



INTERIOR BOARD OF INDIAN APPEALS

Estate of Julius Benter (Bender)

15 IBIA 88 (01/21/1987)

Related Board cases:

1 IBIA 24

Reconsideration denied, 1 IBIA 59 (01/12/1971)

Dismissed, No. 71-1559 (9th Cir. Feb. 18, 1972)

Dismissed upon stipulation, *Brazie v. Morton*, No. S-2360
(E.D. Cal. Dec. 28, 1972)

17 IBIA 86



United States Department of the Interior

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

ESTATE OF JULIUS BENTER (BENDER)

IBIA 87-19

Decided January 21, 1987

Petition for reopening referred to the Board of Indian Appeals by Administrative Law Judge William E. Hammett.

Docketed and remanded.

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

Because there is no statutory or regulatory proscription against the filing of a petition to reopen a closed Indian probate proceeding after the entry of a Federal court decision or order in the estate, Administrative Law Judges have authority to consider such petitions under 43 CFR 4.242. However, in addition to meeting the standing requirements of 43 CFR 4.242 and showing that the cause of action was pursued with due diligence, the petitioner must also show that the petition is not barred by the entry of the appellate decision.

APPEARANCES: Caraway George, pro se and for petitioners.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE LYNN

On December 16, 1986, Administrative Law Judge William E. Hammett received a petition to reopen the estate of Julius Benter (Bender) (decedent). The petition was filed by Caraway George, for himself and for Vermal G. Ryckley, Fern A. Stone, and Alpha O. Templeton (petitioners). Because he questioned his authority to consider the petition under the particular circumstances of this case, Judge Hammett referred the petition to the Board of Indian Appeals (Board) for disposition in accordance with its broader authority to exercise the inherent authority of the Secretary in Indian probate matters. The petition and Judge Hammett's office copy of the earlier probate proceedings were received by the Board on December 23, 1986. The case is hereby docketed under the above case name and number. For the reasons discussed below, the Board concludes that the Judge does have authority to consider the petition, and remands the petition to him for appropriate disposition.

Background

Decedent, a Wintun-Shasta Indian, Redding Allottee No. 551, died on September 16, 1967, at the age of 82 years. He was unmarried at the time of

his death, and had no surviving children, parents, siblings, or issue of deceased siblings. He had executed a document designated a Last Will and Testament on August 20, 1951.

Following extensive hearings held by Administrative Law Judge Alexander H. Wilson, decedent was found to have been mentally retarded and legally incompetent. The principal beneficiary under his will was furthermore found to have been his court-appointed guardian. Because of extensive participation in the preparation of the will by the principal beneficiary, who was in a confidential relationship with the testator, Judge Wilson disapproved the will on the grounds that the will proponent had not met his burden of disproving the presumption of undue influence arising from the facts of the case. See, e.g., Estate of Charles Webster Hills, 13 IBIA 188, 92 I.D. 304 (1985).

Two families claimed to be decedent's closest relatives. Judge Wilson based his heirship determination on his perception of the credibility of the witnesses.

Separate appeals were taken to the Board from Judge Wilson's decision by the will proponent, and the family found not to be decedent's closest relatives. The decision was affirmed on appeal. Estate of Julius Benter, 1 IBIA 24 (1970), reconsideration denied, 1 IBIA 59 (1971). This decision was appealed to Federal court, apparently only by the will proponent. The appeal was dismissed upon stipulation of the parties. Brazie v. Morton, No. S-2360 (E.D. Cal. Dec. 28, 1972).

By order dated January 17, 1975, Judge Hammett reopened the estate for the limited purpose of correcting the number of persons found to be decedent's heirs and their respective shares in the estate. Reopening was based upon a petition showing that one of the persons determined to be an heir of decedent had siblings who were not made known to Judge Wilson.

The present petition to reopen was filed with Judge Hammett on December 16, 1986, more than 10 years after this estate was closed. Because of the actions taken in this matter by the Board and Federal court, Judge Hammett questioned his authority to consider a petition for reopening seeking to reverse the determination of heirs. He, therefore, referred the petition to the Board for the exercise of its broader authority in Indian probate matters. 43 CFR 4.320. The Board has expedited this case on its own motion and issues this decision without additional filings by the parties.

Discussion and Conclusions

Petitions to reopen Indian probate proceedings that have been closed for more than 3 years are governed by 43 CFR 4.242(h), which states:

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. A denial of such petition may be made by the administrative law judge on the basis of the petition and available Bureau records. No such petition shall be granted, however, unless the administrative law judge has caused copies of the petition and all other papers filed by the petitioner to be served on those persons whose interest in the estate might be adversely affected by the granting of the petition, and after allowing such persons an opportunity to resist such petition by filing answers, cross petitions or briefs as provided in (c) of this rule.

In addition, because reopening closed estates after the 3-year regulatory limitation has always been viewed as an exercise of discretionary authority, the petitioner must show that due diligence was exercised in pursuing the cause of action. This due diligence requirement was extensively reviewed and reaffirmed in Estate of Woody Albert, 14 IBIA 223 (1986). ^{1/}

This case presents the more novel situation in which not only is the estate closed because a decision was rendered by an Administrative Law Judge, but it has also been before both the Board and a Federal district court. A similar situation arose in the Estate of Albin (Alvin) Shemamy. In that estate, the Administrative Law Judge's decision was affirmed by the Board, 7 IBIA 70 (1978); by a district court, Longhat v. Andrus, No. CIV 78-0929-D (W.D. Okla. Dec. 31, 1979); and by a circuit court, No. 80-1171 (10th Cir. Feb. 16, 1982). A petition for reopening was filed in 1984, which directly challenged the validity of the affirmances by attacking the adequacy of the record developed during probate of the estate, upon which the affirmances were based. The Administrative Law Judge denied reopening, and the Board affirmed without commenting on the authority of the Judge to consider the petition. Estate of Albin (Alvin) Shemamy, 13 IBIA 258 (1985).

[1] Under the Department's present regulations, authority to consider petitions to reopen Indian probate proceedings rests with the Administrative Law Judges. 43 CFR 4.242. Although it is anticipated that few petitions to reopen will be filed after the entry of Federal court orders or decisions, there is no statutory or regulatory proscription against the filing of petitions to reopen at that time. Therefore, the Administrative Law Judges have jurisdiction to consider such petitions. However, the Department of the Interior does not have authority to overturn Federal court decisions. Therefore, in addition to meeting the requirements of 43 CFR 4.242 and showing due diligence, the petitioner must also show that the petition is not barred by the

^{1/} The Board notes that petitioners may have difficulty showing they pursued their cause of action with due diligence. Petitioners were put on notice in 1967 that the state was inquiring about decedent as an individual who may have died without a will. Lead petitioner Caraway George knew that decedent was of his grandparents' generation. Petitioners have presented no justification for the lapse of almost 20 years before taking any action to inquire about this estate. See Estate of Katie Crossguns, 10 IBIA 141 (1982); Estate of Josephine Bright Fowler, 8 IBIA 201 (1980).

entry of the appellate decision. In determining whether the petition is barred, the Administrative Law Judge must be guided by recognized legal principles, including but not limited to res judicata and laches.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board finds that Judge Hammett has authority to consider this petition for reopening and remands the petition to him for such consideration.

//original signed
Kathryn A. Lynn
Acting Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge