



INTERIOR BOARD OF INDIAN APPEALS

Estate of Donna Gottschalk

30 IBIA 82 (10/30/1996)

Related Board case:
39 IBIA 162



United States Department of the Interior

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

ESTATE OF DONNA GOTTSCHALK

IBIA 95-137, 95-139

Decided October 30, 1996

Appeals from an order denying rehearing issued by Administrative Law Judge William E. Hammett in Indian Probate IP SA 126N 94.

Vacated and remanded.

1. Indian Probate: Renunciation

43 CFR 4.208 provides that, where a devisee or heir renounces an interest in trust or restricted property, the interest passes as if the person renouncing had predeceased the decedent.

2. Indian Probate: Inventory: Property Erroneously Excluded or Included

Departmental regulations found in 43 CFR Part 4, Subpart D, suffice to allow consideration of alleged legal errors in the Bureau of Indian Affairs, inventory of Indian trust assets during the probate of a deceased Indian's estate.

APPEARANCES: William F. Brattain II, Esq., Anchorage, Alaska, for Roylene Gottschalk Mancuso, George Gottschalk, Sr., Glenda Gottschalk Williams, and Michael Gottschalk; Archie Gottschalk, *pro se*; Jon S. Dawson, Esq., and Paul J. Jones, Esq., Anchorage, Alaska, for the Alaska Commercial Fishing and Agriculture Bank.

OPINION BY ADMINISTRATIVE JUDGE VOGT

These are two appeals from a May 24, 1995, order denying petitions for rehearing issued by Administrative Law Judge William E. Hammett in the estate of Donna Gottschalk (decedent). One appeal, docketed as IBIA 95-137-A, was filed by Roylene Gottschalk Mancuso (Roylene), George Gottschalk, Sr. (George Sr.), Glenda Gottschalk Williams (Glenda), and Michael Gottschalk (Michael). The other appeal, docketed as IBIA 95-139-A, was filed by Archie Gottschalk (Archie).

Judge Hammett's May 24, 1995, order let stand a March 10, 1995, order determining decedent's heirs. For the reasons discussed below, the Board vacates both orders and remands this matter for further proceedings. ^{1/}

^{1/} Upon remand, this case will be handled by Administrative Law Judge James H. Heffernan, who is now responsible for the probate of Indian estates in Alaska.

Background

Decedent, an Eskimo, died intestate on September 4, 1992. She was survived by her husband and six children. Judge Hammett held a hearing to probate her trust or restricted estate on April 14, 1994, in Dillingham, Alaska, and conducted a post-hearing conference on August 25, 1994, in Anchorage, Alaska. During the course of the probate proceedings, decedent's husband, George Sr., and two of her children, Roylene and Glenda (collectively, the disclaimants) executed disclaimers in which they disclaimed any interest in decedent's estate.

On March 10, 1995, Judge Hammett issued an order determining decedent's heirs. He accepted the three disclaimers and held that decedent's estate was to be divided equally among decedent's four other children: George Gottschalk, Jr. (George Jr.); Gilbert Gottschalk (Gilbert); Archie; and Michael. With respect to the disclaimers, Judge Hammett stated:

At the hearing, (George Sr.) stated without contradiction that [decedent] desired that [Michael] succeed to the full interest in the Native trust or restricted property interests possessed by [decedent]. * * * In pursuance of what was represented as [decedent's] scheme of distribution, this forum sent disclaimer forms to each of her immediate family members. [George Sr., Roylene and Glenda] each signed full disclaimers of any interest in the Native trust or restricted estate. Thereafter, [Archie] advised this forum that it was not his understanding that [decedent] intended [Michael] to have all of her Native trust or restricted property and indicated that he did not intend to sign a disclaimer. Based on this information, this forum issued a letter dated February 3, 1995, in which it allowed each of the disclaimants the opportunity to withdraw their disclaimers since this forum was of the opinion that the disclaimers might have been executed under some misapprehension as to the outcome of such acts. None of the disclaimants have elected to withdraw their disclaimers.

(Order Determining Heirs at 2).

In the same order, Judge Hammett rejected two claims against the estate, one filed by the National Bank of Alaska in the amount of \$17,165.66, and the other filed by the Alaska Commercial Fishing and Agriculture Bank (CFAB) in the amount of \$943,433.00.

Roylene, George Sr., Glenda, and Michael filed a petition for rehearing in which they contended, inter alia, that the disclaimants had filed their disclaimers under the mistaken belief that George Jr., Archie, and Gilbert would also execute disclaimers, so that the entire interest in decedent's property would pass to Michael. They further contended that (1) even though Judge Hammett offered the disclaimants an opportunity to withdraw their disclaimers, they did not do so because of George Sr.'s belief that George Jr., Archie, and Gilbert would sign disclaimers and (2) George Sr. had become seriously ill, thus preventing Roylene and Glenda from discussing the matter with him.

Archie submitted two filings objecting to Judge Hammett's order. He filed a petition for rehearing with the Superintendent, Anchorage Agency, Bureau of Indian Affairs (Superintendent; BIA). He filed a different document, termed an "appeal," with Judge Hammett. In both filings, Archie contended that CFAB's claim must be dismissed because it was based upon a state court ruling. In the petition for rehearing he filed with the Superintendent, Archie also contended that the inventory of decedent's estate was incomplete in that it omitted approximately 20 acres.

Judge Hammett issued an order denying rehearing on May 24, 1995. With respect to the petition filed by Roylene, George Sr., Glenda, and Michael, he stated:

The regulation pertaining to renunciation of interests, 43 CFR 4.208, is specific about the effect of a renunciation of interest. It states in relevant part as follows:

A renunciation filed in accordance herewith shall be considered accepted when implemented in an order by an administrative law judge and shall be irrevocable thereafter

This forum is required to follow this regulation and is compelled to deny the petition for rehearing.

(Order Denying Petitions at 3).

As to the filings made by Archie, it appears that Judge Hammett had before him only the "appeal" Archie filed with him and not the petition for rehearing Archie filed with the Superintendent. ^{2/} The Judge construed the "appeal" as an informal petition for rehearing. Stating that he found it difficult to interpret the grounds upon which the informal petition was based, he construed it as relating to the claim filed by CFAB and/or some future action which CFAB might take against the property. He denied the petition for failure to state a basis for rehearing.

Roylene, George Sr., Glenda, and Michael appealed to the Board from the order denying rehearing. Archie filed a separate appeal from the same order. The two appeals were consolidated upon docketing.

Discussion and Conclusions

The issues raised in these two appeals are entirely distinct. The Board first addresses the issues raised in Docket No. IBIA 95-137.

^{2/} Judge Hammett's order refers to only one filing, and his description fits the filing Archie made with him. Nothing in his order denying rehearing indicates that he was aware that Archie had raised an issue concerning the estate inventory.

In their notice of appeal, Roylene, George Sr., Glenda, and Michael make the same contentions they made in their petition for rehearing. The essence of their argument is that the disclaimants should be given an opportunity to withdraw their disclaimers because their intent in executing the disclaimers--that Michael receive the entire estate--had been frustrated. ^{3/} In an answer brief responding to these appellants' arguments, Archie contends that the disclaimants should not be permitted to withdraw their disclaimers.

[1] Entirely apart from the arguments made by the parties here, the Board finds that Judge Hammett's orders must be vacated. ^{4/} As noted above, the Judge held that, as a consequence of the three disclaimers, decedent's estate was to be divided equally among George Jr., Archie, Gilbert, and Michael. However, the Department's regulation concerning renunciation of interests, 43 CFR 4.208, provides that "the property so renounced passes as if the person renouncing the interest has predeceased the decedent." ^{5/} Had any of the disclaimants predeceased decedent, his or her share in decedent's estate would have passed to that disclaimant's heirs. Thus, upon accepting the disclaimers in this case, Judge Hammett should have found that the interests disclaimed by Roylene, George Sr., and Glenda passed to their presumptive heirs. Therefore, even if the Board were to determine here that the disclaimers could not be withdrawn, this matter would have to be remanded for a determination of the presumptive heirs of Roylene, George Sr., and Glenda, and a redetermination of decedent's heirs.

There is no indication in the record that Judge Hammett explained this provision of 43 CFR 4.208 to the disclaimants. Indeed, given the distribution scheme set out in his order determining heirs, it is virtually certain that he did not. 43 CFR 4.208 does not permit an heir to renounce an

^{3/} These appellants filed their opening brief, and apparently a reply brief, with Judge Hammett rather than the Board. The opening brief eventually reached the Board, via the Salt Lake City Office of the Office of Hearings and Appeals. (Judge Hammett's Alaska files were being transferred to the Salt Lake City Office at about this time.) No reply brief ever reached the Board.

Appellants were well aware of the Board's address, having properly filed their notice of appeal with the Board. The Board normally does not consider briefs which have not been timely filed with the Board. Miami Tribe v. Muskogee Area Director, 27 IBIA 153 (1995); Trevino v. Acting Billings Area Director, 28 IBIA 140 (1995). Therefore, even though it now has a copy of appellants' opening brief, the Board does not consider it.

^{4/} The Board has authority to consider an issue not raised by the parties under its authority in 43 CFR 4.318, which provides that the Board "shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate." E.g., Estate of Helen Fisher Parker, 27 IBIA 271, 275 (1995).

^{5/} The Board notes that the terms "disclaimer" and "renunciation" are used interchangeably in this context. Judge Hammett used both terms, as does 43 CFR 4.208. See also Uniform Probate Code § 2-801 comment (1974).

interest in trust or restricted property in favor of a particular person or persons. Estate of Gus Four Eyes, 20 IBIA 22 (1991). Thus, even if all of decedent's heirs but Michael had renounced their interests in decedent's estate, they would not have accomplished the result of consolidating all interests in Michael. Under these circumstances, where it is clear that the disclaimants did not understand the consequences of their disclaimers, the Board finds that they must be allowed to withdraw those disclaimers. ^{6/} Accordingly, upon remand of this matter, Judge Heffernan shall accept any withdrawal of his/her disclaimer filed by Roylene, George Sr., or Glenda.

It appears possible that some sort of compromise settlement might be possible among at least some of the heirs. Therefore, Judge Heffernan shall, in accordance with the provisions of 43 CFR 4.207, allow the heirs an opportunity to negotiate a compromise settlement.

In Docket No. IBIA 95-139, Archie contends that the inventory of decedent's estate was incorrect because it excluded a 20-acre parcel, originally part of decedent's Native allotment, with respect to which CFAB had obtained a judgment of foreclosure in 1985 in Alaska state court. Archie contends that the state court lacked jurisdiction over the foreclosure and that, therefore, the parcel was still decedent's property when she died.

CFAB contends that Archie failed to raise the issue of state court jurisdiction in the hearing or post-hearing conference before Judge Hammett or in either of the documents by which he sought rehearing. Thus, CFAB contends, Archie is precluded from raising the issue on appeal.

Archie contends that he raised the issue both in the informal petition he filed with Judge Hammett and in the formal petition he filed with the Superintendent. He does not contend that he raised the issue at either the hearing or the post-hearing conference conducted by Judge Hammett prior to his initial decision.

The Board normally declines to consider arguments raised for the first time on appeal. Estate of Rufus Ricker, Jr., 29 IBIA 56 (1996). Moreover, an Administrative Law Judge may properly decline to consider an argument made for the first time in a petition for rehearing, when that argument could have been made at the original hearing. Estate of Howard Little Charley, 18 IBIA 335 (1990). Thus, if Archie could have raised this issue at the hearing but failed to do so, Judge Hammett was not required to consider it on rehearing, and the Board is not required to consider it at this time.

^{6/} See, e.g., the preamble to the Federal Register publication of 43 CFR 4.208: "The proposed rule was intended to be lenient, with few mandatory procedural requirements, so that it would be easy to use, while still ensuring that the person renouncing both understood and intended the results." 51 FR 35219 (Oct. 2, 1986).

Archie appears to concede that he did not raise the issue at the hearing or the post-hearing conference, and there is no indication in the transcripts of these proceedings that he did so. However, in his formal petition for rehearing, he offered an explanation for his failure to raise the issue earlier. He stated that he was not aware that the 20-acre parcel had been excluded from the estate inventory until after Judge Hammett issued his order determining heirs. ^{7/} He further stated that, prior to the hearing, he had made several requests to the Bristol Bay Native Association for a copy of the estate file but had been refused. ^{8/}

There is no evidence in the record that the parties were given access to the estate inventory prior to or at the hearing or post-hearing conference. The Board therefore finds that Archie could not have made his challenge to the inventory at either of these proceedings and was, accordingly, not precluded from challenging the inventory in a petition for rehearing.

Archie's informal petition for rehearing alluded obliquely to the inventory issue but cannot fairly be deemed to have raised it. However, his formal petition was clearer. It stated: "The inventory is incomplete. The Bristol Bay Area Native Association improperly excluded a large chunk of land (approximately twenty acres) from my mother's estate based upon records of a state court ruling against my parents."

The Board believes that, had Judge Hammett had Archie's formal petition before him, he would have realized that Archie was raising an issue concerning the estate inventory. ^{9/} It is apparent from his order denying rehearing, however, that he did not realize this and so did not address the issue.

[2] Upon remand of this case, Judge Heffernan shall consider Archie's challenge to the estate inventory. The procedure for handling such a challenge was established and described in Estate of Douglas Leonard Ducheneaux, 13 IBIA 169, 92 I.D. 247 (1985), and was further discussed in Estate of Clayton Daniel Prairie Chief, Sr., 24 IBIA 131 (1993), and Estate of George Levi, 26 IBIA 50 (1994). In brief, Judge Heffernan is to notify certain BIA officials, *i.e.*, the Superintendent, Anchorage Agency; the Juneau Area Director; and the Director, Office of Trust Responsibilities, that a challenge to the estate inventory has been raised and is to allow full participation in the case by these officials. At the end of all proceedings in

^{7/} The order determining heirs indicates that a copy of the inventory was attached.

^{8/} The Bristol Bay Native Association prepared the estate inventory for this estate.

^{9/} Under 43 CFR 4.241, Archie's petition for rehearing was properly filed with the Superintendent. Normally, a BIA Superintendent receiving such a petition would forward it to the Administrative Law Judge. It is possible that, in this case, the Superintendent and Judge Hammett, upon learning that each had received a filing from Archie, believed they had received copies of the same filing and therefore concluded that no transmittal was necessary.

