



INTERIOR BOARD OF INDIAN APPEALS

Estate of Buddy Tendoy

33 IBIA 215 (03/16/1999)



United States Department of the Interior

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

ESTATE OF BUDDY TENDOY : Order Affirming Decision
:
: Docket No. IBIA 97-175
:
: March 16, 1999

Appellant Delilah Tendoy, for herself and her minor children Thunder and Twinkal Sky Tendoy, seeks review of a September 15, 1997, order denying rehearing or reopening issued by Administrative Law Judge James H. Heffernan in the estate of Decedent Buddy Tendoy. IP RC 464Z 93. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Decedent, a member of the Shoshone-Bannock Tribes, died on August 8, 1992. Administrative Law Judge Keith L. Burrowes held a hearing to probate Decedent's trust estate on April 13, 1994. A will executed on April 18, 1989, was introduced at the hearing. On September 27, 1996, Judge Burrowes issued an order in which he found that Decedent was survived by his wife, Appellant here, and six children: Feather Sage Tendoy, Fawn Blanche Tendoy, Fern Breeze Tendoy, Thunder J.D. Tendoy, Twinkal Sky F. Tendoy, and Delsaray A. Honena. Judge Burrowes found that, had Decedent died intestate, these individuals would have been his heirs at law with the exception of Delsaray, who had been adopted out and who would therefore not be an heir under Idaho law. However, in his will Decedent specifically disinherited Appellant, stating that "she has land interests of her own," and devised his entire estate to his children equally. The Judge approved Decedent's will and ordered distribution to his six children.

Appellant filed a petition for rehearing which was dated January 23, 1997, and which Judge Heffernan received on January 27, 1997. In her petition, Appellant alleged that she did not receive Judge Burrowes' September 27, 1996, order until November 12, 1996, because her correct address had not been properly recorded and/or used.

On September 15, 1997, Judge Heffernan denied rehearing on the grounds that the petition was untimely under 43 C.F.R. § 4.241 even if the date for filing a petition for rehearing was calculated starting from the date on which Appellant alleged she received Judge Burrowes' order. He further denied reopening under 43 C.F.R. § 4.242 because Appellant had attended the original hearing with counsel, and therefore lacked standing to petition for reopening.

Appellant appealed to the Board. In an order dated October 1, 1997, the Board advised Appellant that Judge Heffernan's denial of rehearing and reopening appeared to be correct, and ordered her to show cause why that decision should not be affirmed. Appellant responded that

she had not received notice of the hearing and had been denied access to Decedent's will, obtaining a full copy of the will for the first time on November 25, 1996. Based on these representations and the limited materials then before it, the Board concluded that there was a possibility that Appellant had been denied due process. It therefore requested the entire probate record and permitted briefing to proceed.

Briefs were filed on appeal by Appellant and by Feather Sage Tendoy, Delsaray Honena, and Bernice Edmo on behalf of minors Fern Tendoy and Fawn Tendoy.

Based upon a review of the full probate record, the Board concludes that Appellant's representations in her response to its October 1, 1997, order were misleading at best.

Although it does appear to be true that Appellant did not receive the official notification of the hearing from Judge Burrowes because of the use of an incorrect address, she nevertheless learned of the hearing and attended it. Although unfortunate, the failure of the official notice to reach Appellant is, under the circumstances of this case, harmless error.

At the hearing, Judge Burrowes specifically asked whether everyone had received a copy of the will. Appellant did not initially inform the Judge that she had not seen the will. Tr. at 2. Judge Burrowes asked Appellant questions intended to disclose whether she believed that Decedent had testamentary capacity when he executed the will and whether she believed that he was acting voluntarily and without undue influence. Although Appellant indicated that Decedent needed to execute a new will to replace an older one, she did not provide any evidence that suggested he lacked testamentary capacity or was subjected to undue influence. *Id.* at 4-5. When Judge Burrowes asked Appellant if she knew of any reason the will should not be approved, she responded: "Well I . . . I don't know I have never really looked at the will." *Id.* at 5. After a discussion among the Judge, Appellant, and Appellant's counsel concerning the fact that Appellant did not receive the notice of the hearing or a copy of the will because of the use of an incorrect address, Judge Burrowes went through the entire will with Appellant. *Id.* at 6-7. After that discussion, Appellant stated that she wished to contest the will, and the Judge explained the grounds on which an Indian will could be contested. *Id.* at 7-9. Appellant's counsel spoke with Appellant, after which Appellant withdrew her objection to the will, although she stated that she believed she should be entitled to something. *Id.* at 9. There is no evidence in the record that Appellant asked Judge Burrowes for a copy of the will, or that she was denied a copy.

The Board finds that Appellant knew the contents of Decedent's will as of April 13, 1994, not November 25, 1996, as implied in her response to the October 1, 1997, order. It further finds that Appellant attended the hearing with counsel, and fully participated in the proceedings. The Board concludes that Appellant was not denied due process during the original hearing.

Therefore, the issue before the Board returns to whether or not Judge Heffernan properly denied rehearing and/or reopening.

Appellant's discussion concerning the timeliness of her petition is found at pages 1-2 of her opening brief. That discussion states:

[Appellant] had retained * * * to represent her interests during the probate of the estate of her husband, [Decedent]. * * *

[Appellant] alleges that [counsel] did not properly advise her with regard to the purpose and status of the proceedings, and that he has had no contact with [Appellant] regarding the matter since the date of the hearing.

When [Appellant] had not received any order or decision from [Judge Burrowes] by early summer of 1995, she began contacting [the] BIA Probate Specialist, and was told that the judge had not yet made a decision.

[Appellant] notified the Court in hearing before Judge Burrowes that the address present in the documentation was incorrect. An adjustment should have been made at that time and [Appellant] has no further information as to why she was not notified of Judge Burrowes' decision until November 12, 1996.

The remainder of Appellant's opening brief is devoted to substantive arguments.

In her reply brief, Appellant attempts to distinguish certain adverse Board precedent regarding the timeliness of petitions for rehearing. However, most of that brief is also devoted to her substantive arguments.

43 C.F.R. § 4.241(a) provides in pertinent part: "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." Although the decision here was mailed on September 27, 1996, Appellant alleges that she did not receive her copy until November 12, 1996, because of the use of an incorrect address. Assuming Appellant received the order on November 12, 1996, she still had two weeks in which to file a timely petition for rehearing. She did not do so.

Judge Heffernan considered whether he could grant the petition for rehearing if he calculated the sixty-day time period as starting on November 12, 1996. He found that Appellant's petition was not timely even under that calculation.

Appellant has not attempted to show that Judge Heffernan's calculations were incorrect. The Board agrees with Judge Heffernan's calculations and with his conclusion that Appellant failed to file a timely petition for rehearing. Therefore it affirms his denial of Appellant's petition for rehearing.

Judge Heffernan also considered whether the petition could be granted as a petition for reopening. 43 C.F.R. § 4.242(a) provides that a probate proceeding may be reopened within the

three-year period following the issuance of the decision on the petition of “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.” Judge Heffernan found that Appellant attended the original hearing with counsel. Appellant does not deny this finding, but does deny receipt of the actual piece of paper from Judge Burrowes setting the hearing. She admits being on the reservation to verify the public notice when that notice was brought to her attention. Appellant has not attempted to show error in the finding that she had actual notice of the hearing and/or was on the reservation during the time period the public notices were posted. Therefore, the Board also affirms Judge Heffernan’s denial of reopening.

Because both rehearing and reopening were properly denied, the Board does not reach Appellant’s substantive arguments.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Heffernan’s September 15, 1997, denial of rehearing and/or reopening in this estate is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge