



INTERIOR BOARD OF INDIAN APPEALS

Estate of Genevieve W. Pollak

47 IBIA 147 (07/16/2008)

Pollak, a Ponca Unallottee, was born on July 3, 1929. On February 23, 1996, Pollak executed her Last Will and Testament. In paragraphs Second, Third, and Fifth, Pollak devised property interests to her children and grandchildren. Paragraph Fourth, however, bequeathed her interests in three Ponca allotments to Henry, as follows:

FOURTH - I give, devise, and bequeath to - Henry Knight, [date of birth]: 09/06/26, Ponca Unallottee, ancestral descendant[,] of all my interest in Ponca 417, Running After Arrow; and Ponca 419, Vera Running After Arrow; and Ponca 422, Flossie Running After Arrow (Minerals Only).

Last Will and Testament of Genevieve W. Pollak, Ponca Unallottee. Paragraph Fourth did not contain a contingent beneficiary clause. However, an unnumbered paragraph in the will devised the “rest and residue” of Pollak’s estate to her children. Though Henry died approximately 18 months after Pollak executed her will and his estate was thereafter distributed, Pollak did not amend her will.

Pollak died on February 16, 2000, at the age of 70, approximately 2.5 years after Henry’s death. Her estate was subject to probate and her will was not contested. The Order Approving Will and Decree of Distribution, Probate No. IP OK 381 P 00 (2001 Order Approving Will (Pollak)), was issued on February 14, 2001. This order directed the distribution of her interests in the Running After Arrow allotments addressed in Paragraph Fourth as follows:

C. Paragraph FOURTH

TO:	Henry Knight, [Date of Birth] 96/26 [sic], Ponca, ALL
WHAT PROPERTY:	Decedent’s interest s [sic] in Ponca 417, Ponca #419 and Ponca 422 (Minerals Only)

2001 Order Approving Will (Pollak), at 2.

The inventory of Pollak’s trust interests shows that the three Ponca allotments 417, 419, and 422, are the “Running After Arrow” allotments. Pollak owned a 1/30 mineral and surface interest in the “Running After Arrow” allotment, allotment 417. Allotment 419 is the “Vera Running After Arrow” allotment, in which Pollak owned a 1/30 mineral

and surface interest. Finally, allotment 422 is the “Flossie Running After Arrow” allotment, in which Pollak owned a 1/10 mineral interest.¹

The 2001 Order Approving Will (Pollak) was subject to two Orders of Modification and Nunc Pro Tunc, entered July 30, 2001, and February 28, 2005 (Nunc Pro Tunc Orders), correcting errors and misspellings unrelated to the Running After Arrow allotments. All references hereafter to the 2001 Order Approving Will (Pollak) address that order as modified by the Nunc Pro Tunc Orders.

On July 11, 2005, the Superintendent, Pawnee Agency, Bureau of Indian Affairs (BIA), sent a memorandum dated July 8, 2005, to the Administrative Law Judge, petitioning him to reopen Pollak’s estate pursuant to 43 C.F.R. § 4.242. The Superintendent explained that the “Data for Heirship Finding and Family History” form (OHA-7), submitted by the Ponca Tribe, had not listed Henry as a beneficiary of Pollak’s will “or report[ed] that he was deceased.”² July 8, 2005, Memorandum from Superintendent to Administrative Law Judge. As best we can determine, in the intervening years it became clear that the ultimate distribution of the Running After Arrows allotments could not proceed as ordered in 2001 because the devise and order were to Henry as a living person with no contingent beneficiary, yet Henry had predeceased Pollak and his estate was fixed at the time of his death. The identity of a devisee to whom that property could be distributed was not included in the 2001 Order Approving Will (Pollak). Accordingly, BIA asked that Pollak’s estate be reopened “to determine the owner(s) of Ms. Pollak’s interest on Ponca Allotments 417, 419, and 422.” *Id.*

On July 13, 2005, Judge Reeh entered a Notice of Reopening and Order to Show Cause (Notice). In this Notice, Judge Reeh explained that Henry had predeceased Pollak

¹ The inventory of Pollak’s estate also shows that she owned a 1/30 surface and mineral interest in Running After Arrow allotment 417-A, which is not directly mentioned in Pollak’s will. It is unclear whether Pollak’s interest in allotment 417-A has already been distributed pursuant to the rest and residue clause of her will. To the extent that the reference to “Ponca 417” in Pollak’s will or in the 2001 Order Approving Will (Pollak) could be read to include both of the tracts identified as 417 and 417-A, the disposition of allotment 417-A would, under Judge Reeh’s Order of Modification, also pass pursuant to the rest and residue clause. Given our disposition of these appeals, we need not decide which clause in Pollak’s will addressed allotment 417-A.

² The OHA-7 in the record for Pollak, signed by Judge Reeh on February 9, 2001, omitted any reference to Henry as a beneficiary of the will, and therefore failed to acknowledge that Henry had predeceased Pollak.

and that Paragraph Fourth of her will did not name a contingent beneficiary for the devise. The question was thus raised how properly to distribute the property subject to that paragraph. Judge Reeh noted that, in such cases, 43 C.F.R. § 4.261 contains an anti-lapse provision that requires distribution of such property to descendants of the devisee *per stirpes* “[w]hen an Indian testator devises or bequeaths trust property to any of his grandparents or to the lineal descendant of a grandparent.” *Id.*³ Thus, Judge Reeh stated that Henry’s familial relationship to Pollak must be identified to determine proper distribution. He notified interested parties to anticipate a modification of the 2001 Order Approving Will (Pollak), that would determine whether Henry and Pollak had a common grandparent. Finally, he provided notice to any party to “answer, oppose or express views” regarding the reopening. This order was served on Henry’s six children: Vera Knight-Harjo, Twila Rose Knight, Susan Nell Knight, Thomas Knight, Starling Knight, and Flolanda Jean Knight.

On August 9, 2005, four of Henry’s children and heirs submitted separate, notarized copies of a single typed letter requesting that the ownership of the three “Ponca Allotments 417, 419 and 422 (Minerals)” be determined. Thomas Knight submitted this letter without other comment. Starling Knight submitted this typed letter along with a handwritten note explaining that Pollak and Henry did not have common grandparents, and that Pollak had received the property interests in the Running After Arrow allotments from a person named Joe Others. Starling contended that Pollak had legally signed over the property to Henry in her will and that her intent in doing so should be taken into consideration. On August 9, 2005, Knight-Harjo and Twila Rose Knight each submitted a separate notarized copy of the same letter. Each of them included a handwritten note asserting that the land should come back to the Knight family. Knight-Harjo averred that the property should pass to her “aunt, Yolanda Petty, [as] the last living heir.” Twila Rose Knight asserted that her aunt is the “last heir alive” but did not specifically identify the person(s) to whom she thought the property should be distributed. Petty was not determined to be an heir of Henry in the 1999 Order of Distribution (Knight).

On August 25, 2005, Knight-Harjo submitted two handwritten notes on a form entitled “Heirship Interests,” which asserts: “owns life estate on the following” 10 allotments, including the Running After Arrow allotments. This form does not indicate the identity of the “owner” referred to. In the first note, Knight-Harjo asked BIA to reconsider Pollak’s will, and give the properties that had been devised to her father Henry to his

³ As a general rule, when a devise to a living person cannot be given effect because that person has predeceased the testator, the devise “lapses” as a matter of law and is rendered null and void. *See* 96 C.J.S. *Wills* § 1197. To prevent such a lapse, probate laws may contain “anti-lapse” provisions, which designate eligible alternative beneficiaries who may receive the devise by operation of statute. *Id.*

children. In the second, she contends that Pollak's interest in allotment 419, the Vera Running After Arrow allotment, should be distributed to herself, since she "was named after [her] aunt, Vera. That was my father's wish."

On December 23, 2005, Judge Reeh issued the Modification Order that is the subject of this appeal. There, Judge Reeh made a finding that is not disputed in this appeal – that Pollak and Henry did not have a common grandparent. He concluded that "Henry's descendants do not fit into one of those circumstances" set forth in the anti-lapse provision of 43 C.F.R. § 4.261. Modification Order at 2. Accordingly, he ordered that the property addressed in Paragraph Fourth be distributed to Pollak's children in accordance with the will's "Rest and Residue provision." *Id.* at 3.

Appellants appealed. Appellant Petty claims that she is Henry Knight's sister. She explains that the Running After Arrow allotments were transferred to Pollak by Joe Others, who Petty asserts was her uncle. She asserts that Others obtained the allotment interests after the death of Petty's sister, Nellie Others Maker Stigall, who was Others' daughter. She believes that Others was verbally obligated to return the allotments to the Knights in some manner, but instead conveyed them to Pollak. She explains that Pollak and Henry were "illicit" companions and that Pollak's decision to will the property to Henry reflected her intention to return the property to him, and through him to his children. *See* Petty's Notice of Appeal.

In her Notice of Appeal, Appellant Knight-Harjo claimed that Pollak had made a verbal agreement to return the Running After Arrow allotments to the Knight family. She asked the Board to reconsider and return the allotments to Henry's heirs. *See* Knight-Harjo's Notice of Appeal.

In a separate Brief submitted by her counsel, however, Knight-Harjo claims to represent the "estate" of Henry Knight and asks for relief different from that argued in her Notice of Appeal and letters submitted in response to the Notice. Opening Brief at 10. She agrees with Judge Reeh and Petty that Pollak and Henry were not related by blood or legal marriage. She explains that Pollak was Henry's "domestic companion and 'lover'" for many years, though Henry never dissolved his legal marriage. *Id.* at 2. Knight-Harjo does not contest Judge Reeh's conclusion that the anti-lapse provision in the probate regulations would not apply if the estate were reopened. Instead, she claims in her brief that Judge Reeh did not have jurisdiction to reopen the 2001 Order Approving Will (Pollak) addressing Pollak's estate because the rule permitting BIA to petition to reopen to correct manifest error only allows such action within 3 years of the date of a final probate decision. Opening Brief at 7 (citing 43 C.F.R. § 4.242(e)). She claims that BIA does not meet the requirements necessary to petition to reopen an estate more than 3 years after it was

closed, and therefore that Judge Reeh had no jurisdiction to grant such a petition. She contends that the original 2001 Order Approving Will (Pollak) specified that it would be final if not appealed within 60 days, and that this Board should vacate the Modification Order and leave in place that order, which she contends “confirmed [Pollak’s] wishes as stated in her Will.” Opening Brief at 16. She also requests that this Board “further direct that the Arrow allotments be distributed to Appellant and the other heirs of Henry Arrow Knight.” *Id.* at 17. No other briefs were received.

Discussion

I. Appellant Petty

Beginning with Appellant Petty, we must dismiss her appeal for failure to show that she is a proper party to appeal Judge Reeh’s Modification Order. Section 4.320(a) of Title 43 of the Code of Federal Regulations ensures that an appellant challenging a decision on a petition to reopen must be an “interested party.” *Estate of Donald E. Blevins*, 44 IBIA 33 (2006) (to participate in a probate proceeding, an individual must be an “interested party” as defined in 43 C.F.R. § 4.201). An interested party is defined in that rule to include, for purposes relevant here, a “probable or actual heir” or a “beneficiary under a will.” 43 C.F.R. § 4.201 (subparts (1) and (2) to definition of “*Interested party*”). Petty is neither for purposes of this appeal. Petty has no relationship to Pollak’s estate. Nor, for that matter, was she determined to be an heir of Henry’s estate, and Henry did not execute a will, let alone one identifying her as a beneficiary. As she is Henry’s sister, we can understand that Petty has a personal interest in ensuring that her brother’s property be properly distributed, but this is not the kind of interest that brings her within the purview of 43 C.F.R. § 4.201 or 43 C.F.R. § 4.320(a). *See Estate of Elvina Shay*, 44 IBIA 133, 135 (2007) (sister who was not a probable or actual heir under the laws of intestacy was not an interested party). Accordingly, Petty is not an “interested party” sufficient to establish that she met the test of 43 C.F.R. § 4.201 with respect to either estate.

II. Appellant Knight-Harjo

Appellant Knight-Harjo’s standing to appeal is far more convoluted and complicated by her request for relief. Knight-Harjo concedes that Pollak and Henry did not have a common grandparent, and were not otherwise related, and also concedes that no anti-lapse provision applies. Therefore, she cannot and does not claim standing as a potential recipient of a distribution under an anti-lapse statute.

Knight-Harjo is not personally an heir of Pollak, nor is she named as a beneficiary under Pollak's will. Thus, she does not meet the test of 43 C.F.R. § 4.201. Knight-Harjo is undoubtedly an "interested party" in Henry's estate within the meaning of 43 C.F.R. § 4.201. She is an asserted actual heir under the 1999 Order of Distribution (Knight). The difficulty is in determining whether her interest in Henry's estate brings her within the purview of the "interested party" with respect to Pollak's estate addressed in 43 C.F.R. § 4.320(a). That rule establishes "who may appeal": "An interested party has a right to appeal to the Board from an order of an administrative law judge . . . on a petition . . . for reopening . . . a deceased Indian's trust estate." *Id.* The petition for reopening was submitted with respect to Pollak's estate, not Henry's. Knight-Harjo's asserted interest in Pollak's estate is entirely derivative of her interest in Henry's estate. Only if Henry's *estate* does actually or could actually be entitled to receive Pollak's interest in the Running After Arrow allotments does Knight-Harjo's interest in his estate arguably make her an interested party to the reopening of Pollak's estate.

But Henry's estate does not and could not include Pollak's property. Henry's estate, like all estates, was fixed at the time of his death. "Estate" is defined to mean the "trust cash assets, restricted or trust lands, and other trust property owned by the decedent at the time of his or her death." 43 C.F.R. § 4.201 ("*Estate*" defined); *see Estate of Samuel R. Boyd*, 43 IBIA 11, 21 (2006). There is no question that, in 1997, at the time of Henry's death, his estate did not include the Running After Arrow allotments. That property remained in Pollak's ownership. Pollak's will had no legal effect until she died, and thus at the time of Henry's death, he had no right or legal interest in the property arising from Pollak's will. *See* 80 Am. Jur. 2d *Wills* § 2 (will creates no interest in beneficiary until testator dies). Accordingly, when Pollak died and the probate of her estate occurred, Judge Reeh's 2001 Order Approving Will (Pollak) could not and did not purport to augment Henry's estate or vest in it an interest not there at the time of his death. 43 C.F.R. § 4.201 ("*Estate*" defined). Rather, the devise to Henry lapsed as a matter of law because the law does not recognize devises to individuals who predecease the testator. Therefore, as Knight-Harjo is not a beneficiary under Pollak's will, Paragraph Fourth, as written, nor is she one of Pollak's actual or probable heirs as a result of her status as heir to Henry's estate, we must conclude that Knight-Harjo lacks standing to appeal Judge Reeh's order, either in her own right or on behalf of Henry's estate.

Moreover, we note that the dilemma posed by Knight-Harjo's request for relief is that only if Pollak's estate is reopened would it be possible for Knight-Harjo to obtain the substantive relief she seeks. By asking this Board to vacate Judge Reeh's Modification Order, Knight-Harjo is asking that the original 2001 Order Approving Will (Pollak), as modified by the Nunc Pro Tunc Orders, be reinstated undisturbed and unamended by the Modification Order. But that request in the form of vacatur would not change her status as

a non-party to the case. More importantly, it leaves Pollak's devise to Henry without effect. Vacating Judge Reeh's order would not, by itself, result in the distribution of the allotments to Knight-Harjo or Henry's other heirs.

Thus, while Knight-Harjo claims to seek a reinstatement of the 2001 Order Approving Will (Pollak), in fact she wants the Board to modify that order to direct that Pollak's interests in the Running After Arrow allotments be distributed to an estate that was not addressed in Pollak's will directly or by virtue of a contingent beneficiary clause. That would require that we rewrite Pollak's will, which we cannot do. *Estate of Teresa Mitchell*, 25 IBIA 88, 94 (1993). It is the lack of any ability to distribute those allotments to a beneficiary that was the genesis of BIA's petition to reopen. Knight-Harjo's request that the Board vacate the Modification Order and declare Judge Reeh to have been without jurisdiction to rule on the petition to reopen is one which she technically has no standing to raise, because she cannot show any interest in an outcome in which the allotments are effectively frozen without possibility of distribution.

Knight-Harjo mistakenly presumes that the effect of vacating Judge Reeh's Modification Order would be to allow the Board to direct distribution of the Running After Arrow allotments in accordance with *Henry's* probate. Opening Brief at 17. This is not the case. If the 2001 Order of Distribution (Pollak) had permitted distribution of the three Running After Arrow allotments identified in Paragraph Fourth, BIA would have had no reason to petition to reopen the estate in the first place. Knight-Harjo never explains how distribution could occur now under the 2001 Order Approving Will (Pollak) when it could not occur before the Modification Order was issued.⁴

We address one final point made by Knight-Harjo. She rejects the notion that a manifest error, that could be corrected by this Board under its authority in 43 C.F.R. § 4.318, would occur if this Board were to vacate Judge Reeh's Modification Order. Opening Brief at 11. Knight-Harjo contended in her Notice of Appeal, however, that it would be manifestly unfair if Pollak's interests in the Running After Arrow allotments were not distributed to Henry's heirs. Because reinstating the 2001 Order Approving Will (Pollak) would leave a devise of the allotments without effect, Knight-Harjo's only recourse for the relief she seeks would be for the Board to exercise its authority under 43 C.F.R.

⁴ To the extent that Knight-Harjo's allegation that Pollak "verbally agreed to return the Arrow Allotments to Henry Arrow Knight and his children upon her death," Opening Brief at 3, may be read as suggesting that Knight-Harjo had a claim, based upon an oral contract, against Pollak's estate, any such claim would have been required to have been asserted years ago, following procedures established at 43 C.F.R. § 4.250.

§ 4.318 to correct manifest error and injustice, a course of action she rejects. Accordingly, it is worth addressing why we could not effectuate the relief Knight-Harjo pursues, even had she properly acknowledged the result of vacating the Modification Order. Knight-Harjo contends that Pollak was entirely willing to have the Running After Arrow allotments returned to the Knight family, through Henry, and that a manifest injustice would result if the Running After Arrow allotments are not so returned. She contends that this result would be an error which BIA “affirmatively produced or, at a minimum, failed to correct.” Opening Brief at 14. To the contrary, the alleged manifest injustice is not the result of the probate proceedings or an action of BIA, but instead directly flows from Pollak’s failure to change her will after Henry died to devise the property to his heirs. As we have already noted, we are not free either to disregard or to rewrite Pollak’s will. Therefore, even if we were to consider section 4.318 in light of the actual substantive relief sought by Knight-Harjo, we find no basis to exercise that authority.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, and for the reasons discussed in the decision, we dismiss both appeals for lack of standing.

I concur:

// original signed
Lisa Hemmer
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.