



INTERIOR BOARD OF INDIAN APPEALS

Estate of George Fishbird

36 IBIA 269 (08/16/2001)



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 FISHBIRD : Order Dismissing Docket No. IBIA 01-161,
: Vacating Decision and Order under
: Docket No. IBIA 01-157, and Referring
: Entire Case to Administrative Law
: Judge Robert Holt
:
: Docket Nos. IBIA 01-157
: IBIA 01-161
:
: August 16, 2001

The Board of Indian Appeals (Board) has received two notices of appeal from a May 31, 2001, order granting petition for rehearing issued in the estate of Decedent George Fishbird by Administrative Law Judge James H. Heffernan. IP BI 135A 90. Rehearing was sought in regard to Judge Heffernan's January 31, 2001, decision determining Decedent's heirs and approving his will. For the reasons discussed below, the Board vacates both the January 31, 2001, decision and the May 31, 2001, order and refers this entire estate to Administrative Law Judge Robert Holt for hearing and decision.

In his January 31, 2001, decision, Judge Heffernan found that Decedent died August 15, 1989; that a hearing to probate Decedent's trust and restricted estate was held on June 1, 1990; that Decedent did not have any children; that his closest relatives were five second cousins; and that Decedent executed a will on December 14, 1979, under which he devised his entire estate to William Stump, whom Decedent identified as a friend. ^{1/} Judge Heffernan noted that the will was contested on grounds of lack of testamentary capacity and undue influence. In support of his conclusion that the will should be approved, the Judge did not cite any testimony presented

^{1/} The Judge's decision states that the will devised Decedent's estate to the "Estate of William Stump." The Board does not know from the materials before it whether Decedent actually devised his estate to another estate, or whether William Stump died after Decedent but before the issuance of the Judge's order.

Appellant Geneva TopSky Stump states that she is the widow of William Stump, Sr. Judge Heffernan's order does not indicate whether the devisee under Decedent's will was William Stump Sr. or Jr.

in this estate, but instead relied upon an account of Decedent's behavior presented in a legal memorandum submitted by counsel for one of the parties in this matter and proceedings held several years after the execution of the will before a county district court.

Judge Heffernan received three petitions for rehearing of his January 31, 2001, decision. One petition was filed by four of the five individuals determined to be Decedent's heirs at law. In regard to that petition, Judge Heffernan stated:

The petition appears to show merit if only because procedural due process requires a supplemental hearing. The record reflects a supplemental hearing scheduled for August 30, 1990 was continued without date, and never rescheduled. Consequently, the petitioners never had the opportunity to present testimony or cross-examine witnesses in support of a will contest.

Judge Heffernan transferred the petition for rehearing to Judge Holt, who now has geographical jurisdiction over this probate.

Judge Heffernan then proceeded to discuss the petitions filed by Geneva TopSky Stump and Sylvia Stops. He found that both petitions were untimely. He further denied rehearing on the grounds that neither Stump nor Stops had standing to petition for rehearing.

Stump and Stops appealed to the Board. Stops filed her notice of appeal with the Superintendent, Crow Agency, Bureau of Indian Affairs (Superintendent). The Superintendent transferred the notice of appeal to Judge Holt's office, which in turn transferred it to the Board. The Superintendent received the notice of appeal on July 31, 2001; Judge Holt's office received it on August 6, 2001; and the Board received it on August 13, 2001. This appeal was assigned Docket No. IBIA 01-161.

Stops filed her notice of appeal with the Superintendent despite the clear instructions in Judge Heffernan's May 31, 2001, order informing her that any notice of appeal was to be filed with the Board. Because Stops filed her appeal in an office other than the one in which she was instructed to file it, her notice of appeal was not timely when the Board received it. The Board has consistently held that an appellant fails to file a timely notice of appeal when that person is given proper appeal information, but chooses to file her appeal with an official other than the Board, resulting in receipt of the appeal by the Board outside of the time for filing an appeal. See, e.g., Estate of Frank Nelson Buffalomeat, 34 IBIA 120 (1999), and cases cited there. The Board therefore dismisses Stops' appeal as untimely.

The Board received Stump's notice of appeal on August 2, 2001, and assigned it Docket No. IBIA 01-157. Stump's appeal was timely filed and is therefore properly before the Board.

In reviewing Stump's notice of appeal, the Board finds that there are major problems with the way this estate was handled. Stump presents a history of the early processing of this

appeal. She asserts that there were many disputed issues, and that Administrative Law Judge Keith L. Burrowes, to whom this estate was originally assigned, suggested that the parties attempt to settle the matter rather than engage in lengthy litigation. Stump further asserts:

The Administrative Law Judge [presumably, Judge Burrowes] indicated that there would be a second hearing if the parties could not agree on the issues herein, and in spite of many requests by [Stump], no second hearing was ever held, and no evidentiary hearing was ever held as to the contested issues in this matter. The Administrative Law Judge [presumably, Judge Heffernan in his May 31, 2001, order] ordered a new hearing, but [Stump] was not allowed to participate * * *.

Stump Notice of Appeal at 1.

Stump's contention concerning the failure to hold a second hearing is consistent with Judge Heffernan's statement in his May 31, 2001, order that a supplemental hearing was scheduled but never held, and with the fact that the Judge did not rely on any testimony in deciding that Decedent's will should be approved despite the fact that it was contested.

Stump further states that the persons attending the first hearing were those individuals determined to be Decedent's heirs, Stops, and herself. For purposes of this order, the Board accepts this statement as accurate. At the very least, the promise of a second hearing if the parties were unable to reach a settlement agreement was made to all parties attending the hearing, not just to the individuals found to be Decedent's heirs as suggested in Judge Heffernan's May 31, 2001, order. Judge Heffernan acknowledged in his May 31, 2001, order that the record showed that no supplemental hearing had been held. If this fact was apparent on the record when he issued the May 31, 2001 order, it should have been equally apparent before he issued the January 31, 2001, decision. Under these circumstances, the Judge should have ordered a supplemental hearing on his own motion rather than issue the January 31, 2001, decision. If a supplemental hearing had been held, all of the parties could have presented their cases, rather than having to petition for rehearing of a decision that was issued without affording them initial due process. 2/

Accordingly, pursuant to the authority delegated to the Board to exercise the inherent authority of the Secretary of the Interior to correct a manifest injustice or error, 43 C.F.R. § 4.318, the Board vacates Judge Heffernan's January 31, 2001, decision and May 31, 2001, order and refers this entire estate to Judge Holt for a supplemental hearing and decision. The persons found to be Decedent's heirs in Judge Heffernan's January 31, 2001, order, Stump

2/ The Board is well aware that the passage of time will cause significant problems in presenting and deciding the issues relating to this estate.

and Stops shall be considered interested parties and shall have a full opportunity to participate in all further proceedings before Judge Holt. The order issued after the supplemental hearing shall be deemed an initial probate decision and shall therefore be subject to the requirements of 43 C.F.R. § 4.241 that a petition for rehearing be filed with Judge Holt before a notice of appeal can be filed with the Board. Judge Holt is instructed to ensure that the proper rehearing notice is included with his decision.

The Board finds that it must also comment on Judge Heffernan's finding that Stump and Stops both lacked standing to petition for rehearing. In discussing the petition filed by Stops, Judge Heffernan quoted 43 C.F.R. § 4.201(i) which provides in pertinent part that a "party in interest" includes "any presumptive or actual heir, any beneficiary under a will, any party asserting a claim against a deceased Indian's estate." The Judge stated: "In the probate decision [of January 31, 2001, Stops] was found not to be an heir at law, and therefore has no standing to petition for rehearing." May 31, 2001, order at 1.

In regard to Stump's petition, Judge Heffernan again referred to 43 C.F.R. § 4.201(i), and stated: "In the probate decision [of January 31, 2001, Stump] was found not to be an heir at law, and therefore has no standing to petition for rehearing." *Id.* at 2.

The Board has held that in order to have standing to file a petition for rehearing or reopening or a notice of appeal, a person must meet the definition of "party in interest" found in 43 C.F.R. § 4.201(i). *See, e.g., Buffalomeat, supra*, and cases cited there. However, this estate does not present the usual situation in which there is no dispute as to the relationship, or lack of a relationship, between the decedent and the person filing the petition or appeal. Here, that relationship is a major contested question of fact.

The primary problem with Judge Heffernan's conclusion that Stump and Stops lacked standing to petition for rehearing is that he used his own finding as to their lack of a relationship to Decedent as the reason for denying review of that finding. Whether the Secretary recognizes any relationship between these individuals for probate purposes cannot be known until the conclusion of the entire probate proceeding, including, if requested, rehearing, appeal, and any judicial review of the final Departmental decision. It is a denial of due process to hold that an individual cannot petition for rehearing because the Administrative Law Judge has issued a decision on a contested issue of fact as to the relationship between that individual and the Decedent.

Furthermore, Judge Heffernan ignored Stump's status as a claimant against Decedent's estate and the fact that such a claimant is a "party in interest" under 43 C.F.R. § 4.201(i). Stump's claim, which Judge Heffernan discussed in detail at page 4 of his January 31, 2001, decision, gave her standing to petition for rehearing concerning the claim regardless of her relationship to Decedent. In addition, as noted in footnote 1, Judge Heffernan failed to determine whether the "William Stump" who was the devisee under Decedent's will was William Stump Sr. or Jr. Stump states that she is the widow of William Stump Sr. As such, she may or may

not have a claim to Decedent's estate through the estate of William Stump. By not identifying fully the individual who was the devisee under Decedent's will, Judge Heffernan could not have known whether or not Stump had derivative standing through Decedent's devisee.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. §§ 4.1 and 4.318, Judge Heffernan's January 31, 2001, decision and May 31, 2001, order are vacated. This entire estate is referred to Judge Holt for a hearing and decision.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge