



INTERIOR BOARD OF INDIAN APPEALS

Estate of Clement Herman Beargrease

51 IBIA 312 (06/18/2010)

Related Board case:

55 IBIA 169

48 IBIA 162

Eleanor Beargrease. Order Determining Heirs, Apr. 6, 1995, at 1.² The remainder of Decedent's estate, consisting of certain land interests that were to pass to the Minnesota Chippewa Tribe (Tribe) in accordance with the Indian Land Consolidation Act (ILCA), Pub. L. 97-459, was held in abeyance pending the outcome of litigation challenging the constitutionality of ILCA.³ No mention is made of Appellant in the Order Determining Heirs and her name does not appear on the service list for that order.

In 2008, the Superintendent of the Minnesota Agency of the Bureau of Indian Affairs (Superintendent) sought reopening of Decedent's estate on the grounds that Appellant is Decedent's biological daughter and an omitted heir. The Superintendent produced a copy of Appellant's enrollment card with the Fond Du Lac Tribe; a copy of a state court Order for Judgment, in which Decedent was determined to be "the father of the female child born to Pearl Jacobson" in Duluth, Minnesota on May 13, 1946; and a copy of Appellant's birth certificate, showing her mother as Pearl Jacobson and her date and place of birth as May 13, 1946, in Duluth, Minnesota. Order Denying Petition to Reopen Estate, July 29, 2008, at 1-2.

Judge Hough, to whom this probate was reassigned, denied the Superintendent's petition on the grounds that the Superintendent lacked standing to seek reopening under the regulations then governing the reopening of closed estates. Thereafter, Appellant sought reopening on her own behalf. On July 29, 2008, Judge Hough denied Appellant's petition because Appellant failed to show that she had not received constructive notice of the original probate proceedings. Judge Hough also found that the interest in finality of probate decisions affecting property rights weighed against reopening. In this regard, Judge Hough found that Appellant had not demonstrated diligence by explaining the cause of her delay in seeking reopening of Decedent's estate, i.e., why she waited 18 years after

² The Board's legal assistant obtained copies of various decisions entered in Decedent's estate, including the Order Determining Heirs and the Order Denying Petition to Reopen Estate, from the Office of Hearings and Appeals in Fort Snelling, Minnesota.

³ According to Judge Lambrecht's Order Determining Heirs, a further order was to be issued for the distribution of these land interests once the litigation concluded. *See* Order Determining Heirs at 2. Ultimately, the Supreme Court held the applicable provision of ILCA to be unconstitutional. *See Babbitt v. Youpee*, 519 U.S. 234 (1997). Without the full record before us, we are unable to determine whether a further order has issued to distribute these land interests.

Decedent's death and 13 years after his estate closed before she contacted BIA.⁴ Appellant appealed Judge Hough's July 29 decision to the Board, arguing that she was not seeking financial gain, but seeking only recognition as Decedent's daughter and heir. The Board dismissed Appellant's appeal for lack of jurisdiction because the appeal was untimely. *Estate of Clement Herman Beargrease*, 48 IBIA 162 (2008).

In January 2010, the Superintendent requested a modification in Decedent's estate to add and distribute certain land interests that were inherited by Decedent after his trust estate was probated in 1995.⁵ Judge Hough issued the requested modification order on February 18, 2010, in which he added the property and ordered that it be distributed in accordance with Judge Lambrecht's 1995 Order Determining Heirs.

Appellant submitted a timely appeal to the Board from Judge Hough's modification order in which she alleges that Decedent's widow gave "false information" when she stated, during the original probate proceedings, that Decedent "never fathered any children." Appellant maintains that she is Decedent's "only surviving child," that she "was not living in or around St. Louis County, Duluth at the time of [Decedent's] death," "was not aware of the proceedings in this case," and that she did not "receive actual notice of the proceedings." She maintains that, as Decedent's sole surviving child, she is entitled to "at least a shared interest in [Decedent's] land."

Discussion

We dismiss this appeal because Appellant's substantive argument is directed at the 1995 Order Determining Heirs where Judge Lambrecht determined that Decedent had no

⁴ While it appears that Appellant received notice that she had the burden of showing that she did not receive constructive notice of the proceedings for Decedent's estate, it is unclear whether she was given an opportunity to show that she had been diligent in seeking reopening.

⁵ Because the Superintendent expressly states that these land interests were inherited by Decedent "after the original probate was determined," Memorandum from Superintendent to Judge Hough, Jan. 4, 2010, we presume that these interests are different from the interests held in abeyance pending a final decision on the constitutionality of ILCA. *See* n.3 *supra*.

children.⁶ But we conclude that the evidence in this case — that Appellant was erroneously omitted as an heir — is sufficiently strong to warrant staying any distribution of the newly-added property and any additional land interests that have not yet been distributed until the propriety of reopening can be decided. We therefore refer Appellant’s appeal to the Probate Hearings Division for further consideration pursuant to 43 C.F.R. § 30.242.

The scope of the Board’s jurisdiction over appeals in Indian probate matters is set forth in 43 C.F.R. §§ 4.318 and 4.320: We may hear appeals from orders on petitions for rehearing, petitions for reopening, purchase of interest(s) in an Indian decedent’s estate, or from a modification order. *See Estate of Caroline Davis*, 51 IBIA 101 (2010). However, nothing in the Modification Order purported to reopen the issue of whether Appellant was entitled to inherit from Decedent. Instead, the Modification Order expressly stated that the land interests referred by the Superintendent “pass[] in accordance with the laws of the state of Minnesota *as cited and set forth in [Judge Lambrecht’s] 1995 Order [Determining Heirs].*” Therefore, because Appellant challenges the original Order Determining Heirs, her appeal is outside the scope of our review. *See* 43 C.F.R. § 4.318; *see also Estate of Irma Ross*, 51 IBIA 21 (2009) (the issue of an individual’s status as an heir was not reopened by an order that modified the estate inventory).

Although we must dismiss this appeal as outside the scope of our review of the Modification Order, we conclude that it is appropriate to refer the matter to the Probate Hearings Division to determine whether reopening of the heirship determination is appropriate. Appellant was adjudicated in state court to be Decedent’s daughter and has been recognized as such by tribal authorities through her enrollment in the Fond du Lac Tribe. She was not identified as Decedent’s daughter or as an otherwise interested party at the time of the original probate proceedings nor did she receive actual notice of the proceedings. Appellant contends that Decedent’s spouse provided false information to BIA and Judge Lambrecht in asserting that Decedent had no children. The evidence proffered by the Superintendent and Appellant presents a strong case, possibly undisputed, that Appellant is Decedent’s daughter. Even assuming that principles of finality and *res judicata* might bar reopening the heirship determination with respect to previously-distributed property, those same considerations carry less weight in the context of distributing newly identified and previously omitted property, particularly under the facts of this case. Given these facts, we conclude that it is appropriate to refer Appellant’s appeal to the Probate Hearings Division for a determination on whether to reopen Decedent’s estate.

⁶ Appellant also, in effect, challenges Judge Hough’s procedural denial in 2008 of her petition to reopen. But, that decision became final when Appellant failed to file a timely appeal with the Board from his denial of reconsideration. *See Estate of Beargrease*, 48 IBIA at 164.

We recognize that both the Superintendent and Appellant previously sought to reopen the Order Determining Heirs to have Appellant determined to be an heir. Those efforts were denied on a procedural ground (constructive notice) that no longer exists under the current regulations. *Comp.* 43 C.F.R. § 4.242 (2008) with *id.* § 30.242 (2009).⁷ Under the facts of this case, we conclude that the prior denial of reopening should not preclude consideration of reopening the heirship determination as applied to the newly-added property.

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 docketed this appeal but dismisses it because Appellant's challenge is outside the scope of Judge Hough's order. We refer this matter to the Probate Hearings Division for further consideration pursuant to 43 C.F.R. § 30.242. Distribution of the omitted property, and any other property not yet distributed, shall be stayed pending a final determination whether to reopen Decedent's estate.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

⁷ The ALJ determined that both the Superintendent and Appellant had notice of the original probate proceedings and, on that basis, barred their petitions to reopen the estate. In addition, the ALJ denied Appellant's petition because she had not demonstrated due diligence in seeking reopening, but it is unclear what opportunity she was afforded to satisfy her burden on that issue. Aside from these issues, there may no longer have been any property to distribute when the matter was before Judge Hough because, pursuant to Judge Lambrecht's probate order, Decedent's non-Indian surviving spouse was his sole heir and any property distributed to her would have passed out of trust, thus potentially mooting both the Superintendent's and Appellant's petitions to reopen.