



INTERIOR BOARD OF INDIAN APPEALS

Estate of Florence Ethel Boury Lane

46 IBIA 188 (01/18/2008)



because it was submitted by BIA, we would still affirm because although the petition expressed disagreement with the effect of the probate order — divestiture of trust status of Decedent's property — it failed to allege any errors of law or fact, and therefore failed to provide grounds for reopening the estate.

### **Background**

Decedent died August 1, 1979, in Milwaukee, Wisconsin. At the time of her death, she owned interests in trust or restricted property located on the Lac Courte Oreilles Reservation in the State of Wisconsin. Decedent was survived by her non-Indian husband, Edward Lane (Lane), and by her son, Appellant, who apparently is a member of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin (Tribe).

Lane died in 1988. His estate was probated by the Richmond County, Georgia, Probate Court in 1990. The state probate court approved Lane's will, under which his property was devised to Appellant. The court also named Appellant the administrator of Lane's estate.

BIA forwarded Decedent's probate file to the Office of Hearings and Appeals (OHA) in 2003.

On March 29, 2004, the ALJ mailed to Appellant a Deposition Upon Written Interrogatories (Deposition). In his cover letter, the ALJ advised Appellant that Decedent was the owner of trust real property located on the Lac Courte Oreilles Reservation, and asked Appellant to complete the Deposition. Appellant completed most of the Deposition, in which he answered questions about Decedent's family history. He did not answer a question asking whether Decedent had left a will. *See* Deposition, Apr. 7, 2004, at 2. Appellant submitted the Deposition to the ALJ.

The ALJ held a hearing to probate Decedent's estate on May 20, 2004. Appellant was mailed notice of the hearing at the address he listed on the Deposition, but did not attend.

On April 21, 2005, the ALJ issued the Order Determining Heirs. The ALJ first found that Decedent had died intestate, because no will had been submitted and there was no evidence that Decedent had executed a will. The ALJ then determined that Decedent's sole heir under the laws of intestate succession of the State of Wisconsin (where the trust property was located) was Lane. The ALJ determined that, because Lane was non-Indian, Decedent's trust estate would pass to Lane in unrestricted or non-trust status, and would become subject to the jurisdiction of the state where the land is located. The Order

Determining Heirs stated that the decision was final for the Department of the Interior unless a timely petition for rehearing was filed, and provided proper instructions for filing a petition for rehearing. The Notice attached to the Order Determining Heirs shows that it was mailed to Appellant at the address he identified as his on the Deposition.

On June 28, 2005, Appellant sent a letter to the Great Lakes Agency Superintendent (Agency; Superintendent). Appellant stated that neither Decedent nor his father had known that Decedent owned trust property and that, had Decedent known of her trust property, she should or would have “willed the trust directly to me.” Letter from Appellant to Superintendent, June 28, 2005. Instead, Appellant stated that Decedent had willed her property to Lane. Appellant acknowledged that he had missed the deadline for filing a petition for rehearing. He also stated that he had contacted several people about this matter (possibly within BIA or OHA), and asserted that he had been advised by one individual to request that Decedent’s interest be put back in trust.

The Superintendent forwarded Appellant’s letter to the ALJ. In a memorandum attached to Appellant’s letter, the Superintendent requested that Decedent’s estate be reopened because extenuating circumstances resulted in a “grave injustice concerning [Decedent’s] trust property.” Memorandum from Superintendent to ALJ, July 9, 2005. The Superintendent’s concern appeared to be that the property would pass out of trust because Lane was non-Indian, even though Appellant — the eventual heir — was Indian. The Superintendent attached an affidavit, completed by Agency Realty Specialist Judith Abelson. Abelson repeated Appellant’s assertion that Decedent had not known about the trust property, and argued that, had BIA known of Decedent’s death sooner and had Decedent’s family known about Decedent’s trust interests, there would have been sufficient time for Lane to execute a disclaimer.<sup>1</sup>

On August 29, 2005, the ALJ issued the Order Denying Petition for Reopening. The ALJ first noted that Appellant’s letter was received after the 60-day period had expired for filing a petition for rehearing, and therefore must be treated as a request for reopening. The ALJ treated Appellant’s letter and the documents filed by the Superintendent as a petition for reopening filed by Appellant, not the Superintendent. The ALJ determined that Appellant was not entitled to seek reopening under 43 C.F.R. § 4.242(a), which only permits an individual to seek reopening if he had no actual or constructive notice of the

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<sup>1</sup> Section 4.208(a) of 25 C.F.R. provides that any probable heir may renounce intestate succession, by filing a signed and acknowledged declaration of renunciation with the ALJ before entry of the final order. The renounced property passes as if the person renouncing the interest had predeceased the decedent. 25 C.F.R. § 4.208(b).

original proceedings.<sup>2</sup> The ALJ found that Appellant had notice of, and even participated in, the original proceedings, as shown by his completion of the Deposition.

