



INTERIOR BOARD OF INDIAN APPEALS

Estate of Herbert Bartlett Levering

36 IBIA 192 (06/22/2001)

Related Board case:
37 IBIA 89

Judicial review of this case:
Appeal dismissed, *Cline v. Norton*, CIV 02-500 (D. Neb. Sept. 2, 2003)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF HERBERT BARTLETT : Order Docketing Appeal, Vacating
LEVERING : Decision, and Remanding Case
: :
: Docket No. IBIA 01-126
: :
: June 22, 2001

Appellants Edward L. Cline and Ramona C. White seek review of an April 20, 2001, order issued by Indian Probate Judge Kathleen H. Switzer denying reopening of the estate of Decedent Herbert Bartlett Levering. For the reasons discussed below, the Board of Indian Appeals (Board) finds that the decision must be vacated and this matter remanded to Judge Switzer for further consideration.

The original order determining Decedent's heirs was issued by Administrative Law Judge Keith L. Burrowes on September 17, 1985. It appears that Appellants, who are a niece and nephew of Decedent, sought reopening of this estate in 2000 in order to challenge Judge Burrowes' determination that Decedent was survived by two sons.

43 C.F.R. § 4.242(h) authorizes reopenings of estates that have been closed for more than three years. It provides that reopening

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.

In addition, under long-standing Departmental practice, petitioners must also show that they exercised due diligence in seeking reopening. See, e.g., Estates of Newton McNeer and Nancy McNeer, 33 IBIA 318 (1999); Estate of George Dragswolf, Jr., 30 IBIA 188, 196-200, modified in non-relevant part, 31 IBIA 228 (1997); Estate of George Dragswolf, Jr., 17 IBIA 10 (1988); Estate of Woody Albert, 14 IBIA 223 (1986).

Judge Switzer considered the substantive question of whether Appellants had shown that a manifest injustice would occur if this estate were not reopened. She concluded that there was not sufficient evidence to make this showing.

At this point, the Board expresses no opinion on the correctness of this conclusion.

In addressing a petition for reopening, the first question which should be considered is whether the petitioners are proper parties to seek reopening. If the petitioners are not proper parties, the petition should be denied on that basis and substantive questions raised should not be reached. Whether a person is a proper party to seek reopening is addressed in both 43 C.F.R. § 4.242(h) and in the requirement that a petitioner show due diligence. Although it is possible that Judge Switzer considered this question, her conclusions do not appear in the decision.

Under the circumstances of this case, the Board finds that the denial of reopening must be vacated and this matter remanded to Judge Switzer for an initial determination of whether Appellants are proper parties to seek reopening. If the Judge finds that Appellants are proper parties to seek reopening, she should then proceed to address the questions of whether a manifest injustice will occur and if a reasonable possibility exists for correcting the error.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal from Judge Switzer's April 20, 2001, decision is docketed, that decision is vacated, and this matter is remanded to the Judge for further consideration.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

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Anita Vogt
Administrative Judge