



INTERIOR BOARD OF INDIAN APPEALS

Estate of Eunice Martha Creek

44 IBIA 214 (03/28/2007)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF EUNICE MARTHA CREEK : Order Affirming Denial of
: Reopening
:
: Docket No. IBIA 07-79
:
: March 28, 2007

Appellant Clayton Creek, pro se, seeks review of an Order Denying Reopening dated February 15, 2007, by Administrative Law Judge Marcel S. Greenia in the estate of Eunice Martha Creek (Decedent), deceased Cheyenne River Sioux Indian, Probate No. IP RC 135 Z 88. Judge Greenia found that Appellant had notice of the original probate proceedings and therefore was not entitled to file a petition for reopening under 43 C.F.R. § 4.242. ^{1/} Judge Greenia also determined that Appellant had failed to demonstrate “any error and/or manifest injustice and/or that a reasonable possibility exists for the correction of such alleged error.” Order Denying Reopening at 1. The Order Denying Reopening let stand a September 20, 1988 Order Determining Heirs and Decree of Distribution (Order Determining Heirs) entered by Administrative Law Judge Elmer T. Nitzschke, which divided Decedent’s estate equally among Decedent’s children, including Appellant. The Board docketed this appeal, but summarily affirms the Order Denying Reopening because Appellant has failed to demonstrate that he had standing to petition for reopening.

^{1/} The applicable probate regulations provide that a petition for reopening a probate estate filed more than 3 years after a final decision

will be allowed only upon a showing that: (1) A manifest injustice will occur; (2) A reasonable possibility exists for correction of the error; (3) The petitioner had no actual notice of the original proceedings; and (4) The petitioner was not on the reservation or otherwise in the vicinity at any time while the public notices were posted.

43 C.F.R. § 4.242(i) (2005). Judge Greenia relied on an earlier codification, 43 C.F.R. § 4.242(h) (2003), but the requirements are substantively identical.

Appellant's notice of appeal to the Board did not contend that he had not received notice of the original probate proceedings. Nor did his petition for reopening to Judge Greenia allege any error in the Order Determining Heirs or injury to him as a result of that order. On March 9, 2007, the Board ordered Appellant to (1) show cause why Judge Greenia's order should not be summarily affirmed as correct in finding that Appellant had notice of the original proceedings and was therefore not entitled to file a petition for reopening and (2) identify the injury to him resulting from the Order Determining Heirs for which he sought reopening. 2/

The Board received a response from Appellant on March 21, 2007, styled "Brief in Opposition for Mandamus at the Petition Stage" (Brief). Appellant asserted that he had "been away from the reservation since 1988, up until now," that "[his] mail from Probate was never forwarded to him," and that he "had no knowledge of any decisions or decrees." Brief at 1-2. Appellant did not identify any injury to him resulting from the Order Determining Heirs. Instead, relying on Silvestri v. General Motors Corp., 210 F.3d 240 (4th Cir. 2000) and Woodford v. Community Action Agency of Green County, 239 F.3d 517 (2nd Cir. 2001), he argued that he was not required to "prove a specific defect," or to "prove case at pleading stage." Id. at 3. He also asserted that "[t]he loss of First Amendment freedoms, for even minimal periods of time, constitutes 'irreparable injury,' for purpose of entitlement of injunctive relief." Id. (citing Gentala v. City of Tucson, 213 F.3d 1055 (9th Cir. 2000)).

We need not decide whether Judge Greenia was correct in finding that Appellant had notice of the original probate proceedings because even assuming, as Appellant now contends, that he did not receive such notice, we conclude that Appellant has failed to allege any injury resulting from the Order Denying Reopening, and therefore he has not shown that he had standing to petition for reopening. Therefore, we affirm the Order Denying Reopening on the grounds that Appellant failed to allege any error or injury.

A party seeking reopening must allege some error that has resulted in injury to him or her. This requirement is implicit in the regulations governing the reopening of probates by, for example, requiring a petition for reopening to state the grounds for reopening, by

2/ Appellant's notice of appeal did not include a copy of the decision from which he seeks to appeal. Upon requesting a copy of the Order Denying Reopening and the Order Determining Heirs from Judge Greenia's office, the Board also received several additional documents related to Decedent's probate. The Board provided copies of these documents to Appellant for his use in responding to the show cause order. The Board declined to order the full probate record, pending resolution of the show cause order.

setting “manifest error” or “manifest injustice” standards for reopening, and by only allowing appeals by “aggrieved parties” from decisions granting or denying reopening. See generally 43 C.F.R. § 4.242(b), (e), (h), (i). In addition, although the Board is not bound by the case or controversy requirement of Article III of the U.S. Constitution, as a matter of prudence, the Board generally limits its jurisdiction to cases in which the appellant can show standing. Arizona State Land Dep’t v. Western Regional Director, 43 IBIA 158, 163 (2006). Thus, a showing of injury is required to establish standing in probate proceedings. See Estate of Harry J. Crebassa, 44 IBIA 84, 85 n.3 (2007). The cases relied on by Appellant do not address the requirements for standing and are inapposite. 3/

Appellant does not allege any injury to him resulting from the Order Determining Heirs. That order determined that Appellant was an heir of Decedent and entitled to share equally in Decedent’s estate with his brothers and sisters. Because Appellant has failed to identify any injury to him resulting from the Order Determining Heirs, he has not shown that he had standing to petition for reopen the estate and Judge Greenia’s Order Denying Reopening was proper.

Appellant also asserts that the Board erred in not inquiring whether Appellant was “financially unable to retain counsel and is under the circumstances of poverty,” and that the Board’s March 9, 2007 order “threaten[ing] to dismiss or in the alternative summarily affirm Judge Greenia’s order * * * violated Appellant’s right to Due process of law and his right to a jury trial.” Brief at 5. We reject these arguments. The right to have appointed counsel exists only where liberty interests are at stake — i.e., where there is risk of imprisonment. Estate of Millie White Romero, 41 IBIA 262, 268 (2005). Because Appellant has no liberty interest at stake in this probate proceeding, there is no requirement that counsel be appointed. See id. at 269; Estate of Blanche Russell (Hosay), 18 IBIA 40, 45-46 (1989). In addition, the probate regulations do not afford interested parties a right to a jury trial, nor has Appellant cited any authority for why such a right would attach to these proceedings. Cf. Estate of Evan Gillette, Sr., 22 IBIA 133, 140 (1992). Finally, with respect to Appellant’s due process argument, Appellant was afforded an opportunity to respond to the Board’s March 9, 2007 order to show cause. Appellant filed a response, and the Board has fully considered his arguments. Appellant has failed to show that the Board has denied him due process.

3/ Silvestri addressed what a plaintiff must prove in a products liability case under New York State law, Woodford addressed the pleading requirements under Title VII and the Age Discrimination in Employment Act, and Gentala addressed the requirements for obtaining an injunction in a First Amendment case.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board docketed this appeal, but summarily affirms the Order Denying Reopening because Appellant has failed that he had standing to petition for reopening the Order Determining Heirs.

I concur:

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Steven K. Linscheid
Chief Administrative Judge

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Debora G. Luther
Administrative Judge