



INTERIOR BOARD OF INDIAN APPEALS

Estate of George Dragswolf, Jr.

30 IBIA 188 (02/24/1997)

Modified:

31 IBIA 228

Voluntary withdrawal, *Morgan v. United States*, Civil No. A4-97-35
(D.N.D. July 8, 1998)

Related Board cases:

13 IBIA 28

17 IBIA 10



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF GEORGE DRAGSWOLF, JR.

IBIA 96-8, 96-9

Decided February 24, 1997

Appeal from an order determining heirs after reopening issued by Administrative Law Judge Vernon J. Rausch in Indian Probate IP TC 105R 90, IP BI 60B 85, D-68-66.

Affirmed in part; reversed in part.

1. Indian Probate: Appeal: Matters Considered on Appeal

Although it normally declines to consider legal arguments raised for the first time on appeal, the Board of Indian Appeals occasionally addresses such arguments when not to do so would only unnecessarily delay resolution of a matter and where the parties' failure to make the arguments earlier can be explained.

2. Indian Probate: Reopening: Generally

Historically, in determining whether or not to reopen a long-closed Indian estate, the Department of the Interior has attempted to balance the interests of the parties who would be affected by a reopening.

3. Board of Indian Appeals: Generally--Indians: Lands: Allotments: Alienation--Indians: Lands: Individual Trust or Restricted Lands: Alienation

At least absent a showing of fraud or undue influence, neither the Board of Indian Appeals nor an Administrative Law Judge has authority to void a deed of Indian trust property.

4. Indian Probate: Reopening: Generally

Under appropriate circumstances, an Indian estate may be reopened even though a portion of the estate has been disposed of and is therefore no longer available for redistribution.

APPEARANCES: Appellants Donna Crow Flies High Morgan, June Crow Flies High Lizotte, Corrine Crow Flies High Yazzie, Martha Crow Flies High Jarski, Leroy Crow Flies High, Rose Ann Crow Flies High Johnson, and Howard Crow Flies High, pro sese; James F. Wagenlander, Esq., and David Heisterkamp II, Esq., Denver, Colorado, for appellant Carmen Fox; Wade G. Enget, Esq., Stanley, North Dakota, for Terry Roberts.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Donna Crow Flies High Morgan, June Crow Flies High Lizotte, Corrine Crow Flies High Yazzie, Martha Crow Flies High Jarski, Leroy Crow Flies High, Rose Ann Crow Flies High Johnson, and Howard Crow Flies High (Crow Flies High heirs) 1/ and Carmen Fox seek review of a September 7, 1995, order determining heirs after reopening issued by Administrative Law Judge Vernon J. Rausch in the estate of George Dragswolf, Jr. (decedent). For the reasons discussed below, the Board affirms Judge Rausch's decision in part and reverses it in part.

Background

Decedent, an unallotted Gros Ventre Indian of the Fort Berthold Indian Reservation, North Dakota, was born on March 30, 1932, and died intestate on September 29, 1964. A hearing to probate his trust estate was held on September 13, 1965, by Examiner of Inheritance Frances C. Elge. Only decedent's father, George Crow Flies High, a.k.a. George Dragswolf, Sr., was present at the hearing. He testified that decedent was unmarried and had no children. On March 24, 1966, Examiner Elge issued an order determining that decedent's heirs were his father, George Crow Flies High, and his mother, Grace Medicine Crow Dragswolf.

George Crow Flies High died testate prior to April 26, 1976. An order approving his will was issued on October 14, 1976, in Indian Probate BI 447B 76. His one-half interest in decedent's estate was determined to have passed to his widow, Rose Crow Flies High, as residuary devisee under the will.

On February 26, 1980, Grace Medicine Crow Dragswolf conveyed her one-half interest in Fort Berthold Allotment 521-A to Fox, her granddaughter, reserving a life estate to herself. 2/ The deed, which states that it was made for consideration of "One dollar, love, and affection," was approved by the Assistant Aberdeen Area Director, Bureau of Indian Affairs (BIA), on March 4, 1980.

Grace Medicine Crow Dragswolf died on March 13, 1982. There was testimony at her probate hearing indicating that decedent had a son, Stanley Charles Dragswolf, a.k.a. Stanley Charles Thomas. Administrative Law Judge Daniel S. Boos reopened decedent's estate to consider the claim.

Hearings on reopening were held by Judge Boos and by Administrative Law Judge Keith L. Burrowes, to whom the case was transferred following Judge Boos' death. On January 5, 1988, Judge Burrowes issued an order finding

1/ These appellants state that they are the children and heirs of Rose Crow Flies High, who is now deceased.

2/ Allotment 521-A was a part of decedent's estate. It is now subject to an oil and gas lease, from which oil production began in January 1988.

Decedent's estate also included interests in Fort Berthold Allotments 2059 and 370-A.

that Stanley Dragswolf was decedent's son and therefore entitled to receive decedent's entire estate.

On appeal, the Board reversed Judge Burrowes' order, holding that Stanley Dragswolf had failed to pursue his claim with due diligence. Estate of George Dragswolf, Jr. (Dragswolf I), 17 IBIA 10 (1988).

In early 1988, Terry Grant Roberts, who was then living in Ronan, Montana, wrote to the Superintendent, Fort Berthold Agency, BIA, stating that he was decedent's son and inquiring about decedent's estate. In subsequent correspondence to the Superintendent and Judge Burrowes, Roberts stated that he had been adopted and that his name at birth had been George Drags Wolf. Roberts' correspondence was misplaced in Judge Burrowes' office and did not resurface until February 1990, at which time Judge Burrowes asked Roberts to file an affidavit which would support reopening of the estate. Roberts filed an affidavit in March 1990. On March 14, 1990, Judge Burrowes sent notice of Roberts' petition to the interested parties, ordering them to show why the estate should not be reopened and distributed in its entirety to Roberts. On the same date, he issued an order suspending distribution of income from the estate.

On July 13, 1990, Administrative Law Judge Sam E. Taylor held a hearing in Seattle, Washington, to take evidence from the clerk of the Juvenile Court of King County, Washington, concerning Roberts' adoption and related matters. ^{3/} Following that hearing, the case was transferred to Judge Rausch, whose territory then included the Fort Berthold Reservation.

Judge Rausch held a hearing on October 30, 1991, in New Town, North Dakota, to take evidence on Roberts' claim. Although at the conclusion of that hearing, it appeared likely that a further hearing would be required, Judge Rausch ultimately concluded that a further hearing would not be necessary. On September 5, 1995, he issued an order concluding the proceedings. On September 7, 1995, he issued the order on appeal here.

Judge Rausch found that Roberts was decedent's son and that he had exercised due diligence in pursuing his claim once he learned his true identity. Stating that he disagreed with the Board's decision in Dragswolf I, the Judge also found Stanley Dragswolf entitled to share in decedent's estate.

Two notices of appeal were filed. The first, docketed as IBIA 96-8, was filed by the Crow Flies High heirs, and the second, docketed as IBIA 96-9, was filed by Fox. Briefs were filed by the Crow Flies High heirs, Fox, and Roberts.

^{3/} Roberts was born in Seattle and lived in that area as a child.

Judge Taylor was asked by Judge Burrowes to conduct this hearing, because Judge Taylor had other hearings scheduled in Seattle at that time.

By order of November 7, 1995, the Board summarily reversed the part of Judge Rausch's order in which he found Stanley Dragswolf entitled to share in decedent's estate. The Board held that the Judge was without authority to disregard the Board's decision of November 3, 1988. 4/

Discussion and Conclusions

The Crow Flies High heirs make a number of arguments. Among other things, they attack the credibility of the witnesses who testified at the October 30, 1991, hearing. They also contend that there is more evidence concerning the case which should now be considered. Further, they argue that, even if he is decedent's natural son, Roberts is not entitled to inherit from decedent because he was adopted by others.

Fox contends that, because she received her one-half interest in Allotment 521-A by deed and was a bona fide purchaser, her rights to the property are superior to those of Roberts and/or Stanley Dragswolf. Therefore, she requests that her one-half interest in Allotment 521-A be excluded from the estate to be distributed to others.

In his response to appellants' arguments, Roberts contends, inter alia, that Fox is now attempting to make legal arguments she should have made to Judge Rausch and the Crow Flies High heirs are now attempting to present evidence they should have presented to the Judge. 5/ He urges the Board not to consider these submissions.

[1] As Roberts argues, the Board normally does not consider arguments raised or evidence presented for the first time on appeal. Estate of Rufus Ricker, Jr., 29 IBIA 56 (1996). Occasionally, however, the Board addresses new issues when not to do so would only unnecessarily delay resolution of the appeal. See Estate of Teresa Mitchell, 25 IBIA 88, 92 (1993).

In this case, it appears possible that, due to the length of time the case was pending before Judge Rausch, and the uncertainties over what further proceedings would be ordered, the parties simply did not know when their legal arguments should be presented to the Judge. As noted above, at the end of the October 30, 1991, hearing, it appeared that a further hearing, or at least a further opportunity to present documentary evidence, would be required. At that time, Fox and Rose Crow Flies High were represented by the same attorney, Thomas K. Schoppert, Esq., who indicated at the hearing that he wanted to obtain further documents concerning Roberts' mother. On December 17, 1991, Judge Rausch wrote to Schoppert, inquiring whether

4/ In a Nov. 30, 1995, memorandum to the Board, Judge Rausch took issue with the Board's Nov. 7, 1995, order. His memorandum did not indicate that it had been served on the parties. The Board therefore sent copies of the memorandum to the parties when it issued the notice of docketing in this appeal.

5/ The Crow Flies High heirs also make legal arguments which were not made below. Roberts does not challenge their legal arguments on this basis.

Schoppert wished to submit further evidence and stating that, once the evidence was fully submitted, a briefing schedule would be established. During 1992, Judge Rausch made several inquiries to Schoppert concerning submission of further evidence but did not mention a briefing schedule. Schoppert failed to respond to the 1992 letters, and it appears that there was a similar lack of communication between Schoppert and his clients. ^{6/} It seems likely that the briefing schedule was simply forgotten during this period. While Schoppert and/or his clients bear some responsibility for failing to respond to Judge Rausch's inquiries concerning evidence, the fact remains that the promised briefing, during which the parties presumably expected to present their legal arguments, never occurred.

For this reason, the Board finds that it should not preclude appellants from presenting legal arguments in this appeal, even if those arguments were not presented to Judge Rausch.

By contrast, the Crow Flies High heirs were on notice, by virtue of Judge Rausch's several letters to their attorney, that they were required to submit any additional evidence they had. Accordingly, the new evidence they seek to submit in this appeal need not be considered.

The Board observes that, even if it were to consider the new evidence offered, it would not find that evidence persuasive. In fact, most of this evidence, claimed by the Crow Flies High heirs to support their new allegations, does not do so. For instance, in support of their claim that decedent was impotent because he abused alcohol and drugs, they submit a May 1986 Mayo Clinic Health Letter which lists alcohol and drug abuse as a cause of impotence. They also submit a classified advertisement for blank birth certificates, apparently to suggest that Roberts' birth certificate may have been forged. Both of these documents are far too general to be of any probative value in this case.

Further, the Crow Flies High heirs submit what appears to be a transcript of a September 20, 1995, interview with Goldie Fox, a sister of decedent (and mother of appellant Carmen Fox). The transcript is not signed by her and therefore the Board reaches no conclusion as to whether it accurately records her statements. Some of the statements attributed to her, however, appear to contradict testimony she gave at the August 1, 1985, hearing held by Judge Burrowes in this estate. ^{7/} To the extent the Crow

^{6/} Schoppert appears to have dropped out of the case, although no notice of withdrawal is included in the record. The record does include an Oct. 6, 1992, letter from Judge Rausch to Rose Crow Flies High, enclosing copies of several letters he had sent to Schoppert and noting that Schoppert had not responded.

^{7/} In 1985, Roberts' whereabouts were still unknown. At the Aug. 1, 1985, hearing, Goldie Fox testified:

"[W]hen my brother came back from the Army he stopped in Seattle and he stayed there for many years. I can't remember how many years, but he lived with a woman. I don't know what kind of nationality she was, but she had a

Flies High heirs are now attempting to offset Goldie Fox's 1985 sworn testimony with this unsworn, unsigned statement, the Board would reject the attempt regardless of whether the evidence had been submitted in a timely manner.

The Board declines to consider any of the new evidence offered by the Crow Flies High heirs.

The Crow Flies High heirs also dispute the credibility of Roberts and some of the witnesses who testified on his behalf. Further, they question the motivation of some of the witnesses. They do not, however, provide persuasive support for their allegations that false testimony was given. Further, none of the supposed discrepancies or other factors they cite has any bearing on the question of whether or not Roberts is decedent's son. Normally, witness credibility is a matter for the Administrative Law Judge, not this Board, to determine, because the Administrative Law Judge has had an opportunity to hear the witnesses and observe their demeanor, whereas the Board has not. See, e.g., Estate of Donald Paul Lafferty, 19 IBIA 90 (1990).

The Board finds that the Crow Flies High heirs have failed to show that Judge Rausch erred by giving credence to the testimony of Roberts or any of his witnesses.

With respect to the legal arguments made by appellants, the Board first addresses the contention of the Crow Flies High heirs that Roberts was not entitled to inherit from his natural father because he was adopted. In making this contention, they apparently rely upon current North Dakota law, under which adopted children cannot inherit from their natural parents. They also note that Roberts was found ineligible to inherit from his natural mother, who was a member of the Lummi Tribe.

Judge Rausch did not cite the law under which he found Roberts entitled to inherit from decedent. The Board therefore requested that he furnish the Board with this information. In response, the Judge sent copies of N.D. Cent. Code §§ 14-11-13 and 14-11-14 (1960); a copy of N.D. Cent. Code § 14-15-14 (1981); and a copy of Estate of William J. Ballantine, 81 N.W.2d

fn. 7 (continued)

baby son for him. And when he was born his birth record is George Dragswolf III. He sent a picture back one time, but when he left Seattle and came back over this way he never brought the baby back. He left the baby with his mother. So he should come in if it's going to continue, continue. I have to hire a lawyer and trace that kid down. He should be about 33 or 34, something like that."

Tr. of Aug. 1, 1985, Hearing at 47-48. This testimony is consistent with testimony given by others on behalf of Roberts at the 1991 hearing.

In the transcript now offered by the Crow Flies High heirs, Goldie Fox is represented as stating that decedent never acknowledged Roberts as his son. Tr. of Sept. 20, 1995, Interview at 4.

259 (N.D. 1957), a North Dakota Supreme Court decision holding that, under N.D. Cent. Code §§ 14-11-13 and 14-11-14, an adopted child may inherit from his/her natural parents. It appears from the materials furnished by Judge Rausch that, at the time of decedent's death in 1964, N.D. Cent. Code §§ 14-11-13 and 14-11-14 were still in effect and, therefore, adopted persons could inherit from their natural parents. It further appears that North Dakota law was not changed until 1971, when N.D. Cent. Code § 14-15-14 was enacted.

Pursuant to 25 U.S.C. § 348, when an Indian owning trust or restricted property dies without a will, the property passes in accordance with the laws of intestate succession of the state in which the property is located. Accordingly, the right of an adopted child to inherit trust property located in that state is determined in accordance with those same state laws. See, e.g., Estate of Victor Blackeagle, 16 IBIA 100 (1988).

While decedent's trust property is located in North Dakota, the trust property once owned by Roberts' natural mother is located in the State of Washington. Roberts' right as an adopted person to inherit from her was required to be and was in fact determined in accordance with Washington State law. ^{8/} Accordingly, the fact that Roberts was determined to be ineligible to inherit from his natural mother is not relevant here.

The Crow Flies High heirs further contend that Roberts does not fall within the North Dakota Supreme Court's decision in Ballantine because decedent was not married to Roberts' natural mother. ^{9/} However, it does not matter in this case whether North Dakota law distinguishes between legitimate and illegitimate children in determining rights to inherit from a father. 25 U.S.C. § 371 provides: "For the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of [25 U.S.C. §] 348, * * * every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child."

The Board concludes that Roberts is not barred from sharing in decedent's estate either because he was adopted or because his natural parents were not married.

The Board further concludes that the Crow Flies High heirs have not shown that Judge Rausch erred in finding Roberts to be decedent's son.

Fox does not dispute Judge Rausch's finding that Roberts is decedent's son. Rather, she seeks to retain a one-half interest in Allotment 521-A on the basis that she is a bona fide purchaser. She contends that "[i]t is a

^{8/} See Estate of Doris (Dorcas) Curley Warbass Garfield, IP PO 80K 71, Aug. 29, 1972.

^{9/} In Ballantine, an adopted child was determined eligible to inherit from his natural father. The court noted that the child was born of a marriage between his natural parents.

well established point of law that a bona fide purchaser of real estate has superior rights to heirs and devisees who were not known at the time an estate was probated." Fox's Opening Brief at 2. For this contention, Fox cites Annotation, Relative rights to real property as between purchasers from or through decedent's heirs and devisees under will subsequently sought to be established, 22 A.L.R.2d 1102 (1952), as well as three cases.

The annotation and cases cited by Fox all concern belatedly discovered wills, rather than belatedly discovered heirs. They address a situation in which a decedent is believed to have died intestate, his heirs at law have been determined, and the heirs have conveyed property to a bona fide purchaser, all prior to the discovery of a will which devises the same property to a different person. While the law on this point might, by analogy, be helpful here if it were more uniform, the annotation makes it clear that the cases are divided as to whether a bona fide purchaser or a devisee will prevail in this situation. ^{10/} Another annotation, not cited by Fox, concerns a somewhat analogous situation in which a spouse of the decedent is belatedly discovered. Annotation, Relative rights in real property as between purchasers from or through decedent's heirs or devisees and unknown surviving spouse, 39 A.L.R.2d 1083 (1955). Although far fewer cases are discussed in this annotation, those cases are also divided.

Whatever guidance these cases might offer here, the primary authority concerning reopening of closed Indian estates is the body of law developed in the Department during the many years in which it has been responsible for probating Indian trust estates. The Board undertakes to review that law as it might relate to, not only the "bona fide purchaser" argument made by Fox, but also the broader question here)) whether the prior distribution of this estate ought to be disturbed at all.

In this regard, the Board first turns to the Department's present regulation concerning reopening of estates which have been closed for more than three years. This regulation appears at 43 C.F.R. 4.242(h) and states:

If a petition for reopening is filed more than 3 years after the entry of a final decision in a probate, it shall be allowed only upon a showing that a manifest injustice will occur; that a reasonable possibility exists for correction of the error; that the petitioner had no actual notice of the original proceedings; and that petitioner was not on the reservation or otherwise in the vicinity at any time while the public notices were posted.

^{10/} See also 77 Am. Jur. 2d Vendor and Purchaser § 615 (1975): "In the absence of controlling statute, different results have been reached where after conveyance of a decedent's realty by his heirs, it was sought to establish a will devising such realty to a devisee. In a number of cases it has been held that purchasers from the decedent's heirs acquired no title to the decedent's realty as against the devisee under a will subsequently discovered or sought to be established. * * * On the other hand, other courts have held that a purchaser from a decedent's heirs acquired a title superior to that of a devisee under a will discovered or offered for probate after the heirs' conveyance."

The last two components of this provision need no discussion here. Roberts clearly satisfies both.

With respect to the first two components, Judge Rausch concluded that "[a] manifest injustice will occur unless these two sons [Roberts and Stanley Dragswolf] do not finally have what is rightfully theirs" and that "[t]here exists a reasonable opportunity to correct the error which occurred exactly thirty (30) years ago." Sept. 7, 1995, Order at 13.

[2] Judge Rausch did not explicitly address the impact of his decision on the other parties, *i.e.*, the parties who have derived their interests from the originally determined heirs. Historically, however, in its decisions concerning reopening of long-closed estates, the Department has sought to balance the interests of the various parties affected. *See, e.g., Estate of David Marksman*, 5 IBIA 56 (1976). ^{11/} In so doing, it has often taken into consideration certain factors other than the question of whether a petitioner seeking reopening is in fact an heir of the decedent. As discussed in *Dragswolf I*, there is significant precedent in the Department for declining to reopen a long-closed estate regardless of the merits of a newly presented claim. Many of these decisions are grounded, at least in part, upon the premise that "[t]he public interest requires that proceedings relative to the probate of estates be brought to a final conclusion sometime, in order that the property rights of the heirs or devisees may be stabilized." 17 IBIA at 12, quoting from *Estate of Lone Dog*, IA-25 (June 12, 1950). *See also, e.g.*, the other cases cited for this proposition in *Dragswolf I*, 17 IBIA at 12.

Chief among the additional factors considered is the "due diligence" factor. The Department has a well-established requirement that a petitioner for reopening exercise due diligence is pursuing his/her claim. As it was put in *Dragswolf I*, "[b]ecause of the substantial interest of Indian heirs in the finality of Indian probate decisions affecting their property rights, it is equitable to require a claimant to act on his rights within a reasonable time after he knows or should know of them." 17 IBIA at 12. In addition to the discussion of this requirement in *Dragswolf I*, *see* the extended analysis in *Estate of Woody Albert*, 14 IBIA 223 (1986).

Judge Rausch found that Roberts exercised due diligence in pursuing his claim. The Board agrees. It is clear that Roberts began pursuit of his claim as soon as he discovered his identity and the possibility that he might be entitled to a share in decedent's estate. It is also clear that he reasonably continued his pursuit and that none of the delays in this proceeding can be attributed to him. Therefore, the Board finds that Roberts has satisfied the due diligence requirement.

^{11/} In *Marksman*, discussed further *infra*, the Board noted, 5 IBIA at 57:

"The difficult task in passing on this petition [for reopening] is balancing the interests served by leaving undisturbed title to land which vested by inheritance over 19 years before other rightful heirs objected versus the correction of an obvious injustice incurred by omitted heirs. Petitions of this nature must be evaluated in light of their peculiar circumstances."

Although lack of due diligence is the factor cited most often in decisions denying reopening, other factors have also been cited. These include: (1) the insubstantial nature of the interest the petitioner would receive. E.g., Estate of Basil Blackburn, 1 IBIA 261, 79 I.D. 422 (1972); Estates of Kate Bitner and Rae Bitner, 1 IBIA 277, 79 I.D. 437 (1972); (2) the fact that some of the trust property in the estate has been conveyed by the original heirs, particularly when there has been a sale to a tribe or where fee patents have been issued. E.g., Blackburn; Estate of Stella Dawson, Fort Peck Allottee 1284, June 30, 1955; and (3) the fact that some or all of the trust property in the estate is or has been subject to a lease, in particular, an oil and gas lease. E.g., Dawson; Estate of Belle Cozad, A-25428 (May 2, 1949). ^{12/} Conversely, in cases where reopening has been granted, the absence of some or all of these factors has been cited in support of the decision. For instance, in Estate of Fred Kearney, IA-S-4 (Jan. 26, 1970), reopening was allowed after 18 years, upon consideration of the facts that (a) the entire estate was still held in trust; (b) there had been no conveyances, exchanges, or partitionments between the heirs; (c) no long-term leases had been approved in reliance on the original order determining heirs; and (d) the other heirs did not object to the reopening. See also Estate of George Mortimer Cummings, 2 IBIA 112, 80 I.D. 789 (1973), allowing reopening after 6 years, based in part upon the lack of intervening rights and/or conveyances.

Reviewing the facts of the present case in light of these factors, the Board notes: (1) The interest at issue here is clearly a substantial one, encompassing decedent's entire estate, which includes an allotment on which oil is currently being produced; (2) a one-half interest in Allotment 521-A has been conveyed, although it is still in trust status; and (3) an oil and gas lease of Allotment 521-A has been entered into.

Another factor which has been taken into consideration in determining whether to reopen a probate is the length of time which has elapsed since the original probate. Among the cases in which length of time elapsed has been cited as a reason for denial of reopening are: Estate of George Minkey, 1 IBIA 1 (1970) (21 years); Estate of Jose Sandoval, IA-1337 (May 17, 1966) (11 years); Estate of Mrs. Jack Bowstring, IA-1250, 68 I.D. 262 (Sept. 11, 1961) (16 years); Estate of Mary Moses, IA-851 (Nov. 17, 1958) (15 years); Estate of Blue Bug, IA-174 (June 20, 1955) (28 years); Estate of Frank Belille, IA-87 (Aug. 13, 1952) (33 years); and Estate of Abel Gravelle, IA-75 (Apr. 11, 1952) (15 years). In Estate of Smoky Jim, IA-148 (June 20, 1955), reopening was denied on the basis of the length of time elapsed (42 years) and the fact that most of the original heirs had died and most of the heirs' estates had been probated by the Department.

These and other reopening cases illustrate the Department's reluctance to reopen an estate when a significant amount of time has passed since the original probate. One reason for this may be a concern with the reliability

^{12/} The decisions do not explain the reasons for taking leases into consideration. As far as oil and gas leases are concerned, it is possible that, because oil and gas are non-renewable resources, such leases were deemed to be dispositions akin to sales.

of evidence, *i.e.*, a concern that evidence becomes less trustworthy as time passes because witnesses die and memories fade. *See, e.g., Estate of Frank Pays*, 10 IBIA 61 (1982), denying reopening for lack of due diligence and observing that the petitioner had waited until after the knowledgeable witnesses had died. Another reason, related to the "stability of property rights" concern discussed in *Dragswolf I*, appears to be the premise that reliance upon the original probate determination increases as time passes, both on the part of the originally determined heirs and on the part of those who deal with them. *See, e.g., Cozad*, denying reopening after 16 years, noting, *inter alia*, that the originally determined heirs had received oil and gas rentals from the estate property for many years.

In this case, decedent's estate has been closed for a substantial period of time, *i.e.*, 30 years. Even so, the evidence of Roberts' paternity was deemed reliable by Judge Rausch, and his finding on this point has withstood challenge in this appeal. Accordingly, at least with respect to Roberts' paternity, the first concern discussed in the preceding paragraph)) reliability of evidence)) is not a major factor here. 13/

However, the second concern)) reliance upon the original decision)) must be taken into consideration here. Clearly, considerable reliance has been placed upon the original decision here. Grace Medicine Crow Dragswolf relied upon a then 14-year-old probate determination when she conveyed her one-half interest in Allotment 521-A to Fox. BIA relied upon that determination when it approved the conveyance. BIA again relied upon the probate determination and the deed to Fox in distributing lease income, including substantial oil and gas lease income, until Judge Burrowes suspended distribution on March 14, 1990. Fox states that she came to rely on the lease income she was receiving and made financial commitments based upon that reliance. It appears likely that Rose Crow Flies High also came to rely on the income she was receiving. Accordingly, the reliance factor clearly appears to weigh against reopening here.

The Board has found two decisions which suggest that another factor has sometimes been taken into consideration. Although mentioned only briefly in one of the decisions and not at all in the other, it is conceivable that these decisions took into consideration the possibility of fraud on the part of a person originally determined to be an heir. In *Estate of Betty Black Garcia*, IA-P-3 (July 3, 1967), reopening was allowed after 11 years, upon the petition of the decedent's minor son. In *Garcia*, it was determined that the original decision, in which the decedent's mother was determined to be her sole heir, had been based upon mistaken, possibly fraudulent, evidence given by the mother, who testified that the decedent had not been married and had no children.

13/ On the other hand, the passage of time has rendered it virtually impossible to make certain other determinations, which might have some relevance here. *See* the discussion *infra* concerning whether or not George Crow Flies High and Grace Medicine Crow Dragswolf were aware of Roberts' existence at the time of the original probate.

In Marksman, supra, reopening was allowed after 19 years to include two grandchildren of the decedent. The grandchildren were the children of the decedent's predeceased son by his first marriage. The decedent's second wife, who was originally found to be the decedent's sole heir, had testified that the decedent had no children. The decision, while reciting these facts, does not cite them as a basis for the decision.

In both Garcia and Marksman, the witness who testified erroneously, whether knowingly or not, was the person found to be the decedent's sole heir. Thus, in each case, the witness benefitted from her own erroneous testimony.

In the present case, George Crow Flies High, the only person present at decedent's probate hearing, testified that decedent had no children. As a result of that testimony, he was found entitled to inherit one half of decedent's estate. Nothing in the record suggests that he was aware his testimony was erroneous. ^{14/} However, there was testimony at the 1991 hearing before Judge Rausch which suggests that Grace Medicine Crow Dragswolf was aware at the time of the original probate hearing that decedent had fathered Roberts. If this testimony is deemed competent to prove Grace's knowledge in 1966, ^{15/} it is perhaps arguable that she should have come forward at that time.

However, both George Crow Flies High and Grace Medicine Crow Dragswolf are now dead. Thirty years have passed since the original probate hearing. Grace Medicine Crow Dragswolf, not having attended the original probate hearing, clearly did not give fraudulent testimony. Further, it is not possible to determine at this time, with any reasonable degree of certainty, whether either of decedent's parents intentionally withheld information concerning the existence of Roberts. The Board finds that there has been no showing of fraud on the part of either of decedent's parents here.

In reviewing Departmental reopening cases, the Board encountered one case which appears to depart markedly from the cases discussed above. In Estate of Eliza Yellow Fox, No. 44953-35 (Dec. 10, 1936), reopening was allowed after 13 years to consider a newly discovered will. The will, although known to exist at the time of the original probate, could not then be located. The decedent's parents were determined to be her heirs. The decedent's allotment was sold and passed out of trust, following which the proceeds of the sale were distributed to her parents. Upon discovery of the will, it was learned that the decedent had devised her allotment to her sister and her cousin. Reopening was allowed and, because it was determined that the devisees could not be fully compensated from the portion of the

^{14/} At the time of the original probate hearing, decedent's parents had been divorced for several years. Tr. of Oct. 30, 1991, Hearing at 65-66 (Testimony of LaVerne Fettig, decedent's sister). Fettig also testified that she and decedent saw little of their father following the divorce and that decedent was not close to their father.

^{15/} Judge Rausch made no findings on the question of Grace's knowledge in 1966.

decedent's estate which remained in trust, it was further determined that claims should be allowed against the estate of the decedent's since-deceased father. Not only is this case unusual in allowing reopening after the bulk of the estate had passed out of trust, it is also unusual in allowing recovery from the estate of an heir of the decedent. Although the decision does not detail the reasons for its unusual result, two reasons can be hypothesized. First, because the existence of a will was known at the time of the original probate, the heirs may have been deemed to be on notice that they stood to lose their shares if the will were found. Second, because the will had been lost in BIA files and was later found there, it is conceivable that the Department believed it had a particular obligation toward the devisees because of its own responsibility for loss of the will. In any event, the result in Yellow Fox seems to be specific to its facts and does not appear to have been followed in later cases.

The Board returns to Fox's argument that her interest in Allotment 521-A should be excepted from any redistribution of decedent's estate. As indicated above, Fox contends that she is a bona fide purchaser. At the same time, however, she appears to concede that the conveyance to her was a gift: "Ms. Fox and her grandmother had a very close relationship and the fact that the Deed and land were a gift from her grandmother has given Ms. Fox a strong emotional attachment to the land in question." Fox's Opening Brief at 3.

The Board finds it unnecessary to determine whether Fox is a bona fide purchaser or, for that matter, whether the conveyance to her was a sale or a gift. In either case, in order for Fox's interest in Allotment 521-A to be considered a part of decedent's estate and thus subject to redistribution, the deed to Fox would have to be declared void. 16/

[3] In Estate of Clifford Celestine v. Acting Portland Area Director, 29 IBIA 269 (1996), the Board held that it lacks authority to void a gift deed in the absence of a showing of fraud or undue influence. (The Board did not reach the question of whether there were any circumstances under which it could void a deed.) There has been no showing of fraud or undue influence here. Accordingly, under Celestine, the Board itself lacks authority to void the deed to Fox. The Board is not aware of any authority under which Judge Rausch could have voided the deed in this case or declared it void ab initio.

The Board therefore finds that, with respect to Fox's interest in Allotment 521-A, no reasonable possibility exists for correction of the error in the original probate. Accordingly, the Board reverses Judge Rausch's order allowing reopening insofar as that order purported to cover Fox's interest in Allotment 521-A.

16/ Judge Rausch did not mention the deed in his Sept. 7, 1995, order, although the record indicates that he was aware of it. Because he did not except the deeded interest from his redistribution of the estate, the Board assumes, as the parties have assumed, that he intended to redistribute that interest. The theory under which he undertook to do so, however, is not clear.

In its review of Departmental reopening cases, the Board found no instance in which a "partial" reopening of an estate was specifically allowed. That is, it found no case in which, although a portion of the estate had been deemed beyond the Department's authority to reopen, the remainder of the estate was nevertheless reopened and redistributed. Rather, reopening seems to have been determined on an "all or nothing" basis. This approach is probably expressed most clearly in Departmental regulations which were in effect from 1929 to 1943 and which precluded reopening "in those cases in which the estate of the decedent or any considerable part thereof has been disposed of under the previous finding of heirs." 25 C.F.R. 81.35 (1938). ^{17/}

[4] Upon consideration of the Department's apparent practice of declining reopening in toto when a "considerable part" of the estate had been disposed of, the Board sees no reason requiring the continuation of that practice in cases where a redistribution of the "undisposed-of" portion of the estate is feasible and where a consideration of the various factors discussed above weighs in favor of redistribution. Accordingly, the Board finds that the question of reopening the remainder of decedent's estate) i.e., all but Fox's portion of Allotment 521-A)) should be considered on its own merits.

There is, of course, a question here as to whether the remainder of decedent's estate is truly "undisposed-of." George Crow Flies High disposed of his half of decedent's estate by will. His devisee, Rose Crow Flies High, is now deceased, and her interest in decedent's property has become a part of her estate. Grace Medicine Crow Dragswolf died in 1982, and her interest in decedent's estate, except for her interest in Allotment 521-A, has descended to her heirs. Estate of Grace Medicine Crow Dragswolf, IP BI 638B 82, January 25, 1984. The Department, however, has never held that it lacked authority to redistribute an estate which has passed through suc-

^{17/} This provision, as published in the 1938 edition of Title 25 of the Code of Federal Regulations, derived from sec. 32 of the Department's May 31, 1935, probate regulations. See 25 C.F.R. 81.1 note (1938). Earlier Departmental probate regulations, as amended on Nov. 25, 1929, included a virtually identical provision. See Cozad, supra.

A 1943 revision of 25 C.F.R. 81.35 deleted this provision. See 9 FED. REG. 600 (Dec. 17, 1943); 25 C.F.R. 81.35 (1943 Supp.). From 1943 to 1971, no comparable provision appeared in the regulations.

In 1971, the predecessor to the present regulation was promulgated. It provided: "If a petition for reopening is filed more than 3 years after the entry of a final decision in a probate, and if it shall appear to the Examiner [of Inheritance (later Administrative Law Judge)] that there exists a possibility for correction of a manifest injustice, he shall forward the petition to the Board of Indian Appeals with a showing as to all intervening rights and a recommendation as to the action to be taken." 43 C.F.R. 4.242(h) (1972).

ceeding probates, even though it has taken the fact of subsequent probates into consideration in determining whether to reopen an estate. E.g., Smoky Jim, supra.

In determining whether the remainder of decedent's estate should be reopened, the Board considers the factors discussed above and attempts to give each it proper weight.

Clearly, Roberts' exercise of due diligence weighs heavily in favor of reopening. At the same time, the factor that otherwise might weigh heavily against reopening)) the reliance placed upon the original probate determination by the originally determined heirs and/or their successors in interest)) loses some importance here because Rose Crow Flies High, who might well have come to rely upon income from her share of the estate, is now deceased. 18/ Because distribution of this income was suspended on March 14, 1990, the Crow Flies High heirs have never received any of the income and have no more than an expectation of receiving it.

Under Departmental precedent, the fact that the interest at issue here is a substantial one weighs in favor of reopening. Under this same precedent, however, the fact that Allotment 521-A is subject to an oil and gas lease weighs against reopening. The Board gives this latter factor minimal weight. As noted above, none of the cases explain why the existence of a lease should be critical to a reopening determination, and the reason is not immediately apparent. If this estate is reopened, Roberts will have to take his interest subject to any existing leases, including the oil and gas lease of Allotment 521-A.

The fact that the estate has been closed for 30 years weighs against reopening but, under the facts of this case, the significance of this factor is diminished to the extent the significance of the reliance factor is diminished.

On balance, the Board finds that the weight of these factors favors reopening in this case. 19/ Accordingly, the Board finds that decedent's estate should be reopened for the purpose of distributing all of decedent's estate to Roberts, except for Fox's one-half interest in Allotment 521-A, which, for the reasons discussed above, should remain with Fox.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. 4.1, Judge Rausch's September 7, 1995, order is affirmed in part and reversed in part. The

18/ Rose Crow Flies High's date of death is not shown in any of the materials before the Board. It is clear, however, that she was still alive in early 1993.

19/ In Dragswolf I, there was no need to engage in the protracted balancing analysis employed here because there was no showing whatsoever that Stanley Dragswolf had exercised due diligence. Even if it were to revisit Dragswolf I here, the Board would find no reason to alter the result in that case.

Superintendent shall distribute to Roberts all of decedent's interests in Allotments 2059 and 370-A and a one-half interest in Allotment 521-A. Judge Burrowes' March 14, 1990, order suspending distribution of income is lifted. The Superintendent shall distribute the income to Roberts and Fox, in accordance with their respective interests in decedent's estate.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge