



INTERIOR BOARD OF INDIAN APPEALS

Estates of Edwin (Edward) J. Scarborough and Nora Scarborough Brignone

11 IBIA 179 (05/10/1983)



United States Department of the Interior

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

ESTATES OF EDWIN (EDWARD) J. SCARBOROUGH
and
NORA SCARBOROUGH BRIGNONE

IBIA 82-52, 82-53

Decided May 10, 1983

Appeal from a June 2, 1982 order denying petition for reopening issued by Administrative Law Judge Robert C. Snashall in IP PO 171L 75-75 and IP PO 48LX 76-51.

Affirmed.

1. Indian Probate: Non-Restricted Property--Indian Probate: Secretary's Authority: Generally--Indian Probate: State Law: Generally

The Department of the Interior has no authority to probate non-trust assets held by an Indian at the time of death. A finding, made in the context of a Departmental probate proceeding, that the will of an Indian holding non-trust assets is a valid testamentary instrument, cannot operate to transfer non-trust property. Such property must be probated through the appropriate state or tribal court.

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

A person who participated in the original probate proceeding lacks standing to petition to reopen the estate.

3. Administrative Procedure: Burden of Proof--Indian Probate: Reopening: Generally

Under the provisions of 43 CFR 4.242(h), the burden of proving entitlement to reopening in Indian probate proceedings lies with the petitioner.

APPEARANCES: Stanley A. Roth, appellant, pro se; 1/ Dennis J. Whittlesey, Esq., Washington, D.C., for appellees the Scarborough family; 2/ Roy D. Amelia, appellee, pro se. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On August 2, 1982, the Board of Indian Appeals received a notice of appeal from Stanley A. Roth (appellant), seeking review of a June 2, 1982, order denying reopening issued by Administrative Law Judge Robert C. Snashall in the estates of Edwin (Edward) J. Scarborough (Docket No. IBIA 82-52) and Nora Scarborough Brignone (Docket No. IBIA 82-53). Appellant sought reopening of the Scarborough estate for the purpose of showing that he was of Indian descent and therefore entitled to inherit Indian trust property on the Quinault Indian Reservation as provided in the Scarborough will. Reopening of the Brignone estate was sought to show that property from this estate should have passed to appellant through the Scarborough estate, again as provided in the Scarborough will.

Reopening of both estates was denied on the grounds that the petition failed to meet the requirements of 43 CFR 4.242(h) and failed to include any supporting evidence for the assertion of Indian ancestry. For the reasons discussed below, the Board affirms the denial of reopening.

Background of Estate of Edwin (Edward) J. Scarborough

Edwin (Edward) J. Scarborough, Quinault No. 2184, was born on December 11, 1890, and died on April 7, 1974. Decedent's father was one-half Chinook and his mother was one-half Cowlitz. Decedent had eight brothers and sisters, all of whom predeceased him except his sister, Nora Scarborough Brignone. Decedent had no children, but was survived by his sister, 20 children of his deceased brothers and sisters, and 3 children of deceased children of his deceased brothers and sisters.

A hearing into decedent's estate was held on April 29, 1975. Appellant was present at and participated in this hearing. After an inquiry into decedent's family history, the Administrative Law Judge took evidence regarding a last will and testament allegedly executed by decedent on December 21, 1973. Except for a nominal bequest of \$1, decedent devised all of his prop-

1/ Appellant's notice of appeal was filed on his behalf by counsel Phillip Anselmo, Esq., Kent, Washington. Although the Board did not receive a notice of withdrawal of counsel, all subsequent filings were made personally by appellant.

2/ The Scarborough family members represented by Mr. Whittlesey are Sandra L. Mason, James Mason, Merton Mason, Charlotte Mason Turner, William LeClair, Neal LeClair, Sarah LeClair Jarvy, Ruby Scarborough Keating, Clarence Allen Scarborough, James Scarborough, Darrell Scarborough, Marie Scarborough Schultz, Charlea Scarborough Ramirez, Deforest Scarborough, Donald C. Mason, Marian Mason Clark, Laura Mason Sims, Allen E. Mason, and Homer Mason.

erty, which may have included both trust and non-trust property, 3/ to appellant, who had apparently been a friend and companion for many years and had cared for decedent when his health failed in the last years of his life. 4/

[1] Although generalized objections to the will were raised at the hearing, no one was able to show that the decedent had in fact been of unsound mind or under undue influence at the time of its execution. Accordingly, the Administrative Law Judge approved the will on May 16, 1975. However, the order approving the will further found that

at the time of the hearing the total trust estate consisted only of real property situate on and under the jurisdiction of the Quinault Indian Reservation and Tribe. The Quinault Tribe has accepted the terms of the Indian Reorganization Act of 1934 (48 Stat. 984, 25 U.S.C. §464) which bars devise of such properties to non-heirs or non-members of the applicable Tribe. Devisee herein is neither an heir at law of decedent nor a member of the Quinault Tribe and therefore cannot inherit the subject lands of the estate. The said real property therefore passes as hereinabove directed by intestate succession to decedent's heirs at law. However, since the Last Will and Testament is for all other purposes valid, should it later appear the testator had additional [trust] assets at the time of death, not subject to the said Indian Reorganization Act of 1934, then and in that event distribution of said additional assets is to be made by the Superintendent of the Western Washington Agency to said Stanley A. Roth.

(Decision at 2). Thus, although the will was found valid, appellant took nothing under it. 5/

3/ At the hearing a family member questioned whether decedent actually held certain non-trust property mentioned in his will at the time of his death (Tr. 39).

4/ In addition to the provisions leaving decedent's property to appellant, Clause 3.8 states in pertinent part: "Anything she [my sister Nora] leaves me, if I go first, is to go to Stanley [A. Roth] to help Columbia Minerals Corporation get started at Scarborough Hill."

5/ As previously mentioned, decedent's estate may have included certain non-trust properties. These properties apparently could have passed to appellant under the terms of decedent's will. However, non-trust property allegedly held by decedent Scarborough and devised to appellant is not under the jurisdiction of the Department of the Interior (see 25 U.S.C. §§ 372-373 (1976)) and a finding, made in the context of a Departmental probate proceeding, that the will is a valid testamentary instrument, cannot operate to transfer non-trust property. Such property must be probated through the appropriate state or tribal court.

Background of Estate of Nora Scarborough Brignone

Nora Scarborough Brignone, Quinault No. 1666, was born April 28, 1895, and died March 28, 1976. Decedent was the full sister of Edwin (Edward) J. Scarborough, and was the last survivor of nine brothers and sisters. Decedent had no children, but was survived by 23 offspring of her deceased brothers and sisters.

A hearing into decedent's estate was held on January 25, 1977. Testimony was taken on decedent's family history. Under the provisions of decedent's last will and testament, executed on September 4, 1975, the validity of which was not challenged, a specific bequest of \$5,000 in cash was made to a friend and the residue of decedent's estate was devised "to my heirs at law living at the date of my death, determined in accordance with the laws of the State of Washington for the intestate succession of property." 6/

Decedent's will was approved and her heirs at law under the intestate succession laws of the State of Washington were determined in an order dated March 10, 1977.

Discussion and Conclusions

Appellant's petition to reopen these estates was filed on May 10, 1982. Because the petition was filed more than 3 years after the entry of a final decision in each estate, it was governed by 43 CFR 4.242.(h). This regulation provides that such a petition

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. * * * A denial of such petition may be made * * * on the basis of the petition and available Bureau records.

[2] It is quite evident that appellant cannot meet the standing requirements of section 4.242(h) in regard to the Scarborough estate. Appellant actively participated in the original probate proceeding in that estate and so is not a person eligible to petition for reopening. See Estate of Coe, 8 IBIA 164 (1980); Estate of Bobb, 5 IBIA 92 (1976).

6/ Because the Brignone will specifically states that the residue of her estate is to pass to her "heirs at law living at the date of my death," appellant could inherit nothing from this estate. Appellant's argument is that the Scarborough will passed anything received from the Brignone estate to him. Decedent Scarborough was not living at the date of decedent Brignone's death and therefore his estate took nothing under that will. Thus, even assuming that the Scarborough will could have passed after-acquired property, there was nothing to pass to appellant.

[3] Appellant was not listed as being present at the original hearing into the estate of decedent Brignone. Neither is there an evidence in the record indicating whether or not decedent was present on the reservation or in the vicinity when the notices of this hearing were posted. The regulation clearly places the burden of proving entitlement to reopening upon the petitioner. Petitioner has made no showing that he was unaware of the original probate proceedings in the Brignone estate. He has, therefore, failed to demonstrate that he meets the standing requirement of section 4.242(h) in regard to this estate.

Thus, the Board finds that appellant lacked standing to petition for reopening in the Scarborough estate and failed to demonstrate standing in the Brignone estate. Reopening of both estates was properly denied. 7/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order denying petition to reopen is affirmed.

//original signed
Wm. Philip Horton
Chief Administrative Judge

We concur:

//original signed
Jerry Muskrat
Administrative Judge

//original signed
Franklin D. Arness
Administrative Judge

7/ Because of this disposition, the Board does not reach the merits of appellant's arguments. The Board notes, however, that from its examination of the record and appellant's filings, it would have found against appellant on the merits. Appellant's unsupported assertion that his real father was part-Indian, made after the deaths of all individuals who could be expected to have knowledge of this circumstance, cannot overcome the documentary evidence of his birth certificate showing that appellant is a white man. Furthermore, the exchange of blood between appellant and decedent Scarborough is insufficient to make appellant an heir by adoption under 25 U.S.C. § 372a (1976). Therefore, the Board would have been required to find appellant to be a non-Indian and ineligible to inherit trust property on the Quinault Indian Reservation under the provisions of the Indian Reorganization Act of 1934, 25 U.S.C. § 464 (1976).