



INTERIOR BOARD OF INDIAN APPEALS

Estate of Thomas Boe

47 IBIA 138 (07/11/2008)

Related Board case:
56 IBIA 15



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF THOMAS BOE)
) Order Vacating Denial of Reopening
) and Remanding for Supplemental
) Hearing
)
) Docket No. IBIA 06-66
)
)
) July 11, 2008

Appellant Linda Boe-Foster appealed to the Board of Indian Appeals (Board) from an order by Indian Probate Judge Albert C. Jones (IPJ), denying her petition to reopen the probate of her late father, Thomas Boe (Decedent), for the purpose of removing Walter D. Boe as a son and an heir of Decedent.¹ Decedent died in 1981, and Walter was not identified or included as an heir during the original probate proceedings, which took place in 1984, but he also was not given notice of those proceedings. In 2001, an administrative law judge (ALJ) reopened the estate to add Walter, but Appellant did not have notice of those proceedings. According to Appellant, Walter is not Decedent's son; he is her half-brother through their mother, Lillian Mae Harvey Boe Nolen (deceased), was always known as Walter David Nolen, and was known not to be the son of Decedent, even though he was born when Decedent and Lillian were still married and even though his birth certificate identifies him as "Walter David Boe" and identifies Decedent as his father.

The IPJ deferred to the ALJ's order issued in 2001, and concluded that Appellant had not shown that a manifest injustice would occur if reopening were denied because the ALJ had made credibility determinations during those proceedings and had concluded just the opposite — that a manifest injustice would occur if Walter were *not* added as an heir. The IPJ also concluded that Appellant had not shown that there was a possibility that the alleged error could be corrected, and that the interest in finality weighed against reopening the estate.

¹ The Order Denying Petition to Reopen was entered on May 12, 2006, by the IPJ in the estate of Thomas Boe, deceased Fort Belknap Indian, Enrollment No. 204-A00999, Probate No. IP BI 269 B 84-1.

We resolve this appeal without reaching the merits of whether Decedent's estate should be reopened to set aside that 2001 order and again omit Walter as an heir. Instead, we conclude that in denying reopening, the IPJ gave too much deference to the ALJ's proceedings in 2001, relied in part on an incorrect finding that the ALJ had made credibility determinations, and gave insufficient consideration to the due process implications arising from the de facto one-sided proceedings in which Walter was added as an heir. Appellant has proffered evidence, in the form of sworn statements and statements to which she says she is willing to testify, that Walter is not Decedent's son. Appellant also contends that there may be written documentary evidence, from collateral proceedings, that would support her argument. The evidence offered or described by Appellant, if produced and credible, could be sufficient to rebut the presumption of paternity that arises from the fact that Walter was born during the marriage of Decedent and Lillian. Because Appellant had no notice of the 2001 proceedings, and no opportunity to present evidence to overcome the limited evidence submitted by Walter, we conclude that the IPJ erred in denying Appellant's petition for reopening without conducting a supplemental hearing to allow Appellant an opportunity to present her case, with proper notice to Walter.

Whether Appellant's evidence will be sufficient to warrant an order granting reopening and setting aside the 2001 order is a question we leave for the probate judge to decide in the first instance. But in light of the specific evidence that Appellant has proffered and described in this case, she is at least entitled to an opportunity to present her testimony and evidence and have it considered by a probate judge. Therefore, we vacate the IPJ's order denying reopening and remand this case to the Probate Hearings Division for a supplemental hearing and other proceedings, as appropriate, and issuance of a new decision either granting or denying reopening.

Background

I. Probate Proceedings in 1984

Decedent died intestate on February 2, 1981. In May of 1984, ALJ William E. Hammett held a hearing to probate Decedent's Indian trust estate. The only family member in attendance was Appellant, who testified that she, Thomas H. Boe, and Kenneth D. Boe, were the only surviving children of Decedent.² Upon inquiry from ALJ Hammett that Decedent may have had another child — a daughter, Marjorie Elaine — Appellant testified that Marjorie was her half-sister through their mother, but was not a child of

² A fourth child, Robert Gary Boe, predeceased Decedent without marrying and without issue.

Decedent. No mention of Walter was made at the hearing. On June 4, 1984, ALJ Hammett issued an Order Determining Heirs, which found that Marjorie was not Decedent's daughter and that Appellant, Thomas H., and Kenneth were the only surviving children and heirs of Decedent, each entitled to a one-third share in Decedent's estate.

II. Order Granting Reopening in 2001

In 1999, Walter petitioned for reopening of Decedent's estate, and submitted his birth certificate, which identified Decedent as his father, Lillian as his mother, and his given name as "Walter David Boe." Walter submitted three affidavits to further support reopening the estate. All three affiants were siblings of Lillian, who by then was deceased. Two averred that Walter was born to Decedent and Lillian, one stated that Decedent was listed as Walter's father on his birth certificate, and one stated that Decedent and Lillian were not divorced until four years after Walter was born. Each affiant stated that he or she had read Appellant's 1984 testimony, and each contended that Appellant had lied at the hearing.

In response to the petition and evidence, ALJ William S. Herbert issued a Notice to Show Cause Why Estate Should Not Be Reopened (Show Cause Notice), dated August 17, 2001. The address for Appellant to which the Show Cause Notice was mailed was long outdated. On November 21, 2001, ALJ Frederick W. Lambrecht, to whom the case had been reassigned, issued an Order Granting Reopening of Estate, finding that no objections to reopening had been filed.³ ALJ Lambrecht's order reopened the estate and modified the determination of heirs and order of distribution, adding Walter as a son and as entitled to a one-fourth share in Decedent's estate, thus reducing the shares of Appellant, Thomas H., and Kenneth from one-third to one-fourth.

III. Appellant's Petition for Reopening in 2006

By letter dated March 25, 2006, Appellant sought to have Decedent's estate reopened again, to reverse the decision that had added Walter as an heir. In her letter, Appellant contended that Walter

is actually Walter David Mitchell, also known as Walter David Nolen. . . .
He was born . . . nearly three (3) years after [Decedent] had joined the Army.

³ The order recites that there were "no valid objections filed with [the ALJ's] office before the expiration of the sixty (60) day filing period," but based on the probate record, it is apparent that there were no objections filed, whether or not valid and timely.

Walter David's father lived in our home for a while. His name is Wendell P. Mitchell of Gainesville, Texas. A couple months before our mother gave birth to Walter David, Mr. Mitchell left, saying that he was married and had a family in Texas.

When Walter David was a toddler, [Decedent] came for a visit and he had some unresolved issues with our Mother. She had given the child his name. . . . Our father fought back and won, proving that he was no where near the vicinity when the child was born . . . or conceived. [Decedent] left our home when I was four years old and the child, Walter David, was born when I was seven years old. [Decedent] never returned to our home. Our Mother was ordered to change the birth certificate and all through the years, it was common knowledge that she did because Walter David was given the name NOLEN He has NEVER used the name BOE because he is not a BOE.

. . . .
. . . I am willing to testify as to these truths . . . under oath.

. . . .
Somewhere in the archives of the District Attorneys office in Ventura, California, is information that Lillian Mae Boe/Nolen filed paternity charges against Wendell P. Mitchell seeking child support for Walter David. I believe it was in the early 1950's.

After the case was filed and info went back and forth from Ventura to Gainesville, Texas, our mother had a visit from Wendell's sister who is Walter David's aunt. She wanted to see the child and spent half a day visiting and talking about child support. I remember that she wanted to take Walter David to Texas but mother would have none of it. . . . I don't think Mr. Mitchell paid any child support.

Walter David Nolen has had this name since kindergarten. He had "Nolen" in the work place, he was drafted in the army by [that] name He married as "Nolen" He graduated from high school as a "Nolen." The reason he didn't use the name BOE is because he is not a BOE. In these appeal papers it states that he had a birth certificate and "other documents" to prove heritage — I challenge that.

Letter from Appellant to IPJ, Mar. 25, 2006, at 1-3.

The IPJ evaluated Appellant's petition for reopening under the regulations that govern reopening an Indian trust probate proceeding more than 3 years after it has been

closed. *See* 43 C.F.R. § 4.242(i).⁴ The IPJ found that Appellant had made the requisite showing that she had no notice of the reopening proceedings that took place in 2001, and therefore that she had standing to petition to reopen the estate to challenge the 2001 order. The IPJ concluded, however, that Appellant had made no showing that a manifest injustice would occur if her petition for reopening were not granted. First, the IPJ noted that ALJ Lambrecht had specifically stated, in his 2001 order, that he reopened the estate to prevent such an injustice — i.e., by adding Walter as an heir. Second, the IPJ stated that there was no reasonable possibility to correct the error, if an error had been committed. Third, the IPJ recited the evidence that Walter had submitted in the previous reopening proceedings — the birth certificate and three affidavits — and stated that ALJ Lambrecht “previously concluded that the evidence was credible,” and that the IPJ “is not in a position to question or refute that finding.” Order Denying Reopening at 2. Finally, the IPJ concluded that the need for finality outweighed Appellant’s competing claim.

Appellant appealed the IPJ’s denial of reopening to the Board. In addition to raising the same allegations described above with respect to Walter, Appellant submitted an affidavit of Priscilla June Campbell Boe, the wife of Appellant’s brother, Kenneth Boe (now deceased). In her affidavit, Priscilla avers that as a child she lived on the same street as Lillian Nolen and Bob Nolen, and that Tom (presumably Thomas H.), Appellant, Robert, and Kenneth all used the “Boe” surname, but David used the “Nolen” surname. Priscilla further avers that “it was . . . said that David Nolen’s father was a man from Texas and his last name was Mitchell. David took Bob Nolen’s last name.” Affidavit of Priscilla June Campbell Boe.

⁴ The IPJ’s order mistakenly quotes an earlier version of the reopening provision, which was codified at 43 C.F.R. § 4.242(h) (2004), but which was revised and superseded when the probate regulations were revised in 2005. *See* 70 Fed. Reg. 11,821 (Mar. 9, 2005). The differences between prior subsection 4.242(h) and the current provision for reopening estates after 3 years, which is codified at 43 C.F.R. § 4.242(i) (2007), are not material. Subsection 4.242(i) provides:

- A petition for reopening filed more than 3 years after the entry of a final decision in a probate proceeding 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.

Discussion

Appellant has the burden of proving error in the decision being appealed, which in the present case is the IPJ's order denying reopening. *See Estate of William Hayes Wheeler*, 41 IBIA 106, 107 (2005). In addition, when a person seeks to reopen an Indian estate more than 3 years after it has been closed, that person must, among other things, show that there was an error in the probate decision being challenged, that there is a reasonable possibility of correcting that error, and that a manifest injustice would occur if the error is not corrected. *See* 43 C.F.R. § 4.242(i); *see also Estate of Milward Wallace Ward*, 46 IBIA 5, 8 (2007); *Estate of Wilma Florence First Youngman*, 12 IBIA 219, 221 (1984). As discussed below, without reaching the underlying merits, we conclude that Appellant has satisfied her burden of proof that the IPJ erred — as a procedural matter — in denying reopening without first affording Appellant an opportunity to present testimony and other evidence in a supplemental hearing in support of her petition.

First, we think the IPJ's deference to ALJ Lambrecht was misplaced. In finding that no manifest injustice would occur by denying reopening, the IPJ apparently was swayed by the fact that ALJ Lambrecht had specifically stated, in his 2001 order, that he was reopening the estate — and adding Walter as an heir — with the express purpose of preventing such an injustice. But the proceedings that took place in 2001, and the evidence considered (including affidavits challenging Appellant's credibility), were one-sided. That was due to no fault of the ALJ, but, as the IPJ found, Appellant did not receive notice of those proceedings. In addition, contrary to the IPJ's statement in his order denying reopening, ALJ Lambrecht did not make any credibility determinations. Instead, he simply accepted the evidence to which no one had objected. Nor was the evidence considered in 2001 in the form of live personal testimony that would have been subject to either cross-examination or a credibility determination. Rather than deferring to ALJ Lambrecht's determination in 2001, the IPJ should have considered whether the testimony and evidence being proffered by Appellant might, if deemed credible and sufficient, warrant reopening the estate to remove Walter as an heir. Under the circumstances, we conclude that the allegations made by Appellant and her proffer of evidence are sufficiently specific to warrant a supplemental hearing. After proper notice to Walter by the probate judge to give him an opportunity to appear, Appellant should be allowed to testify and to offer whatever evidence she may have that Walter is not Decedent's biological son.

Second, we conclude that the IPJ erred in finding that there was no reasonable possibility that the alleged error — adding Walter as an heir — can be corrected. It can be. It is possible to reopen the estate and remove Walter as an heir and, if that were to happen, the Bureau of Indian Affairs could correct its title records with respect to Decedent's trust real property that was distributed to Walter. Appellant, Thomas H., and Kenneth each

originally took a one-third share in Decedent's estate, but under the 2001 reopening order they only received a one-fourth share, along with Walter. If the order reopening the estate in 2001 is set aside, property titles may be restored to the status quo ante, pursuant to the original 1984 order determining heirs and distributing the estate. Thus, we conclude that there is a reasonable possibility for correcting the alleged error, if it is determined that Walter is not a son of Decedent.

Third, considering the facts of this case, we disagree with the IPJ that the interest in finality, which attaches after an estate has been closed for at least 3 years, outweighs the interest in affording Appellant an opportunity to seek to rebut the evidence of paternity submitted by Walter. If all interested parties had participated in the reopening proceedings in 2001, which occurred 17 years after the estate originally was closed, the interest in finality might well have weighed against Walter.⁵ In light of the fact that Appellant did not have notice of those proceedings, we believe it was error, 5 years later, for the IPJ to use finality as a factor in denying her an opportunity to present her case.

In summary, we conclude that because Appellant had no notice of the 2001 proceedings, and no opportunity to present evidence to overcome the evidence submitted by Walter, and because Appellant proffered specific relevant evidence that could possibly be sufficient to warrant reopening, it was error for the IPJ to deny reopening without affording Appellant the opportunity to present her case through testimony and other evidence at a supplemental hearing.

Proceedings on Remand

The procedural difficulties with the way in which this case developed raise a question of who has the burden of proof on remand. In her appeal to the Board, Appellant contends that Walter should have the burden to prove that he is Decedent's son. As we noted earlier, a party seeking reopening has the burden of proof to demonstrate why reopening should be granted — but in this case there have been two reopening proceedings. In the first proceeding, Walter had the burden of proof, but that burden was not put to the test because Appellant did not have an opportunity to rebut Walter's evidence. If the purpose of a supplemental hearing is to cure that procedural problem, and restore the case to its status at the time of the 2001 proceedings, it would be logical to again place the burden of proof on Walter — except that Appellant is now the one seeking to have the 2001 order

⁵ Appellant alleges, for example, that she and Walter were living in the same house in 1984 and therefore Walter had actual notice of the original probate proceedings for Decedent's estate, although she acknowledges that he was not given formal legal notice.

reopened. Fortunately, we think the legal presumption of paternity that applies in this case makes the burden of proof on remand simpler than it might otherwise appear.

As the Board noted in *Estate of Anthony “Tony” Henry Ross*, “[w]hen a child is conceived and born during the course of a valid marriage, . . . it is presumed that the child’s parents are the husband and wife.” 44 IBIA 113, 120 (2007); *see also Estate of Ward*, 46 IBIA at 9. The presumption of paternity is not, however, irrebuttable. For example, if a preponderance of the evidence establishes that a husband and wife did not have physical access to one another at the time of conception, the presumption of paternity may be rebutted. *Estate of Ross*, 44 IBIA at 122. If it is rebutted, the presumption drops away, it is no longer considered, and the inquiry turns to whether a preponderance of the evidence establishes paternity. *See Estate of Ross*, 44 IBIA at 120, 123.

In the present case, it is undisputed that Walter was born during the marriage between Decedent and Lillian, and therefore the legal presumption attaches that Decedent is Walter’s father. In addition, the birth certificate submitted by Walter, which identifies Decedent as his father, provides further evidence of paternity. As noted, however, the presumption of paternity may be rebutted by a preponderance of evidence, and a birth certificate is not conclusive. *Estate of Ross*, 44 IBIA at 115, 120. Thus, after a supplemental hearing, and upon consideration of evidence offered by or on behalf of Appellant or Walter, if it is determined that Appellant has not rebutted the presumption of paternity by a preponderance of the evidence, then there are no grounds to grant reopening to set aside the 2001 order. If, on the other hand, Appellant does rebut the presumption by a preponderance of the evidence, the probate judge must then determine whether a preponderance of the evidence, taken as a whole and without consideration of the presumption, establishes that Decedent was Walter’s father. If Appellant rebuts the presumption of paternity, the burden then shifts to Walter to prove by a preponderance of the evidence that he is Decedent’s son. If Walter then does not satisfy his burden, the estate should be reopened and the 2001 order set aside, because to do otherwise would result in a manifest injustice.

Conclusion

We conclude that when Appellant sought reopening of Decedent’s estate, and supported her request with specific allegations and a proffer of sworn specific testimony and possibly additional evidence, to demonstrate that Walter is not Decedent’s son, the IPJ erred by denying reopening without first conducting a supplemental hearing. Appellant is entitled to such a hearing, with notice to Walter and an opportunity for him to participate and to present evidence.

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 vacates the IPJ's May 12, 2006, order denying reopening, and remands this case to the Probate Hearings Division for a supplemental hearing and other proceedings, as appropriate, and issuance of a new decision either granting or denying Appellant's petition to reopen Decedent's estate and modify the November 21, 2001, order on reopening.⁶

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Maria Lurie
Acting Administrative Judge

⁶ The copy of the Board's pre-docketing notice for this appeal that was sent to Walter was returned by the Postal Service, and thereafter the Board sent Walter's copies of orders in care of the Superintendent, Fort Belknap Agency, Bureau of Indian Affairs. Prior to issuing this decision, the Board's legal assistant was able to contact Walter with information provided by his uncle, Kenneth D. Harvey, and was informed by Walter that the address for him that was originally used by the Board was correct, but that to avoid confusion, the Board should address mailings to him using both Walter D. Boe and "aka Walter Nolen," which the Board has done for mailing this decision.