ESTATE OF DAVID MARKSMAN

IBIA 76-10 (Supp. to IBIA 72-7) Decided March 29, 1976

Petition to reopen.

Granted and prior orders modified.

1. Indian Probate: Reopening: Generally

   While requests for reopening estates closed for more than 3 years face rigid requirements under Departmental regulations, exceptional cases arise in which such petitions should be granted.

2. Indian Probate: Reopening: Generally

   Generally, three elements must be satisfied to justify reopening an estate which has been closed a long time. First, it must appear that a manifest injustice will likely prevail if the petition to reopen is denied. Second, it should be demonstrated by compelling proof that the delay in requesting relief was not occasioned by the lack of diligence on the part of the petitioning parties. Third, there should exist a possibility for correction of the error.

APPEARANCES: Charles J. Marksman and Virgil Ann Marksman Thompson, petitioners; Anthony Johnston, Theresa Johnston Drinville and William Murphy, respondents.

OPINION BY BOARD MEMBER HORTON

David Marksman, deceased Bad River Chippewa Allottee 354(4) of Wisconsin, died intestate on June 17, 1951. Following a brief probate hearing conducted September 20, 1951, an Order Determining

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Heirs was entered on March 6, 1952, in which Maggie Marksman, a/k/a Margaret Decoteau or Dakota Marksman, decedent's surviving spouse, was declared to be sole heir to decedent's estate. This finding was based on the testimony of Maggie Marksman, now deceased, that the decedent had not fathered any children during his lifetime.

On October 12, 1971, the Superintendent of the Great Lakes Indian Agency, Ashland, Wisconsin, filed a petition to reopen the David Marksman estate on behalf of Charles J. Marksman, a/k/a Joseph Charles Livingston Marksman, and Virgil Ann Marksman Thompson, alleged grandchildren of David Marksman, hereafter identified as petitioners.

In accordance with former procedure the Board entered a Preliminary Procedural Order on Petition for Reopening, dated January 31, 1972, which conditionally reopened decedent's estate. The Examiner of Inheritance, now Administrative Law Judge, was directed by this order to develop a complete record upon which a Departmental decision could be issued by the Board.

On September 11, 1975, following evidentiary hearings in Ashland, Wisconsin (April 5, 1973), and Waukegan, Illinois (March 26, 1974), Administrative Law Judge Vernon J. Rausch issued a Recommended Order Redetermining Heirs Upon Conditional Reopening. For the reasons set forth herein the Board adopts in toto the recommended findings and conclusions contained in Judge Rausch's proposed order which grants petitioners their requested relief.

It does not appear necessary for this opinion to recite the many facts upon which Judge Rausch rests his proposed finding that the petitioners are, in fact, grandchildren of the decedent. These are sufficiently set forth in his recommended order at pages 3-4. In sum, the record discloses by substantial evidence that the decedent fathered a son, Joseph P. Marksman, during an Indian-custom marriage which preceded decedent's marriage to Maggie Marksman. Joseph P. Marksman in turn fathered the petitioners just prior to WW II and was subsequently killed while fighting in Europe on January 10, 1944, 7 years before the natural death of his father, David Marksman.

The difficult task in passing on this petition is balancing the interests served by leaving undisturbed title to land which vested by inheritance over 19 years before other rightful heirs objected versus the correction of an obvious injustice incurred by omitted heirs. Petitions of this nature must be evaluated in light of their peculiar circumstances.

[1] While requests for the reopening of estates closed for more,than 3 years face rigid requirements under Departmental regulations (see 43 CFR 4.242(a) - (g) concerning requests for

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reopening submitted within 3 years of a final probate decision and 43 CFR 4.242(h) which governs requests filed after a 3-year period), exceptional cases arise in which such petitions should be granted. Estate of George Mortimer Cummings (Deceased Cheyenne River Allottee 3484), 2 IBIA 112, 80 I.D. 789 (1973); Estate of Linda M. Whitetail (Drunkard) Penn (Deceased Cheyenne Unallotted), 2 IBIA 285, 81 I.D. 256 (1974); Estate of Oscar Bubuna Deloria (Deceased Yankton Sioux Allottee No. 579), 5 IBIA 34 (February 26, 1976).

[2] Generally, three elements must be satisfied to justify reopening an estate which has been closed a long time. First, it must appear that a manifest injustice will likely prevail if the petition to reopen is denied. The Board has previously held that omission of an heir is a type of injustice which Department regulations permitting reopening under 43 CFR 4.242(h) were designed to correct. Estate of Opie Samuel Bordeaux, Sr. (Deceased Rosebud Sioux Allottee No. 6301), 5 IBIA 24 (February 10, 1976).

Second, it should be demonstrated by compelling proof that the delay in requesting relief was not occasioned by the lack of diligence on the part of the petitioning parties. Estate of George Mortimer Cummings, supra.

The above question was addressed by Judge Rausch at pages 4-5 of his recommended order in which he concludes the petitioners acted diligently under the circumstances. Among other things, Judge Rausch points out that decedent's wife, Maggie Marksman, was the only person upon whom notice of the original probate hearing was served. Moreover, the record shows that the petitioners' maternal grandmother, Angeline Rice, wrote the Great Lakes Office of the BIA approximately 3 years after decedent's death specifically inquiring into any inheritance rights of petitioners in the estate of their deceased grandfather, David Marksman. Petitioners were still of minority age at this time. By letter dated April 21, 1955, the Area Office tersely replied to Angeline Rice, "You are advised that the sole heir of David Marksman is Maggie Decoteau Marksman * * * ." As Judge Rausch states at page 5 of his recommended order, "It seems so apparent that had personnel of the Indian Office studied the inquiry and their files, it would have been discovered much sooner in time that a possible error had occurred." But for this oversight, the Board is of the opinion that the unjust omission of petitioners in the distribution of decedent's estate would have been corrected in 1955. In a previous case involving a petition to reopen under 43 CFR 4.242(h), the Board was inclined to treat an informal written objection by an omitted heir to a determination of heirship as the equivalent of a timely petition for reopening. Estate of Opie Samuel Bordeaux, Sr., supra. In the interest of justice we adopt like reasoning to the circumstances of this case.

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The third factor which bears on whether a closed estate should be reopened is the status of the land. It is often the case that interests in land become so divided over the years, and property owners so dispersed, that the administrative burden of correcting probate errors outweighs the advantages of correction. Our regulations recognize this dilemma by requiring "possibility for correction" of a manifest injustice (43 CFR 4.242(h)). In this case, however, the Great Lakes Indian Agency has advised that the property of the decedent and his deceased spouse is still intact.

For the reasons discussed above and in Judge Rausch's September 11, 1975, recommended order, the Board sees fit to grant petitioners their requested relief. Consistent with this ruling, the written request of one of the respondents, Anthony Johnston, dated October 12, 1975, which asks for another hearing, shall be denied.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, and in order to correct a manifest injustice, the Petition to Reopen the Estate of David Marksman filed on behalf of Charles J. Marksman and Virgil Ann Marksman Thompson on October 12, 1971, is hereby GRANTED and the Order Determining Heirs dated March 6, 1952, be, and the same is hereby, MODIFIED to designate and include the aforementioned omitted grandchildren of the deceased. That portion of said order which reads:

"Maggie Marksman or Margaret Decoteau Marksman, wife, ALL"

is hereby changed to read:

Maggie Marksman or Margaret Decoteau Marksman, wife, 1/3

*Charles J. Marksman, b. 2-11-39, grandson, 1/3

*Virgil Ann Marksman, b. 6-27-40, granddaughter, 1/3

*(Children of prior deceased son, Joseph P. Marksman, d.o.d. 1-10-44)

IT IS HEREBY FURTHER ORDERED, in rendering effective the above-described modification, that the inventory in the estate of Maggie (Margaret) Decoteau Marksman (Pro. A-168-70), subsequently deceased wife of David Marksman, be, and the same is hereby MODIFIED to delete the 2/3 interest she erroneously acquired from the estate of David Marksman, as follows:

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Allotment No.	
36 (386) Sagakomin	Change “All” (thru) David Marksman to 1/3 (thru) David Marksman
4 (354) David Marksman	Change “All” (direct) to 1/3
9 (491) Wedose	Change “1/2” (thru) David Marksman to 1/6 (thru) David Marksman
119 (772) Oni ka bat no kwe (Delia Diver)	Change “1/4” (thru) David Marksman to 1/12 (thru) David Marksman
1 John Diver or Shaw bon desh kong	Change “1/4” (thru) David Marksman to 1/12 (thru) David Marksman
14 (447) Joe Diver	Change “1/8” (thru) David Marksman to 1/24 (thru) David Marksman

IT IS ALSO FURTHER ORDERED that the request for additional hearing submitted by Anthony Johnston on October 12, 1975, be, and the same is hereby DENIED.

This decision is final for the Department.

Done at Arlington, Virginia.

Wm. Philip Horton
Member

I concur:

Alexander H. Wilson
Administrative Judge

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