



INTERIOR BOARD OF INDIAN APPEALS

Estate of Evelyn F. Broadhead

51 IBIA 238 (04/28/2010)



# 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 EVELYN F. ) Order Affirming Decision  
BROADHEAD )  
) Docket No. IBIA 08-100  
)  
) April 28, 2010

Genevieve South (Appellant) has appealed the April 24, 2008, Order Denying Reopening issued by Indian Probate Judge Albert C. Jones in the estate of Appellant's sister Evelyn F. Broadhead (Decedent), deceased Turtle Mountain Chippewa Indian, Probate No. P000002979IP. The Order Denying Reopening rejected Appellant's petition to reopen the February 18, 2004, Order Determining Heirs, Approving Will and Decree of Distribution (Order Approving Will) entered by Indian Probate Judge George Tah-bone. The Order Approving Will distributed the estate pursuant to the provisions of an Indian will executed by Decedent on July 24, 1972 (1972 Will or Indian Will), under which Appellant received an undivided one-half interest in Decedent's trust estate and the three surviving children of Decedent's pre-deceased twin sister Edna F. Bickers (Edna) shared the remaining undivided one-half. Appellant based her petition for reopening on her claim that a Last Will and Testament executed by Decedent on June 12, 2003 (2003 Will), which revoked all prior wills and designated Appellant as the sole recipient of the entire estate, should have been probated instead of the 1972 Will.

In the Order Denying Reopening, Judge Jones, citing 43 C.F.R. § 4.242(i) (2007), concluded that neither Appellant nor the Acting Superintendent, Turtle Mountain Agency, Bureau of Indian Affairs (BIA), who had filed the reopening petition on her behalf, had standing to seek reopening of the Order Approving Will because they were presumed to have received actual notice of both the original probate proceedings and the Order Approving Will, and because Appellant had participated in the telephone hearing held in the probate.<sup>1</sup> He further found that a failure to reopen would not result in manifest injustice

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<sup>1</sup> At the time Judge Jones issued the Order Denying Reopening, the regulation governing petitions for reopening an estate filed more than 3 years after the entry of a final decision in a probate proceeding, 43 C.F.R. § 4.242(i) (2007), provided that such a petition

(continued...)

because Appellant, despite being in possession of the 2003 Will at the time of the telephonic probate hearing conducted on December 11, 2003, had not made the existence of the will known until 2008 and thus had not been diligent in pursuing her rights.

On appeal, Appellant contends that she had provided Judge Tah-bone with notice of the 2003 Will prior to the hearing through her August 2003 submission of the Affidavit of Family History (Affidavit) in which she had indicated that she had Decedent's will in her possession and that the will named her as the sole beneficiary of all of Decedent's estate. She asserts that she had not raised the issue of the 2003 Will earlier because Judge Tah-bone's failure to question her at the hearing about the will in her possession had misled her into believing that the 1972 Will, which had been executed on a BIA form and dealt only with the Decedent's trust property, took precedence over the 2003 Will. She also maintains that she acted with due diligence because she filed the petition to reopen once she learned that the 2003 Will should have been probated instead of the 1972 Will.

We find Appellant's arguments insufficient to meet her burden of showing error in the Order Denying Reopening. Although Appellant stated in the Affidavit that she had in her possession a will naming her as the sole beneficiary of Decedent's estate, she provided neither the date nor a copy of the noted will, nor did she mention the will during the course of the hearing. Thus, Judge Tah-bone was unaware that the noted will post-dated the 1972 Will or potentially affected Decedent's trust estate. And, as the transcript of the

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<sup>1</sup>(...continued)

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 public notices were posted.

The Indian probate regulations were substantially revised in November 2008. The revised regulation addressing the reopening of closed probate cases more than 3 years after the date of the original decision, 43 C.F.R. § 30.242(a), eliminated, *inter alia*, the lack of notice requirement, i.e., the standing question. In *Estate of Benson Potter*, 49 IBIA 37, 38-41 (2009), the Board concluded that the new provision governs pending petitions for reopening and that therefore a petitioner's inability to meet the lack of notice requirements no longer precludes granting a petition to reopen. Accordingly, the question of Appellant's (and the Acting Superintendent's) standing has become moot and will not be addressed further. The stringent "manifest injustice" standard, however, still applies. *See id.* at 40 n.10; *see also* 43 C.F.R. § 30.242(a).

hearing confirms, Judge Tah-bone did nothing to affirmatively mislead Appellant about the significance of the will in her possession or to suggest that the 1972 Will had precedence over a later will. Appellant also has not established that she acted with due diligence in pursuing her interests since she admits that she had the 2003 Will in her possession at the time of the original probate proceedings. Appellant therefore has failed to show that a manifest injustice will occur if Decedent's estate is not reopened, and we affirm the Order Denying Reopening.

### **Background**

Decedent was born on July 17, 1921. Decedent's non-Indian husband died in 1985 and she had no children. She had three siblings, Walter Foughty LaFountain, Edna F. Bickers, and Appellant. Walter and Appellant survived her but Edna predeceased Decedent, leaving three surviving children: two sons, William Burton Bickers and John Melton Bickers, and one daughter, Kathleen Louise Bickers (Kathleen). On July 24, 1972, Decedent, along with Appellant and Edna, visited the Turtle Mountain Agency, BIA, where they executed wills disposing of their Indian trust property. Decedent's 1972 Will, bequeathed to her sisters (or to their surviving children) an undivided one-half interest each in her trust property. *See* 1972 Will Paragraph Three and Residuary Clause.

During the ensuing years, Decedent executed at least one other will that by its own terms affected only her non-trust property. *See* Kathleen Bickers' Brief in Opposition, Ex. 2, Last Will and Testament (1995). On June 12, 2003, Decedent executed the 2003 Will, which revoked "all former wills, testaments, codicils, and testamentary documents of any sort heretofore made" by her. 2003 Will at 1. This will named Appellant as the sole beneficiary of Decedent's entire estate. 2003 Will, Paragraph Fourth. Decedent died on July 9, 2003, in Reno, Nevada.

By letter dated July 29, 2003, the Acting Superintendent advised Appellant that probate proceedings would be held for Decedent but that BIA needed additional information before it could submit the probate package for further proceedings. He asked Appellant to provide a certified death certificate and a completed Affidavit of Family History for inclusion in the probate package. Appellant filled out the Affidavit and returned the completed form to BIA in August 2003. She indicated on the Affidavit that Decedent had a will, although she neither identified the date of the will nor submitted a copy of it, and stated that the location of the original will was "POSSESSION OF GENEVIEVE SOUTH[,] SISTER AND SOLE HEIR." Affidavit at 1.

Judge Tah-bone held a telephonic hearing on December 11, 2003, at which both Appellant and Kathleen appeared and testified. After ensuring the accuracy and

completeness of Decedent's personal information, her family members' identity and status, and the inventory of her trust property, the Judge confirmed that both Appellant and Kathleen had received copies of the 1972 Will, that they recognized the signature on the will as that of Decedent, and that Decedent had known what she was doing when she executed the will. *See* Transcript (Tr.) at 4-12. He also asked them if they had any objection to the 1972 Will being admitted into probate, to which they both stated "No." *Id.* at 11. Appellant also volunteered that she was with Decedent when Decedent signed the will. *Id.* The Judge then reviewed the provisions of the will and how the estate would be distributed under the will. *Id.* at 12-14. Judge Tah-bone did not ask Appellant any questions about the will she had stated was in her possession nor did Appellant mention that will or inquire as to whether it should be probated.

Judge Tah-bone issued his Order Approving Will on February 18, 2004. He declared the 1972 Will to be Decedent's last will and testament, admitted it to probate, approved it, and distributed Decedent's estate according to its provisions: An undivided one-half interest in Decedent's trust real property on the Turtle Mountain Reservation located in both Montana and North Dakota, including any income accrued after her death, and in Decedent's trust personalty in her Individual Indian Money account went to Appellant, with the other undivided one-half interest in the trust real property and personalty shared equally by Edna's three living children. Order Approving Will at 2-3.<sup>2</sup> Appellant did not petition for rehearing or otherwise object to the Order Approving Will at that time, and the Order became final in April 2004. *See* 43 C.F.R. § 4.240(c) (2007).

Over 3 years later, by letter dated January 30, 2008, Appellant requested that Decedent's estate be reopened due to the "fact that the *Indian Will* of 1972 (used to render probate) was not in reality [Decedent's] Last Will and Testament." Appellant asserted that Decedent's 2003 Will, which had revoked all previous wills without any exceptions and had left her entire estate to Appellant, should have been the will that was probated. She explained that she failed to raise the 2003 Will at the hearing because she was surprised and flustered by the call. She also averred that she was misled at the hearing to believe that the

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<sup>2</sup> In her Reply Brief, Appellant alleges for the first time that she did not receive notice of the Order Approving Will. *See* Reply at 13. The Board normally does not take up issues raised for the first time on appeal. *See, e.g., Estate of Phillip Loring*, 50 IBIA 178, 186 n.13 (2009); *Bunney v. Pacific Regional Director*, 49 IBIA 26, 31 (2009) (citing 43 C.F.R. § 4.318). In any event, the Notice transmitting the Order to interested parties indicates that the Order was properly sent to Appellant's long-time address of record, which is the address she listed on her Affidavit and at which she has received other notices related to Decedent's probate proceeding.

1972 Indian Will took precedence over the 2003 Will, and that she only recently discovered that the 2003 Will legally encompassed the trust properties and thus negated the 1972 Will. She enclosed a copy of the 2003 Will with her letter. On February 7, 2008, the Acting Superintendent requested that Decedent's estate be reopened for the reasons set forth in Appellant's letter, which he attached to the request.

Judge Jones issued the Order Denying Reopening on April 24, 2008. He construed Appellant's arguments as allegations that failure to reopen the estate would result in manifest injustice because the Order Approving Will honored the 1972 Will instead of the 2003 Will. He concluded, however, that Appellant had not provided any real explanation for her failure to make the 2003 Will's existence known earlier, noting that the 2003 Will had been in her possession at the time of the Order Approving Will. Citing the necessity of balancing the need for finality in probate decisions and the need to correct errors in decisions when reviewing petitions to reopen estates closed for more than 3 years, Judge Jones determined that Appellant's failure to mention the 2003 Will at the probate hearing or at any other time during the pendency of the probate proceeding demonstrated that Appellant had not been diligent in pursuing her rights and thus had not established that manifest injustice would result if the estate was not reopened. He therefore denied the petition for reopening.

## Discussion

### Legal Principles

Both the regulation in effect at the time the Superintendent filed the petition to reopen on Appellant's behalf, 43 C.F.R. § 4.242(i)(1) (2007), and the current revised regulation, 43 C.F.R. § 30.242(a), provide that a petition to reopen an estate that has been closed for more than 3 years will be allowed only upon a showing that a manifest injustice will occur if the estate is not reopened. Manifest injustice is determined by balancing the interests of the public and heirs in the finality of long-closed probate proceedings against the interests of the petitioner and the need to correct errors. *See Estate of Milward Wallace Ward*, 46 IBIA 5, 8 (2007); *Estate of George Dragswolf, Jr.*, 17 IBIA 10, 12 (1988). Because of the substantial interest of Indian heirs and devisees in the finality of Indian probate decisions affecting their property rights, the Board requires a petitioner, as part of the showing of manifest injustice, to demonstrate that he or she has acted with due diligence in pursuing the claim. *Estate of Dragswolf*, 17 IBIA at 12; *see Estate of Albert Angus Sr. and Estate of George Angus*, 46 IBIA 90, 98-99 (2007); *Estate of George Dragswolf, Jr.*, 30 IBIA 188, 196 (1997); *see also* 43 C.F.R. 30.242(a) (requiring that petitions to reopen filed by an interested be filed within 1 year after the petitioner's discovery of an alleged error). An appellant bears the burden of establishing that an order denying a petition to

reopen an estate is erroneous. *Estate of Darryl Edwin Rice*, 49 IBIA 16, 18 (2009); *Estate of Ward*, 46 IBIA at 8. Appellant has failed to meet that burden here, and we affirm the Order Denying Reopening.

## Analysis

On appeal, Appellant argues that Decedent's estate should have been reopened to prevent the miscarriage of justice created by the incorrect, incomplete, and inadequate evidence presented at the hearing. In support of this claim, she reiterates that she was surprised by the unanticipated telephonic hearing and thus had no time to prepare for the hearing, and that she was confused by the proceedings. She asserts that Judge Tah-bone had notice of the 2003 Will because she had indicated the existence of that will on the Affidavit, yet he failed to question her about the will in her possession and thus misled her into believing that the 1972 Indian Will trumped the 2003 Will. She maintains that this failure breached the Judge's trust responsibility to her and constituted manifest injustice. She further alleges that she has been diligent in pursuing her claim. She attributes her lengthy delay in filing the petition to reopen to her purportedly justifiable belief, based on the hearing, that the 1972 Will took precedence over the 2003 Will, and explains that it was only through diligent research and investigative communications with BIA that she discovered in January 2008 that the 2003 Will should have been probated. She further argues that the balance of equity weighs in favor of reopening of Decedent's estate because the estate is still held in trust and the status of the property has not changed.<sup>3</sup> We find none of these arguments persuasive.

Although Appellant maintains that Judge Tah-bone knew or should have known of the "new" 2003 Will at the time of the hearing because she had stated on the Affidavit that she had a will in her possession naming her as Decedent's sole heir, she did not provide the date of the will, did not describe the will as "new," and did not otherwise identify the will, nor did she provide a copy of the will along with the Affidavit. While it is true that Judge Tah-bone did not question her about the will, it is equally true that Appellant did not even mention the will, much less inquire about its relevance. Her failure is especially significant because she does not contend that she was unaware of the commonly known fact that wills affect the distribution of estates, and yet she did not mention the will as would be expected of a person in possession of a will, especially a will naming the individual as the sole

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<sup>3</sup> Appellant also contends for the first time that she has presented sufficient evidence to establish that the 2003 Will is valid on its face. This issue was not raised before Judge Jones or earlier in this and appeal and thus is not properly before us. *See, e.g., Estate of Loring*, 50 IBIA at 186 n.13; *Bunney*, 49 IBIA at 31; *see also* n.2, *supra*.

beneficiary. On its face, the 2003 Will stated that it “revoked all former wills,” thus giving Appellant sufficient information to at least inquire about the Will during the hearing. Instead, Appellant explicitly stated that she had no objections to the 1972 Will being admitted into probate. *See* Tr. at 11. Her assertion that she was confused by the hearing proceedings is belied by the hearing transcript which shows that she actively participated in the hearing, answered questions clearly and fully with no hesitation or misunderstanding, and even volunteered additional information about the execution of the 1972 Will. *See, e.g.*, Tr. at 10-14. We find that nothing in the record even remotely suggests that the Judge’s conduct of the hearing misled Appellant into believing that the 1972 Will took precedence over the unmentioned 2003 Will, or justifies her failure to even refer to the 2003 Will during that proceeding. Thus, even if, as she contends, the Order Approving Will was based on incorrect and incomplete information because it failed to consider the 2003 Will, no “miscarriage of justice” will result if the Order is not reopened because Appellant was in possession of the will at the time of the hearing but failed to bring it to the attention of the Judge.

Appellant has also not established that she exercised due diligence in pursuing her claim. Appellant does not contend that the 2003 Will is newly discovered evidence unavailable earlier, nor could she do so since she admits that the will was in her possession at the time of the original probate proceedings. Rather, she avers that she only recently discovered the legal significance of the 2003 Will and its relevance to the probate of Decedent’s estate.<sup>4</sup> New knowledge, however, is not new evidence nor does it excuse her failure to even mention the 2003 Will at the hearing.<sup>5</sup> Appellant thus has not shown that she diligently pursued her interests. And, given the facts of this case, she also has not established that the equities favor the reopening of Decedent’s estate. We therefore find that Appellant has not demonstrated that failure to reopen Decedent’s estate would create manifest injustice, and we affirm the Order Denying Reopening.

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<sup>4</sup> Appellant does not explain what prompted her to belatedly question the applicability of the 1972 Will or to investigate the possibility that the 2003 Will trumped the earlier will.

<sup>5</sup> We note that allowing long-closed estates to be reopened whenever an interested party subsequently discovers new information about the law existing at the time the estate was closed could lead to limitless challenges to those estates and thwart the important interest in the finality of estate decisions.

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 Judge Jones' Order Denying Reopening.

I concur:

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// original signed  
Sara B. Greenberg  
Administrative Judge\*

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

\*Interior Board of Land Appeals, sitting by designation.