ESTATE OF CLEMENT SHOT

IBIA 85-35 Decided December 13, 1985

Appeal from an order denying rehearing issued by Administrative Law Judge Elmer T. Nitzschke in IP RC 10Z 85, IP RC 94Z 84.

Affirmed.

1. Indian Probate: Claim Against Estate: Timely Filing: Generally--Indian Probate: Notice of Hearing: Generally

   Under 43 CFR 4.250(a) and 4.211(c), a creditor of a deceased Indian chargeable with notice of the first probate hearing must present the claim before the conclusion of that hearing, or the claim is barred.

2. Indian Probate: Claim Against Estate: Care and Support

   Under 43 CFR 4.250(d), a claim against the trust estate of a deceased Indian based on care and support must be supported by clear and convincing evidence that the care was given on a promise of compensation and that compensation was expected.

APPEARANCES: Mabel Whiteface, pro se. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On May 17, 1985, the Board of Indian Appeals (Board) received a notice of appeal from Mabel Whiteface (appellant). Appellant sought review of a March 8, 1985, order denying rehearing issued in the estate of Clement Shot (decedent) by Administrative Law Judge Elmer T. Nitzschke. For the reasons discussed below, the Board affirms the denial of rehearing.

Background

Decedent, Oglala Sioux Unallottee OSU-11886 of the Pine Ridge Indian Reservation in South Dakota, was born on April 6, 1926, and died intestate on October 13, 1983. Judge Nitzschke held a hearing to probate decedent's Indian trust estate on June 25, 1984. As a result of that hearing, on September 21, 1984, Judge Nitzschke issued an order determining decedent's heirs. That order found that decedent's heirs were his wife, Elfreda Shot,

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and four children, Clement Shot, Jr., Brenda Shot, Seth Shot, and Berdell Shot. Judge Nitzschke further found that no claims had been filed against the estate.

On November 2, 1984, appellant sought rehearing in order to present a claim against decedent's estate, in the amount of $3,000, for her care of decedent. Appellant stated that she received no actual notice of the probate hearing and was not on the Pine Ridge Reservation when notices were posted.

Judge Nitzschke issued an order on November 16, 1984, advising the parties of the petition and staying distribution of the estate. On February 12, 1985, he held a hearing on the petition. After this hearing, Judge Nitzschke determined that appellant had in fact been on the reservation when the notices of the original hearing were posted. He, therefore, found that her claim, which was not filed before the hearing, was barred. Accordingly, on March 8, 1985, he denied her claim.

The Board received appellant's notice of appeal on May 17, 1985. The notice, which constitutes the only filing in this appeal, states in its entirety:

> Pursuant to 43 CFR 4.320(a) I file this appeal on the grounds that the Administrative Law Judge in the above captioned decision misapplied the provisions of 43 CFR 4.211(c) in ruling that I was within the vicinity of any place of posting during the posting period and prior to the original probate hearing held in this case. During the posting period I did not reside in any of the communities at which post offices notice of the original probate hearing in this matter were posted.
>
> Thank you for your kind consideration of my appeal.

Discussion and Conclusions

[1] Under 43 CFR 4.211(c), "[a]ll parties in interest, known and unknown, including creditors, shall be bound by the decision based on such [probate] hearing if they lived within the vicinity of any place of posting during the posting period, whether they had actual notice of the hearing or not." Section 4.250(a) further provides that:

> All claims against the estate of a deceased Indian held by creditors chargeable with notice of the hearings under § 4.211(c) shall be filed with either the Superintendent or the administrative law judge prior to the conclusion of the first hearing, and if they are not so filed, they shall be forever barred.

The record shows that on or about June 1, 1984, notices of the hearing were posted at the Pine Ridge Indian Agency and at the post offices in Gordon and Rushville, Nebraska; and Pine Ridge, Manderson, Porcupine, and Oglala, South Dakota. From her testimony, it appears that appellant lived in Pine Ridge but, on June 3, 1984, left the reservation for Seattle, Washington, and did not return until after the hearing. The Board agrees

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with Judge Nitzschke that because appellant was in the vicinity of the places of posting during the posting period, she was chargeable with notice of the hearing. Because her claim was not timely filed, it is barred.

[2] Furthermore, even if Judge Nitzschke had reached the merits of appellant's claim, she would not have prevailed. Section 4.250(d) of title 43 CFR states: "Claims for care may not be allowed except upon clear and convincing evidence that the care was given on a promise of compensation and that compensation was expected." Appellant was allowed to present evidence on her claim at the second hearing. The testimony showed that decedent drank to excess, and that he probably owed money to several people. Appellant testified that on two occasions decedent stated that she would be paid for her services. She presented no other evidence of a promise or an expectation of compensation. The evidence simply does not clearly and convincingly establish a promise of compensation.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Nitzschke's March 8, 1985, decision denying appellant's claim is affirmed.

_____
Bernard V. Parrette
Chief Administrative Judge

I concur:

_____
Jerry Muskrat
Administrative Judge

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