



INTERIOR BOARD OF INDIAN APPEALS

Estate of Paul Widow

17 IBIA 107 (04/03/1989)



United States Department of the Interior

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

ESTATE OF PAUL WIDOW

IBIA 89-7

Decided April 3, 1989

Appeal from an order affirming an order granting reopening and redetermining heirs entered by Administrative Law Judge Elmer T. Nitzschke in Indian probate No. IP BI 747C 78, IP RC 94Z 86.

Affirmed as modified.

1. Appeals: Generally--Indian Probate: Administrative Law Judge--
Indian Probate: Appeal: Timely Filing

An Administrative Law Judge does not have authority to limit or cut off appeal rights.

2. Indian Probate: Reopening: Generally

An Administrative Law Judge has authority under 43 CFR 4.242(h) to reopen an Indian probate estate that has been closed for more than 3 years.

3. Indian Probate: Reopening: Standing to Petition for Reopening

An Agency Superintendent is a proper party to file a petition to reopen a closed Indian probate under 43 CFR 4.242(h).

4. Indian Probate: Reopening: Generally

The omission of an heir or heirs is a manifest error within the meaning of 43 CFR 4.242(h) for which a closed Indian probate should be reopened, provided the other conditions of the regulation and the due diligence requirement have been met.

APPEARANCES: Al Arendt, Esq., Pierre, South Dakota, for appellants.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On December 5, 1988, the Board of Indian Appeals (Board) received a notice of appeal from Edward Widow and Mary Buffalo (appellants), seeking review of a November 1, 1988, order issued by Administrative Law Judge

Elmer T. Nitzschke in the estate of Paul Widow (decedent). The November 1988 order affirmed a March 19, 1986, order granting reopening and modifying a March 5, 1979, order determining decedent's heirs. For the reasons discussed below, the Board affirms the November 1, 1988, order as modified in this opinion.

Background

Decedent, Cheyenne River Sioux Allottee 1053, was born in 1890 and died intestate on May 30, 1978. A hearing to probate decedent's trust or restricted estate was held before Administrative Law Judge Garry V. Fisher on November 14, 1978. Testimony at that hearing revealed that decedent was married to Agnes Book Talks in 1914 and that Agnes died in 1945. Decedent was survived by two children from that marriage, appellants here. Other testimony indicated that decedent had previously been married to another woman, but no one at the hearing knew that woman's identity.

On March 5, 1979, Judge Fisher entered an order determining decedent's heirs to be the present appellants. No appeal was taken from this order.

By memorandum dated September 28, 1982, the Superintendent, Lower Brule Agency, Bureau of Indian Affairs (BIA), wrote to Administrative Law Judge Vernon J. Rausch stating that on August 6, 1982, the Aberdeen Area Office, BIA, had contacted the Lower Brule Agency concerning the land holdings of Eliza Medicine Bird/Widow/Bear/Flute, Lower Brule Allottee 67A, who had come to the Area Office to make a will. The Superintendent's letter stated:

In checking her inherited interests and the names of her children and grandchildren we discovered that Eliza was married at one time to Paul Widow, Cheyenne River Allottee No. 1053, and had one daughter, Louise Widow/Chase The Bear, Lower Brule Allottee No. 762, who was born October 2, 1911 and died November 1, 1971. Further checking revealed that Paul Widow died May 5, 1978 and a final order determining his heirs was made on March 3, 1979 by Garry [V.] Fisher, Administrative Law Judge and no testimony was entered at the hearing that he had been married to Eliza Flute or that he had a daughter by the name of Louise Widow.

Should we inform the Cheyenne River Realty Officer of our findings and recommend that the case be re-opened to consider the children or heirs of Lower Brule Allottee, Louise Widow?

(Sept. 28, 1982, letter at 1).

Judge Rausch responded by letter dated November 4, 1982:

Although it has been more than three years from the date of the final order, [43 CFR 4.242] subparagraph (h) provides for the filing of a petition to reopen after three years. Subparagraph (h) has been determined to apply to the petition of an officer of the Bureau of Indian Affairs.

Under the circumstances, it would appear that either you or the Superintendent of the Cheyenne River [Agency] or his Realty Officer could file the petition for reopening with Administrative Law Judge Garry [V.] Fisher. In order to expedite matters, attention should be made to furnish information requested or required by subparagraph (h) of Section 4.242. The Cheyenne [River] Agency should certify that the land interests that comprise the estate of Paul Widow, Cheyenne River Allottee 1053, are still held in trust by the United States Government and have not been disposed of by the heirs determined in the Final Order dated March 3, 1979.

(Nov. 4, 1982, letter at 1).

Pursuant to Judge Rausch's suggestions, the Lower Brule Superintendent wrote the Cheyenne River Superintendent by memorandum dated November 15, 1982, requesting that Cheyenne River prepare and file a petition for reopening because decedent's trust property was located on the Cheyenne River Reservation.

When Judge Nitzschke became aware of the marital relationship between decedent and Eliza, the child born of that union, and the correspondence initiated by the Lower Brule Superintendent, he sought information from the Cheyenne River Agency concerning the situation. ^{1/} By letter dated January 31, 1986, the Cheyenne River Superintendent wrote Judge Nitzschke stating:

[O]ur Realty office has no record of the decedent ever being married to Eliza Medicine Bird/Bear/Flute, Lower Brule allottee 67, nor is there record of a child born to that union, namely, Louise Widow/Chase The Bear, Lower Brule allottee 62, born October 2, 1911. However, in reading the transcript of the probate hearing, one of the heirs mentions that there had been a previous marriage.

There is no record of our Realty section receiving a memo dated November 15, 1982, from the Lower Brule Agency concerning their request for this agency to submit a request for reopening of the case, to include an omitted heir. [Emphasis in original.]

(Jan. 31, 1986, letter at 1) .

On February 14, 1986, Judge Nitzschke issued an order to show cause why decedent's estate should not be reopened and Louise's heirs added as

^{1/} Judge Nitzschke apparently became aware of these facts through the probate of Eliza's trust or restricted estate. See Estate of Eliza Medicine Bird/Widow/Bear/Flute (LB-A00067), IP RC 116Z (Dec. 1985). Judge Fisher had retired in the interim.

decedent's heirs. ^{2/} No response was received to this order. Consequently, by order dated March 19, 1986, Judge Nitzschke reopened decedent's estate and added appellees as heirs of decedent.

On April 14, 1988, Judge Nitzschke received a motion to set aside order and a memorandum in support of the motion from appellants. The motion and memorandum were dated April 11, 1988. Appellants sought to have the March 19, 1986, order set aside because Judge Fisher's March 5, 1979, order specifically stated that it was final 60 days from the date of mailing. Appellants argued that Judge Nitzschke lacked authority to reopen the estate in the absence of a showing of fraud or excusable neglect.

Judge Nitzschke held a hearing on the motion on September 1, 1988. By order dated November 1, 1988, he denied the motion on the grounds that it was not timely because it had not been filed within the time period established in his order to show cause. Judge Nitzschke further found that the motion would have been denied even if it had been timely because he had authority under 43 CFR 4.242(d) and (h) to reopen the estate under the circumstances present here.

Appellants' appeal to the Board was received on December 5, 1988. Only appellants filed a brief on appeal.

Discussion and Conclusions

The primary basis for Judge Nitzschke's denial of the motion to set aside his order reopening decedent's estate was that the motion was not timely under the procedure set forth in his February 14, 1986, order to show cause. Although appellants do not address this issue in their opening brief, the Board finds that it must consider whether or not their motion was timely filed.

After reciting the facts concerning appellees' family history, Judge Nitzschke's order to show cause stated:

Those persons whose interests in this estate would be adversely affected by the granting of this reopening and subsequent modification as set out above, are hereby given thirty (30) days from the date hereof within which to submit valid written objections, if any, as to why this estate should not be reopened and modified as set out herein.

^{2/} Louise's heirs had previously been determined by the Department to be her surviving children Paul E. Chase The Bear (LBU-89), Ethel M. Chase The Bear (LBU-90), Lionel M. Chase The Bear (LBU-96), Marlene Chase The Bear (LBU-800), Elvera Chase The Bear/Driving Hawk (LBU-801), Ellsworth Chase The Bear (CRU-10695), Kenneth (Gordon William) Chase The Bear (CRU-10696), and Martha Chase The Bear/Cozad (CRU-10697) (appellees).

If no valid written objections are received by the undersigned on or before the expiration of thirty (30) days, the estate of Paul Widow will be modified to include those additional persons named above and the respective shares as indicated. Should it be determined that a further hearing is necessary all interested parties will be given not less than twenty (20) days notice of the time and place set for the hearing.

(Feb. 14, 1986, Order at 2).

Appellants do not allege that they filed written objections to the petition for reopening.

Judge Nitzschke's subsequent March 19, 1986, order granting reopening and adding appellees as heirs of decedent, concluded:

This decision is final for the Department as of this date. Because all parties in interest have been fully informed of these proceedings and have had ample opportunity to file objections to the "Notice to Show Cause," and none have done so, the provisions of Title 43 CFR 4.320 granting the right to appeal this determination, become nugatory. Therefore, no sixty (60) day appeal time need [be] observed by the Superintendent before implementing this order.

(Mar. 19, 1986, order at 1).

Appellants did not file an appeal from the order granting reopening. Instead, they first objected to the reopening in their April 11, 1988, motion. This motion was clearly filed more than 30 days from the date of Judge Nitzschke's February 14, 1986, order to show cause and more than 60 days from his March 19, 1986, order granting reopening. ^{3/}

[1] 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 reopening." Judge Nitzschke exceeded his authority in his March 19, 1986, order when he stated that because no one had responded to his February 14, 1986, order, the appeal provisions of 43 CFR 4.320 were "nugatory." An Administrative Law Judge does not have the authority to limit or cut off appeal rights. Because of the Judge's error in telling parties there was no right to appeal his order, the Board

^{3/} Under 43 CFR 4.320(a) (1986), the regulation in effect at the time of the Mar. 19, 1986, order, an aggrieved party had 60 days from receipt of the Administrative Law Judge's order on reopening in which to file an appeal with the Board. An appeal was the proper procedural step for review of an order on reopening.

declines to find that appellants' motion to set aside his March 19, 1986, order was untimely. 4/

Therefore, we reach the merits of appellants' argument that Judge Nitzschke lacked authority to reopen this estate. Because decedent's estate had been closed for more than 3 years, reopening was governed by 43 CFR 4.242(h) which provides:

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 the 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, when the petitioner is an individual acting on his or her own behalf, there must be a showing that the petitioner has diligently pursued the claim. See, e.g., Estate of Julius Benter (Bender), 17 IBIA 86, 88-89 (1989), and cases cited therein. 5/

4/ Furthermore, there is no indication in the record of the date when appellants received the Judge's order. Cf. Lillian Lord, a.k.a. Lillian George v. Commissioner of Indian Affairs, 11 IBIA 51 (1983) (an appellant's statement as to when notice of a decision was received will be accepted in the absence of contradictory proof in the administrative record), and Leo M. Kennerly, Sr. v. Billings Area Director, 8 IBIA 106 (1980) (when the administrative record fails to disclose the date when the appellant received notice of a decision, the Board will not infer failure to file a timely appeal).

5/ The circumstances of this case are such that the earliest knowledge of decedent's death and probate that can be attributed to appellees arose from a Sept. 1, 1982, letter from the Lower Brule Superintendent to Eliza concerning her relationship with decedent. At page 1 of that letter, the Superintendent stated he "need[ed] this information for probate purposes." After receiving the information, the Lower Brule Superintendent took the initiative in contacting Judge Rausch and determining how to proceed in filing a petition for reopening on behalf of appellees. Apparently to the best of Eliza's or appellees' knowledge, BIA was handling the reopening petition. Appellees were entitled to rely upon BIA to finish what it had begun. The fact that the process broke down at some point cannot be attributed to appellees. Accordingly, because BIA assumed responsibility for filing the reopening petition, this case must be considered as having arisen from a Superintendent's petition to reopen.

Appellants specifically state they do not dispute that appellees are decedent's grandchildren (Sept. 1, 1988, Tr. at 3). Neither do they assert that appellees knew of the original probate hearing or were on the reservation or otherwise within the vicinity at any time while the public notices of decedent's probate hearing were posted. In fact, appellants do not even contend that appellees knew of their relationship to decedent. Instead, they argue only that under 43 CFR 4.242, the Judge had no authority to reopen this estate because it had been closed for more than 3 years. They contend at page 4 of their opening brief that 43 CFR 4.242(h)

allows an estate to be reopened after passage of more than three years to prevent manifest injustice. However, it is clear that the Code of Federal Regulations does not allow the filing of petitions after three years merely because someone was not notified or an heir was not determined. Therefore, the term manifest injustice cannot be utilized, as done so here by Judge Nitzschke, to include pretermitted heirs.

Appellants support this interpretation of 43 CFR 4.242(h) by reference to South Dakota probate law.

Initially, we note that the interpretation of a Federal regulation is a matter of Federal, not state, law. Section 4.242(h) has a long history of interpretation by the Department. As the Board noted in Estate of George Dragswolf, Jr., 17 IBIA 10, 12 (1988), "[t]he 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." The Department's interpretation of section 4.242(h), not South Dakota's interpretation of an allegedly similar State law, will be applied here.

[2] The fact that an estate has been closed for more than 3 years does not mean the estate cannot be reopened. The existence of 43 CFR 4.242(h) is explicit authority to reopen such estates. The Board held in Estate of Jason Crane, 12 IBIA 165, 168 (1984), that as long as the requirements of section 4.242(h) are met and the petitioner has diligently pursued the claim, an Administrative Law Judge is acting within the scope of his or her authority in reopening the estate.

[3] In Estates of Walter George & Minnie Racehorse George Snipe, 9 IBIA 20 (1981), the Board expressly held that an Agency Superintendent is a proper party to file a petition for reopening under 43 CFR 4.242(h). See also Estate of Helen Ward Willey, 11 IBIA 43, 47 (1983), and cases cited therein. Similarly, in Estate of John Yazza Antonio, 12 IBIA 177 (1984), the Board held that it was manifest error for BIA not to seek reopening when it had information indicating some likelihood that a probate decision was incorrect. 12 IBIA at 178. 6/

6/ In Antonio, a final probate order was entered in 1943. Reopening was sought by a potentially omitted heir apparently in 1983, with a notation by the Agency Superintendent that the petition appeared to have merit. The record submitted to the Administrative Law Judge with the petition for reopening did not disclose that at least as early as 1958 BIA had knowledge

[4] Furthermore, the Board has also specifically held that the omission of an heir or heirs is manifest error for which reopening should be granted if the other conditions of 43 CFR 4.242 and the due diligence requirement have been met. See, e.g., Estate of Robert R. Monroe, 9 IBIA 67 (1981).

Accordingly, we find that Judge Nitzschke properly granted reopening pursuant to a petition from BIA and properly determined that appellees should be added as decedent's heirs.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 1, 1988, decision of Judge Nitzschke is affirmed as modified in this opinion.

//original signed
Kathryn A Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

fn. 6 (continued)
that an heir had been omitted, and knew the identity and whereabouts of that heir. BIA took no action to seek reopening and did not place the 1958 information in the administrative record until the case was appealed to the Board.