



INTERIOR BOARD OF INDIAN APPEALS

Estate of George Dragswolf, Jr.

17 IBIA 10 (11/03/1988)

Related Board cases:

13 IBIA 28

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Modified, 31 IBIA 228

Voluntary withdrawal, *Morgan v. United States*, Civil No. A4-97-35
(D.N.D. July 8, 1998)



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 DRAGSWOLF, JR.

IBIA 88-18

Decided November 3, 1988

Appeal from an order determining heirs after remand issued by Administrative Law Judge Keith L. Burrowes in Indian Probate IP BI 60B 85, D-68-66.

Vacated; original order determining heirs reinstated.

1. 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.

2. Indian Probate: Reopening: Generally

A claimant to an Indian probate estate closed for more than 3 years who has not filed a petition to reopen the estate has not acted with due diligence.

APPEARANCES: Thomas K. Schoppert, Esq., Minot, North Dakota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Rose Crow Flies High seeks review of a January 5, 1988, order determining heirs after remand issued by Administrative Law Judge Keith L. Burrowes in the estate of George Dragswolf, Jr. (decendent). For the reasons discussed below, the Board vacates that order and reinstates the original order determining heirs in this estate, dated March 24, 1966.

Background

Decendent, an unallotted Gros Ventre Indian of the Fort Berthold Indian Reservation, North Dakota, was born on March 30, 1932, and died intestate on September 29, 1964. A hearing to probate his trust estate was held on September 13, 1965, by Examiner of Inheritance Frances C. Elge. Only decendent's father, George Crow Flies High, a.k.a. George Dragswolf, Sr., was present at the hearing. He testified that decendent was unmarried and had no children. On March 24, 1966, Examiner Elge issued an order determining that decendent's heirs were his father, George Crow Flies High, and his mother, Grace Medicine Crow Dragswolf.

On November 4, 1982, Administrative Law Judge Daniel S. Boos reopened decedent's estate after testimony at the probate hearing for decedent's mother indicated that decedent had a son. Judge Boos held a hearing on reopening on July 20, 1983, at which further testimony was taken. On January 16, 1984, he issued an order determining heirs after reopening, in which he determined that Stanley Charles Dragswolf, a.k.a. Stanley Charles Thomas, was the son and sole heir of decedent. Appellant, who is the widow of George Crow Flies High and devisee of his share in decedent's estate, appealed to the Board, alleging that she had not received notice of the reopening. At the request of Judge Boos, the Board remanded the case to him so he could give appellant an opportunity to be heard. 13 IBIA 28 (1984).

Following the death of Judge Boos, the case was transferred to Administrative Law Judge Keith L. Burrowes, who held another hearing on August 1, 1985. Evidence presented at the hearing showed that Stanley had originally been named Stanley Charles Thomas but, as authorized by order of the Fort Berthold Tribal Court dated November 9, 1979, had changed his name to Stanley Charles Dragswolf. Mary Halverson, Stanley's mother, testified that she and decedent lived together from 1953 to 1960, that Stanley was born in 1959, and that decedent was Stanley's father.

Goldie Fox and Laverne Fettig, sisters of decedent, confirmed Mary's testimony and further testified that decedent had acknowledged Stanley as his son.

Appellant testified that she first became aware of Stanley's claim to be decedent's son when Stanley filed his petition for change of name in the tribal court.

On January 5, 1988, Judge Burrowes issued an order determining heirs after remand. He found that there was overwhelming evidence that Stanley was decedent's son. He therefore ordered that the estate be redistributed in its entirety to Stanley.

Appellant's notice of appeal from Judge Burrowes' order was received by the Board on March 3, 1988. No briefs were filed on appeal.

Discussion and Conclusions

In her notice of appeal, appellant contends: (1) there is no statute or regulation which allows reopening of estates on the issue of paternity in a case like the present one, (2) evidence concerning Stanley's name change proceeding in tribal court should not have been admitted, (3) the reopening is subject to the doctrine of laches because of the length of time since the original proceeding, (4) questions of paternity must be determined by tribal law, and no tribal determination of paternity has been made, and (5) Judge Burrowes closed the record without notifying the parties. The Board addresses only appellant's third contention.

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 relevant 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.

[1] In addition, the petitioner must show that he or she has diligently pursued the claim. As discussed in detail in Estate of Woody Albert, 14 IBIA 223, 226-28 (1986), the requirement that a petitioner show due diligence is well established. The Board has frequently held that petitions to reopen closed estates require "compelling proof that delays in requesting relief have not been occasioned by lack of diligence on the part of petitioning parties." Estate of Annie Bear, 5 IBIA 149, 151 (1976). See also, e.g., Estate of Enoch Abraham, 5 IBIA 89, 90 (1976); Estate of George Minkey, 1 IBIA 1, 7 (1970). In interpreting the due diligence requirement, the Board takes into consideration the specific circumstances of the case before it. In cases where the petitioner had knowledge necessary to question the initial decision for many years prior to actually filing the petition, reopening has been denied. Estate of Katie Crossguns, 10 IBIA 141 (1982); Estate of Josephine Bright Fowler, 8 IBIA 201 (1980); Estate of Samuel Picknoll (Pickernell), 1 IBIA 168, 78 I.D. 325 (1971).

The rules developed during years of Indian probate decision-making in the Department have resulted in an appropriate and fair balance between the need for finality in probate decisions and the need to correct errors in the decisions. Numerous decisions denying reopening, in some cases even though the probable validity of a claim was recognized, have been grounded on a recognition that "[t]he public interest requires that proceedings relative to the probate of estates be brought to a final conclusion sometime, in order that the property rights of the heirs or devisees may be stabilized." Estate of Lone Dog, IA-25 (June 12, 1950) at 3. Accord, e.g., Estate of George Minkey, *supra*; Estates of Jose Sandoval, et al., IA-1337 (May 17, 1966); Estate of Mrs. Jack Bowstring, IA-1250, 68 I.D. 262 (Sept. 11, 1961); Estate of Abel Gravelle, IA-75 (Apr. 11, 1952). Because of the substantial interest of Indian heirs and devisees in the finality of Indian probate decisions affecting their property rights, it is equitable to require a claimant to act on his rights within a reasonable time after he knows or should know of them. See Estate of Josephine Bright Fowler, 8 IBIA at 204.

Even so, the decision the Board reaches in this case is difficult because Stanley appears almost certainly to be the son of decedent and therefore decedent's rightful heir. ^{1/} Stanley, however, has taken no action whatsoever in pursuit of his claim to decedent's estate. He not

^{1/} This decision should not be construed as a determination concerning Stanley's paternity. Because of the Board's disposition of this case, that question is not reached.

only failed to file a petition for reopening, 2/ but also failed to attend the first hearing on reopening held by Judge Boos, although he lived in New Town, where the hearing was held. He attended but did not testify at the second hearing held by Judge Burrowes. The record does not disclose whether Stanley even wanted to have decedent's estate redistributed to him. Rather, it appears that the sisters of decedent were the individuals who wanted the estate to be redistributed. 3/ Upon questioning by Judge Burrowes, however, neither decedent's sisters nor Stanley's mother, Mary, were able to give any cogent explanation for the long delay in seeking redistribution.

It is clear from the record that Stanley had known since his childhood, and for many years prior to reopening of the estate in 1982, that he was probably decedent's son and was so regarded by his mother and by decedent's family. Although he was a minor at the time of the original probate hearing in 1965, he was 20 in 1979 when he sought to change his name in tribal court. He was represented by an attorney in that proceeding, during which evidence concerning his paternity was introduced. 4/ There is no assertion, nor any evidence, that Stanley suffered from any disability which would have hampered him in pursuing his claim. 5/

[2] In view of the strict standards for reopening estates beyond the 3-year regulatory period, discussed above, including the well-established rule that a claimant demonstrate by compelling proof that a delay in requesting relief is not caused by a lack of diligence on his or her part, the Board is unable to agree with Judge Boos that this estate should have been reopened. It is simply not possible to conclude that a claimant who has not even filed a petition for reopening, although aware for many years of facts necessary to question the original decision, has demonstrated by compelling proof that he has not been dilatory in pursuing his claim.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Burrowes'

2/ No petition for reopening was filed. Instead, Judge Boos reopened the estate on his own motion. Although 43 CFR 4.242(d) explicitly authorizes Administrative Law Judges to reopen estates closed for less than 3 years on their own motion, there is no such explicit authority in 43 CFR 4.242(h) for cases closed more than 3 years. For purposes of this decision, the Board assumes without deciding that Administrative Law Judges have such authority in appropriate cases.

3/ The sisters would have lacked standing to file a petition for reopening because they could not claim an interest in the estate. 43 CFR 4.242(a). See also 43 CFR 4.201(i), 4.320; Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216, 218 (1987).

4/ The order issued by the court includes as a finding of fact that "the evidence presented herein demonstrates that George Dragswolf, Jr. is the natural father of Stanley Charles Thomas."

5/ Cf. Estate of Woody Albert, supra, in which belated reopening was allowed where the petitioner had suffered a serious mental disability since birth.

January 5, 1988, order determining heirs after remand is vacated and the original order determining heirs in this estate, dated March 24, 1966, is reinstated.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge