



INTERIOR BOARD OF INDIAN APPEALS

Estate of James John Scott

40 IBIA 152 (11/22/2004)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF JAMES JOHN SCOTT : Order Affirming in Part, Vacating in
: Part, and Referring to Hearings
: Division for Further Proceedings
:
:
: Docket No. 03-27
:
: November 22, 2004

Appellants Harvey Scott and Alice Marie Scott, pro se, appeal from an order denying rehearing in the estate of James John Scott (Decedent), deceased Warm Springs Indian, Probate No. IP SA 3 N 01 (Enrollment No. 145U003901), issued by Administrative Law Judge William E. Hammett on October 3, 2002. Appellants, an uncle and aunt of Decedent, had sought rehearing from an August 8, 2002, order denying Appellants' claim against the estate for the cost of a headstone for Decedent's grave; and from a July 26, 2002, order determining heirs. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the October 3, 2002, order with respect to the determination of heirs, but vacates the denial of rehearing with respect to Appellants' claim for the cost of the headstone, and refers that issue to the Hearings Division for further proceedings.

Factual Background

James John Scott (Decedent) died intestate on May 31, 2000. Neither of Decedent's parents, nor any of his brothers or sisters, were still living at the time of his death. He was survived by Appellants and by numerous cousins who are the issue of predeceased aunts and uncles.

Initially, the Bureau of Indian Affairs (BIA) reported to Judge Hammett that no claims had been filed against the estate, but later the Superintendent, Warm Springs Agency, corrected that report in a letter received by the Judge on October 30, 2000. In that letter, BIA transmitted a claim dated July 3, 2000, from Alice Scott. The claim was for \$1517.80, and included an itemized listing of expenses related to a traditional give away at Decedent's funeral, and for cleaning Decedent's house following his death. The claim did not include any costs or estimated costs for a headstone for Decedent's grave.

On September 24, 2001, Judge Hammett held a probate hearing, which both Appellants attended. At the hearing, Alice Scott's claim for \$1517.80 was discussed. The transcript of the hearing does not reflect any mention of an additional claim for the cost of a headstone. The transcript, however, is incomplete, because portions of the proceedings, which were recorded on tape, were not audible to the transcriber. In addition, the transcript indicates that at various times during the hearing, the Judge went "off record" to discuss certain matters. At one point, the transcript indicates that the Judge went "off record" to discuss Alice Scott's claim, which was followed by a conversation on the record concerning the claim, not all of which was audible to the transcriber. See Transcript at 30-33.

On July 26, 2002, Judge Hammett issued an order determining heirs. The Judge found that Decedent had died intestate, possessing trust or restricted property. Pursuant to Federal law, the Judge determined Decedent's heirs according to the State of Oregon's statutory rules of intestate succession. Because Decedent had no surviving parents or siblings, the heirs included Appellants, as surviving paternal uncle and aunt, and Decedent's cousins who are the issue of predeceased uncles and aunts. The Judge approved Alice Scott's claim for \$1517.80 for reimbursement of expenditures she had incurred in connection with Decedent's funeral and wake, noting that there had been no objections to the claim. He also found that no one else had filed a claim against the estate.

On August 2, 2002, the Acting Superintendent of the Warm Springs Agency, BIA, sent a letter to Judge Hammett, which the Judge received on August 8, 2002. The letter enclosed a claim form signed by Alice Scott on August 2, 2002, for \$715 for the cost of a headstone, and two invoice statements from The Dalles Marble & Granite company. In the letter, the Acting Superintendent wrote that Alice Scott

stated she submitted this receipt last fall but was not submitted by our probate clerk[.] In discussing this with Mr. James Ration, Realty Specialist Northwest Regional Office, he stated he had submitted every receipt that was found in the probate file and this receipt from The Dalles Marble & Granite was not included in the file. We apologize for this over[sight].

Aug. 2, 2002, Letter from Acting Superintendent to Judge Hammett.

The claim form enclosed with the Superintendent's letter stated that Alice Scott and Harvey Scott had each paid \$357.50 for the cost of the headstone, for a total of \$715.00. One of the enclosed invoice statements was dated December 7, 2000, and shows an estimate of \$715.00 for the cost of the headstone, with a handwritten note stating, "reconfirmed

8-31-2001 S.L.W.” 1/ The other invoice statement is dated October 30, 2001, and indicates receipt of payment in full from Alice Scott and Harvey Scott.

On August 8, 2002, Judge Hammett issued an order denying the claim for the cost of the headstone. The order states that the claim was filed with BIA prior to the September 24, 2001, hearing, but was not submitted to the Judge until August 2, 2002. The Judge’s order notes that both Appellants had attended the September 24 hearing. It then states that Appellants had a responsibility to bring the “overlooked” claim to the Judge’s attention at the hearing, and that Appellants had failed to carry out that duty. The Judge then denied the claim because they had failed their obligation to raise the claim for headstone at the hearing.

Appellants filed a petition for rehearing with Judge Hammett, objecting to the order determining heirs, claiming that “distant relatives” should not share in the inheritance. Appellants also objected to the denial of their claim for the cost of the headstone. 2/ With respect to their claim for the headstone, Appellants contended:

[I]t was mentioned during the Hearing that was held on September 24, 2001 at 9:15 am that we Alice & Harvey would be purchasing a Monument for our nephew and would like to be reimbursed upon closure of the Estate. The Monument was on order and was paid in full on October 5, 2001 and the receipts were given to the branch of Realty Probate. During the Hearing you mentioned that no funds will be disbursed until the final decision is done. By this note we are appealing your denial of our claim since it was mentioned during the hearing and from time to time you were fumbling with the recorder. The witness’ at the time was Randy Scott, Realty Probate Clerk and Annette Polk, Tribal Probate Assistant. On August 14, 2002, we had submitted two notarized claims in reference to the monument that was mentioned during the hearing.

Pet. for Rehearing at 2.

1/ The initials correspond to the signature on the invoice, and appear to be those of an owner or employee of The Dalles Marble & Granite.

2/ The signatures on the petition for rehearing are dated the “5th day of August, 2002,” but the month appears to be erroneous. Judge Hammett’s order denying the claim was issued on Aug. 8, 2002, and Appellant’s petition for rehearing was received by Judge Hammett on Sept. 12, 2002. The petition for rehearing refers to claims forms signed by both Alice Scott and Harvey Scott on Aug. 14, 2002. Based on these dates, it appears that the wrong month was typed on Appellant’s petition for rehearing, and more likely it was signed on Sept. 5, 2002, and not Aug. 5, 2002.

On October 3, 2002, the Judge denied Appellants' petition for rehearing. The Judge rejected Appellants' argument that the heirship determination was erroneous because it was "unfair" for other relatives to inherit from Decedent. The Judge again rejected Appellants' claim for the cost of the monument, stating that the claim "should have been filed with [him] prior to the conclusion of the [September 2001] hearing." Oct. 3, 2002, Order at 1. The order acknowledged that Appellants were asserting that the monument had been mentioned at the hearing, but did not address that contention. The order noted, however, that Appellants "admit that the headstone had not been purchased at the time of the hearing." Id. The order also stated that Appellant "Harvey Scott did not attend the hearing," and found that Alice Scott had not presented any written authorization from the other heirs for the headstone purchase. Characterizing Appellants' purchase of the headstone as a "precipitate action," the order concluded that it "should not be allowed to impact the inheritance of the other heirs." Id.

On appeal to the Board, Appellants challenge both the order determining heirs and the denial of their claim for the cost of the monument. Only one interested party responded to Appellants, taking issue with Appellants' argument that they alone should inherit from Decedent, but not mentioning Appellants' claim for the cost of the headstone.

Discussion

Parties challenging a probate decision bear the burden of proving error in that decision. Estate of Glenn Birdinground, Sr., 39 IBIA 160 (2003); Estate of Clara G. Moonlight, 39 IBIA 119, 122 (2003). Here, Appellants must show that the Judge's decisions were legally erroneous or otherwise cannot be sustained on the record. Cf. Plain Feather v. Acting Billings Area Director, 18 IBIA 26, 29 (1989) (decision must be supported by the record).

Appellants first contend that it is "unfair" for "distant relatives" to inherit from Decedent, and therefore the order determining heirs is in error. Notice of Appeal at 1. Appellants argue that no other relatives of Decedent had provided him with assistance while he was living, and that Appellants were the only family that Decedent really knew or that helped him. Therefore, Appellants contend, only they, as Decedent's closest relatives, should be entitled to inherit from his estate. Appellants further assert, apparently in the alternative, that at least the relatives on Decedent's mother's side should be precluded from inheriting, because Decedent had sold all of the land that he had inherited from his mother, leaving in his estate only property he had inherited from his father.

