent) by Administrative Law Judge Patricia McDonald. For the reasons discussed below, the Board affirms that order.

Background

Decendent, Navajo Allottee No. 2040, C#10082, died intestate on April 24, 1957. A hearing to probate his Indian trust estate was held on July 8, 1957, by Examiner of Inheritance Walter W. Andre. By order dated July 9, 1957, decendent's heirs were found to be his surviving spouse and children, present appellants.

On August 30, 1982, Judge McDonald received a petition to reopen decendent's estate from Jimmie Albert (appellee). ^{1/} The petition alleged that appellee was the son of decendent and Nellie Francisco Begay, and that he had been mentally disabled since birth and did not fully understand the nature of probate proceedings or his rights as a probable heir to his father's estate. The petition requested the probate be reopened, a new hearing held, and appellee be found eligible to participate in decendent's estate.

By order dated April 25, 1983, the Judge informed appellants of the petition and the possibility that a manifest injustice might have occurred in the original probate proceeding. Appellants were given an opportunity to respond to the petition.

Appellants responded by requesting a hearing in which appellee would be required to prove his alleged relationship to decendent. Appellants also stated their belief that appellee should have come forward earlier with this claim.

After receiving appellants' response, the Judge issued an order for an evidentiary hearing. The hearing was held on July 27 and August 2, 1983. On July 16, 1985, the Judge issued an order finding appellee met the requirements of 43 CFR 4.242(h) for reopening a probate proceeding closed for more than 3 years, and had shown by a preponderance of the evidence that decendent was his father. Accordingly, she ordered the estate distribution to be altered to include appellee.

^{1/} There are two individuals in this case named Jimmy (or Jimmie) Albert.

The Board received appellants' appeal from this decision on September 18, 1985. Briefs were filed by both appellants and appellee.

Discussion and Conclusions

There are two issues before the Board: (1) whether appellee has the right to reopen this estate, and (2) if reopening is permissible, whether appellee has shown by a preponderance of the evidence that decedent was his father.

Reopening of Indian probate estates that have been closed for more than 3 years is governed by 43 CFR 4.242(h), which provides in pertinent part:

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.

In addition, the petitioner must show he or she has diligently pursued the claim. See, e.g., Estate of Jason Crane, 12 IBIA 165 (1984); Estate of Leonard (Raymond) Cooper, 7 IBIA 5 (1978); Estate of Samuel Picknoll (Pickernell), 1 IBIA 169 (1971); Estate of Alvin Hudson, IA-P-17 (1969); Estate of George Squawlie (Squally), IA-1231 (1966).

Appellants concede that appellee did not receive actual notice of the original probate proceedings and was not on the reservation or otherwise in the vicinity at any time while the public notices of the probate were posted. They also raise no argument concerning the possibility that any error can be corrected.

Appellants argue instead that no manifest injustice will occur in this case if appellee is omitted from decedent's estate because, even if he were found to be decedent's son, he would not be entitled to inherit under 25 U.S.C. § 371 (1982). Section 371 provides in pertinent part:

For the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of section 348 of this title, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child: * * *.

Appellants contend this section allows an "illegitimate" child to inherit from the father only when the parents were married by Indian custom.

They thus present a lengthy argument showing that decedent and appellee's mother were together for only a few months, at a time when decedent was legally married to another woman.

[1, 2] The Board has interpreted section 371 on numerous occasions. The consistent interpretation has been that the section allows inheritance under two circumstances: (1) when a child is born from an Indian custom marriage, and (2) when the child is illegitimate, but the identity of the father can be proven. See, e.g., Estate of Benjamin Kent, Sr. (Ben Nawanoway), 13 IBIA 21 (1984); Ruff v. Portland Area Director, 11 IBIA 267 (1983), petition dismissed, Ruff v. Watt, Civ. No. 83-1329 (D. Or. Mar. 6, 1984), aff'd sub nom. Ruff v. Hodel, 770 F.2d 839 (9th Cir. 1985); Estate of Willis Attocknie, 9 IBIA 249, 89 I.D. 193 (1982). Accordingly, because appellee could inherit from decedent if he succeeded in proving that decedent was his father, a manifest injustice would occur if appellee was improperly excluded from participating in decedent's estate. Estate of Robert R. Monroe, 9 IBIA 67 (1981).

[3] The remaining requirement for reopening is that appellee show he diligently pursued his claim. The requirement that a petitioner must show due diligence in pursuing a cause of action and seeking reopening has a long history. As discussed in Estate of Belle Cozad, A-25428 (May 2, 1949), at pages 1-2, Departmental regulations have for many years imposed a time limitation upon petitions for reopening estates:

The probate regulations of the Department of the Interior, as approved on June 19, 1923, and amended on November 25, 1929, contained provisions dealing with the consideration of petitions for reopening and imposed a 10-year limitation with respect to such petitions. ^{3/} A general revision of the probate regulations was effected on May 31, 1935, and that revision contained a similar 10-year limitation with respect to reopenings. ^{4/} The amendatory regulations of December 17, 1943, limited the period in which petitions for reopening could be considered to a period of three years following the original heirship determination. ^{5/} This same period of limitation is found in the * * * probate regulations, approved May 29, 1947. ^{6/}

^{3/} Sec. 29 * * * Except for very cogent reasons, petitions for reopening will not be considered where ten years or longer have elapsed since the heirs were previously determined nor in those cases where the estate of the decedent or any considerable part thereof has been disposed of under the previous finding of heirs * * *.

^{4/} 25 CFR 81.35 [1935].

^{5/} 25 CFR, 1943 Supp., 81.35.

^{6/} 25 CFR, 1947 Supp., 81.18.

The 3-year limitation was continued through the transition of jurisdiction over Indian probate from the Office of the Solicitor to the newly created

Office of Hearings and Appeals. See 25 CFR 15.18(a) (1968) and 43 CFR 4.242(a) (1971).

[4] It has been clear since the Supreme Court's decision in Lane v. Mickadiet, 241 U.S. 201 (1916), that the Secretary has the authority to reopen a probate upon a showing of good cause. In response to an argument that the Secretary lacked such authority, the Court stated:

The words "final and conclusive" describing the power given to the Secretary [to determine heirs 2/], must be taken as conferring and not as limiting or destroying that authority. In other words they must be treated as absolutely excluding the right to review in the courts, as had hitherto been the case under the act of 1887, [3/] the question of fact as to who were the heirs of an allottee, thereby causing that question to become one within the final and conclusive competency of the administrative authority. As it is obvious that the right to review on proper charges of newly discovered evidence or fraud a previous administrative order while the property to which it related was under administrative control, was of the very essence of administrative authority (Michigan Land & Lumber Company v. Rust, 168 U.S. 589 [1897]), it must follow that the construction upheld would not only deprive the Secretary of the final and conclusive authority which the statute in its context contemplated he should have, but would indeed render the administrative power conferred wholly inadequate for the purpose intended by the statute. And it must be further apparent that the inadequacy of authority which the proposition if accepted would bring about could not be supplied, since it would come to pass that although the property was yet in the control of the United States to carry out the trust, there would be an absence of all power both in the administrative and judicial tribunals to correct an order once rendered, however complete might be the proof of the fraud which had procured it.

241 U.S. at 209. Following Lane, the Department has consistently held that the Secretary has both the inherent discretionary authority to reopen a closed Indian probate at any time and the responsibility to reopen appropriate probates. See, e.g., Estate of William Bigheart, Jr., 3 IBIA 293 (1969), 4/ and numerous cases cited therein. 5/ The discretionary nature

2/ See Act of May 8, 1906, ch. 2348, 34 Stat. 182, and Act of June 25, 1910, ch. 431, § 1, 36 Stat. 855. Cf. 25 U.S.C. § 372 (1982).

3/ Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.

4/ Aff'd, 3 IBIA 274 (1969); aff'd sub nom., Bigheart v. Pappan, No. 69-C-303 (D.Okla. July 3, 1972), recon. denied, No. 69-C-303 (D. Okla. Aug. 23, 1972), aff'd, 482 F.2d 1066 (10th Cir. 1973), cert. denied, 416 U.S. 937 (1974), reh'g denied, 417 U.S. 977 (1974).

5/ See also, e.g., Estate of Rebecca (Wahbmeme) Pigeon, 4 IBIA 168 (1975); Estate of Henry Max Brouillette, 4 IBIA 48 (1975); Estate of John Mahkuk, 3 IBIA 291 (1975).

of a decision to reopen after 3 years was explicitly set forth in 43 CFR 4.242(h) (1972), when the Office of Hearings and Appeals and Board of Indian Appeals were established:

If a petition for reopening is filed more than 3 years after the entry of a final decision in a probate, and if it shall appear to the Examiner [now, Administrative Law Judge, Indian Probate] that there exists a possibility for correction of a manifest injustice, he shall forward the petition to the Board of Indian Appeals with a showing as to all intervening rights and a recommendation as to the action to be taken. The Board may, in its discretion, exercise the power reserved to the Secretary in § 1.2 of Title 25 of the Code of Federal Regulations, [6/] and waive or make an exception to the 3-year limitation contained in this section. If the Board shall determine that a reopening appears proper, then the petition may be remanded to the Examiner with instructions for further proceedings.

This section was amended in 1978 to allow an administrative law judge to make the initial determination as to whether or not a petition for reopening should be granted. See 43 CFR 4.242(h) (1979).

Because reopening after the 3-year regulatory limitation has consistently been viewed as an exercise of discretionary authority, both the Solicitor's Office and the Board have required the petitioner to show due diligence in pursuing the cause of action. In interpreting the due diligence requirement, the specific circumstances of each case have been taken into consideration. Thus, for example, reopening has been denied when the individuals with knowledge of the facts have died before the filing of the petition (Estate of Frank Pays, 10 IBIA 61 (1982); Cozad, *supra*. Cf. Estate of Jason Crane, 12 IBIA 165 (1984), in which the Board noted that the petition was filed while the elderly individuals who would be expected to oppose the petition were still living), or the petitioner had knowledge necessary to question the initial decision for many years prior to actually filing the petition (Estate of Katie Crossguns, 10 IBIA 141 (1982); Estate of Josephine Bright Fowler, 8 IBIA 201 (1980)). In contrast, the Board has allowed reopening when the petition was filed as soon as the petitioner learned of potential rights to participate in the estate (Estate of Wilma Florence First Youngman, 10 IBIA 3, 89 I.D. 291 (1982)), or the petitioner showed that any delay in filing the petition resulted from reasonable attempts to gather information concerning the merits of the case (Estate of Jason Crane, *supra*).

6/ Section 1.2 provides:

"The regulations in Chapter I of Title 25 of the Code of Federal Regulations are of general application. Notwithstanding any limitations contained in the regulations of this chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in Chapter I of Title 25 of the Code of Federal Regulations in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians."

In this case, the Judge found appellee was a minor when the original probate hearing was held and had suffered from a serious mental disability since birth. She also found appellee was not capable of living independently and had been cared for by relatives or in boarding schools. She concluded that, at the time of the original probate proceeding, appellee was a minor and was not represented by a guardian ad litem, and after reaching his majority, his mental disability resulted in an inability to understand his claim without outside assistance. ^{7/}

Appellants attack this holding on the grounds that appellee's mental disability had not been established, apparently in a judicial competency proceeding, and no guardian had been appointed for him. It is conceded that no guardian was ever appointed for appellee under state or tribal law. The transcript of the hearing on reopening, however, clearly shows appellee was incapable of answering even the most elementary questions. His school and medical records consistently set forth his learning and comprehension problems. Appellants themselves only raise legal arguments and do not dispute appellee's competency as a question of fact.

Departmental regulations in 43 CFR 4.282 provide that "[m]inors and other legal incompetents who are parties in interest shall be represented at all hearings by legally appointed guardians, or by guardians ad litem, appointed by the administrative law judge." This regulation clearly contemplates that not all minors or other legal incompetents will have legally appointed guardians. The Board knows of no Indian probate case in which it was held that an individual had to be adjudged incompetent and a guardian judicially appointed before an administrative law judge had authority to find the person needed the appointment of a guardian ad litem at a probate proceeding. It declines to make that holding here.

The Judge found on the evidence before her that appellee was not competent to pursue his case without assistance. Just as he needed a guardian

^{7/} As support for this position, the Judge cited two cases. In Tafoya v. Doe, 100 N.M. 328, 670 P.2d 582, 586 (N.M. App. 1983), the New Mexico Court of Appeals cited several cases from other jurisdictions, all standing for the proposition

"that one unable to comply with a notice requirement by reason of minority is protected by the reasonableness requirements of the common law, the Fourteenth Amendment to the United States Constitution, or similar provisions in their state constitutions. * * * A state may bar a right if a reasonable time is given to enforce that right. * * * In the absence of a provision * * * providing for notice on the baby's behalf, application of the notice provision to the baby is unreasonable and violates due process."

In Eubanks v. Clarke, 434 F. Supp. 1022, 1031 (E.D. Pa. 1977), the Federal court tolled a borrowed state statute of limitations under circumstances that would not have been sufficient to toll the statute in the state, when the statute would "effectively deny rights or impede policies created by federal law."

ad litem at the probate hearing, she found he needed someone else to tell him of his cause of action. Once that cause of action was discovered, it was diligently pursued. The Board agrees with the Judge's findings. Therefore, this estate was properly reopened.

[5] The next question is whether appellee proved by a preponderance of the evidence that decedent was his father. On appeal, appellants bear the burden of proving the error of the decision below. See Estate of Pearl Asapermy Werqueyah, 13 IBIA 49 (1984); Estate of Fred Redstone, Sr., 13 IBIA 44 (1984); Estate of Wilma Florence First Youngman, *supra*. Appellants' attempt to carry that burden of proof amounts merely to a dispute over the weight that should be given to the evidence presented at the hearing.

The Judge's decision clearly acknowledges the conflicts in and problems with the evidence. Nevertheless she found that, taken as a whole, the evidence indicated decedent was appellee's father. The Board cannot say this decision is not supported by the evidence.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 16, 1985, order appealed from is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Administrative Judge