In the United States Claims Court

(FILED APRIL 10, 1985)

JESSIE SHORT, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 102-63
	)	
THE UNITED STATES,	)	
Defendant,	)	
	)	
and	)	
	)	
THE HOOPA VALLEY TRIBE OF INDIANS,	)	
	)	
Defendant-Intervenor.	)	

O R D E R

On April 9, 1984 the Intervenor suggested upon the record the death of 354 plaintiffs. To replace them as the representative of the deceased plaintiffs, the plaintiffs moved to substitute the Superintendent of the Northern California Agency of the Bureau of Indian Affairs. This motion presents two questions: 1) Who are the proper parties to substitute for the deceased plaintiffs? and 2) Which deceased plaintiffs remain parties to this action?

1. The "Proper Parties"

Rule 25(a)(1) of the U.S. Claims Court provides: "If a party dies and the claim is not thereby extinguished, the court may order the substitution of the proper parties." This rule is identical to Rule 25 of the Federal Rules of Civil Procedure. Construing an earlier version of that rule, Justice Douglas said: "It is plain, I think, that Rule 25(a)(1) applies only to the substitution of legal representatives. That is not only clear from its history; it is implicit in the wording of the provision and in the

cases construing it." Mallonee v. Fahey, 200 F.2d 918, 919 (Douglas, Circuit Justice 1952). Even in its present form, "Rule 25(a) clearly contemplates appointment of legal representatives, such as an executor or administrator." Roberson v. Wood, 500 F. Supp. 854, 859 (S.D. Ill. 1980) (citing Mallonee).

The plaintiffs argue that the Superintendent must act as the legal representative of the deceased plaintiffs because of the following regulation:

> Within 90 days of receipt of notice of death of an Indian who died owning trust property, the Superintendent having jurisdiction thereof shall commence the probate of the trust estate by filing with the appropriate administrative law judge all data shown in the records relative to the family of the deceased and his property.

43 C.F.R. § 4.210(b) (1984). The regulation defines "trust property" as "real or personal property title to which is in the United States for the benefit of an Indian." Id. at § 4.201(m).

Some deceased plaintiffs owned the right to pursue this lawsuit to judgment. That right is a chose in action or a right to recover a sum of money by action, which passes to the holder's estate like any other kind of personal property. The plaintiffs owned this chose in action directly; the United States did not hold it for them. Therefore, they died owning personal property, not trust property, and the Superintendent cannot act as their legal representative. The Court must deny the plaintiffs' motion.

The plaintiffs object that to deny this motion is practically to deny the deceased plaintiffs any recovery, because of the cost of opening probate proceedings and appointing separate administrators for each of more than 400 deceased plaintiffs. These worries are groundless.

Each deceased plaintiff died owning a chose in action, which passed to his estate. During probate, the legal representative alone could be substituted as a party. See Roberson, 500 F. Supp. at 859. Therefore, the administrator or executor is the proper party to substitute for the deceased plaintiffs whose estates are still in probate.

But once the estate is settled, the person who inherits the cause of action becomes the real party in interest. See, e.g., Stoner v. Security Trust Co., 190 P. 500, 502 (Cal. Dist. Ct. App. 1920). See generally 26A C.J.S. Descent & Distribution § 85(d) (1956) (listing circumstances in which distributees can sue on an inherited cause of action). The distributees who own the right must pursue the action. See RUSCC 17(a). See also DuRoure v. Alvord, 120 F. Supp. 166, 168 (S.D.N.Y. 1954) (Applicable law vested title to lawsuit in plaintiff's heir, who became real party in interest.).

Therefore, if the state or the Bureau of Indian Affairs has probated the estate of any deceased plaintiff, the Court will substitute either the legatee who has received the chose in action as a specific bequest, the residuary legatee, or the heir, as the case may be.

If the estate was never probated, the Court will substitute the persons who received the deceased plaintiff's personal property according to Indian law and custom, if applicable. See Y-Ta-Tah-Wah v. Robeck, 105 F. 257, 265 (C.C.N.D. Iowa 1900). See generally F. Cohen, Handbook of Federal Indian Law 139-43 (1942) (tribal control of descent and distribution).

2. Deceased Plaintiffs Who Remain Parties

The Intervenor has suggested that some named plaintiffs died before March 27, 1963 (when the case was filed) or before their names were added to the list of plaintiffs by the amended petition filed on March 6, 1967.

Persons who died before the case was filed are not parties. The Court cannot introduce them into the suit by substituting a representative. See, e.g., Hanberry v. United States, 204 Ct. Cl. 811 (1974).

The plaintiffs argue that the Court should not dismiss plaintiffs who died after the suit was filed but before being named, because the suit was filed as a class action; the unnamed plaintiffs were therefore parties from the beginning. The plaintiffs cite Perry v. Beneficial Finance Co., 88 F.R.D. 221 (W.D.N.Y. 1980) (In Rule 23 class action, court will not dismiss claims of deceased class members for failure to substitute representatives.).

But the U.S. Court of Claims never adopted the class action device defined by Rule 23 of the Federal Rules of Civil Procedure. Instead, the court applied different features of the class action to different cases, tailoring the procedure to the problems it faced. See Quinault Allottee Association v. United States, 197 Ct. Cl. 134, 140, 453 F.2d 1272, 1275-76 (1972). For example, in the Short case the court held that the original filing of this lawsuit stopped the statute of limitations from running against the claims of later intervenors. Short v. United States, 209 Ct. Cl. 777 (1976).

But the court especially mistrusted the feature of Rule 23 that "contemplates binding absent members of the class. . . ." Quinault, 197 Ct. Cl. at 140, 453 F.2d at 1275. In a Rule 23 case, the judgment binds unnamed class members unless they "opt out" by requesting to be excluded. In Quinault, however, the court reversed the Rule 23 procedure and required plaintiffs to "opt in." Like the plaintiffs in Short, most of the Quinault plaintiffs lived on or near the reservation and were not sophisticated in the realm of judicial proceedings. Under those circumstances, the court required individual plaintiffs "to appear and to include themselves if they desire the advantages (and are willing to bear the risks and costs) of the suit." Id. at 141, 453 F.2d at 1276.

In this case, the plaintiffs who died before being named were parties to the suit only if a judgment would have bound them. But the Quinault decision shows that the Court of Claims would not have held absent class members to a judgment rendered in Short. Therefore, plaintiffs who died before being named are not parties to this suit, and the Court must dismiss their claims.

IT IS SO ORDERED.

Lawrence S. Margolis

LAWRENCE S. MARGOLIS
Judge, U.S. Claims Court