Appellants have failed to satisfy their burden to show that Judge Hammett's heirship determination was erroneous. The Judge correctly noted, in his order denying the petition for rehearing, that Federal law provides that intestate succession in this case be determined according to the law of the state or states within which the trust or restricted property is located. See 25 U.S.C. § 348; Estate of Paul Grant, 25 IBIA 228, 229 (1994); Estate of Victor

Blackeagle, 16 IBIA 100, 101-02, recon. denied, 17 IBIA 5 (1988). In this case, the Judge applied the rules of intestate succession in accordance with Oregon law. Appellants do not contend that it was legally incorrect to apply Oregon rules of intestate succession pursuant to Federal law to determine heirship; they simply argue that the result is “unfair.” ^{3/} Nor do Appellants contend that any of the individuals determined to be heirs, including Decedent’s maternal relatives, were as a matter of Oregon law incorrectly included as heirs. Therefore, Appellants have failed to satisfy their burden to prove that Judge Hammett erred in determining heirship, and the Board affirms the October 3, 2002, order denying rehearing with respect to the July 26, 2002, order determining heirs.

Appellants also challenge the denial of their claim for the cost of a headstone for Decedent’s grave. Appellants contend that (1) the Judge verbally granted their reimbursement request for the monument at the September 2001 hearing, on the condition that they submit a receipt to BIA, which they subsequently did; (2) the Judge said that BIA Realty would turn in the receipts to him; (3) Appellants were never asked nor informed that a “claim form” would be required to be submitted along with the receipt; (4) a woman at BIA Realty stated that she had faxed the October 30, 2001, receipt and the December 7, 2000, estimate to the Portland Regional Office, BIA, but the documents had been misplaced and overlooked; and (5) Appellants did not follow up on this claim because they assumed that submitting the receipt to BIA was sufficient. Appellants contend that the Judge was turning the tape recorder on and off during the hearing, thereby not recording necessary information for the record.

In support of their argument that the matter was discussed at the hearing and that the Judge verbally granted their request for reimbursement for the headstone, Appellants submitted with their appeal a sworn affidavit signed by Annette Polk, a tribal court probate assistant. Ms. Polk’s affidavit states that she attended the September 2001 hearing, and further states:

^{3/} When a person dies without a will, the government – through statutes – determines the rules for inheritance of a decedent’s property based on certain generalized presumptions about how individuals might be expected to want their property distributed. Cf. Estate of Sam A. Simeon, 15 IBIA 135, 137-38 (1987) (law makes assumptions for intestate succession). Admittedly, the statutory rules for inheritance will not necessarily conform with what a decedent’s wishes would in fact have been in a given case, or even what some might consider the “fairest” way to distribute a particular estate. Because the individual died without making a will that could have carried out his or her actual wishes, the rules of intestate succession are the legislature’s judgment of the “fairest” way to distribute the property of intestate decedents. Appellants suggest that because a tribal court appointed the BIA Superintendent as conservator of Decedent’s property in 1995, BIA should have assisted Decedent in preparing a will. Appellants did not raise this argument before Judge Hammett, and the Board will not consider it here. Estate of Edward Q. Boyer, 38 IBIA 146, 147 n.4 (2002) (Board does not consider arguments raised for the first time on appeal).

Alice had requested to be reimbursed for cost of funeral expense[s] that she had contributed and was granted because Harvey didn't object to her request. ALJ stated after finalizing all liabilities and obtaining an accurate accounting in the estate the reimbursement will be done. Alice had also requested that they be reimbursed for the purchase of the headstone and that was granted with the stipulation that the proof of purchase such a receipt was to be turned into the Realty Dept. who[] will forward a copy to Portland Area Office who[] will relay to ALJ. So both of Alice's request had been verbally granted by the ALJ.

Nov. 20, 2002, Polk Aff. at 1.

Neither the August 8, 2002, order denying the claim nor the October 3, 2002, order denying the petition for rehearing responded to Appellants' contentions that their claim for the cost of the headstone was specifically discussed at the September 2001 hearing, and that a BIA realty probate clerk and a tribal probate assistant were "witnesses" to the proceedings. Neither order specifically addresses Appellants' contention that they were led to believe that their request for reimbursement had been granted, subject to BIA receiving the proper receipt. Neither order suggests that the Judge listened to the tape recording of the probate hearing to refresh his own recollection of the proceedings, or considered taking evidence from those present at the original hearing to elicit their recollection of whether the headstone claim was discussed, and if so, what may have been said.

Normally, an Administrative Law Judge would be able to review the transcript of proceedings in order to review allegations of fact concerning what transpired during a probate hearing. And normally — even if an Administrative Law Judge did not fully address certain factual allegations concerning a proceeding — the Board would be able to rely on the transcript as the complete record of what was said at the hearing, and decide the contested issue on the basis of the record. As noted above, however, the written transcript in this case contains numerous gaps. At times, the tape recording was unintelligible to the transcriber. At other times, as Appellants contend, the transcript shows that the Judge turned off the tape recorder.

The Judge's orders simply do not address Appellants' contention that their headstone claim had been specifically discussed at the hearing. Rather than address that contention directly, the order states that the claim should have been filed with the Judge "prior to the conclusion of the hearing." Oct. 3, 2002, Order at 1. The order notes that Appellants admitted that the headstone had not been purchased prior to the hearing, but it does not address Appellants' contention that no such requirement was imposed on them. In the absence of a complete transcript of those proceedings, the Board is unable to resolve these issues based on the current record. The record is insufficient to resolve the factual questions regarding alleged representations made to Appellants with respect to this claim, and whether or not Appellants complied with any instructions given to them. Under the circumstances, the Board

concludes that the Judge should have convened another hearing or otherwise elicited testimony from those in attendance, in order to either substantiate or refute Appellants' contentions that the headstone claim was discussed at the September 2001 hearing and that the Judge granted the claim, subject only to Appellants' submission of a receipt following payment.

The order denying rehearing also appears to rely, at least in part, on Appellants' failure to obtain written consent from the other heirs for the headstone purchase. But no such requirement was imposed with respect to the expenses in Alice Scott's \$1517.80 approved claim, which included funeral-related expenses. And no explanation was given for imposing a consent requirement for the headstone claim, even though the cost of a headstone could also reasonably be understood as a funeral expense. ^{4/} Furthermore, none of the other heirs objected to the claim that was approved, nor have any objections been raised against this claim.

In addition, the order denying rehearing characterizes Appellants' purchase of the headstone as a "precipitate action," which should not be allowed to impact the inheritance of the other heirs. The record does not support this characterization. Appellants obtained an estimate for the cost of the headstone in December 2000, and had the estimate reconfirmed a short time before the September 2001 hearing. Regardless of what occurred at the hearing, Appellants' action in purchasing the headstone does not appear to have been a precipitate one.

The Board concludes that Appellants have satisfied their burden to demonstrate that the order denying their claim cannot be sustained on the current record. The Board does not hold that denial of their claim was necessarily incorrect, but rather that we are unable to determine, based on the present record, whether the denial was correct or incorrect. See Plain Feather, supra, 18 IBIA at 29. Based on the record before it, the Board concludes that unresolved factual issues exist whether Appellants' claim was specifically discussed and verbally acknowledged by the Judge at the September 2001 hearing, and whether Appellants complied with any instructions provided by the Judge at the hearing. Therefore, the Board must vacate the portion of the order denying rehearing regarding Appellants' claim for the headstone cost, and remand the matter for further proceedings.

Because of the absence of a complete hearing transcript, it is possible that resolution of the factual issues may require consideration of the Judge's own recollection of the 2001 hearing proceedings, placing him in the position of a witness. Therefore, the Board also concludes that instead of being remanded to Judge Hammett, the matter should be referred to the Hearings Division for assignment to a different Administrative Law Judge.

^{4/} See 43 C.F.R. § 4.251(b)(1) (funeral expenses include cemetery markers). Although this case was decided under a previous version of the regulations, the current version simply illustrates that the cost of a headstone is not categorically different from other funeral-related expenses.

To the extent that real property or other assets in Decedent's estate can be distributed without affecting Appellants' ability to be reimbursed for this monetary claim, should it be approved, the Board authorizes partial distribution of Decedent's estate. See Estate of Donna Gottschalk, 39 IBIA 162, 163 (2003).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the October 3, 2002, order denying rehearing with respect to the July 26, 2002, order determining heirs. The Board vacates the denial of rehearing with respect to the August 8, 2002, order denying Appellants' claim for the cost of the headstone. The Board refers the vacated portion of the order to the Hearings Division for assignment to a different Administrative Law Judge and for further proceedings.

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Anita Vogt
Senior Administrative Judge