INTERIOR BOARD OF INDIAN APPEALS

Estate of Calvin Leroy Leighton

36 IBIA 215 (07/23/2001)

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 CALVIN LEROY LEIGHTON	: Order Docketing Appeal and Affirming Decision : : Docket No. IBIA 01-147 : : July 23, 2001

On July 9, 2001, the Board of Indian Appeals received a notice of appeal from Dorothy L. McLean (Appellant), who seeks review of a May 4, 2001, Order Denying Petition for Rehearing issued by Administrative Law Judge Marcel S. Greenia in the estate of Calvin Leroy Leighton (Decedent). At the Board's request, Judge Greenia's office has furnished copies of his May 4, 2001, order; his June 30, 2000, Order Determining [Decedent's] Heirs; and the petition by which Appellant sought rehearing from Judge Greenia. 1/

Appellant's notice of appeal is postmarked July 5, 2001, and is therefore untimely under 43 C.F.R. § 4.320(a). Under that regulation, Appellant was required to mail her notice of appeal to the Board within 60 days from May 4, 2001, i.e., on or before July 3, 2001. Ordinarily, an untimely notice of appeal is dismissed on that basis. In this case, however, Appellant was given confusing appeal information by Judge Greenia. The notice he attached to his May 4, 2001, order stated in one place that a notice of appeal must be filed within 30 days of the date of mailing of his decision and in another place that it must be filed "within the 60-day period."

Judge Greenia has a duty to provide clear and correct appeal information. In light of his failure to do so in this case, the Board will consider this appeal. Cf. Estate of Frank Nelson Buffalomeat, 34 IBIA 120 (1999) (Where an appellant has been given correct appeal instructions but files an untimely appeal, the appeal will be dismissed).

Even though this appeal will not be dismissed as untimely, the Board finds that it is appropriate for summary disposition.

1/ The Judge's office also furnished a copy of the Feb. 1, 2001, memorandum by which the Acting Superintendent, Rosebud Agency, Bureau of Indian Affairs, transmitted Appellant's petition for rehearing to Judge Greenia. The petition shows that it was received at the Agency on Aug. 30, 2000.

Judge Greenia denied Appellant's petition for rehearing upon finding that it was "not substantiated with any specific and concise grounds on which to base her request for rehearing."

In her notice of appeal to the Board, Appellant states:

> At this time I am attaching a copy of a true document signed by [Decedent, Appellant] and notary which was signed and witnessed on or about September 4, 1993. That [Appellant] is a blood relative of [Decedent] and that the attached was filed with the US Department of Interior Probate Office giving [Appellant] a portion of [Decedent's] Estate.

The document attached to Appellant's notice of appeal is untitled. It is dated September 4, 1993, and reads as follows:

> I, Calvin "Kelly" Leighton, do hereby give sole permission and power of attorney of my property, land, cattle, and estate to my niece, [Appellant]. She, [Appellant], will be my sole beneficiary and shall be responsible to take care of my personal business if I am unable to and/or in death.

The document bears the signature "Calvin Leroy Leighton," although the name typed under the signature is the same as that in the text, i.e., "Calvin 'Kelly' Leighton." The document also bears Appellant's signature and that of a notary.

As noted above, Appellant states that this document was submitted during earlier proceedings in this probate. Her petition for rehearing before Judge Greenia also stated that the document had been submitted earlier. 2/ Neither Judge Greenia's June 30, 2000, Order Determining Heirs nor his May 4, 2001, Order Denying Petition for Rehearing mentions the document. Therefore, it is not entirely clear whether the Judge had the document before him when he issued his two orders. 3/

Appellant presumably intends to argue that the September 4, 1993, document is Decedent's will and that Decedent's estate should be distributed in accordance with the document, rather than by intestate succession, as ordered by Judge Greenia. For purposes of this order,

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2/ Appellant evidently did not attach a copy of the document to her petition for rehearing. The Superintendent's Feb. 1, 2001, memorandum stated: "[Appellant] has not provided our agency with any documents to support her Appeal."

3/ The Order Determining Heirs states: "Will. No Last Will and Testament was submitted for probate in this estate, and there is no substantial evidence to conclude that the decedent executed a Will."

the Board assumes that the document was timely presented to Judge Greenia as Decedent's purported will and that Appellant intends to argue here that Judge Greenia erred in not considering it to be Decedent's will.

It is clear that Appellant cannot succeed with such an argument because Judge Greenia could not have approved the document as Decedent's will. In order to be valid, an Indian will must be "attested by two disinterested adult witnesses." 43 C.F.R. § 4.260(a). Only two individuals, other than Decedent, 4/ signed the document--Appellant and a notary. Even if the notary can be considered an attesting witness in this case, 5/ Appellant cannot qualify as an attesting witness because, as the sole beneficiary under the purported will, she was plainly not a disinterested person. In light of this obvious impediment, the Board finds it unnecessary to consider any other questions that might exist with respect to the document.

The materials before the Board make it apparent that there is no way in which Appellant can prevail in this appeal. She is not an actual or presumptive heir of Decedent. Her only claim to Decedent's estate is through the September 4, 1993, document which, as just discussed, is not a valid will. Accordingly, the Board finds that briefing is not necessary and that a decision may be issued at this time. See, e.g., Estate of Frances Alfred Graham, 34 IBIA 276 (2000), and cases cited therein.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal is docketed, and Judge Greenia's May 4, 2001, Order Denying Petition for Rehearing is affirmed.

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

4/ For purposes of this order, the Board assumes that Decedent's purported signature is genuine.

5/ But see Estate of Sallie Fawbush, 34 IBIA 254, 256 and n.9 (2000), and Estate of Orville Lee Kauley, 30 IBIA 116, 120-21 n.4 (1996), on the question of whether, and under what circumstances, a notary may be considered an attesting witness.