



INTERIOR BOARD OF INDIAN APPEALS

Estate of Benedict Edward Defender

36 IBIA 280 (08/22/2001)

Related Board case:  
44 IBIA 8



## United States Department of the Interior

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

ESTATE OF BENEDICT EDWARD : Order Vacating Decisions and Remanding  
DEFENDER : Estate  
:   
: Docket Nos. IBIA 01-72  
: IBIA 01-162  
:   
: August 22, 2001

The Board of Indian Appeals (Board) has received two appeals concerning the estate of Decedent Benedict Edward Defender. IP TC 037 H 00. The first appeal was filed by Bridget Defender, who seeks review of a January 9, 2001, order denying her petition for rehearing. Her appeal, which the Board received on February 20, 2001, was assigned Docket No. IBIA 01-72. The second appeal was filed by the Superintendent, Standing Rock Agency, Bureau of Indian Affairs (Superintendent), who seeks review of a June 29, 2001, order denying his petition for rehearing. The Superintendent's appeal, which was received on August 13, 2001, was assigned Docket No. IBIA 01-162. For the reasons discussed below, the Board vacates both of these orders; remands this estate to Administrative Law Judge William S. Herbert; and instructs the Judge to issue a decision on the merits of the legal questions raised in the petitions for rehearing.

Decedent died on August 27, 1999. A hearing was held to probate his trust or restricted estate on May 30, 2000. Judge Herbert issued an order determining Decedent's heirs and approving his will on September 28, 2000. The devisee under Decedent's will was his ex-wife, Martha Sue Harvey Defender (Sue Defender).

Bridget Defender filed a timely petition for rehearing. She contended that Decedent's will should not have been approved and that Sue Defender should not have taken any of Decedent's real property on the Standing Rock Reservation because she is not Indian. By order of January 9, 2001, Judge Herbert denied this petition for rehearing. As to the first contention, the Judge repeated the conclusion in his September 28, 2000, order that Decedent's will had not been properly revoked. As to the second contention, he stated that "there was substantial evidence adduced during the original proceedings that Sue Defender is Indian, and none to the contrary. Accordingly, she was determined to be Indian, and therefore eligible to receive the decedent's devised trust property." Jan. 9, 2001, Order re Bridget Defender's Petition at 1.

Bridget Defender then appealed to the Board. Her notice of appeal and supplemental documents showed that the Superintendent had also filed a petition for rehearing and that the

Judge had not yet ruled finally on that petition. Accordingly, the Board stayed further proceedings in Bridget Defender's appeal in order to avoid piecemeal consideration of the estate.

In his petition for rehearing, the Superintendent argued that Judge Herbert had erred in determining that Sue Defender was eligible to receive a devise of real property on the Standing Rock Sioux Reservation. He stated that the Enrollment Officer for the Eastern Band of Cherokee Indians of North Carolina, the tribe from which Sue Defender claimed descendency, had informed the Judge that Sue Defender could not be certified as a descendant of the Tribe.

On January 9, 2001, Judge Herbert denied the Superintendent's petition for rehearing, but stayed the effectiveness of the decision for 60 days to allow the Superintendent "to submit substantive evidence, if any there be, that the decedent's devisee, Sue Defender, is not a descendant of Gi-Yo-Sti, an Indian, or of other Indians as alleged in her evidentiary submission who predate the "Official Membership Record of the Eastern Band of Cherokee Indian [sic] (Re-vised and Baker Roll)." Jan. 9, 2001, Order re Superintendent's Petition at 3. 1/

On March 8, 2001, the Superintendent filed a Supplement to the Superintendent's Petition to Reopen. The Superintendent requested "review of the standard by which the decedent's devisee, Sue Defender, was determined to be an Indian." Supplement to Petition to Reopen at 1. The Superintendent contended:

The order did not articulate the basis for the determination that Ms. Defender was recognized as an Indian except for the conclusion that mere descendance from an Indian was sufficient to inherit trust property. The order denying reopening does not state the standard that would support such a conclusion. Indian probate proceedings are subject to the Administrative Procedures Act and require that the fact finder develop a sufficient record to support his findings and conclusions. Estate of Catalina Clifford, 9 IBIA 165 (1982). The record supplied by the devisee *subsequent* to the hearing does not support the findings and conclusions in the January 9, 2001 order that Ms. Defender is an eligible devisee under Section 2(c) of the Standing Rock [Heirship Lands] Act [of 1980, Act of June 17, 1980, Pub. L. No. 96-274, 94 Stat. 537 ("Standing Rock Act")].

The Standing Rock \* \* \* Act \* \* \* is legislation designed to provide a uniform law to govern the descent and distribution of trust or restricted land located on the reservation which straddles the boundary between North and South Dakota. Section 2 of the Act provides:

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1/ The procedure which the Judge used here, i.e., denying the petition for rehearing but staying the effectiveness of the order, is not authorized under any Departmental probate regulation.

Only the Standing Rock Sioux Tribe of North Dakota and South Dakota (hereinafter the “tribe”) or persons who are (a) enrolled members of the tribe, (b) members of a federally recognized tribe, or (c) otherwise recognized as Indians by the Secretary of the Interior \* \* \* shall be entitled to receive by devise or descent any interest in trust or restricted land within the boundaries of the reservation \* \* \*.

Id. at 2-3. The Superintendent argued that Sue Defender did not fall within any of the classifications of individuals eligible to receive land on the reservation under the Standing Rock Act.

By order dated June 4, 2001, the Board requested from Judge Herbert a report on the status of his consideration of the Superintendent’s petition.

On June 29, 2001, Judge Herbert issued a “Final Order Denying Petition of Superintendent, Standing Rock Agency, Bureau of Indian Affairs, for Rehearing.” Judge Herbert found that the Superintendent did not “submit additional factual evidence on the devisee’s descendency, [but instead] submitted his legal argument and authorities as to the meaning and application of the Standing Rock Act.” June 29, 2001, Order at 1.

He continued:

\* \* \* In communicating with devisee’s attorney \* \* \*, a preference was expressed that the [Board] \* \* \* rule on the Superintendent’s position without further evidentiary proceedings [before the Judge].

\* \* \* \* \* \* \* \* \*

Because, in part, it is obvious that this matter will ultimately be appealed to the [Board] by one contesting party or the other, it is my judgment that the *Supplement to the Superintendent’s Petition for Rehearing* should be ruled NON-RESPONSIVE to the stayed *Order Denying Petition of the Superintendent... for Rehearing*; that the 60-day stay of the *Order Denying Petition* of January 9, 2001, should now be VACATED, that the *Superintendent’s Petition for Re-hearing*, as amplified by its Supplement of March 8, 2001, should be DENIED; and that any further appeal should go forward in the posture of the Decree of September 28, 2000.

Id. at 1-2.

On July 6, 2001, the Board declined to accept the June 29, 2001, order as responsive to its request for a status report. It noted:

The June 29, 2001, order is technically a denial of a request for rehearing which is appealable to the Board. Therefore, the Board could await any possible appeal of that order by the Superintendent. However, because this estate is before the Board on Bridget Defender's notice of appeal, because the June 29, 2001, order was provided to the Board in response to its order for a status report on the Superintendent's companion petition for rehearing, and because the Board has the authority under 43 C.F.R. § 4.318 to exercise the inherent authority of the Secretary of the Interior to correct a manifest injustice or error, the Board has determined that it must address the order even though it has not yet received an appeal from the Superintendent.

July 6, 2001, Order at unnumbered 2. The Board noted that Judge Herbert had recently certified 14 cases to it for interlocutory review without himself rendering a decision on the questions of law raised in those cases. Estate of Iris Storvick, 36 IBIA 168 (2001). One of the statutes at issue in Storvick was the Standing Rock Act. The Board declined to accept the interlocutory certification and returned the cases to Judge Herbert for decision. Although noting that the Judge did not certify this case for interlocutory review, the Board found that he instead "explicitly declined to issue a decision on the Superintendent's legal arguments, stating that, in a communication with counsel for one party to this case, 'a preference was expressed' for Board resolution of the question." July 6, 2001, Order at unnumbered 3. The Board continued:

Although it may well be the case that no further evidentiary proceedings are required in this estate, that fact does not relieve Judge Herbert of his responsibility to issue a decision on the legal arguments raised. See 43 C.F.R. § 4.240(a): "The administrative law judge shall decide the issues of fact and law involved in the proceedings \* \* \*." (Emphasis added.) Nor does the preference of a party as to the forum for decision overrule duly promulgated Departmental regulations.

The Board declines to accept Judge Herbert's June 29, 2001, order as a proper response to its June 4, 2001, order for a status report. It suggests that Judge Herbert vacate that order and issue a decision addressing the legal arguments that the Superintendent has raised. Should Judge Herbert decline to vacate his order, the Board will do so immediately upon receipt of a notice of appeal from the Superintendent.

Id.

On August 13, 2001, the Board received a notice of appeal from the Superintendent. Contending that, as of August 8, 2001, the date of the notice of appeal, Judge Herbert had not vacated the June 29, 2001, order, the Superintendent requested that the Board vacate the order so that a decision could be issued addressing the legal arguments raised.

On August 15, 2001, the Board received a response to the notice of appeal from Sue Defender. She contends that it is premature for the Board to vacate the June 29, 2001, order because Judge Herbert has never indicated that he would not vacate the order, the Judge has discretion in determining timeframes and procedures for the cases he handles, and only a little over a month has passed since the Board entered its July 6, 2001, order; it could be argued that the Judge had already issued his decision and 43 C.F.R. § 4.240(a) does not dictate the manner in which issues of law are to be determined; and that she should not be deprived of her right to respond to the Superintendent's supplement to his petition.

The Superintendent's notice of appeal is taken from Judge Herbert's June 29, 2001, denial of rehearing, not from the Board's July 6, 2001, order. The Superintendent had 60 days from the date of Judge Herbert's order in which to file his notice of appeal. The notice of appeal was filed on the 40th day of the appeal period. The Superintendent's notice of appeal cannot in any way be deemed premature. Nor, given the promise in the Board's July 6, 2001, order, is the action taken here premature.

As quoted above, 43 C.F.R. § 4.240(a) requires the Administrative Law Judge to issue a decision on the questions of fact and law presented in probate cases. The only aspect of the June 29, 2001, order which can be construed as a "decision," is the statement that the Superintendent's supplement to his notice of appeal was not responsive to the January 9, 2001, order. To the extent that this is a "decision," it is based on the Judge's prior incorrect allocation of the burden of proof. Judge Herbert placed the burden on the Bureau of Indian Affairs and/or other interested parties to prove that Sue Defender was not entitled to take land on the Standing Rock Reservation. The burden of proof should, however, have been placed on Sue Defender, as the person claiming a right to inherit or to take a devise, to prove that the requirements set forth in the relevant statute were met.

The Board finds that Judge Herbert has not issued a decision on the questions of law raised in the Superintendent's petition for rehearing.

In response to Sue Defender's final contention, the Board has every confidence that Judge Herbert will give her a full opportunity to respond to the Superintendent's supplementation of his petition for rehearing.

The Board finds nothing persuasive in Sue Defender's arguments. Therefore, Judge Herbert's June 29, 2001, Final Order Denying Petition of Superintendent, Standing Rock Agency, Bureau of Indian Affairs, for Rehearing is vacated, and this estate is remanded to him for consideration of the questions of law raised by the Superintendent.

Because Bridget Defender raised the same argument as the Superintendent in regard to Sue Defender's entitlement to take real property on the Standing Rock Reservation, the Board also vacates the January 9, 2001, order denying her petition for rehearing so that Judge Herbert can consider all arguments at the same time.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Herbert's January 9, 2001, and June 29, 2001, orders are vacated. This estate is remanded to the Judge for further consideration.

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

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//original signed  
Anita Vogt  
Administrative Judge