



INTERIOR BOARD OF INDIAN APPEALS

Estate of Robert William Waln

50 IBIA 189 (09/10/2009)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF ROBERT WILLIAM) Order Affirming Decision
WALN)
) Docket No. IBIA 08-42
)
)
) September 10, 2009

James R. Leader Charge (Appellant) appeals to the Board of Indian Appeals (Board) from an Order Denying Reopening of Estate entered February 20, 2008, by Indian Probate Judge (IPJ) Michael Stancampiano in the Estate of Robert William Waln (Decedent), deceased Rosebud Sioux Indian, Probate No. P000025133IP (formerly No. IP RC 45IZ 93). The Order Denying Reopening let stand findings and conclusions set forth in a probate decision entered September 30, 1994 (1994 Decision), by Administrative Law Judge John R. Rampton, Jr., in which Appellant is identified as a son of Decedent and one of Decedent's heirs. Appellant contends that Judge Stancampiano erred in refusing to reopen the probate proceeding to amend the findings in the 1994 Decision and conclude instead that Appellant was not Decedent's son. Appellant has not shown that Judge Stancampiano erred when he concluded that no proof had been proffered to demonstrate that the 1994 Decision was wrong. In addition, Appellant's untimely proffers of evidence to this Board, in the form of results of genetic testing on unidentified samples taken without the adherence to medical protocol or third party verification required to make them legally admissible in a court of law, are insufficient for us to conclude that a manifest error or injustice would occur if the matter is not reopened to consider that evidence. We affirm the Order Denying Reopening.

Background

Decedent died intestate on June 9, 1993, and an order determining heirs was entered on September 30, 1994. 1994 Decision. Judge Rampton found that James Robert Waln, date of birth March 6, 1951, was the oldest son of the 13 biological and adopted children of Decedent and Marie Boyd Waln, and thus was one of Decedent's heirs. The estate had minimal value. In 2005, James Robert Waln petitioned the Rosebud Sioux Tribal Court for a name change to James Robert Leader Charge. On February 7, 2005, the Tribal Court issued an Order for Change of Name (Tribal Order). According to this Tribal Order, Appellant admitted that he was a son of Marie Boyd Waln but averred that Fred (also Frederick) Leader Charge was his deceased father, and asserted that the mother of Fred

Leader Charge, Lucille Eagle Bear, testified that she believed herself to be Appellant's grandmother and Fred Leader Charge to be his father. The Tribal Order decreed that James Robert Waln would thereafter be known as James Robert Leader Charge, and also that the birth record for James Robert Waln should be amended.

In June 2005, Appellant participated and testified in the probate of the estate of Frederick Leader Charge, seeking to be determined as an heir. The record before us contains no transcript, orders, or records from that probate proceeding. But according to the transcript for *this* appeal, Administrative Law Judge Marcel Greenia determined in that proceeding that Appellant was the son of Frederick. *See* Transcript, May 16, 2006, at 3-4 (referring to July 28, 2005, order in Frederick's probate).

On July 19, 2005, the Custodian of Records-Realty Probate, Rosebud Indian Agency (Agency), Bureau of Indian Affairs (BIA), executed an Affidavit Verifying Alleged Errors of Fact in the 1994 Decision. The affiant swore that, given Appellant's testimony at the Leader Charge probate proceeding and his own name change proceeding, "an error was made in that James Robert Waln . . . was a known heir in the probate of the estate of Robert William Waln . . ." Affidavit at ¶ 4 (tribal enrollment numbers omitted).

The Acting Superintendent of the Agency submitted a Petition for Reopening of the 1994 Decision. Citing a potential for manifest injustice and the possibility of reasonable correction of error, this Petition explained that Appellant had been found to be the son of two different fathers. The Petition cited testimony given by Appellant on June 13, 2005 (absent from the record in this case), in which Appellant allegedly asserted that his mother Marie Waln had told him that his biological father was Frederick Leader Charge. The Petition requested that James Robert Waln be excluded as an heir from the Waln probate.¹

On November 14, 2005, Judge Greenia issued, with respect to Decedent's estate, a "Notice to Show Cause Why Estate Should Not Be Reopened" (Notice). This Notice asserted, mistakenly, that a petition had been submitted on December 19, 2004, by Decedent's wife, Marie Boyd Waln. Judge Greenia also asserted, without explanation, that the remaining heirs would be adversely impacted by "granting of this Petition for

¹ This Petition was dated December 19, 2003, but was submitted to Judge Greenia on *July* 21, 2005, by cover letter dated *July* 19, 2005. The authority for a petition for reopening was found at that time at 43 C.F.R. § 4.242 (2004).

Reopening of Case, because their share would be larger.” Notice at 2.² He concluded that, in the absence of objections submitted within 60 days, the 1994 Decision would be amended to exclude James Robert Waln as an heir. *Id.*

Appellant’s mother and sister, Marie Boyd Waln and Sonnie Waln-Jenssen, submitted objections to the Petition for Reopening in a statement signed December 1, 2005. They contended that Fred Leader Charge had never claimed to be Appellant’s father, that Appellant had not notified the Waln family of his name change, and that Appellant’s motivation was “greed” to “gain an inheritance.” Marie Boyd Waln signed a separate individual statement that “Robert William Waln is in fact the father of James Robert Waln [who] is the first child of our eleven [biological] children together.”

Judge Greenia conducted a hearing on May 16, 2006. Appellant, and sisters Sammie, Jody, and Dolores Waln appeared, as did his mother. Appellant testified that he “was told [he] was not a Waln” when he got out of the military in 1972, and that he was told he was a Leader Charge “clear back” by “some elderly people.” Transcript, May 16, 2006, at 9. The sisters asserted that they knew and were in communication with Fred Leader Charge but that he had never indicated that he was Appellant’s father, *id.* at 7 (Sammie); that they would pay for genetic testing to prove that Decedent is Appellant’s biological father; and that their father had signed an Affidavit of Paternity because he was going into the service in 1951 when Appellant was born.³ *Id.* at 6 (Sammie, Dolores). Appellant agreed to DNA testing. *Id.* at 10. Based on representations that both sides of the dispute would resolve it by genetic testing, Judge Greenia agreed to make a decision after that process took place. *Id.* at 13.

On November 14, 2006, Sammie Waln sent a letter to Appellant with information, dated May 30, 2006, from a company called “Identity Genetics, Inc.,” which provided a \$500 quote for testing the blood of siblings to determine their genetic relationship. In her letter, Sammie indicated some confusion over who was to contact whom, but explained that the siblings were to provide blood samples at the Rosebud Hospital; that she had provided this information to the “judge and secretary”; and that she and Appellant would each owe \$250 for the test. No evidence suggests Appellant ever responded to the letter.

² The estate amounted to little more than \$3 per heir. The removal of one participant in the limited estate would have increased the share of each individual by a total of approximately a quarter, assuming it was not already distributed. The mistakes in the Notice were generally corrected in the Order Denying Reopening and are immaterial now.

³ A notarized Affidavit of Paternity was signed by Robert W. Waln on October 3, 1951.

A hearing was held on March 23, 2007. From the only partial transcript available, it appears that Judge Greenia conducted a conference call.

By certified letter to Appellant dated April 9, 2007, and copied to the Office of Hearings and Appeals (OHA), Sonnie Waln-Jenssen explained that she had contacted Appellant multiple times but that he had not responded to her messages. She stated that the “reason for the calls is to set up a time for you and our sister Sam to complete a DNA sibling test. You only need to give a blood sample at Rosebud Hospital and *we will pay for the complete cost* of the test. Please contact Sam to set a time and date.” (Emphasis added).

On April 23, 2007, Judge Greenia issued subpoenas directing Appellant and his mother to appear at a hearing on May 11, 2007. Marie and five siblings appeared on that date, according to a sign-in sheet, but Appellant did not.

On August 30, 2007, Appellant forwarded by telefax a letter to himself from Genetrack Biolabs Inc. entitled “DNA Grandparentage Results.” This document presented results of analysis of two unidentified samples received allegedly from Lucille Eagle Bear on May 3, 2007, and from James R. Leader Charge on August 14, 2007. Page 1 reported a combined grandparent index of 40.45, and asserted that an “*index greater than 1 is more consistent with biological relatedness; whereas a Grandparentage index less than 1 is more consistent with non-biological relatedness.*” The letter provided no scale, no percentage probability of relatedness, no explanation of the contrast between 1 and 40.45 or the significance of the 40-fold numerical factor, and failed to identify the nature of the samples provided. The letter explained that the results were taken from “a home legal test,” and provided the following disclaimer: “*the collection facility and the sample collector were selected by the participant(s), and not by Genetrack Biolabs Inc. The results described are based upon the assumption that the sample collector and collection facility are reliable. Genetrack Biolabs Inc. is not responsible for any wrongful collection of the samples, whether accidental or intentional*”

On February 20, 2008, Judge Stancampiano issued the Order Denying Reopening. At page 2, he denied the Petition for Reopening

because James Robert Waln a.k.a. James Robert Leader Charge did not appear in response to the subpoenas and refused to undergo DNA testing with his siblings, to determine his paternity, as offered by the decedent’s daughters. The decedent’s spouse, Marie Boyd Waln[,] did appear in response to the subpoenas and testified that she is the mother of James Robert Waln a.k.a. James Robert Leader Charge and decedent is the father of James. This testimony is corroborated by a signed paternity affidavit, the birth certificate and the sworn testimony.

On February 26, 2008, Appellant submitted a request for reconsideration to the IPJ, which was properly forwarded to the Board and which we construe as a Notice of Appeal. 43 C.F.R. §§ 4.242, 4.320.⁴ Appellant argues that he “never went to the hearing that was held in May, because I was waiting for the DNA results that I had done with my grandmother Lucille Eagle Bear” Notice of Appeal. Based on those results, he claims to be the grandchild of this person, who is Frederick Leader Charge’s mother, and requests another hearing.⁵ Thereafter, Appellant and one of his siblings engaged in a volley of written communications between each other, through this Board.

Appellant submitted a letter to the Board dated June 2, 2008, in response to the Board’s Notice of Docketing and Order Setting Briefing Schedule, in which he averred that “the parties intend to discuss” settlement; stating for this reason that he presumed that he need not yet file a pleading, and directing the Board to “notify” him otherwise. He stated that he was “prejudiced by the procedural problems present in the hearing process in this case [which] prevented the proper consideration of DNA evidence.” *Id.*

On June 16, 2008, Sonnie Waln-Jenssen submitted a letter denying that the siblings were engaging in settlement discussions and stating that, instead, Appellant “has rejected all attempts I’ve made to contact him” and had failed even to appear at the hearing provided him. She stated that his home DNA test report was not acceptable.

On July 2, 2008, Appellant submitted a letter, which we take as an Opening Brief, in which he purported to explain his refusal to participate in the genetic testing which he and his siblings had offered at the 2006 hearing as a solution to their dispute. He complained that he had refused to contribute a DNA sample because he had received a note from Sammie (presumably the November 2006 letter) stating that she expected him to pay for

⁴ The Department’s probate regulations were amended effective December 15, 2008, to incorporate the provisions of the American Indian Probate Reform Act of 2004, *as amended*, primarily codified at 25 U.S.C. §§ 2201, *et seq.* See 73 Fed. Reg. 67,256, 67,289-67,305 (Nov. 13, 2008). The rules governing Indian probate hearings are to be codified at 43 C.F.R. Part 30. This case is governed by the prior version of the regulations, and the citations to 43 C.F.R. Part 4 are to regulations codified in 2007, unless otherwise noted.

⁵ In this letter, Appellant responds to a comment in the Order Denying Reopening regarding the fact that the testing results were submitted by telefax and not “original”; he attaches the original results. Whether the test results were originals was relevant neither to Judge Stancampiano’s ultimate decision, nor to our own analysis.

half of the test, which he had never agreed to do. Noting that the “next hearing date was on the 23rd of March, 2007,” he averred that on that date, he told Judge Greenia, privately outside the hearing room, that he would conduct a genetic test with his grandmother because he did not wish to pay any costs. He averred that Judge Greenia agreed to this procedure. He explained that he skipped the May 11, 2007, hearing because he did not have the results of the DNA test, had a meeting and “did lose track of time,” and “did not worry about it because I was told by Judge Greenia that I did not need to come until the results from the DNA test were done.”⁶ Nonetheless, he attached to the Opening Brief results of three DNA tests involving sister Jody Waln and brother Calvin Waln. He asserted that the tests “show a difference between us” and should “be considered new evidence.” *Id.* at 2. He also stated that “it was suggested by genex diagnostics Inc. that I do a Y chromosome test with my brother that would show that we do have different fathers” and declared that “[w]e are doing this test.” *Id.*

The three different test results submitted with this Opening Brief, each presented in two total pages dated May 14, 2008, and entitled “DNA Sibship Results” are from Genex (formerly Genetrack) Diagnostics Inc. The first report depicts the relationship between unidentified sample material submitted May 12, 2008, by Appellant and Jody Waln. Page 1 states that the “full-sibship index” for the two is “78.42 (probability of relatedness as full siblings = 98.7%),” while the “half-sibship” index is “423.81 (probability of relatedness as half siblings = 99.7%).” The second depicts the relationship between unidentified samples submitted May 12, 2008, by Appellant and Calvin Waln. Page 1 states that the “full-sibship index” for the two is “49.46 (probability of relatedness as full siblings = 98.0%),” while the “half-sibship” index is “23.01 (probability of relatedness as half siblings = 95.8%).” The third depicts the relationship between samples submitted May 12, 2008, by Calvin and Jody Waln. Page 1 states that the “full-sibship index” for the two is “1960352.67 (probability of relatedness as full siblings = 99.9999%),” while the “half-sibship” index is “8957.56 (probability of relatedness as half siblings = 99.9%).” All three reports repeat the disclaimer quoted above; each report also asserts that “samples were submitted without adherence to Genex Diagnostics Inc. sample collection protocol, of witness/collection by an unbiased third party collector, *which is required in a legally admissible paternity test.*” Test results, May 14, 2008, at pages 1 (emphasis added).

⁶ The record shows that Sonnie sent her certified letter on April 9, 2007, two weeks after the hearing date, offering to assume all costs, a fact of which Judge Greenia was aware when he issued, on April 23, a subpoena for Appellant to appear at a hearing on May 11.

On July 11, 2008, Sonnie Waln-Jenssen responded by suggesting that the probability factors for the tests actually showed that all three siblings have the same father. She also stated that the disclaimers on the tests should make the results inconclusive.

On August 29, 2008, Appellant submitted a letter with August 12, 2008, “results of the Y chromosome test done with my sibling Calvin Waln sr. [T]he results state that Calvin Waln sr. and James R. Leader Charge are not biologically related along the male lineage.” Again he asks for a new hearing, and states that his siblings “can pay for a DNA test of their own if they want to prove me wrong.” The attached test is from the same laboratory, but does not include the “page 1” found on the other four tests in which indices or probabilities are presented. It compares samples allegedly submitted by Calvin Waln Sr. and James R. Leader Charge. This report concludes that the “Y chromosome haplotypes are different, *consistent with the hypothesis that the tested individuals are not biologically related along the male lineage.*” Test Report, Aug. 12, 2008 (emphasis added). The report contains the above quoted disclaimer and repeats the statement regarding the lack of the unbiased third party collector required for a legally admissible test and the lack of any evidence of adherence to sampling protocol. *Id.*

On September 8, 2008, Sonnie Waln-Jenssen submitted a letter stating that she spoke with Calvin Waln Sr., who, she asserts, denied providing a new home DNA sample. She challenged any collection obtained without an unbiased third party witness.

Discussion

We affirm the Order Denying Reopening. We agree with Judge Stancampiano’s conclusion, based on the evidence before him, that there was no justification for reopening Decedent’s probate when Appellant failed to appear in response to a subpoena and refused to undergo the DNA testing proffered by himself and his siblings at the 2006 hearing which would have included an appropriate third party collection protocol. Moreover, we find no basis in 43 C.F.R. § 4.318 to order a reopening of probate proceedings based on Appellant’s post-hearing proffers of genetic testing data, when that data is uncorroborated by any indicia of accuracy.

In order to overcome an order denying a petition for reopening, an appellant must show that it is erroneous. *Estate of Martha Marie Vielle Gallineaux*, 44 IBIA 230, 234 (2007). Appellant has not met this burden. The only argument presented by Appellant for this purpose is his claim that Judge Stancampiano should have awaited the outcome of DNA testing before holding a hearing. We find this grievance to be unwarranted. Appellant failed to comply with a subpoena issued April 23, 2007, for his appearance at a hearing to be conducted on May 11, 2007. An appropriate response to this failure was for

the deciding official to “[d]ecide the fact or issue relating to the material requested to be produced, or the subject matter of the probable testimony, in accordance with the claims of the other interested party” 43 C.F.R. § 4.224(a)(1). Accordingly, it would have been appropriate under this rule for Judge Stancampiano to issue a finding in favor of Appellant’s mother and siblings, strictly on the basis of Appellant’s failure to appear.⁷ That he waited almost another year to issue a decision, until after Appellant *did* submit the results of genetic testing that Appellant thought best served his case, was only to Appellant’s benefit and provided more process than Appellant was otherwise entitled to receive.

Moreover, we reject Appellant’s suggestion that he was entitled to additional time to obtain information regarding his genetics. At the May 16, 2006, hearing, he testified that he learned upon his release from military service in 1972 that he was the son of Fred Leader Charge. Setting aside the lack of any written or testimonial evidence in the record before us to support this contention, either in his own actions or those of Leader Charge or Leader Charge’s family, Appellant was 42 when the father who raised him, Robert Waln, died. Waln’s probate was decided in 1994. Appellant did nothing ever to challenge that ruling. His allegations that he knew by the 1970s that he was not the son of Robert Waln confirm that he had decades before the 2005 Petition for Reopening was submitted by the Agency to determine the true identify of his father. Whether or not the denial of reopening in *this* estate will have any relevance to the determination that Appellant is an heir to the Leader Charge estate is an issue outside the scope of this appeal. To the extent he believes that the inconsistency may adversely affect him, Appellant has had years to seek resolution of the paternity question to avoid inconsistent findings in the two probates.

The passage of these decades in silence was merely the first of a series of opportunities missed by Appellant to garner the facts he later expected a judge to accept as truth enough for reconsidering the decision in the Waln probate. The Notice was issued in November 2005 apprising him of the Petition for Reopening. His mother and sister objected to it. In the face of these objections, at the May 2006 proceeding, Appellant

⁷ As noted above, Appellant claims that at the March 23, 2007, hearing, Judge Greenia advised him that he need not appear again until Appellant completed his chosen DNA testing with his grandmother. Neither this oral communication nor Appellant’s construction of it is documented in the record. Nonetheless, a month later, on April 23, Judge Greenia issued a subpoena directing Appellant to appear at a May 11 hearing. Even if Appellant had understood Judge Greenia to have excused him from subsequent appearances on March 23, the written subpoena expressly issued more recently and by the same judge under cited Federal law and regulation should have been enough to apprise Appellant of his legal obligation to appear.

agreed to participate in DNA testing with his siblings to resolve the dispute finally. He never did anything in this regard before the February 2008 ruling against him. In fact, at the May 2006 hearing, Judge Greenia provided all parties an OHA contact for assistance in investigating legally acceptable genetics testing. It was the sisters, *not* Appellant, who followed through with OHA and who found a genetics laboratory that would work through the Rosebud Hospital. Despite his grievance that Sammie asked for half the cost in her November 2006 letter, the record contains no indication that he sought to resolve any misunderstanding with her. When Sonnie sent him a certified letter agreeing to bear all costs in April 2007, again he remained silent. And when issued a subpoena, he did not respond. He offered instead an unverified grandparent test, paid for without the payment from his siblings that he had demanded in order to undergo any sibling tests. He then waited 3 months after the adverse decision, until May 2008, to provide a sample for a sibling test — though one not taken at a hospital with third party witnesses. Appellant never followed the process agreed to among the parties and Judge Greenia in May 2006.

We recognize that it was neither Appellant nor the Waln family that sought reopening of the Waln probate. But it *was* Appellant's actions in pursuing both a name change and a revision of his birth records in 2005 that generated the situation. The process generated by the Agency's 2005 Petition for Reopening, the Notice, and the Waln family objections and testimony at the hearing rendered it necessary for Appellant to respond with additional evidence if he wished to have his position considered; it was not a chance for him to refuse compliance with OHA procedures in order to obtain more process.

Judge Stancampiano held that Appellant failed to cooperate with DNA testing with his siblings, failed to justify his lack of participation, failed to refute his mother's testimony, and failed to overcome the evidence in the record presented by his own birth certificate and Robert Waln's affidavit of paternity. All of these findings were accurate, and Appellant has failed to show otherwise, even, for reasons stated below, with his proffered grandparent test.

We find no basis for reopening the Waln probate based on Appellant's pre- or post-decision genetic testing reports. Though Appellant has not presented a rule-based justification for considering information submitted for the first time to the Board on appeal, we have recently held that, notwithstanding the fact that the Board cannot compel genetic testing, it could be manifest error under 43 C.F.R. § 4.318 to refuse consideration of DNA evidence before a final Departmental decision is issued. *Estate of Levi Junmile Smith*,

49 IBIA 275 (2009).⁸ For purposes of considering Appellant’s submissions, we therefore construe them to have been presented on the basis of Appellant’s belief that test results proffered during the appeal demonstrate that a manifest injustice or error would occur if the Order Denying Reopening is not vacated or reversed. We distinguish the circumstances of the *Smith* case from those in this one to explain why we do not find the evidence proffered here sufficient to invoke the Board’s discretionary authority.

In *Smith*, an issue of paternity was also raised. We vacated and remanded for purposes of a hearing to consider DNA testing. The sampling at issue there was duly undertaken with full participation of attorney-advocates and unbiased third party witnesses; tissue samples were identified and proper sampling protocol was followed; results were tendered at a tribal court hearing in which the genetic laboratory presented both a report showing a “0%” chance of paternity and also testimony regarding sampling, test procedure, and sample custody subject to full cross-examination; and a tribal court rendered a paternity determination on the basis of that hearing. In this case, by contrast, Appellant has submitted results of five tests of undisclosed sample material, all collected without third party verification, all collected at home without verifying proof of adherence to medical protocol, and all subject to disclaimers by the genetics laboratory as to any probative legal value of its results. Quite simply, the very genetics laboratory whose information has been submitted admits that nothing presented about the genetics testing in this case would be legally admissible in a court of law. This lack of authentication alone renders the five genetics tests submitted by Appellant inadequate as a basis for invoking our authority under 43 C.F.R. § 4.318.

We note additional problems we would have as an administrative body in reaching any factual conclusions from the test results presented. As noted above, four of the tests are accompanied by “indices” on a common page 1. The scale of indices appears to be wildly exponential, ranging from 23.01 to 1960352.67, with a probability percentage associated with the lowest index of 23 set at 95.8%. Any conclusion from such numbers, other than that Appellant is more than 95.8% likely to be related to everyone involved in the alleged testing, is impossible for us to discern on this record alone and without expert testimony or

⁸ Under 43 C.F.R. § 4.318 (2007), “the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.” In *Estate of Smith*, we concluded that the rule also provides authority to prevent such error or injustice. 49 IBIA at 280.

a reliable explanation. Such results raise questions regarding the accuracy of the sampling techniques or the identity of the individuals sampled, or at least require an explanation.⁹

Moreover, three of the five samples were accompanied by probability factors on the common pages “1.” All probabilities regarding Appellant’s relationship to the Waln siblings as “full” siblings exceeded 98%. In the absence of some other explanation, it is possible that these results could well demonstrate that Appellant is a full sibling to the Walns. We note that Charlie and Jody Waln have a 99.9% chance of being both full and half siblings to each other, where by contrast Appellant has a 98% or greater chance of being a full sibling to both. But without some expert or other credible explanation, the legal consequence of the difference between 98% and 99.9% is not evident to this Board, and not sufficient for us to invoke section 4.318. We also note that those indices related to full-sibling factors with the Waln siblings were higher than the index with his alleged Leader Charge grandmother, although again, the legal relevance of this cannot be determined based on this record. Finally, the test results regarding the Y chromosomes are insufficient to be accepted as valid or as proof that would warrant action by this Board to exercise our discretionary authority to vacate or reverse the Order Denying Reopening. This test, performed by the same laboratory, is not presented with the same page 1 containing numerical indices and probability factors found with the other tests. As with the other tests, the report disclaims any responsibility for wrongful sample collection and instead presumes that collection was reliable. Thus, the statement provided that the results are “consistent with a hypothesis” of non-relationship cannot be accepted by the Board as having sufficient weight to cause us to invoke our authority under section 4.318.

Appellant had a chance proffered by his siblings and OHA to participate in a legally acceptable DNA test. He consistently refused, even when full payment was offered. In the face of the objections to reopening the estate, and absent evidence from Appellant to refute the evidence of paternity that *did* exist in *this* case, we find no basis to vacate or reverse the IPJ’s denial of reopening. Nor do we find a basis for exercising our discretionary authority under 43 C.F.R. § 4.318.¹⁰

⁹ We note that Appellant alleges without actual proof that all tests were accompanied by finger prints, two forms of ID, and a picture. Letter from Appellant to Board, Aug. 29, 2008. That both individuals may have provided such material to each other in home sampling, without an unbiased third-party witness, renders Appellant’s allegation of minimal, if any, relevance.

¹⁰ We recognize that the result of this holding is that Appellant has now been found, in two probate proceedings conducted by the Department of the Interior, to be the biological son
(continued...)

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, the Order Denying Rehearing is affirmed.

I concur:

// original signed
Lisa Hemmer
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.

¹⁰(...continued)

of two different fathers. We are not convinced, however, that the inconsistent and irreconcilable findings in the two probate proceedings necessarily constitute “manifest injustice” or compel resolution. The objective of a probate proceeding is the distribution of Decedent’s estate. In this case, Decedent’s estate was of minimal value and the heirs to it do not object to Appellant’s continued recognition as an heir. We can neither reach a holding nor express an opinion on the ultimate question of Appellant’s paternity.