



INTERIOR BOARD OF INDIAN APPEALS

Estate of Herbert Bartlett Levering

37 IBIA 89 (12/31/2001)

Related Board case:
36 IBIA 192

Judicial review of this case:
Appeal dismissed, *Cline v. Norton*, CIV 02-500 (D. Neb. Sept. 2, 2003)



United States Department of the Interior

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

ESTATE OF HERBERT BARTLETT : Order Affirming Decision
LEVERING :
: Docket No. IBIA 02-26
:
: December 31, 2001

Appellants Edward L. Cline and Ramona C. White seek review of an October 19, 2001, order on remand issued in the estate of Decedent Herbert Bartlett Levering by Indian Probate Judge Kathleen H. Switzer. IP BI 646A 81. For the reasons discussed below, the Board of Indian Appeals (Board) finds that there is no way in which Appellants can succeed in this appeal and therefore addresses this appeal without further briefing.

Decedent died intestate on March 8, 1981. On March 31, 1982, Administrative Law Judge Keith L. Burrowes held a hearing to probate Decedent's trust or restricted estate. In a September 17, 1985, order, Judge Burrowes found that Decedent was survived by two sons, Levi Herbert Levering and Randolph C. Levering, aka Rudolph C. Levering. Appellants, who are a niece and nephew of Decedent, and therefore were not considered to be parties in interest, were not specifically notified of the issuance of Judge Burrowes' order.

Sometime in 2000, Appellants sought reopening of the estate in order to challenge the finding that Levi and Randolph were Decedent's sons. On April 20, 2001, Judge Switzer declined to reopen the estate after finding that Appellants had not shown that a manifest injustice would occur if the estate were not reopened. Appellants appealed to the Board. On June 22, 2001, the Board vacated Judge Switzer's order and remanded the matter to her for an initial determination of whether Appellants were proper parties to seek reopening. 36 IBIA 192.

The October 19, 2001, decision was issued in response to the Board's remand. Judge Switzer found that Appellants lacked standing to seek reopening because they were not Decedent's presumptive or actual heirs and were therefore not parties in interest.

In their present notice of appeal, which repeats their arguments before Judge Switzer, Appellants contend: (1) Judge Switzer did not fully and carefully consider their allegations; (2) Levi is deceased and left no heirs, so only Randolph would receive anything from Decedent's estate; (3) the oral testimony they wish to present on the issue of paternity should be persuasive; (4) Randolph may not even be Indian, let alone Decedent's son, and should not be permitted to inherit Indian land; and (5) DNA tests should be used to establish paternity.

The Board finds no evidence that Judge Switzer did not consider the allegations which Appellants raised. Instead, she clearly found those allegations less persuasive than the documentary evidence which she found in the probate record and identified as Levi and Randolph's birth certificates and Bureau of Indian Affairs (BIA) records. Appellants have not challenged the documentary evidence on which Judges Burrowes and Switzer relied.

Appellants do not contend that Levi died before Decedent. The fact that Levi is now deceased does not alter his inheritance rights, which vested as of the date of Decedent's death. Any property that Levi inherited from Decedent would be part of Levi's estate and would pass in accordance with the probate of Levi's estate.

Oral evidence can be presented and considered in order to determine family relationships. However, documentary evidence which is regularly maintained in the course of business, such as birth certificates and BIA records, is generally given greater weight than oral evidence.

Other than Appellants' assertions concerning paternity, there is nothing in the record to contradict the finding that Levi and Randolph are Decedent's sons or that Randolph is Indian.

The Board has no authority to order DNA tests to establish paternity. See, e.g., WELSA Heirship Determination of Herman James Laroque, 25 IBIA 44 (1993).

Furthermore, in regard to an issue it was not necessary for Judge Switzer to reach, Appellants have not even attempted to show that they exercised due diligence in seeking reopening. Although they were not personally served with copies of Judge Burrowes' original decision determining Decedent's heirs, approximately 15 years passed between the issuance of that decision and Appellants' filing of a petition for reopening. Appellants are required to explain why they allowed so much time to pass before seeking reopening. See, e.g., Estates of Newton McNeer and Nancy McNeer, 33 IBIA 318 (1999); Estate of Woody Albert, 14 IBIA 223 (1986).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Switzer's October 19, 2001, order is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge