



INTERIOR BOARD OF INDIAN APPEALS

Estate of Howard Little Charley

18 IBIA 335 (07/03/1990)



United States Department of the Interior

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

ESTATE OF HOWARD LITTLE CHARLEY

IBIA 90-11

Decided July 3, 1990

Appeal from an order denying petition for rehearing issued by Administrative law Judge Sam E. Taylor in Indian Probate IP OK 228 P 88-1.

Affirmed.

1. Indian Probate: Rehearing: Generally

Rehearings in Indian probate proceedings are intended to allow consideration of alleged errors made by the Administrative Law Judge and to permit the introduction of evidence that could not, with diligent effort, have been discovered prior to the original bearing. They are not a means for presenting evidence and arguments that were known at the time of the original hearing but not introduced.

2. Indian Probate: Wills: Children, Disinheritance of--Indian Probate: Wills: Disapproval of Will

Under Tooahnippah v. Hickel, 397 U.S. 598 (1970), and in the absence of substantive probate regulations, the Department of the Interior lacks the authority to disapprove an Indian will because it does not provide for pretermitted heirs.

APPEARANCES: John Ray Stow, Jr., Esq., Norman, Oklahoma, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Barbara June Little Charley Whittaker seeks review of an August 28, 1989, order denying rehearing issued by Administrative Law Judge Sam E. Taylor in the estate of Howard Little Charley (decendent). For the reasons discussed below, the Board affirms that order.

Background

Decendent, Absentee Shawnee No. 820-U-4546, was born on May 7, 1921, and died testate on October 18, 1987. Appellant, who claims to be a daughter of decendent, was not included in decendent's will.

Judge Taylor held a hearing to probate decendent's trust estate on December 1, 1988, at Shawnee, Oklahoma. Decendent did not attend the hearing. By order dated June 21, 1989, Judge Taylor approved decendent's will.

Appellant filed a petition for rehearing alleging that she had been under the mistaken belief that, since she was listed on the notice of hearing as a party-in-interest, she did not need to take any further action to be awarded a share of decedent's estate. It was not until she received the order approving will, she stated, that she realized she had been omitted from the will. She argued that she was a pretermitted heir entitled to a share of decedent's estate.

Judge Taylor denied the petition on August 28, 1989, on the grounds that appellant received notice of the hearing but willfully failed to attend and that the regulations of the Department of the Interior concerning probate of Indian wills make no provision for pretermitted heirs.

Appellant's notice of appeal from this order was received by the Board on October 26, 1989. Appellant filed a brief on appeal.

Discussion and Conclusions

[1] It is well established that all evidence in a probate case should be presented to the Administrative Law Judge at the original hearing and that a rehearing to present additional evidence is normally appropriate only if it is shown that the evidence could not, with diligent effort, have been presented at the original hearing. E.g., Estate of Benjamin Kent, Sr. (Ben Nawanoway), 13 IBIA 21 (1984); Estate of Alice Mae Sasse, 12 IBIA 281 (1984).

In this case, appellant, who neither attended nor attempted to present evidence at the original hearing, seeks a rehearing in order to submit evidence that she is a pretermitted heir of decedent.

Appellant concedes that she received notice of the hearing. She contends however that she "has little formal education and encounters great difficulty in interpreting documents, especially those of legal import. Consequently, [she] was misled into believing that she would automatically receive her fair portion of her father's estate by the fact that her name was on the Notice of Hearing. [S]he did not grasp that her attendance at the Hearing on decedent's estate was mandatory" (Appellant's brief at 1).

She argues that the notice of hearing sent by Judge Taylor did not comply with the requirements of 43 CFR 4.212(a) because it failed to cite Subpart D of 43 CFR Part 4 as authority for holding the hearing and because it failed to inform persons with an interest in the estate that their rights could be lost by default if they were not present at the hearing.

The notice form used by Judge Taylor is a standard printed form, No. OHA 15, used by Administrative Law Judges in providing notice of Indian probate hearings. The notice of decedent's probate hearing states:

NOTICE IS HEREBY GIVEN That on THURSDAY, DECEMBER 1, 1988
at 10:30 A.M. at MCC BUILDING, ABSENTEE SHAWNEE TRIBAL OFFICES,
SHAWNEE, OKLAHOMA, testimony will be taken and evidence received

for the purpose of considering the claims of creditors, determining the heirs, and probating the will dated November 10, 1976 (Copy attached.) of HOWARD LITTLE CHARLEY, deceased.

If sufficient reason appears, the Hearing Examiner, in his discretion, may continue the hearing another time and place to be announced.

All persons having an interest in the estate of the above-named decedent, and all creditors having claims against said estate are hereby notified to be present at the hearing and furnish such evidence as they desire.

This hearing is to be held pursuant to the act of June 25, 1910, 25 U.S.C. 377 (1970) as amended, and the Probate Regulations of the Department of the Interior, 43 CFR, part 4.

In addition, the notice has a typed-in provision stating: "PARTICULAR NOTICE IS GIVEN TO THE PARTIES HERE NAMED WHO MAY CLAIM AN INTEREST IN THIS PROCEEDING," followed by a list of names and addresses of parties, including appellant. At the bottom, a typed-in notation appears in boldface type, stating: "ANY PERSON WISHING TO CONTEST DECEDENT'S WILL SHOULD BE PREPARED TO DO SO AT THE TIME OF THE HEARING."

A copy of decedent's will was attached to the notice sent to the parties. The will does not show appellant as a beneficiary.

Although the notice does not explicitly state that rights can be lost by default if parties fail to attend the probate hearing, the typed-in provisions explicitly inform parties with an interest in the estate that they should be present at the hearing and that if they wish to contest the will, they should be prepared to do so at the time of the hearing. Appellant received a copy of the will and was therefore aware that she was not included in it. The Board finds that the notice sent by Judge Taylor was adequate to inform appellant that she should have made her objection to the will at the original hearing.

[2] In any event, even if appellant had made and been able to prove her argument that she was a pretermitted heir, *i.e.*, that she was unintentionally omitted from the will, it would have availed her nothing. As this Board has previously held, under Tooahnippah v. Hickel, 397 U.S. 598 (1970), and in the absence of substantive probate regulations, the Department of the Interior lacks authority to disapprove an Indian will because of its failure to provide for a pretermitted heir. *E.g.*, Estate of Winona June Little Hawk Garcia, 14 IBIA 106 (1986); Estate of Ronald Richard Saubel, 9 IBIA 94, 88 I.D. 993 (1981). ^{1/}

^{1/} Although some state statutes make provision for pretermitted heirs, the construction of Indian wills is governed by Federal law, not state law. *See, e.g.*, Cultee v. United States, 713 F.2d. 1455 (9th Cir. 1983), cert. denied, 466 U.S. 950 (1984); Estate of Reuben Mesteth, 16 IBIA 148 (1988).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Taylor's August 28, 1989, order denying rehearing is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge