INTERIOR BOARD OF INDIAN APPEALS

Estate of Julius Benter (Bender)

17 IBIA 86 (03/06/1989)

Related Board cases:
1 IBIA 24
Reconsideration denied, 1 IBIA 59 (01/12/1971)
Dismissed, No. 71-1559 (9th Cir. Feb. 18, 1972)
Dismissed upon stipulation, *Brazie v. Morton*, No. S-2360 (E.D. Cal. Dec. 28, 1972)
15 IBIA 88

United States Department of the Interior

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

ESTATE OF JULIUS BENTER (BENDER)

IBIA 88-36 Decided March 6, 1989

Appeal from an order redetermining heirs after reopening issued by Administrative Law Judge William E. Hammett in IP SA 147N 75 (A)

Vacated; prior order determining heirs reinstated.

1. Indian Probate: Reopening: Generally

   Petitions to reopen Indian probates closed for more than 3 years require compelling proof that the petitioner has acted with due diligence.

2. Indian Probate: Reopening: Generally

   In determining whether an Indian probate closed for more than 3 years should be reopened, the Board considers, inter alia, whether individuals with knowledge of the facts, or who might be expected to oppose the petition for reopening, have died before the filing of the petition.

APPEARANCES: James J. Johnson, Esq., for appellants.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Florence Offield Nelson, Oscar Stanley Nelson, and Louise Offield Montague seek review of a June 20, 1988, order redetermining heirs after reopening issued by Administrative Law Judge William E. Hammett in the estate of Julius Benter (Bender) (decedent). 1/ For the reasons discussed below, the Board vacates that order and reinstates Judge Hammett's corrected order after reopening dated October 16, 1975.

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1/ Louise Offield Montague was previously determined to be an heir of decedent and clearly has standing to pursue this appeal. The interests of Florence Offield Nelson and Oscar Stanley Nelson in decedent's estate are not identified in appellants' filings or elsewhere in the record. The Board reaches no conclusion as to their standing to appeal.

Background

Decedent, a Wintun-Shasta Indian, Redding Allottee No. 551, died on September 16, 1967, at the age of 82 years. An initial determination of his heirs was made by Hearing Examiner Alexander H. Wilson in an order dated July 24, 1969. In the same order, Examiner Wilson disapproved a will executed by decedent. The subsequent history of this case, prior to proceedings leading to this appeal, was discussed in the Board's opinions in Estate of Julius Benter, 1 IBIA 24 (1970), reconsideration denied, 1 IBIA 59 (1971), and Estate of Julius Benter (Bender), 15 IBIA 88 (1987), and will not be repeated here. When the petition for reopening at issue here was filed, the determination of heirs in effect was a corrected order after reopening issued on October 16, 1975, by Judge Hammett. 2/

A petition to reopen decedent's estate was filed with Judge Hammett on December 16, 1986, by Caraway George, for himself and for Vermal G. Ryckeley, Fern A. Stone, and Alpha O. Templeton. 3/ George alleged in the petition that he had no notice of the original probate hearing and was not in the vicinity when public notice of the hearing was posted.

Because of the prior proceedings in this estate, including an appeal to Federal court, Judge Hammett questioned his authority to reopen the estate and therefore referred the petition to the Board for the exercise of its broader authority in probate matters. 43 CFR 4.320. The Board remanded the case to Judge Hammett, holding that no statutory or regulatory provision precluded reopening of the estate but noting that the petitioners, in addition to meeting the requirements of 43 CFR 4.242(h) and showing they had exercised due diligence in pursuing their claim, would also be required to show that their petition was not barred by entry of the Federal court decision. 15 IBIA 88.

Judge Hammett reopened the estate by order dated April 1, 1987, and held a hearing on reopening on May 7, 1987, at Yreka, California. Caraway George testified as attorney in fact for his mother, Alpha O. Templeton, who was alleged to be the niece of decedent. 4/ Templeton was unable to attend the hearing because of illness and physical disability. George testified that Templeton did not reside in the vicinity of the initial probate hearing at the time notice was posted and that, to his knowledge, she had

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2/ The Oct. 16, 1975, order determined that 10 individuals, all of whom were second cousins to decedent, were each entitled to inherit one-tenth of his estate. The 10 were: Winnie E. Nelson, Elizabeth Moore, Lillian S. Rose, Robert Offield, Louise Offield Montague, Loren Offield, Eldon T. Offield, Mabel O. Leslie, Lorna O. Marker, and Maxine O. Sullivan.

3/ During his testimony at the hearing held by Judge Hammett, George identified Alpha Templeton as his mother and Vermal Ryckeley as his sister. The fourth petitioner, Fern A. Stone, is not identified.

4/ This decision should not be construed as a determination concerning Templeton's relationship to decedent. Because of the Board's disposition of this case, that question is not reached.

not received notice of the hearing (Tr. 7-8, and 28-30). He also testified that he had not received notice of the hearing. Id. at 30. The principal witness for the petitioners was Betty Hall, enrollment clerk and historian of the Shasta Nation, a non-Federally recognized Indian tribe. Ms. Hall testified and presented exhibits concerning the relationship of Templeton to decedent. The respondents, appellants here, challenged the validity of some of the documentary evidence submitted on behalf of the petitioners.

On June 20, 1988, Judge Hammett issued an order after reopening. He determined that Templeton was the sole heir of decedent and ordered the portion of decedent's estate remaining in trust or restricted status redistributed to her.

Appellants filed a notice of appeal, which was received by the Board on August 8, 1988. The appeal was docketed on October 31, 1988, following receipt of the probate record. Only appellants filed a brief on appeal. 5/

Discussion and Conclusions

Appellants argue that (1) Judge Hammett's findings and conclusions were based upon inaccurate and incomplete evidence and (2) res judicata, estoppel, and laches preclude reopening in this case. The Board addresses only appellants' second argument.

Reopening of Indian probate estates that have been closed for more than 3 years is governed by 43 CFR 4.242(h), which provides in relevant part:

> If a petition for reopening is filed more than 3 years after the entry of a final decision in a probate, it shall be allowed only upon a showing that a manifest injustice will occur; that a reasonable possibility exists for correction of the error; that the petitioner had no actual notice of the original proceedings; and that petitioner was not on the reservation or otherwise in the vicinity at any time while the public notices were posted.

[1] In addition, the petitioner must show that he or she has diligently pursued the claim. This requirement and its history were discussed in detail in Estate of Woody Albert, 14 IBIA 223, 226-28 (1986). In its most recent decision addressing the due diligence requirement, the Board stated:

> The Board has frequently held that petitions to reopen closed estates require "compelling proof that delays in requesting relief

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5/ The Board also received a filing from Betty Hall. As noted above, Ms. Hall participated in the hearing before Judge Hammett as a witness for the petitioners, appellees here. In her filing with the Board, she does not claim to represent any party to this appeal. Therefore, the Board does not consider whether she is a qualified representative under 43 CFR 1.3.

> have not been occasioned by lack of diligence on the part of petitioning parties." Estate of Annie Bear, 5 IBIA 149, 151 (1976). See also, Estate of Enoch Abraham, 5 IBIA 89, 90 (1976); Estate of George Minkey, 1 IBIA 1, 7 (1970). In interpreting the due diligence requirement, the Board takes into consideration the specific circumstances of the case before it. In cases where the petitioner had knowledge necessary to question the initial decision for many years prior to actually filing the petition, reopening has been denied. Estate of Katie Crossguns, 10 IBIA 141 (1982); Estate of Josephine Bright Fowler, 8 IBIA 201 (1980); Estate of Samuel Picknoll (Pickernell), 1 IBIA 168, 78 I.D. 325 (1971).
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> * * * Because of the substantial interest of Indian heirs and devisees in the finality of Indian probate decisions affecting their property rights it is equitable to require a claimant to act on his rights within a reasonable time after he knows or should know of them.

Estate of George Dragswolf, Jr., 17 IBIA 10, 12 (1988).

[2] In Albert, 14 IBIA at 228, the Board discussed another of the specific circumstances which it takes into consideration in determining whether an estate closed for more than 3 years should be reopened:

> [R]eopening has been denied when individuals with knowledge of the facts have died before the filing of the petition (Estate of Frank Pays, 10 IBIA 61 (1982); [Estate of Belle] Cozad, [A-25428 (May 2, 1949)]. Cf. Estate of Jason Crane, 12 IBIA 165 (1984), in which the Board noted that the petition was filed while the elderly individuals who would be expected to oppose the petition were still living).

In remanding the instant case to Judge Hammett, the Board alerted the parties to the due diligence requirement, citing Albert and stating:

> The Board notes that petitioners may have difficulty showing they pursued their cause of action with due diligence. Petitioners were put on notice in 1967 that the state was inquiring about decedent as an individual who may have died without a will. Lead petitioner Caraway George knew that decedent was of his grandparents' generation. Petitioners have presented no justification for the lapse of almost 20 years before taking any action to inquire about this estate.

15 IBIA at 90 n.l.

Despite this admonition, however, petitioners have failed to explain why they made no inquiry concerning decedent's estate prior to 1986. The petition for rehearing indicates that Caraway George has been aware of decedent's death and aware of his relationship to decedent since 1967. Alpha Templeton's knowledge of these facts, or lack thereof, is not discussed in any of the pleadings or hearing testimony. 6/ With respect to her reasons for not pursuing the claim in a more timely manner, George testified only that she had no actual or constructive knowledge of the initial probate hearing.

It was petitioners' burden to show that Templeton was unaware of the facts that should have put her on inquiry, or to produce other "compelling proof that delays in requesting relief have not been occasioned by [her] lack of diligence." Bear, 5 IBIA at 151. This they have not done.

The Board takes another factor into consideration as well. Winnie Nelson, one of the principal witnesses at the initial hearing before Examiner Wilson, and upon whose testimony he relied, died in 1983. It is clear from the Examiner's decisions that Winnie Nelson was an individual with extensive knowledge concerning the family. 7/ Her role in the earlier proceedings and her status as an heir make it reasonably apparent that she would oppose this petition for reopening if she were still living. As noted above, the Board has denied reopening where individuals with knowledge of the facts or who might be expected to oppose the petition have died before the filing of a petition for reopening.

Because petitioners failed to carry their burden of showing they pursued their claim with due diligence, their petition for reopening decedent's estate should have been denied.

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6/ As the alleged heir of decedent, Templeton (and Caraway George, insofar as he represents her) is the only proper claimant here. It was her responsibility to pursue her claim with due diligence.

The other petitioners do not purport to be heirs and thus have no standing to file a petition for reopening. See Dragswolf, 17 IBIA at 13 n. 3.

7/ In his original order dated July 24, 1969, Examiner Wilson stated at page 4: "The testimony of Winnie Nelson, principal witness for the Offield claimants, * * * was quite clear and concise as to the Bender family and the relationship existing between the Offield claimants and the decedent."

In his Jan. 20, 1970, order denying rehearing, he stated at page 3:

"The attack upon the credibility of Winnie Nelson's testimony is certainly without erit. Mrs. Nelson is mentally alert and sharp for a person of her age. She testified with clear recollection as to events, and knew in detail the relationship between the parties and decedent. Only a person knowledgeable of such matters could possibly testify in such clear and detailed manner, and accordingly, there appears to be no basis for questioning her credibility."

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Hammett's June 20, 1988, order redetermining heirs after reopening is vacated, and his corrected order after reopening dated October 16, 1975, is reinstated.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge