



INTERIOR BOARD OF INDIAN APPEALS

In re Attorney Fees Requests of Joanne Foster and J.P. Sferra

12 IBIA 172 (02/10/1984)

Related Board case:
12 IBIA 160



United States Department of the Interior

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

IN RE ATTORNEY FEES REQUEST OF JOANNE FOSTER
AND
IN RE ATTORNEY FEES REQUEST OF P. J. SFERRA

IBIA 84-6-F, 84-7-F

Decided February 10, 1984

Consolidated requests for attorney fees for representation of Indian clients in regard to the Estate of Hattie George Lewis, 12 IBIA 160 (1984).

IBIA 84-6-F, attorney fees approved, with limitation.

IBIA 84-7-F, attorney fees approved.

1. Attorney's Fees: Generally--Indian Probate: Attorneys at Law: Fees

In considering a petition for the award of attorney fees in an Indian probate proceeding, the Board will examine the itemized list of services provided to the client to determine whether each item is allowable.

APPEARANCES: Joanne Foster, Esq., Seattle, Washington, pro se; P. J. Sferra, Esq., Seattle, Washington, pro se. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On December 7, 1983, the Board of Indian Appeals received separate applications for the award of attorney fees from Joanne Foster and P. J. Sferra (petitioners). Petitioners seek attorney fees, costs, and expenses in connection with their filing of notices of appeal and the preparation and submission of a settlement agreement between their respective clients, Thomas and Dolores Lewis and Walter Lewis, following Administrative Law Judge Robert C. Snashall's June 29, 1983, denial of rehearing in the Estate of Hattie George Lewis, 12 IBIA 160 (1984). ^{1/} Each petitioner had previously received an award of fees, costs, and expenses from the Administrative Law Judge for their appearances before him. Each petition will be discussed separately.

Petition of Joanne Foster

Petitioner Foster represented Thomas and Dolores Lewis before both the Administrative Law Judge and the Board. The Administrative Law Judge

^{1/} The Board approved a settlement agreement submitted in this estate and allowed distribution, but required the Bureau of Indian Affairs to retain \$9,484.58, the amount sought by petitioners, pending consideration of these petitions.

awarded petitioner attorney fees in the amount of \$18,430.55, plus costs and expenses of \$2,399.04, for a total of \$20,829.59. ^{2/} This award, which was made on April 20, 1983, for work done through February 14, 1983, was based on a May 12, 1981, contract with Thomas and Dolores Lewis, providing for a fee based upon an hourly rate of \$85. Petitioner now seeks an additional \$4,405.83 in attorney fees and \$77.95 in costs and expenses, or a total of \$4,483.78, for work done after February 13, 1983.

The Administrative Law Judge determined that petitioner's fee of \$85 per hour was reasonable. No evidence has been submitted disputing this finding. The Board accepts this rate as appropriate.

[1] The Board has reviewed the itemized list of services provided to Thomas and Dolores Lewis and concludes that the fees claimed are not unreasonable and may be allowed, with two exceptions. The list includes two items for October 28 and November 3, 1983, concerning the completion of the parties' settlement agreement. That agreement was signed on July 20, 1983, but was not submitted to the Board until December 7, 1983. No explanation was offered for the delay of almost 4-1/2 months in presenting the agreement to the Board for approval. The Board recognizes that a certain amount of time is normally required to process a document, and, therefore, will not disallow all fees claimed after the date the agreement was signed. However, under the circumstances of this case, the Board will not approve attorney fees for undefined services in "finalizing" an executed document some 3-1/2 months after the date on which it was signed. See Estate of Hattie George Lewis, 12 IBIA at 160 n.1 (1984). The fees claimed for October 28 and November 3, 1983, totaling 5 hours and 20 minutes, are, consequently, disallowed. ^{3/}

Therefore, additional attorney fees in the amount of \$3,952.50 and costs and expenses of \$77.95, for a total of \$4,030.45, are allowed to petitioner for her representation of Thomas and Dolores Lewis in regard to the Estate of Hattie George Lewis for the period from February 13, 1983, to the present. This award is in addition to the award previously given to petitioner by the Administrative Law Judge's April 20, 1983, order. In accordance with Clause 7 of the settlement agreement in the Estate of Hattie George Lewis, this fee shall be paid from the distributive share of the estate accruing to Thomas and Dolores Lewis.

Petition of P. J. Sferra

Petitioner Sferra represented Walter Lewis before both the Administrative Law Judge and the Board. On April 20, 1983, the Administrative Law Judge awarded petitioner \$16,900 in attorney fees and \$1,673.32 in costs and expenses, for a total of \$18,573.32, for services rendered prior to March 7, 1983. Petitioner seeks an additional \$4,850 in fees and \$150.80 in costs and

^{2/} Decedent's Indian trust estate was valued at approximately \$615,000.

^{3/} The dissent in this case suggests that the Board should have disallowed items claimed by petitioner after August 1983. This suggestion is based on assumptions not supported by the record before the Board on the reasonableness of the period between petitioner's filing of the notice of appeal and the settlement agreement. In the absence of objection from the client, the majority declines to adopt an arbitrary cut-off date for determining whether services rendered are compensable.

expenses, for a total of \$5,000.80, for his work subsequent to March 7, including his appearance before the Board on behalf of Walter Lewis. All of these fees are based on an hourly rate of \$100.

The Administrative Law Judge determined that petitioner's rate of \$100 per hour was reasonable. No evidence has been submitted disputing this finding. Therefore, the Board accepts it.

All work claimed by petitioner Sferra was performed on or before July 20, 1983, the date on which the settlement agreement was signed. The Board has reviewed the itemized list of services provided to Walter Lewis and concludes that the fees are reasonable and may be awarded. Therefore, additional attorney fees in the amount of \$4,850 and costs and expenses of \$150.80, for a total of \$5,000.80, are allowed to petitioner for his representation of Walter Lewis from March 7, 1983, to the present in regard to the Estate of Hattie George Lewis. This award is in addition to the award previously given to petitioner by the Administrative Law Judge's April 20, 1983, order. ^{4/} Pursuant to Clause 8 of the settlement agreement in the Estate of Hattie George Lewis, this fee shall be paid from the property accruing to Walter Lewis under the July 20, 1983, settlement agreement.

In accordance with the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the petitions for attorney fees of Joanne Foster and P. J. Sferra are approved as indicated in this opinion. The Bureau of Indian Affairs may distribute the \$9,484.58 held in the estate of Hattie George Lewis under the Board's January 27, 1984, order as follows: \$4,030.45 from the amount accruing to Thomas and Dolores Lewis shall be paid to Joanne Foster; \$5,000.80 from the amount accruing to Walter Lewis shall be paid to P. J. Sferra; the remaining \$453 shall be distributed in accordance with the Administrative Law Judge's April 20, 1983, final order, as modified by the settlement agreement approved by the Board on January 27, 1984.

//original signed

Franklin D. Arness
Administrative Judge

I concur:

//original signed

Jerry Muskrat
Administrative Judge

^{4/} While recognizing that the issue was not raised by the parties, the dissent questions the propriety of the award of attorney fees as a cost of administration of the estate to counsel representing a losing client. The majority is not inclined to address this issue unless such an award has been appealed to the Board or is so egregious that the Board feels compelled to invoke the inherent authority of the Secretary to correct manifest injustice or error. 43 CFR 4.320. On the basis of the record in this case, it appears that the decision was a close question and might easily have been in favor of petitioner's client.

CHIEF ADMINISTRATIVE JUDGE PARRETTE CONCURRING IN PART AND
DISSENTING IN PART:

Although I concur with the majority that petitioners are entitled to reasonable compensation for representing their clients in the negotiation and submission of the settlement agreement and therefore agree with the amount being approved for petitioner Sferra in this decision, I think the Board should have drawn a finer line with regard to the fees being approved for petitioner Foster. The difference in amount would not have been great, but the principle involved is, in my view, of considerable importance.

The principle I am concerned with is how properly to treat requested attorney fees that on an item-by-item basis might not seem unreasonable but which tend to become so because of unexplained and apparently unnecessary delays on the part of counsel in winding up the case. For example, after a sufficient time has elapsed, why should a client be charged for a telephone call that he makes to the attorney to find why a settlement agreement has not been approved by the Board when the settlement agreement, for no apparent reason, has not yet even been submitted to the Board?

In this case, petitioner Foster's itemized list shows that her legal research on appellate procedure was completed in August, in the context of filing an appeal with the Board, already a month after the settlement agreement had been signed. There is no reason why the July 20 settlement agreement, which was apparently unchanged when it was finally submitted to the Board on December 7, could not have accompanied the notice of appeal, which the Board received on August 29. In contrast, petitioner Sferra, who also filed a notice of appeal (on his own stationery) on August 26, did not seek any additional attorney fees beyond July 20 when the settlement agreement was signed.

Under the circumstances, I would be disposed to disallow all attorney fees claimed by petitioner Foster after August, since by that time all of the necessary work in connection with the drafting and submission of the settlement agreement had already been performed. The work that was done subsequently, though not unreasonable simply on an item-by-item basis, was redundant and, in my view, became "necessary" only because of petitioner Foster's delay in submitting the agreement for our approval.

Similarly, although the issue is not formally before us, I would have reservations about the propriety of the Department's approving an award from the decedent's estate to an attorney who had unsuccessfully represented a client in challenging the latter's omission from decedent's will. That was the basis for the initial award made by the Administrative Law Judge to petitioner Sferra in this case. His client lost, but he received his fees from decedent's estate, despite the fact that the estate received no apparent benefit from the challenge.

I do not suggest that such an award by the Administrative Law Judge would per se and in all cases amount to an abuse of discretion, since state

laws on the subject may vary and special circumstances may exist in particular cases. What I suggest, however, is that this is an area where the propriety of awarding attorney fees seems likely to be questioned, and that such awards by Administrative Law Judges should be fully explained in their decisions in anticipation of possible appeals. It is certainly not self-evident that the funds in Indian trust estates should be used for such purposes, and there may well be cases where the Board should exercise its inherent authority under 43 CFR 4.320 to correct manifest injustice by disallowing such awards.

//original signed

Bernard V. Parrette
Chief Administrative Judge