



INTERIOR BOARD OF INDIAN APPEALS

Estate of Ethel Edith Wood Ring Janis

15 IBIA 216 (07/09/1987)



United States Department of the Interior

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

ESTATE OF ETHEL EDITH WOOD RING JANIS

IBIA 87-15

Decided July 9, 1987

Appeal from an order denying rehearing issued by Administrative Law Judge Elmer T. Nitzschke in Indian Probate No. IP TC-234S 85-87.

Dismissed.

1. Indian Probate: Aggrieved Parties--Indian Probate: Appeal: Standing to Appeal

In order to have standing to appeal a decision entered in an Indian probate case, an individual must be an actual or presumptive heir of the decedent, a beneficiary under a will executed by the decedent, or a person asserting a claim against the decedent's estate.

2. Indians: Generally--Intervention

An intervenor or joined party cannot maintain a case when the original case or parties are dismissed unless he/she is independently properly before the Board of Indian Appeals.

3. Indian Probate: Appeals: Timely Filing

Under 43 CFR 4.320(a), a notice of appeal from a denial of rehearing in an Indian probate proceeding must be filed within 60 days from the date of the decision being appealed.

APPEARANCES: Gordon L. Bettelyoun, William Hawkman Bettelyoun, Geraldine Cherry Janis Bettelyoun, and Dorrine Janis Gardner, each pro se; Terry L. Pechota, Esq., Rapid City, South Dakota, for appellee.

OPINION BY ADMINISTRATIVE JUDGE LYNN

On December 15, 1986, the Board of Indian Appeals (Board) received separate notices of appeal from Gordon L. Bettelyoun (Gordon) and William Hawkman Bettelyoun (William) (also appellants). Appellants sought review of an order denying rehearing entered on October 21, 1986, in the estate of their grandmother, Ethel Edith Wood Ring Janis (decedent), by Administrative Law Judge Elmer T. Nitzschke. Denial of rehearing let stand an August 5, 1986 order approving decedent's last will and testament. For the reasons discussed below, the Board finds this appeal must be dismissed.

Background

Decedent, Allottee 5950 of the Rosebud Sioux Reservation in South Dakota, was born December 23, 1903, and died June 17, 1983. Hearings to probate her Indian trust or restricted estate were held on October 24, 1985, before Administrative Law Judge Frederick W. Lambrecht and on May 21, 1986, before Judge Nitzschke. The hearing before Judge Lambrecht primarily concerned the establishment of decedent's family history. A continuance was granted when it became apparent that a document dated September 18, 1978, and purported to be decedent's last will and testament, would be contested. The will left decedent's estate to one of her daughters, Vera (Bissonette) Herman, and a grandson, specifically excluding other family members. The continuance resulted in the second hearing before Judge Nitzschke. That hearing was specifically addressed to the contest to decedent's will.

The will contest was based on the allegation of some family members that decedent had changed her mind about the testamentary scheme established in the 1978 will. However, no later document either revoking the 1978 will or constituting a new will was introduced.

In his August 5, 1986 order, Judge Nitzschke approved decedent's will, but found that Vera Herman had predeceased her mother. Accordingly, he applied the Department's anti-lapse regulation, 43 CFR 4.261, 1/ to find that the devise to Vera Herman passed to her sole lineal descendant, Janis Steenberg (appellee). Appellee was one of the family members listed in decedent's will as not to take under the will.

Appellants sought review of this order. Judge Nitzschke treated their appeal as a petition for rehearing. By order dated October 21, 1986, he denied rehearing on the grounds that appellants lacked standing because they were not heirs of the decedent or beneficiaries under her will. 2/

Appellants filed separate notices of appeal from this order. Both notices were received on December 15, 1986. Appellants also filed separate briefs.

On April 7, 1987, while briefing was continuing, the Board received a motion to join as appellants and statements from Geraldine Cherry Janis Bettelyoun (Geraldine) and Dorrine Janis Gardner (Dorrine). Geraldine is the mother of Gordon and William; Geraldine and Dorrine are daughters of

1/ Section 4.261 states:

"When an Indian testator devises or bequeaths trust property to any of his lineal descendants, mother or father, brothers or sisters, either of the whole or half-blood or their issue, and the devisee or legatee dies before the testator leaving lineal descendants, such descendants shall take the right, title, or interest so given by the will per stirpes. Relationship by adoption shall be equivalent to relationship by blood."

2/ Appellants were also specifically mentioned in decedent's will as not taking.

decedent. By order dated April 9, 1987, joinder was allowed. The order stated: "Because the appeal is already properly pending before the Board, and because petitioners' interest in the estate parallels that of the present appellants, joinder of petitioners as appellants will not prejudice other parties."

Appellee's answer brief was received on May 14, 1987. Gordon and William objected to this brief as being untimely filed, but replied to it. ^{3/}

Discussion and Conclusions

[1] The initial question before the Board is whether the various appellants have standing to bring this appeal. Appeal rights in Indian probate cases are established in Departmental regulations. Under 43 CFR 4.320, "[a] party in interest shall have a right of appeal to the Board of Indian Appeals from an order of an administrative law judge on a petition for rehearing * * *." "Party in interest" is defined by 43 CFR 4.201(i) to mean "any presumptive or actual heir, any beneficiary under a will, any party asserting a claim against a deceased Indian's estate, and any Tribe having a statutory option to purchase interests of a decedent." See also Estate of Jennie L. Brown Bearing, 1 IBIA 320, 79 I.D. 619 (1972).

Under these rules, Gordon and William lack standing. They are decedent's grandsons. Their mother, Geraldine, is still living. In order to be a presumptive heir, an individual must be a person who would have been entitled to receive some or all of the decedent's estate. Because their ancestor was still living, Gordon and William had no right to receive any of decedent's estate. Despite the fact that decedent imprecisely used the term "heirs" in her will to describe all those persons she wished not to participate under the will, Gordon and William were not and are not decedent's presumptive or actual heirs, beneficiaries under her will, persons asserting a claim against her estate, or an Indian tribe. Accordingly, appellants Gordon L. Bettelyoun and William Hawkman Bettelyoun lack standing, and this appeal is dismissed as to them.

This dismissal shows that the April 9, 1987 order allowing joinder was erroneous in its statement that Gordon and William's appeal was "properly pending before the Board." Therefore, the Board must determine whether Geraldine and Dorrine have the right to continue this appeal after dismissal of the original appellants.

[2] "It is a general rule that an intervenor may merely follow the suit in which he has intervened; that he cannot maintain any such suit, with the original parties plaintiffs dismissed." Wright v. The Praetorians, 63 F. Supp. 839, 849 (N.D. Tex. 1943), aff'd, 152 F.2d 856 (5th Cir. 1945). See also United States ex rel. Texas Portland Cement Co. v. McCord, 233 U.S. 157 (1914); Hutto v. Benson, 110 F. Supp. 355 (E. D. Tenn. 1953) (intervenor

^{3/} Because of the Board's disposition of this case, it does not address the question of the timeliness of appellee's brief.

could not maintain case when original suit was barred by statute of limitations), rev'd, 212 F.2d 349 (6th Cir.) (intervention permitted after finding that original suit was not barred), cert. denied, 348 U.S. 831 (1954). 4/

An exception to this general rule arises if the intervenor has the right to bring and maintain the appeal independently of the rights of the original parties. See Simmons v. ICC, 716 F.2d 40 (D.C. Cir. 1983) ("An intervenor lacking an independent jurisdictional basis cannot maintain suit where the court lacked original subject matter jurisdiction." 716 F.2d at 46.). 5/

[3] Geraldine and Dorrine's appeal cannot stand on its own merits. Although as decedent's daughters, Geraldine and Dorrine have standing under 43 CFR 4.201(i), their first appearance in this case, their motion to join in the appeal, was filed too late to stand as an independent notice of appeal. Under 43 CFR 4.320(a), a notice of appeal must be filed within 60 days from the date of the decision being appealed. The decision being appealed was dated October 21, 1986. Geraldine and Dorrine's motion to join was received on April 7, 1987, 5-1/2 months after the date of the decision being appealed. The motion is not sufficient to give the Board jurisdiction over the appeal independently of the appeal filed by Gordon and William because it was not filed within 60 days of the date of the decision being appealed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed as to all parties. 6/

//original signed
Kathryn A. Lynn
Administrative Judge

I concur:

//original signed
Anita Vogt
Acting Chief Administrative Judge

4/ Cf. Howard v. Stahl, 211 S.W. 826 (Tex. 1919) (intervenor was allowed to continue action although, through mistake by attorney, case was brought in the name of a person having no interest in the subject matter). All parties here were put on notice by Judge Nitzschke's order denying rehearing that Gordon and William's standing was at issue.

5/ Although Geraldine and Dorrine are technically joined parties rather than intervenors, for most purposes, including the right to continue an appeal under the present circumstances, the Board will apply the same standards to determine the rights of joined parties and of intervenors.

6/ Although this dismissal means that the merits of the appeal are not reached, the Board's review of the record indicates that the orders below would have been affirmed. None of the arguments raised are procedurally proper or legally sufficient to cause a reversal of the Judge's holdings.