



INTERIOR BOARD OF INDIAN APPEALS

Estate of Grace First Eagle Tolbert (Talbert)

1 IBIA 209 (02/04/1972)

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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 GRACE FIRST EAGLE TOLBERT (TALBERT)

(DECEASED ALLOTTEE NO. 1318
OF THE FORT PECK INDIAN RESERVATION OF MONTANA)

IBIA 72-3

Decided February 4, 1972

Appeal from Decision after Rehearing of the Secretary of the Interior, Rogers C.B. Morton, approving will.

Affirmed

Indian Probate: Appeal: Dismissal

Timely service of a notice of appeal on all adverse parties is a jurisdictional requirement under the Indian probate regulations and failure of a party seeking an appeal to make such service will result in dismissal of the appeal.

APPEARANCES: John Crawford, Indian Legal Assistance Center, for appellant.

OPINION BY MR. LASHER

This is an appeal by Lena L. Crispino from a Decision After Rehearing entered by the Secretary of the Interior, Rogers C. B. Morton, on June 29, 1971. ^{1/} At the time of issuance of the

^{1/} Ordinarily at this stage of the proceedings the decision would have been rendered by the hearing examiner who conducted the hearings, David J. McKee. However, because of Mr. McKee's unavailability by virtue of his appointment as Chairman of this Board, the Secretary requested that the record in this case be certified to him for decision. Mr. McKee has disqualified himself and has not participated in this decision on appeal.

Secretary's decision all parties in interest, including the appellant, were advised of their right to file an appeal with this Board in accordance with the provisions of 43 CFR 4.291.

Following the death of the decedent, Grace First Eagle Tolbert, 2/ on September 8, 1964, a hearing was held on June 18, 1965, for the purpose of ascertaining her heirs and determining pertinent facts surrounding the making and execution of her last will and testament. 3/ On December 28, 1965, the examiner entered an Order Approving Will and Decree of Distribution.

On March 11, 1966, after the timely filing of petitions for rehearing, the examiner ordered a rehearing to take evidence relating to two monetary claims filed by Dorothy N. Nudo and appellant, respectively, and to allow appellant further opportunity to present evidence in support of her objection to the will. 4/

2/ Sometimes referred to in the record as Grace Tolbert, Grace Talbert First Eagle, and Grace First Eagle Talbert.

3/ The appellant, Crispino, is the daughter and sole heir of decedent. Had decedent died intestate her entire estate would have passed to appellant pursuant to the Montana statute of descent and distribution. By her will, however, the decedent disinherited Thurman LaBelle and Arden Wayne LaBelle Kimberly Imogene LaBelle and Kristine Lee LaBelle. In an affidavit accompanying her will the decedent stated: "I did not mention my daughter Leona [sic] First Eagle Crispino, Fort Peck Allottee No. 2288, born 3/17/15 in my Will for the reason that she has sufficient interests of her own."

4/ In her petition for rehearing dated February 24, 1966, appellant claimed that she had deeded certain lands to her mother under duress,

On January 23, 1968, Examiner McKee issued an Order Approving Claims After Rehearing, sustaining the monetary claims of Nudo and appellant in the sums of \$800 and \$519.63, respectively, and also finding, in effect, that no evidence was presented by appellant at the rehearing which would justify reconsideration of his order approving the will entered on December 28, 1965.

Following the filing of Crispino's first appeal herein the Regional Solicitor issued his decision dated September 5, 1968, remanding the case to the examiner for the taking of further testimony and evidence on the following issues: (1) whether the will of February 24, 1964, should be approved or disapproved, (2) whether appellant could establish a constructive trust, and (3) whether appellant's action of paying a debt of the decedent after the latter's death entitles her to have such payment allowed as a claim against the estate. The examiner's orders of December 28, 1965, and January 23, 1968, were, in all other respects, affirmed by the Regional Solicitor's decision. The second rehearing was

fn. 4 (Cont.)

thus raising the possibility that a constructive trust might have been created in her favor as to lands comprising the decedent's trust estate. Specifically, Crispino alleged that ". . . some of the land that was willed to others by mother was land that I formerly owned; land that was obtained from me by duress on the part of my mother. This, I will prove at a rehearing."

held on June 12, 1969, and upon the record thereof the Secretary's Decision After Rehearing of June 29, 1971, was rendered. 5/

On August 30, 1971, appellant filed a one-page document in the nature of a notice of appeal 6/ in which she noted her "protest" of the decisions rendered by the examiner and the Secretary and requested another rehearing at which she proposed to prove (1) how she supported her children by "selling land and other personal property and by working at various jobs," and (2) that in 1957 when her health began to fail she had to beg for help. 7/

5/ The Secretary held, *inter alia*, that (1) no evidence whatever was offered by the appellant indicating that the decedent lacked testamentary capacity, or that she acted under duress, coercion, or undue influence in executing her will, (2) the equitable elements necessary to impose a constructive trust upon the lands in question were not established by substantial evidence much less a preponderance of the evidence, and (3) the examiner's allowance of the appellant's claim for \$519.63 was correct and that appellant should also be allowed an additional \$500 for the advance made by her to discharge a part of the \$800 claim allowed to Dorothy Nudo, provided that such allowance be reduced by the sum of \$283.56 cash which appellant received from decedent's nontrust estate--making a total allowance to appellant of \$736.07.

6/ We are inclined to give appellant the benefit of the doubt by treating the pleading as a notice of appeal because the regulation setting forth the procedure for taking an appeal to this Board, 43 CFR § 4.291, requires a party seeking to appeal to first file a notice of appeal within 60 days after the date of mailing of the notice of the decision being appealed.

7/ On November 1, 1971, appellant filed a six-page document in the nature of a brief entitled "Appeal of Secretary's Decision" in the office of the Area Director, Bureau of Indian Affairs at Billings, Montana. We gather that this pleading was prepared by an attorney in the Indian Legal Assistance Center. Although served on the examiner, the Superintendent, and all parties sharing in the estate as required by the regulation, it would not benefit appellant for us to construe this document as a notice of appeal instead of a brief on appeal since it was filed more than four months after the issuance of the Secretary's decision and is thus untimely.

Although timely filed, the notice of appeal was not served on the parties who shared in the decedent's estate under the decision being appealed, as required by the pertinent regulation, 43 CFR § 4.291(b). 8/ Also, the notice itself is deficient in form by virtue of its failure to contain an affidavit or certificate setting forth the names of the parties served and their last known addresses. Finally, with respect to appellant's request for a third rehearing, we note that even if appellant were given the opportunity to establish the allegations contained in her notice of appeal, the result would be the same since such allegations have no relevance to any factual or legal issues which might provide the basis for amending or setting aside the Secretary's decision.

8/ The regulations governing appeals have been the subject of recent revision. The regulations quoted herein are those which were in effect at the time this appeal was taken and which govern our decision. Thus, 43 CFR § 4.291(b) before its revision provided as follows:

“(b) Service of copies of Notice of Appeal. The appellant shall hand deliver, or forward by certified mail, to the Examiner, the original and one copy of the notice of appeal and any amendment thereto, and in a like manner, one copy of the notice and of any amendment to the Board. It is a jurisdictional requirement that, at the time of filing the original notice, he shall forward copies of the notice of appeal by regular mail or otherwise to all Superintendents named on the Examiner's notice of decision, to all parties who share in the estate under the decision being appealed, and to all other parties who have appeared of record. The notice of appeal shall have attached thereto a certificate if filed by an attorney of record, or an affidavit if filed by a non-attorney, setting forth the names of parties served and the last known address of each to whom the notice was mailed. Any amendments to the notice of appeal shall be served on the same parties in like manner, and similar evidence of service must be filed with regard thereto.” (Emphasis supplied)

Even by treating the papers filed by appellant herein in the light most favorable to protecting her rights, as we have done, we are constrained to hold that her failure to comply with the regulations in the respects noted is fatal to her right of appeal. Not only does the regulation itself squarely establish it as a jurisdictional requirement that one seeking to appeal must obtain service on the parties specified therein, but, also, this Department has in past decisions consistently adhered to the policy of dismissing appeals for failure to provide timely service on adverse parties. See Estate of Ellen Fitzpatrick, IA-T-5 (July 28, 1967); Esther Bosworth and W. E. James, A-30703 (May 31, 1967); United States v. Jess A. Thom, A-30459 (November 17, 1965); and United States v. Wm. F. and F. M. Keys, A-29594 (November 20, 1962).

In Estate of Ellen Fitzpatrick, *supra*, the strict policy of this Department in requiring compliance with its regulations was particularly underscored. In that case, which was an Indian probate matter arising under an earlier version of the regulations which required service upon the opposing counsel or litigants at the same time service was made upon the Superintendent, the Regional Solicitor held that service of the notice of intention to appeal upon the attorney for the adverse party 11 days after such notice was served upon the Superintendent could not reasonably be construed to constitute service upon him "at the same time" service was made upon the Superintendent.

Because this appeal must be dismissed for the reason that the service of the notice of appeal did not meet the requirements of the regulations, it is unnecessary to discuss or comment upon other contentions or matters raised in the appeal. We have, however, reviewed the record and find that the decision of the Secretary is fully substantiated by the facts of this case and that there are no compelling reasons ascertainable from the record herein for us to depart from the usual strict rule of compliance with Departmental regulations. 9/

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7; 35 F.R. 12081, the appeal of Lena L. Crispino is denied and the Decision After Rehearing entered by the Secretary of the Interior on June 29, 1971, is affirmed. This decision is final for the Department.

//original signed
Michael A. Lasher, Member

I concur:

//original signed
Daniel Harris, Member

9/ In this latter connection, it should be noted that appellant was specifically advised in the Secretary's decision and the Notice accompanying the same of the necessity of complying with Part 4 of Title 43 CFR appearing in 36 F.R. 7186 (April 15, 1971), a copy of which was served on appellant together with the notice and the decision, and in particular, of the necessity of complying with 43 CFR § 4.291 appearing therein.