The ALJ also denied the petition because Appellant failed to point to any errors of law or fact in the Order Determining Heirs. Finally, the ALJ denied reopening on the grounds that he lacked authority to grant Appellant the relief he apparently sought — to have the property pass directly to him — because that would require a disclaimer by Lane, who was no longer living. The ALJ concluded that only a probable heir or will beneficiary may renounce an interest under the regulations, and that Lane would personally have been required to complete the disclaimer.

Appellant appealed to the Board, and submitted a statement of reasons with his notice of appeal. No briefs were filed.

### Discussion

Appellant bears the burden of establishing that the Order Denying Petition for Reopening was erroneous. *Estate of Martha Marie Vielle Gallineaux*, 44 IBIA 230, 234 (2007). We conclude that Appellant has not met his burden and therefore we affirm.

On appeal to the Board, Appellant offers several reasons to explain his delay in challenging the April 21, 2005, Order Determining Heirs, and for failing to raise any objections during the original proceedings: (1) The Order Determining Heirs stated that Decedent's interests would pass in non-trust status to Lane, "*not that [Appellant] would forfeit all interest in the Indian property,*" Notice of Appeal at 1 (emphasis in original); (2) Appellant was waiting to be contacted by BIA, because that was what happened when he inherited trust interests from his aunt — he had received a form from BIA concerning the sale of his inherited interest; (3) his father's estate was probated in 1990, and he was named the heir, therefore he did not understand what action he needed to take to protect his interests with respect to the probate of his mother's trust assets; and (4) he received a "Notice" from BIA that said "Nothing in this notice . . . will eliminate or adversely affect any rights that the Indian trust land owner has."

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<sup>2</sup> Subsection 4.242(e) allows a BIA official to file a petition for reopening within three years from the date of the final probate decision, based on alleged manifest error, without imposing the lack-of-notice requirement that is imposed on individual interested parties.

We reject Appellant’s arguments that the ALJ should have excused Appellant’s failure to comply with the 60-day deadline and treated his letter as a petition for rehearing,<sup>3</sup> or that the ALJ erred in denying reopening for lack of standing.

The 60-day deadline for filing a petition for rehearing was not subject to waiver by the ALJ. *Estate of Foster Gregorio Marruffo*, 45 IBIA 149, 151 (2007). An untimely petition for rehearing “must” be denied. *Id.* (citing 43 C.F.R. § 4.241(c); *Estate of Joe Benally*, 41 IBIA 270, 272 (2005)). Because Appellant’s letter was submitted more than 60 days after the Order Determining Heirs was mailed, the ALJ could not treat it as a timely petition for rehearing, and instead properly treated Appellant’s letter as a petition for reopening.

Turning to the ALJ’s order denying reopening, we note as an initial matter that the Superintendent did not appeal from the order, and also that Appellant does not challenge the ALJ’s decision to treat the Superintendent’s memorandum and transmittal of Appellant’s letter as constituting a petition for reopening filed by Appellant, rather than by the Superintendent. However, even if — as appears to be the case — the Superintendent intended independently to request reopening, we would nevertheless affirm the order denying reopening.

First, with respect to Appellant’s own standing, Appellant appears to suggest that the regulatory requirement that an individual seeking reopening of an estate not have had actual or constructive notice of the original proceedings, should not apply in his case because of his confusion about whether he needed to respond or object to the Order Determining Heirs. We disagree. The Board has no authority to ignore a duly promulgated Departmental regulation or to declare such a regulation invalid. *Louriero v. Acting Pacific Regional Director*, 37 IBIA 158, 159 (2002).<sup>4</sup> The only persons with standing to seek reopening under 43 C.F.R. § 4.242(a) are those who had no actual or constructive notice of the original proceedings. *See Estate of Irene C. Poolam*, 40 IBIA 99 (2004). Appellant does not challenge the ALJ’s determination that he received actual notice of the hearing held in this matter and participated in the proceedings by completing a Deposition. To the extent that Appellant suggests that this notice was not sufficient because he did not understand the Order Determining Heirs or did not understand what was required of him

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<sup>3</sup> The regulations do not impose the same lack-of-notice requirement on persons who petition for rehearing, as they do for petitions for reopening.

<sup>4</sup> Moreover, the Order Determining Heirs clearly stated that Decedent’s interests would pass out of trust, and advised parties that the decision would become final for the Department if a petition for rehearing were not filed.

to challenge the Order Determining Heirs, we reject that argument.<sup>5</sup> Appellant's receipt of the Notice of Hearing and the April 21, 2005, Order Determining Heirs, and his participation in the proceedings through submission of the Deposition establishes that he had actual notice of the proceedings for the purposes of 43 C.F.R. § 4.242(a). *Cf. Estate of Little Snake (John Smith)*, 24 IBIA 121, 124 (1993) (“[a] person who attended a probate hearing is clearly one who had actual notice of the proceedings”). Appellant therefore lacked standing to petition for reopening. Thus, we affirm the ALJ's denial of reopening because Appellant lacked standing to petition for reopening.

Even if we were to treat the petition for reopening as being filed by the Superintendent on BIA's behalf, and not by Appellant, we would find that the Superintendent had not shown that a manifest error had occurred that required reopening the estate. Under 43 C.F.R. § 4.242(e), a Superintendent has standing to seek to reopen an estate within three years from the date of the final decision to “prevent manifest error.” “Manifest error” requires that the error be obvious. *Estate of Reginald Dennis Birthmark Owens*, 45 IBIA 74, 79 (2007). The petition for reopening did not allege any error of fact or law in the Order Determining Heirs, and Appellant does not argue on appeal that the ALJ erred in denying reopening on this ground. Instead, Appellant apparently is concerned with having the property pass out of trust.<sup>6</sup> The ALJ determined that Decedent's sole heir under the laws of intestate succession of the State of Wisconsin was Lane. Because Lane is non-Indian, the United States has no authority to hold land in trust for him, and the interest passes out of trust by operation of law. *Johnson v. Rocky Mountain Regional Director*, 38 IBIA 64, 66 n.5 (2002). Simple disagreement with the legally correct outcome of a probate proceeding, on the grounds that the outcome is undesirable or might have been

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<sup>5</sup> Appellant refers in his notice of appeal to a Notice from BIA advising him that “Nothing in this notice . . . will eliminate or adversely affect any rights that the Indian trust owner has.” Appellant does not include this Notice with his notice of appeal, nor has it been included in the original probate record, and therefore we are unable to evaluate it. In a Departmental probate proceeding, however, failure to appear or to respond to a notice may affect an individual's rights. In the present case, of course, although Appellant apparently is entitled, through his father's estate, to receive Decedent's property, he would only become an “Indian trust owner” if BIA agrees to accept the property back into trust. *See* 25 C.F.R. Part 151.

<sup>6</sup> To the extent that Appellant is concerned about the absence of Decedent's will from Decedent's probate file and intends to argue that this constitutes “manifest error” justifying reopening, we disagree. Even if the will had been submitted to the ALJ and had been found to be valid with respect to her Indian trust estate, it would not have affected the outcome: Lane was the sole devisee under the will, and the ALJ determined that he was the sole heir under the laws of intestate succession.

avoided if a decedent had acted differently (e.g., willed her property directly to another party), does not state a legal error in the probate order itself, and therefore does not constitute “manifest error” under section 4.242(e).<sup>7</sup>

### Conclusion

In conclusion, we affirm the denial of reopening on the grounds that Appellant lacked standing to petition for reopening and the petition for reopening did not allege any error of fact or law in the Order Determining Heirs.<sup>8</sup>

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 affirms the ALJ’s August 29, 2005, Order Denying Petition for Reopening.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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// original signed  
Debora G. Luther  
Administrative Judge

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<sup>7</sup> One of Appellant’s arguments reflects what appears to be a misplaced concern that he will “forfeit” any interest in Decedent’s trust property because the ALJ ordered that the property pass to Lane, out of trust, thus becoming subject to state jurisdiction. Apparently, because Appellant has been named Lane’s sole heir, he will ultimately inherit the property through the state court probate of Lane’s estate. He would not “forfeit” an interest in the property, although in becoming subject to state jurisdiction, it may become subject to property taxes. If Appellant, as heir to the property, would like to have it held in trust on his own behalf, nothing in the order denying reopening, or in this decision, prevents Appellant from separately asking BIA to take the property back into trust, pursuant to the regulations at 25 C.F.R. Part 151.

<sup>8</sup> Because we affirm the ALJ’s denial of reopening on these two grounds, we need not reach the merits of the third ground relied on by the ALJ — that he was without authority to provide Appellant with the relief he sought because Lane, who died before Decedent’s estate was probated, would personally have been required to renounce an interest in Decedent’s trust property by executing a disclaimer. We note, however, that the ALJ did not consider whether Appellant, as the administrator of Lane’s estate, could have renounced Lane’s interest in Decedent’s estate.