



INTERIOR BOARD OF INDIAN APPEALS

Estate of Baz Nip Pah

22 IBIA 72 (06/04/1992)



United States Department of the Interior

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

ESTATE OF BAZ NIP PAH : Order Docketing Appeal and
: Affirming Decision
:
: Docket No. IBIA 92-150
:
: June 4, 1992

On May 13, 1992, the Board of Indian Appeals (Board) received a notice of appeal filed by Priscilla Chee, Jake Chee, and Dorothy Charley (appellants), through Loritta J. Johnson, Navajo Tribal Court Advocate. Appellants seek review of a March 10, 1992, order denying petition for rehearing issued by Administrative Law Judge Patricia McDonald in the estate of Baz Nip Pah, C#10049, Navajo Allottee No. 016264 (decedent).

The appeal is docketed under the above case name and number which should be cited in all future correspondence or inquiries regarding the matter. The Board finds, however, that the circumstances of this case clearly show that the appeal cannot be sustained. Accordingly and for the reasons discussed below, the Board affirms Judge McDonald's order.

Decedent died on December 17, 1989, at the age of 99. Judge McDonald held a hearing to probate decedent's trust or restricted estate on March 4, 1991. On November 26, 1991, the judge issued an order approving decedent's December 11, 1963, will, under which decedent divided her trust property among Jake Chee, Dorothy Charley, and Ella Chitwood. The Judge's order stated: "This decision is final for the Department unless a petition for rehearing is timely filed in accordance with 43 CFR 4.241 within 60 days from the date hereof as set forth in the notice attached hereto." 1/ No petition for rehearing was timely filed.

1/ Section 4.241 provides in pertinent part:

"(a) Any person aggrieved by the decision of the administrative law judge may, within 60 days after the date on which notice of the decision is mailed to the interested parties, file with the Superintendent a written petition for rehearing. * * *

"(b) If * * * the petition is not filed within the time prescribed in paragraph (a) of this section, the administrative law judge shall issue an order denying the petition and shall set forth therein his reasons therefor. * * *"

By letter dated February 12, 1992, and received by Judge McDonald on February 21, 1992, Jake Chee and Dorothy Charley requested rehearing. Jake Chee and Charley acknowledged that their petition was late and requested an extension of time, stating that 60 days was not a sufficient period of time for seeking rehearing. Jake Chee and Charley then outlined 12 points on which they based their request for rehearing.

Judge McDonald found that the petition for rehearing was untimely, and that she lacked authority to extend the time for filing a petition for rehearing. The Judge reviewed the substantive points on which Jake Chee and Charley sought rehearing, and found that the points were without merit. Judge McDonald also considered the petition for rehearing as a petition for reopening under 43 CFR 4.242(a), 2/ and found that Jake Chee and Charley lacked standing to petition for reopening because they each had notice of and were present at the original hearing.

The Board has reviewed appellants' notice of appeal; a transcript of the March 4, 1991, probate hearing; and Judge McDonald's November 26, 1991, order approving will, and March 10, 1992, order denying petition for rehearing. The last three documents were requested from and provided by Judge McDonald's office.

There is no question that appellants failed to file a timely petition for rehearing. Appellants admit this fact in their petition to Judge McDonald. Furthermore, the transcript of the probate hearing shows that appellants Jake Chee and Dorothy Charley, the only petitioners before Judge McDonald, were present at and participated in the original hearing. Jake Chee and Charley do not dispute that they received notice of and attended the hearing; rather, they contend that Judge McDonald should not have considered their petition under the reopening procedures.

Judge McDonald did not err in considering appellants' petition under both the rehearing and reopening regulations. Doing so gave appellants two opportunities rather than merely one to show that the Judge's decision could be reviewed.

Under the present circumstances, however, the Board sees no possible scenario under which appellants Jake Chee and Dorothy Charley could successfully petition for either rehearing or reopening.

2/ Section 4.242 provides:

“(a) Within a period of 3 years from the date of a final decision issued by an administrative law judge * * * any person claiming an interest in the estate who had no actual notice of the original proceedings and who was not on the reservation or otherwise in the vicinity at any time while the public notices of the hearing were posted may file a petition in writing for reopening of the case. * * *

“(b) If the administrative law judge finds that proper grounds are not shown, he shall issue an order denying the petition and setting forth the reasons for such denial. * * *

Priscilla Chee was added as an appellant when an appeal was filed with the Board. Appellants contend that Priscilla Chee is an interested party and did not receive notice of the original hearing. This contention is based upon the allegation that decedent made an oral will under which Priscilla Chee would take an interest in decedent's estate.

In order to have standing to petition for reopening, Priscilla Chee must show both that she is an interested party and that she did not receive actual notice of the original hearing and was not on the reservation or in the vicinity at any time while the notices of hearing were posted.

Under the Department's regulations, Priscilla Chee is not an "interested party," and therefore is also not an "aggrieved party." 43 CFR 4.201(i) defines "interested party" for probate purposes to include "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 Ethel Edith Wood Ring Janis, 15 IBIA 216, 218 (1987). Priscilla Chee is not a presumptive heir because her father, Jake Chee, is still living; she was not a beneficiary under decedent's December 11, 1963, will. Priscilla Chee's claim is instead based upon an alleged oral will. Oral wills cannot be recognized for the purpose of conveying trust or restricted property. 43 CFR 4.260(a), which is based upon authority granted to the Department in 25 U.S.C. § 373 (1988), provides that "[a]n Indian of the age of 18 years or over and of testamentary capacity, who has any right, title, or interest in trust property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses." (Emphasis added.)

Accordingly, appellant Priscilla Chee does not have standing to petition for either rehearing or reopening.

Although Judge McDonald discussed the merits of the petition for rehearing in her March 1992 order, this discussion was merely to show appellants that, even if their petition had been timely, they still would not have prevailed. The basis for Judge McDonald's decision was that appellants had failed to file a timely petition for rehearing and lacked standing to file a petition for reopening.

Under these circumstances, the Board sees no point in further delaying final resolution of this matter. Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge McDonald's March 10, 1992, order denying rehearing is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge