



INTERIOR BOARD OF INDIAN APPEALS

Estate of Charles Daniels

1 IBIA 177 (11/19/1971)

Also published at 78 Interior Decisions 329

ESTATE OF CHARLES DANIELS

IBIA 70-6E

Decided November 19, 1971

Indian Probate: Escheat

After a final order of escheat has been entered in Indian probate proceedings, one petitioning for reconsideration thereof has the burden of proof to establish his claim by a preponderance of the evidence.



United States Department of the Interior

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

ESTATE OF CHARLES DANIELS : Petition for Reconsideration
: Denied
Unallotted Wintun (Winton) :
Deceased : IBIA 70-6E
:
Probate No. IBIA 70-6E : November 19, 1971

This matter is before the Board for reconsideration of an order of escheat entered March 20, 1967, by the Associate Solicitor in the exercise of authority vested in the Secretary of the Interior which was delegated to the Solicitor by the Secretary. ^{1/} The delegations of authority from the Secretary to the Solicitor, relating to the disposition of restricted or trust estates of Indians who have died intestate and without heirs, were superseded by the Secretary's delegation of authority to the Board of Indian Appeals. 35 F.R. 12081 (July 28, 1970).

Factual and Procedural Background

The decedent, Charles Daniels, died intestate on December 27, 1941, at the age of 84 years (approximately). At the time of his death he was possessed of trust or restricted interests in five public domain allotments totaling some 560 acres located in the State

^{1/} 210 DM 2.2a(3)(c), 24 F.R. 1348 (February 21, 1959), redelegated to the Associate Solicitor by Solicitor's regulation 23, 31 F.R. 4631.

of California. Several hearings were held during the years between 1946 and 1963, the result of which was the failure of all parties so claiming to establish any relationship to the decedent. On March 20, 1967, an order of escheat was entered by the Associate Solicitor, Indian Affairs, finding, inter alia, that decedent's estate consisted of cash and trust or restricted allotments on the public domain exceeding \$17,000 in value; that none of the tracts of land involved lie within or adjacent to an Indian community; and that the evidence adduced at the hearings failed to establish any heirs of decedent. It was ordered that the assets of decedent's estate escheat to the United States to become part of the public domain. 2/ Thereafter, on January 13, 1969, the petitioners, Grace McKibbon and Dorothy Tardiff, petitioned the hearing examiner to vacate the order of escheat. On January 22, 1969, Hearing Examiner Alexander H. Wilson

2/ Since the lands involved here are on the public domain, and are not within or adjacent to an Indian community, under the controlling statute, 25 U.S.C. § 373b (1970), such lands become part of the public domain upon escheat and are not subject to the proviso of section 373b permitting such lands to be held in trust for such Indians as might be designated by the Secretary of the Interior or by Congress. In view of our subsequent holding herein as to burden of proof we note that trust or restricted estates which do not lie on the public domain, regardless of value will escheat to the tribe owning the land at the time of the allotment, or its successor. 25 U.S.C. § 373a (1970). If such tribe is no longer in existence, the land is held in trust for the benefit of such Indians as the Secretary may designate. Pursuant to the proviso to section 373b, lands on the public domain which are within or adjacent to an Indian community and exceed \$2,000 in value are held in trust for such Indians as Congress may designate, and those valued less than \$2,000 are held in trust for such "needy" Indians as may be designated by the Secretary. Thus, in most instances where there is a failure of heirs, the lands will either escheat to a tribe, or be held in trust for the benefit of designated Indians.

entered an order dismissing their petition for the reason that he no longer had probate jurisdiction of the matter. Petitioners appealed Examiner Wilson's order dismissing their petition by letter to the Regional Solicitor dated March 20, 1969. Following the creation of the Office of Hearings and Appeals in the Department of the Interior, and the Board of Indian Appeals thereunder, the Acting Regional Solicitor, transferred this matter to the Director, Office of Hearings and Appeals on July 6, 1970, pursuant to 111 DM 13.

The Board of Indian Appeals has jurisdiction to determine this matter under 35 F.R. 12081. On February 17, 1971, by Procedural Order and Delegation of Authority, the matter was referred to Examiner Wilson to take and receive testimony and other evidence tendered by the petitioners in support of their allegations.

On July 21, 1971 a special hearing was held at Weaverville, California, at which the testimony of the two petitioners and other witnesses was received. On August 20, 1971, Examiner Wilson issued Findings and Recommendations in which he held that petitioners had failed to satisfactorily establish their alleged relationship to the decedent, and recommended that the escheat order of March 20, 1967, be affirmed. On September 1, 1971, the petitioners filed objections to the Findings and Recommendations of the examiner.

Petitioner Grace McKibbon claims to be related to Charles Daniels 3/ through her father, Jim Nalton, the son of Ann Nalton, 4/ who is alleged to be the sister of both Bob Tewis 5/ and Pottis, the alleged father of Charles Daniels.

Dorothy Tardiff claims to be the "second cousin" of Grace McKibbon based on the allegation that her grandmother, Anne Nalton, was the sister of Jim Nalton (Grace McKibbon's father) and the daughter of Ann Nalton. 6/ Technically speaking, if petitioners' theory is correct, McKibbon is related to the decedent as first cousin once removed in the fifth degree of relationship and Tardiff is related to the decedent as first cousin twice removed in the sixth degree of relationship.

We must initially discuss the presumptions, general law, and rules relating to burden of proof, which should govern this matter.

3/ Sometimes referred to in the record as "Charley" Daniels.

4/ Sometimes spelled "A-n-n-e" in the record. For clarity herein, we will refer to the alleged sister of Bob Tewis and Pottis as "Ann" and to Ann's daughter as "Anne."

5/ The estate of Bob Tewis (who is sometimes referred to in the record as "Buckskin Bob") was the subject of Indian probate proceedings in 1923 and 1924. This file has a strong bearing on this case and is part of the record herein.

6/ Thus, the key element in the primary theory advanced the petitioners herein is that Charles Daniels' father was Pottis, and that Pottis had a brother, Bob Tewis, and a sister, Ann. Ann is the common ancestor through whom both petitioners claim. McKibbon claims that Ann was the mother of her father, Jim Nalton. Tardiff claims that Ann was her great-grandmother, i.e., the mother of Anne Nalton (Jim Nalton's sister) who was the mother of Sally George (Tardiff's mother).

Legal Principles Involved

It is a well-settled general rule that escheats are not favored by the law. 27 Am. Jur. 2d, Escheat, § 11 (1966). There is also a presumption, at least in actions initiated by states under specific statutes authorizing escheat proceedings, that a person dying intestate has left heirs or next of kin who will succeed to his estate upon his death. 27 Am. Jur. 2d, Escheat, § 34 (1966). While the presumption is rebuttable, proof in rebuttal must be of a high degree, 30A C.J.S. Escheat § 16 (1965).

Escheat proceedings in state courts are generally provided for and regulated by statutes which prescribe the manner and procedures therefor. 30A C.J.S. Escheat, § 8 (1965). The common-law procedure for enforcing an escheat has been generally superseded by statutory provisions which provide an exclusive method of procedure. Such statutes usually provide for the bringing of an information by the state, whereupon the court issues and causes to be published an order requiring all persons interested to appear and show cause why title should not vest in the state. 27 Am. Jur. 2d Escheat § 29 (1966). ^{7/} Consequently, it is not unusual that under such detailed statutes the burden of proof should rest on the state initiating the action. 27 Am. Jur. 2d Escheat, § 34 (1966).

^{7/} By contrast, in Indian probate cases neither the controlling statute involved, 25 U.S.C. §373b (1970), nor the applicable regulations, 25 CFR, Part 15, provide procedures for escheat cases. Nor does the Departmental Manual so provide.

We are concerned, however, with the feasibility of applying such rule to Indian probate proceedings where, as here, such proceedings follow the issuance of an order of escheat and the filing of petitions for reconsideration filed by persons claiming to be heirs. To our knowledge, only one case, Estate of Jackson Searle, IA-S-2 (December 9, 1968), has dealt with the subject of escheats in Indian probate proceedings in a substantial way. In his opinion therein, the Regional Solicitor in effect applied the rule applicable in state courts to our proceedings holding that:

* * * Where the case concerns the possibility of escheat, the presumption is even stronger, and the courts hold that the burden of proof shifts to the state to prove the failure of heirs * * *.

In disagreeing with the holding in the Searle case, we are of the opinion that because of vast differences between Indian probate matters and escheat actions brought by states the burden of proof should not be on the government in our proceedings to establish that the decedent died without heirs. To begin with the Department is not a party in Indian probate proceedings. ^{8/} Furthermore, the primary purpose of the hearings conducted by examiners employed by the Department is to ascertain the heirs of the decedents, 25 CFR 15.1, and to afford all interested parties the opportunity to establish their claims as either creditors

^{8/} In our proceedings, the nature of the property over which the Department has jurisdiction is trust or restricted property of which the Secretary is the trustee for the benefit of individual Indians. Thus, the General Allotment Act of February 8, 1887 (24 Stat. 388, as

or heirs. Experience has shown that these proceedings characteristically involve claimants whose ability to establish heirship have been blunted by time and the effects of their disadvantage. Consequently, the purpose and approach of the Department in carrying out the scheme of Congress has been, and is, to help them establish their claims, not to defeat such claims or to assert an adverse claim of title. As an example, we need only point to the numerous hearings held in the instant case over the last 30 years. While the relationship of the government to Indian claimants in these cases is not exactly that of guardian and ward, Department of the Interior, Federal Indian Law (1958), page 557 et seq., it is protective in the sense that the thrust of the proceeding is to ascertain heirs. Escheat orders are not the product of special proceedings. They result only where the Department has determined in ordinary probate proceedings that there are no heirs.

fn. 8 (Cont.)

amended by Act of February 28, 1891, 26 Stat. 794, as amended by Act of June 25, 1910, 36 Stat. 855), 25 U.S.C. § 331 (1970), et seq., provides inter alia, for the allotment to individual Indians of specific tracts of land. Title to these lands is held by the United States in trust for the allottee, or his heirs, during the trust period or any extension thereof. Although the allottee and his heirs were given possessory rights to the land, their interest is not a fee simple. Rather, the land is held in trust by the United States for the allottee's benefit. 25 U.S.C. § 348 (1970). So long as the legal title to the land is held in trust, there are drastic restrictions on the alienability of these allotment interests. For example, it is only by securing the prior approval of the Secretary of the Interior that allottees can sell, mortgage, or give away their restricted allotments, or make a valid will disposing of same. Tooahnippah (Goombi) v. Hickel, 397 U.S. 598 (1970).

Because of the unique relationship existing between the federal government and Indians, the trust or restricted character of the lands normally involved in Indian probate proceedings, the nature of the proceedings, and the non-adversary role of the government therein, the difficult, if not sometimes impossible, burden of proving a negative fact, i.e., the nonexistence of heirs, should not fall upon the government. ^{9/} We take the view that in Indian probate hearings, there being no statute or regulation to the contrary, the "preponderance of the evidence" rule applicable to administrative tribunals as well in judicial proceedings should operate. That is, one claiming to be an heir of the decedent must establish his claim by a simple preponderance of the evidence. 2 Am. Jur. 2d Administrative Law, §§ 392, 393 (1962).

Furthermore, since our proceedings are governed by the provisions of the Administrative Procedure Act, Estate of Charles White, 70 I.D. 102 (1963); Estate of Lucille Mathilda Callous Leg Ireland, 1 IBIA 67; 78 I.D. 66 (1971); Estate of William Cecil Robedeaux, 1 IBIA 106; 78 I.D. 234 (1971), Section 7(c) thereof is applicable here. It provides that "Except as statutes otherwise provide, the

^{9/} In a similar if not analogous situation, where a deceased veteran left no heirs and the assets of his estate consisted of unexpended Veteran's Administration pension payments, it has been held that the federal government had no burden of proving, as a condition precedent to its right thereto, that the decedent left no distributees. In re Regan's Estate, 185 N.Y.S.2d 350, 18 Misc. 2d 463 (1959).

proponent of a rule or order shall have the burden of proof." This language has been construed to mean that the party initiating the proceeding has the general burden of establishing a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. 2 Davis, Administrative Law Treatise, § 14.14 (1958); Department of Justice, Attorney General's Manual on the Administrative Procedure Act, p. 75, footnote 3 (1947).

Accordingly, to the extent of its inconsistency with this decision, Estate of Jackson Searle, supra, will not be followed. Let us now examine the facts of this case in light of the above principles. 10/

Factual and Legal Analysis

The determinative issues herein are primarily factual, and turn largely upon the credibility of the testimony offered by the petitioner, Grace McKibbon.

At the hearing on July 21, 1971, McKibbon testified that she is a full-blood Wintun, born in 1900; that her parents were Sarah and Jim Nalton; that her grandparents on her father's side were George Nalton and Ann Nalton; that Ann Nalton was the sister of both Bob

10/ The record herein consists not only of the transcript of hearing held on July 21, 1971, but also of transcripts of hearings previously held in 1950, 1951, 1952, 1956, 1961, and 1963, and the record of a related probate proceeding, Estate of Bob Tewis, (Red-437), Probate No. 82056-24.

Tewis and Pottis; that Pottis had two sons, Charles Daniels and another son who died without issue prior to Charles Daniels; that Bob Tewis was therefore Charles Daniels' uncle, and her grandmother, Ann, was Charles Daniels' aunt; that her grandmother, Ann, had three children: Jim Nalton (her father), another son, Martin, and a daughter, Anne; that Anne married William George; that four children were born of this marriage one of which was a daughter, Sally George; that Sally George, had three children one of which was Dorothy Tardiff. McKibbon was unable to name the parents of Pottis, Bob Tewis, and Ann Nalton, thus leaving unresolved the question as to whether they were full-blood or half-blood brothers and sister.

McKibbon claims that her father told her that Pottis, Bob Tewis and Ann, were brothers and sisters but that he did not know the names of the parents of Pottis, Bob Tewis or Ann. She also testified that the decedent referred to her as "niece."

The significant portions of Dorothy Tardiff's brief testimony is that her mother's name was Sally George; that her mother married Thomas Burns; that her maternal grandfather and grandmother were Anne Nalton and Bill George; that she first met Charles Daniels when she was 12 or 13; that he referred to her as "cousin" and once told her, "I am your relative, cousin"; and that she has a sister, Ruth Morton, who is still living. 11/

11/ Unlike McKibbon, Tardiff did not testify at the hearings previously held herein. McKibbon, on the other hand, gave testimony in 1951, 1956, 1961, and 1963.

The petitioners presented two witnesses at the July 21, 1971, hearing in support of their allegations, J. B. Thomas and Wilma Olsen. Thomas, an eighty year old non-Indian, testified that he had "heard" from a source he was unable to recall, that Charles Daniels was related to the Thomas Burns family, and that Bob Tewis, Charles Daniels and Jim Nalton were all related. 12/

Thomas also testified, however, that although he was acquainted with McKibbon, he had never heard that she was related to Charles Daniels or Jim Nalton. He emphasized that the only relative Charles Daniels ever mentioned to him was Bob Tewis.

Wilma Olsen, approximately 71 years of age, testified that she is acquainted with both McKibbon and Tardiff; that the first time Charles Daniels visited her home, he came with Jim Nalton and introduced him to her mother and her folks as his cousin. Although she also testified that it was "common knowledge" that Charles Daniels and Jim Nalton were related, she did not specify the degree, or nature (blood or marriage) of the relationship.

Barbara Ferris, an assistant realty officer at the Hoopa area field office, testified that Sally George (Dorothy Tardiff's mother) was present at a hearing held on October 15, 1924, in the Bob Tewis estate matter, and that Sally George did not claim any interest in the Tewis estate. 13/

12/ This is in direct contradiction to Thomas' testimony in 1950 that only Bob Tewis, Ellen Hosendolly and Walter Loomis were related to Charles Daniels. As noted by the hearing examiner, Loomis, at the 1963 hearing, disclaimed any relationship to the decedent.

13/ This is confirmed by our review of the Tewis file. Sally George's testimony at the 1923 hearing therein is significant:

The theory advanced by the two petitioners is based almost entirely on McKibbon's testimony. It does not bear up under scrutiny. To begin with, McKibbon's conclusions that she and Tardiff are related to the decedent through her grandmother, Ann, is not based on any firsthand personal knowledge. Only when pressed by the examiner did she furnish the explanation that her father told her that Pottis, Tewis, and Ann were brothers and sister. There is no corroboration of this vital point from other witnesses, or by photographs, family documents, court records, church records, or other Indian probate files. McKibbon's testimony boils down to little more than a naked assertion on her part that "this was the way it was." Yet, at the 1951 hearing, after McKibbon had testified that her father's mother was the sister of Tewis and decedent's father, this exchange occurred:

fn. 13 (Cont.)

Q. Do you know an Indian named Bob Tewis?

A. No, I did not know him.

Q. Did you ever hear of him?

A. I think I have, but I do not know him.

Q. Was Bob Tewis related to you?

A. Not that I know of.

Q. Are you a daughter of Ann(e) George?

A. Yes.

Q. When did Ann(e) George die?

A. About 10 years ago.

Q. Who was her father?

A. George Nalton. He is an old man, he is over hundred years old. He is feebleminded. He lives near Knob, Calif.

Q. Who was the mother of Ann(e) George?

A. I do not know her. She died years ago." (Emphasis supplied.)

Four other witnesses testified at this hearing. Two testified Tewis had no sisters. Of the two remaining witnesses, Charles Daniels testified that Tewis had 3 sisters, Little Ellen, Big Ellen and Broomhead; Jim Tye testified Tewis had 2 sisters, Little Ellen and Big Ellen.

Q. Is it not true that the old Indians called their cousins their brothers and sisters?

A. Yes.

Q. Is it possible that Charles Daniels father and Buckskin Bob [Tewis] and Jim Nalton's mother were just cousins, instead of brothers and sisters?

A. I don't know. I couldn't tell you that. 14/

It is also remarkable that at the 1951 hearing, McKibbon could not name "Ann" as her father's mother. When specifically asked the question, she replied: "I don't know, but she was Mrs. George Nalton." "Ann" first cropped up in McKibbon's testimony at the 1961 hearing. The source of McKibbon's acquisition of this most crucial information remains a mystery.

Furthermore, the petitioners' claims are not borne out by the conduct of their antecedent relatives. They not only failed to assert any relationship to Bob Tewis in the Tewis probate proceedings, but also, according to Caroline E. Smith, the nurse who attended Charles Daniels for several months in 1933 and again at the time of his death, they never visited the decedent during his illnesses. Mrs. Smith further testified that she asked the decedent if he had any blood kindred and that he replied that he "didn't have any."

14/ At the 1971 hearing, McKibbon was most emphatic that the relationship was "brothers and sisters" and not "cousins." However, in 1950 she testified they were "half" brothers and sister.

There is also evidence in the record that the decedent practiced the convention of addressing nonrelatives as "cousin." Thus, the fact that he so addressed the two petitioners is not of particular import. 15/

In evaluating the evidence and testimony presented by the two appellants, we have considered all the evidence previously introduced in these lengthy probate proceedings, and the numerous and conflicting theories of relationships propounded by other claimants therein. There is substantial evidence in the record from impartial witnesses that the decedent left no relatives. The Bob Tewis file, which the hearing examiner found to be "the best evidence available" in determining the relations of Charles Daniels, is of singular importance. It was determined therein that Tewis died during the month of January 1923, at the approximate age of 100 years, intestate, unmarried at time of death, without issue, father or mother, or brothers or sisters, leaving surviving as his only heir and next of kin his nephew, Charles Daniels, son of a prior deceased brother, "Puik-Dow-Hanny." 16/ The entire Tewis estate passed to Charles Daniels under the laws of California. As noted heretofore, none of the petitioners' ancestors, through whom their relationship to both Tewis and Charles Daniels must be

15/ We have no reason to disagree with the sage comment of the hearing examiner on this point: "Anyone familiar with Indians, particularly the older ones, is well aware of the existing custom of them addressing each other as cousin, sister, brother, etc., when in fact no relationship actually exists."

16/ Presumably the same person as "Puik-dow-con-ne" and Pu-yuk-dow-con-ne."

traced, claimed to be heirs in the Tewis proceedings. Indeed, McKibbon admitted being present at the hearing herself but could not offer a satisfactory explanation why neither she nor her relatives made a claim.

We agree with John H. Anderson, the Examiner of Inheritance in the Bob Tewis matter, that if Bob Tewis was an uncle of Ann George, the mother of Sally George, Ann George must have been a daughter of a brother or sister of Bob Tewis, which, as Anderson stated "is not borne out by the testimony" taken by him. Anderson pointed out that, Indians "usually refer to a cousin as a brother or sister, and that is probably the cause of the mixup in this particular case." 17/

We also agree with Examiner Wilson that the petitioners' testimony that Pottis was the father of Charles Daniels is not supported by the Tewis probate file. Of considerable importance in this connection is the enrollment application executed by Charles Daniels in 1930 in which he identifies his father as "Pu yuk-dow-con-ne," and his father's father as "Pot-us."

In view of the foregoing and the testimony of a significant number of disinterested witnesses that Charles Daniels had no relatives, we find that the petitioners have not satisfactorily substantiated their claim of relationship to the decedent.

17/ These statements are contained in a letter from Anderson to Violet E. Lehmann, Deputy County Clerk, Hyampom, California, dated March 11, 1924.

Finally, we call attention to the fact that the Indian probate regulations contain no provision for further proceedings where the Secretary has determined that an Indian estate shall escheat. Since the inherent power of the Secretary to reopen and review final administrative determinations of the Department will be exercised only where some new factor, such as newly discovered evidence, fraud or mistake of a truly compelling nature is brought to his attention ^{18/}, the question arises whether such a factor is present in this case. We conclude that there is not. The evidence presented by Grace McKibbon in the hearings on July 21, 1971 (which is relied on by both petitioners) is essentially the same as that previously presented by her in the 1951, 1956, 1961, and 1963 hearings which preceded the Order of Escheat. We find that no newly discovered evidence, or evidence of fraud, accident or other cause of a compelling nature has been presented such as would warrant the exercise of Secretarial discretion to reopen this proceeding. Estate of Meshach (Mace) Tipton, IA-41 (January 19, 1951).

Furthermore, with respect to Grace McKibbon, the bar of 25 CFR § 15.18 is clearly applicable. It limits reopenings to an individual 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. . . ." See Estate of Philomene (Jessie P.) Carpenter et al., IA-1444 (April 21, 1966).

^{18/} Estate of Samuel Picknoll (Pickernell), 1 IBIA 168 (1971).

Conclusion and Order

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.5; 35 F.R. 12081, the petition of Grace McKibbon and Dorothy Tardiff is denied and the Order of Escheat dated March 20, 1967, is affirmed. The Bureau of Indian Affairs is directed to take appropriate action forthwith to cause the transfer of the assets of the decedent's estate from its jurisdiction, the trust and restricted interests in the allotments described in said Order of Escheat to become part of the public domain under the administration of the Bureau of Land Management, Department of the Interior. This decision is final for the Department.

//original signed

Michael A. Lasher,
Alternate Board Member
Board of Indian Appeals

I concur:

//original signed

David J. McKee, Chairman,
Board of Indian Appeals

Date: November 19, 1971