INTERIOR BOARD OF INDIAN APPEALS

Estate of Laberta Stewart, a.k.a. Laberta LaForge, a.k.a. Laberta Rondeau

54 IBIA 198 (01/13/2012)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
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ESTATE OF LABERTA STEWART, a.k.a. LABERTA LAFORGE, a.k.a. LABERTA RONDEAU	)	Order Vacating Decisions and Remanding
	)	Docket No. IBIA 10-038
	)	January 13, 2012

In this appeal in the estate of Laberta Stewart (Decedent),[1] deceased Crow Indian, Probate No. P000062042IP, we conclude that Indian Probate Judge Albert C. Jones (IPJ) erred when he denied the Petition to Reopen (Petition) submitted by Appellant Roland K. LaForge, Sr., and failed to vacate his underlying Decision, in which the IPJ approved an agreement (Agreement) between Decedent's two surviving children, Appellant and his half-brother, Lonnie D. Stewart (Stewart).[2] The Agreement grew out of a discussion on the record at the hearing held in Decedent's estate at which Appellant stated that he wanted to divide Decedent's estate evenly between him and Stewart.[3] Instead, the written Agreement that the IPJ approved gave Stewart 78 percent of the aggregate value of Decedent's trust real property and gave Appellant the remaining 22 percent. Not only is there no explanation for the disparity between the written Agreement and Appellant's stated intentions at the hearing, but the record contains no support for the IPJ's conclusion that the Agreement satisfied the criteria of 43 C.F.R. § 30.150(a), which governs the approval of settlements during probate.

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[1] Decedent was also known as Laberta LaForge and as Laberta Rondeau.

[2] The Order Affirming Decision After Hearing on Reopening (Reopening Decision) issued on December 11, 2009; the underlying probate decision issued on September 11, 2008.

[3] Because Decedent died intestate owning primarily real property and mineral interests of less than five percent in various trust allotments, 73 percent of the aggregate value of her trust real property would pass to Appellant, as Decedent's oldest child, under the applicable intestacy law, and the remaining 27 percent would pass to Stewart.

The IPJ failed to correct his error on reopening. Instead, he further erred in finding the Petition to be defective, refusing to consider a letter that cured the defects in the Petition, and requiring Appellant to show that the IPJ's error resulted in manifest injustice. Therefore, we vacate both the Reopening Decision and the Decision, and we remand this matter to the Probate Hearings Division for further proceedings.

Background

Decedent died intestate on June 10, 2007, and was survived by her two sons, Appellant and Stewart. Appellant is the older of the two brothers. Decedent's trust estate included an Individual Indian Money (IIM) account and 175 minerals, land, or combined minerals/land interests in trust or restricted allotments on the Crow Reservation and in the Crow Ceded Area. Decedent's ownership interest exceeded 5 percent in only 14 of the 175 interests.

On July 1, 2008, the IPJ held a hearing to probate Decedent's estate. Both Appellant and Stewart attended. At the hearing, the IPJ explained that probate of the estate would be governed by the American Indian Probate Reform Act (AIPRA), 25 U.S.C. § 2201 *et seq*. He explained that, under AIPRA, the brothers would each inherit equal shares of those allotments in which Decedent's ownership interest was five percent or greater and they would each share equally in the funds in her IIM account. He further explained that Appellant, as the oldest child, would inherit all of Decedent's interests in trust allotments in which she owned less than five percent. According to the Title Status Report from the Bureau of Indian Affairs' Land Titles and Records Office, a copy of which is in the record, the effect of the intestate distribution of Decedent's allotment interests under AIPRA would result in 73 percent of the aggregate value of Decedent's trust real property interests passing to Appellant, as Decedent's oldest child, and the remaining 27 percent to Stewart.

During the hearing, Appellant repeatedly expressed his desire to split Decedent's estate equally with Stewart. *See* Hearing Transcript (Tr.) at 9:10-12, 10:4, 11:2-4 (Probate Record (PR) Tab 14). The IPJ explained that this could be achieved by executing a consolidation agreement before the estate was distributed.[4] The IPJ urged the brothers to write, execute, and return a written agreement as quickly as possible in order to expedite distribution of the estate. *Id*. at 13:3, 15:8-9, 17:13-15.

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[4] The IPJ also mentioned that Appellant could renounce certain interests or, once the estate was distributed pursuant to the applicable intestacy rules, Appellant could execute gift deeds to transfer any interests to Stewart.

The brothers drafted, signed, and notarized the Agreement immediately after the hearing. The Agreement, handwritten on one sheet of paper, states,

> I Roland LaForge agree to give these lands & lots and to Lonnie Stewart. I also agree to give 1/2 of our mother[']s IIM accounts. I agree to give half of any future lands or lots our mother may receive in the future. Thank you.

PR Tab 13. The Agreement lists 32 allotments by allotment number and name of the original allottee.[5] Both Appellant and Stewart signed the Agreement, and a notary's seal and signature are present. The written Agreement was delivered to the IPJ the following day, July 2, 2008.

After seeking and receiving clarification from Appellant concerning 11 of Decedent's interests to be transferred to Stewart (clarification letter), the IPJ issued his Decision on September 11, 2008, and approved the Agreement.[6] The Decision distributed the IIM account equally to each son and gave the 29 allotment interests identified in the Agreement to Stewart.[7] In approving the parties' Agreement, the IPJ stated that, at the hearing, he had "fully explained the parties' options for achieving the effect of the agreement they have now filed." Decision at 3. The IPJ further stated that he had sought clarification from Appellant as to certain allotment interests, and that Appellant had responded. Thereupon, the IPJ concluded that "the parties have been fully advised, and are cognizant of all material facts and the effect of the agreement upon their rights." *Id*. With respect to the allotment interests that Appellant did not give to Stewart, the IPJ found "that the parties intended [Appellant] to have the rest and residue of Decedent's trust real property," including those remaining allotments in which Decedent's interest was five percent or greater, because the

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[5] Three allotments were listed twice in the Agreement (allotment nos. 1231, 1558, and 1551).

[6] According to the Summary of Telephonic Hearing, which was also signed on September 11, 2008, and which was a summary of the July 1 hearing, the IPJ "accepted and approved" the Agreement during the hearing. PR Tab 11. Nothing in the hearing transcript reflects any acceptance or approval of any agreement by the IPJ and, as we discuss later, the proposed agreement discussed at the hearing differed dramatically from the written Agreement presented to the IPJ the next day.

[7] The Decision listed 30 allotments, of which 1 was listed twice (allotment no. 1231).

Agreement did not identify any allotments for Appellant and because Appellant agreed "to give the listed allotments to [Stewart]." *See id.* Under the terms of the IPJ's order, Appellant received 22 percent of the total estimated value of Decedent's allotment interests and Stewart received 78 percent.[8]

On March 27, 2009, the IPJ received Appellant's Petition, in which Appellant stated that the Decision resulted in "a forfeit of land & lots given to my sibling brother Lonnie Stewart. . . . Attention: Land and allotments were not accurate." Petition, PR Tab 10.[9] The IPJ calendared a hearing for August 5, 2009, to clarify Appellant's claims. Stewart appeared at the hearing, but Appellant did not.[10] At the hearing, the IPJ stated that he would hold the record open for 20 days, until August 26, 2009, to give Appellant a chance to explain his claim. Stewart said he would tell Appellant. The IPJ did not send written notice to Appellant that the record would be held open.

On September 2, 2009, the IPJ received another letter from Appellant (September 2 Letter). In it, Appellant asserted that, although he and Stewart had agreed to split the estate equally, the Agreement did not have that effect. Appellant stated that he had allowed Stewart to draft the Agreement and that Appellant had signed it without carefully reviewing it. Appellant explained that he later realized that Stewart "took most of [the estate] and left practically nothing" for Appellant, which he characterized as unfair when he was the one

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[8] Under the Agreement, Stewart received *all* of Decedent's allotment interests valued above $1,000.00 (11 separate allotment interests), which constituted 59 percent of the total estimated value of Decedent's trust land interests. Stewart also received an additional 18 interests.

[9] Appellant also asserted that he had not received a copy of the Decision. The IPJ certified that he had sent the Decision to the address Appellant provided at the hearing and, because it had not been returned, it was presumed that Appellant received it. Reopening Decision at 1-2.

[10] The Petition itself did not contain an address for Appellant. The record reflects several addresses for Appellant during the course of the probate proceeding, including two different street addresses and the "Family Shelter" in Billings, Montana, all of which suggests that Appellant moved frequently. For reasons not apparent in the record, the notice for the August 5 hearing was sent to Appellant at an address that Appellant previously had informed the IPJ was no longer a valid address.

who would have inherited all of Decedent's property in the absence of an agreement. September 2 Letter at 2 (PR Tab 5).[11]

The IPJ issued his Reopening Decision on December 11, 2009. The IPJ held that Appellant had not "includ[ed in the Petition] information substantiating an error of fact or law that would result in manifest injustice," as required by § 30.242(a)(2)(ii) (2009),[12] and that Appellant's claim resulted from his "fail[ing] to review a document that he signed before a notary." Reopening Decision at 2. He noted that Appellant did not raise any issue concerning the Agreement when he responded to the IPJ's clarification letter, and noted that Appellant did not attend the August 5 hearing.

Alternatively, the IPJ held that the Petition did not fulfill the requirements of 43 C.F.R. § 30.242(b), (c)(1), and (c)(2), which require the grounds for reopening to be fully explained in the petition and supported by affidavit. The IPJ noted that he had scheduled the August 5 hearing "to ensure that [Appellant] understood the settlement agreement he had signed," and to provide the parties with the opportunity to "explain the potential problem with the estate." Reopening Decision at 2. The IPJ characterized the September 2 Letter as "too little, too late." *Id*. at 3. He denied the Petition and affirmed the Decision.

This appeal followed.

Discussion

The Agreement is inexplicably contrary to Appellant's statements on the record at the hearing. The IPJ committed error when he approved the Agreement without determining why the written Agreement varied so significantly from Appellant's stated wishes at the hearing, without advising the parties of the material facts, and without determining if they understood the effect of the Agreement on their rights. The IPJ failed

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[11] As explained *supra* at 199, Appellant was mistaken in his belief that he was entitled to inherit all of Decedent's estate.

[12] Section 30.242(a) was published with two subsections marked as (2). The regulations to which we refer in our decision are part of the second subsection (2). The error was corrected when § 30.242 was redesignated as § 30.243 as part of the 2011 amendments to 43 C.F.R. pt. 30. *See* 76 Fed. Reg. 7,500, 7,508 (Feb. 10, 2011) (interim final rule, confirmed by 76 Fed. Reg. 45,198 (July 28, 2011)). For purposes of our decision, all references to the regulations refer to the 2009 edition of the Code of Federal Regulations.

to correct his errors when Appellant sought reopening. Therefore, we vacate both the Reopening Decision and the underlying Decision, and remand this matter for further proceedings.

1. Standard of Review

The Board reviews *de novo* legal determinations and the sufficiency of the evidence. *Estate of Cyprian Buisson*, 53 IBIA 103, 107 (2011). While we will not reverse or vacate where a legal error is harmless, *see Estate of Rose Medicine Elk*, 39 IBIA 167, 171 (2003), we do not hesitate to do so where it is not clear that the error is harmless, *see Estate of Peter Chatelaine*, 40 IBIA 160, 161 (2004).

2. The IPJ Erred in Approving the Agreement in his Decision and Erred in Failing to Correct the Error Upon Reopening

A written agreement that inexplicably fails to adhere to Appellant's stated intentions to share Decedent's estate equally — especially considering Appellant's entitlement under the applicable intestacy rules to 73 percent of the value of Decedent's real property interests — cannot stand. Although the IPJ asserts in his Decision that the required criteria — found in 43 C.F.R. § 30.150(a) for approving settlement agreements — were satisfied, we find no support for his conclusion in the record and it appears instead that the IPJ may not have examined the written Agreement. The Agreement that the IPJ presumably was expecting and that was discussed at the hearing was one that split Decedent's trust real property estate evenly between the two brothers. Instead, the Agreement gave 78 percent of the aggregate value of Decedent's trust real property to Stewart without explanation. The terms of such an agreement should have raised red flags for the IPJ and caused him to communicate with the brothers *before* approving the Agreement to determine why the distribution varied so significantly from the discussion at the hearing, whether the brothers understood the terms of their Agreement, and to advise them of the material facts. And, when he received Appellant's Petition and had the opportunity to correct his error on reopening, the IPJ failed to do so.

Prior to approving a settlement agreement during probate, the probate judge must make certain findings:

(1) All parties to the agreement are advised as to all material facts;
(2) All parties to the agreement understand the effect of the agreement on their rights; and
(3) It is in the best interest of the parties to settle.

43 C.F.R. § 30.150(a); *Estate of Francis X. Davis*, 52 IBIA 69, 70 (2010).[13] These findings are to be made *prior* to approving the agreement, not afterwards. In his Decision, the IPJ asserted that the criteria of § 30.150(a) were met, but it is evident that he did not undertake the requisite inquiry.[14] The IPJ's articulated support for finding that the criteria were satisfied consists of the following: 1) He had explained at the hearing the several "options for achieving the effect of the agreement they have now filed," 2) Appellant and Stewart had filed the Agreement identifying allotments to be distributed to Stewart, and 3) Appellant had affirmed that the 11 corrections in the IPJ's clarification letter were accurate. Decision at 3. These findings fail to address the key inquiries required under § 30.150(a).

Ultimately and prior to approving the Agreement, the IPJ should have determined why the Agreement provided a distribution of the estate that was so clearly contrary to Appellant's stated intentions at the hearing, especially considering the inheritance to which Appellant would be entitled under AIPRA in the absence of his willingness to share the estate equally with his brother. In the absence of an adequate explanation, such a distribution is *not* in Appellant's best interest.[15]

Notwithstanding his underlying error, the IPJ had the opportunity to correct this error on reopening but did not. In his Petition, Appellant characterized the

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[13] It is not clear to us that the parties' Agreement was a "settlement" agreement inasmuch as no "issue" appeared to arise between the parties and, thus, there appears to be no "issue" to settle. *See* 43 C.F.R. § 30.150(a) (A "settlement" is an "agreement among interested parties *resolving any issue* in the probate proceeding." Emphasis added.). Whether the Agreement is more appropriately construed as a consolidation agreement or as a renunciation in favor of Stewart need not be resolved inasmuch as the IPJ's approval of the Agreement cannot stand.

[14] In fact, the IPJ concedes in his Reopening Decision that he scheduled the second hearing — which was scheduled *after* he had already approved the settlement and *after* he received Appellant's Petition — "to ensure that [Appellant] understood the settlement agreement he had signed." Reopening Decision at 2.

[15] If the Agreement were considered as a consolidation agreement or renunciation of interests in favor of Stewart, no "best interest" finding need be made, but the Agreement must be voluntary, *see* 43 C.F.R. § 30.151(c), which would also require an inquiry into the discrepancy between Appellant's stated intentions to split the estate 50-50 and the Agreement's 78-22 split.

Agreement as a "*forfeit* of land [and] lots" and stated that "[l]and and allot[]ments were not accurate." Emphasis added. This information was sufficient to have caused the IPJ to examine the Agreement to determine whether it in fact effected and captured the terms stated on the record at the hearing and whether it was in fact an equitable agreement. Had he done so, the IPJ surely would have seen the significant disparity in the value of the allotment interests to be distributed to the two heirs and, presumably, would have squarely addressed this issue.

Even assuming that the Petition were deficient, Appellant cured any deficiency with his September 2 Letter, which the IPJ erroneously declined to consider because it was "too little, too late." Reopening Decision at 3. In his letter, Appellant explained that he and Stewart had agreed upon an equal division of the estate at the hearing. He stated that Stewart had drafted the Agreement, and that he had signed it without reviewing it. Notably, he said that he had trusted Stewart and later realized that the Agreement distributed much more real property to Stewart than had been discussed and agreed. This information adequately informed the IPJ of his error in failing to determine whether Appellant understood the effect of the Agreement.

Because the September 2 Letter arrived before the IPJ issued his decision on Appellant's Petition, the IPJ should have considered the letter as an amended or supplemental reopening petition. Nothing in 43 C.F.R. pt. 30 bars an appellant from filing an amended petition or supplementing his petition *before a decision on the petition issues* and having this new pleading considered by the probate judge.[16] When Appellant submitted this additional argument before a decision on reopening had issued, and especially where as here the initial petition was deemed to be deficient, the IPJ should have reviewed and considered the merits of Appellant's supplemental pleading.

Finally, the ALJ applied an incorrect standard to his review of Appellant's Petition. Instead of applying 43 C.F.R. § 30.242(a)(2)(i), which requires a petitioner to show an error of fact or law if the petition is filed *within* 3 years of the date of the original decision, the IPJ applied § 30.242(a)(2)(ii), which is reserved for

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[16] Indeed, when pleadings are received by probate judges *after* a decision has been issued, the pleadings are generally construed, depending on the posture of the case, as petitions for rehearing or reopening or forwarded to the Board as potential appeals. We see no reason why supplemental or amended pleadings should be disregarded simply because they are received after the initial petition for reopening or rehearing but before a decision has issued.

petitions filed *more* than 3 years after the date of the original decision and which requires that manifest injustice be shown. The IPJ held that Appellant failed to demonstrate manifest injustice. Because Appellant filed his Petition less than 7 months after the Decision, the applicable standard to apply was § 30.242(a)(2)(i), which does not require a showing of manifest injustice.[17]

The IPJ failed to undertake the inquiry he was required to make before approving the Agreement, and he failed to correct this error when given the opportunity to do so upon receipt of Appellant's Petition and September 2 Letter. Because the Agreement was wholly at odds with Appellant's stated intentions and because Appellant's objection to its approval was clearly shown in his Petition, we vacate both the Decision and the Reopening Decision, and remand this matter for further proceedings.

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 Reopening Decision and the Decision, and remands this matter to the Probate Hearings Division for further proceedings consistent with our decision.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

[17] Even under the manifest injustice standard, we would be hard-pressed to affirm the Order Affirming Decision because the Agreement gave Stewart a grossly disproportionate share of Decedent's estate for no apparent reason and Appellant did not delay significantly in seeking reopening.