



INTERIOR BOARD OF INDIAN APPEALS

Estate of Richard Yellow Hammer

45 IBIA 34 (05/16/2007)

four children of Decedent and his wife, Salina Yellow Hammer.² The Adoption Decree granted the adoption by Spencer and Rae Bun Johnson of Appellant, his sister Louella Yellow Hammer, and his brothers Leslie³ and Curtis Yellow Hammer. It provided that the four children would be “deemed and taken to be the children of” Spencer and Rae Bun Johnson. Adoption Decree at 2.⁴ No mention was made in the Adoption Decree of Decedent’s youngest son, Kenneth Many Horses.⁵

Judge Rausch held a hearing to probate Decedent’s estate on May 15-16, 1990. Decedent’s brother William Yellow Hammer Sr., Decedent’s biological daughter Louella Johnson, and a BIA realty specialist attended the May 15, 1990, hearing.⁶ Appellant was not sent a notice of the hearing and he did not attend the hearing. Notice of the hearing was posted at the Standing Rock Agency in North Dakota and at post offices in North Dakota and in South Dakota. At the time of the hearing, Appellant resided on the Hopi Reservation in Arizona.

Although Appellant did not attend the hearing, he sent a notarized statement dated May 1, 1990, to Many Horses, which Many Horses submitted to Judge Rausch on May 16, 1990. In this statement, Appellant averred that he had been adopted by the Johnsons against his wishes and that he had kept in touch with Decedent following the adoption. Appellant stated that Decedent and his mother were threatened with the possibility of jail if they did not consent to the adoption. Appellant also asserted that “[t]his law concerning adopted children not eligible to inherit his rightful heritage is discriminatory and genocidal in content, to destroy the cultural connection to the land that is to be passed to him by a natural father” Statement by Appellant, May 1, 1990, at 2.

² Decedent and Salina divorced in 1968.

³ Leslie predeceased Decedent in 1979.

⁴ The Adoption Decree also changed the last names of the four children to that of their adoptive parents.

⁵ According to Many Horses, he was raised by Bertha and Mike Many Horses but was never formally adopted by them. Transcript, May 16, 1990, at 1, 3-4.

⁶ At the end of the hearing on May 15, Judge Rausch indicated that he was “leav[ing] the record open to . . . take some additional testimony such as [Many Horses’s] own testimony.” Transcript, May 15, 1990, at 16. On May 16, 1990, Judge Rausch reopened the hearing to take the testimony of Many Horses.

Judge Rausch issued an Order Determining Heirs on October 18, 1990. With respect to Decedent's interests on the Standing Rock Reservation, he found Many Horses to be Decedent's sole heir. Judge Rausch determined that, under the Standing Rock Act, the children adopted by the Johnsons were ineligible to inherit Decedent's interests on the Standing Rock Reservation.⁷ The Notice attached to the Order Determining Heirs shows that it was mailed to Appellant at a post office box in Winslow, Arizona in October 1990. Both the Order Determining Heirs and the accompanying Notice advised interested parties that the Order Determining Heirs would become final 60 days from the date of mailing of the Notice unless a written petition for rehearing was filed in accordance with 43 C.F.R. § 4.241.

No petitions for rehearing were filed. The Order Determining Heirs became final in December 1990.

On February 25, 2004, Appellant filed a petition for reopening. Appellant asserted that he "disagree[d] with the distribution of the estate because the provisions of [the Standing Rock Act] were improperly implemented." Petition for Reopening at 1. Appellant argued that "[t]he law provides that if parental rights are 'terminated,' a child may not inherit by intestate succession," but that Decedent "'voluntarily' relinquished [his parental] rights." *Id.* Appellant also argued that the Order Determining Heirs violated the spirit and intent of the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 *et. seq.*, the purpose of which was to prevent the breakup of Indian families and to protect the rights of Indian children. Appellant also argued that the Supreme Court decision in *Babbitt v. Youpee*, 519 U.S. 234 (1997), impacted the distribution of Decedent's trust or restricted

⁷ Section 3(c) of the Standing Rock Act provides that "a child may not inherit by intestate succession from or through a parent whose parental rights with respect to said child have been terminated pursuant to lawful authority."

With respect to the children adopted by the Johnsons, including Appellant, Judge Rausch stated that they were "barred from inheriting . . . property in the State of North Dakota by virtue of their adoptions. South Dakota, however does not bar adopted children from inheriting in the estates of their biological parents." Order Determining Heirs at 1. He then went on to cite to the Standing Rock Act, which as explained below, does preclude the inheritance of interests on the Standing Rock Reservation in both North and South Dakota by adopted children from their biological parents if these parents' parental rights were terminated.

property.⁸ He requested that he “be able to inherit [his] rightful share of land from [Decedent’s] estate[,] . . . includ[ing] land on both the Standing Rock Sioux Reservation in both North and South Dakota and on the Crow Creek Sioux Reservation in South Dakota.” *Id.* Appellant did not explain why he waited 14 years to seek reopening of Decedent’s estate.

On April 9, 2004, Judge Tah-bone issued a notice of petition for reopening and order to show cause. Judge Tah-bone also ordered Appellant to provide a statement concerning his address from March 1990 through October 1990, whether he had visited the Standing Rock Reservation during that period, and when he had received notice of the October 18, 1990, Order Determining Heirs.

Appellant responded to Judge Tah-Bone’s show cause order. He stated that he had resided at the same location in Arizona since September 1982 and had used the same post office box address since 1980. Appellant did not state whether or when he received notice of the Order Determining Heirs.

Many Horses also responded to Judge Tah-bone’s order and stated that he “disagree[d] with reopening.” Letter from Many Horses to Judge Tah-bone, Apr. 20, 2004. Many Horses did not provide any reasons for his opposition to reopening.

Judge Tah-bone denied reopening on March 23, 2005. He first found that Appellant had notice of the Order Determining Heirs issued by Judge Rausch and that therefore Appellant could be barred from seeking reopening under 43 C.F.R. § 4.242, which requires that a petitioner not have had notice of the original proceedings. Judge Tah-bone noted that although Appellant’s name was not listed on the Notice of the May 15, 1990, hearing, Appellant’s name and post office box address were listed on the Notice of Decision attached to the Order Determining Heirs, and that the decision was not returned as undeliverable. Judge Tah-bone also stated that Appellant had not advised him whether and when he received notice of the Order Determining Heirs, as was required in the show cause order. Judge Tah-bone noted however, that Appellant “explains his delay in appealing [the Order Determining Heirs] as his lack of information on his adoption, [because Appellant] did not know that [Decedent] ‘voluntarily relinquished’ his parental rights . . . until recently.” Order Denying Reopening at 2.

⁸ In *Babbitt*, the Supreme Court held unconstitutional the provisions of the 1984 Amendments to Indian Land Consolidation Act (ILCA). 534 U.S. at 237. Judge Rausch relied on the 1984 Amendments to order the escheat of Decedent’s trust or restricted property on the Crow Creek Reservation.

Judge Tah-bone then considered whether manifest injustice was apparent and concluded that it was not. Judge Tah-bone noted that, under section 3(c) of the Standing Rock Act, a child may not inherit by intestate succession from or through a parent whose parental rights with respect to that child have been terminated pursuant to lawful authority. With respect to Appellant's argument that Decedent voluntarily relinquished his parental rights to Appellant, rather than had them "terminated," Judge Tah-bone stated,

In a way, [Appellant] is correct. A parent may relinquish their parental rights to a child, and it is their choice to do so; however, a court terminates parental rights through a court order. In other words, a parent either voluntarily or involuntarily relinquishes their parental rights, then the court issues an order legally terminating those rights, either through an order terminating parental rights or an adoption decree. Relinquishment and termination are separate and distinct steps in the adoption process.

Id. Judge Tah-bone noted that Appellant's Adoption Decree was issued by the state court in 1963, but that it did not specifically state that Decedent's parental rights were terminated. However, Judge Tah-bone held that, under North Dakota Century Code § 14-15-14, which was in effect at the time of Decedent's death, a final decree of adoption "terminate[s] all legal relationships between the adopted individual and his relatives, including his natural parents." *Id.* at 3 (quoting N.D.C.C. § 14-15-14(1)(a)). Ultimately, Judge Tah-bone concluded that Decedent's parental rights were terminated as to Appellant, Curtis, and Louella by the 1963 Adoption Decree and they were thus precluded by the Standing Rock Act from inheriting an interest in Decedent's trust or restricted property on the Standing Rock Reservation.

In addition, Judge Tah-bone rejected Appellant's argument that the Order Determining Heirs violated the principles of ICWA by eliminating his right to inherit. Judge Tah-bone found that the Standing Rock Act was enacted in 1980 after the passage of ICWA and that ICWA dealt with minimum requirements for adoptions of Indian children and "d[id] not set forth rules of inheritance over Indian lands." Order Denying Reopening at 4. Judge Tah-bone held that ICWA "d[id] not trump a Tribe's right of self-governance and sovereignty" or its right to dictate inheritance rights. *Id.*

Finally, with respect to Decedent's interests on the Crow Creek Reservation, Judge Tah-bone determined that Appellant's argument was moot. Judge Tah-bone noted that, as a result of the Supreme Court's decision in *Babbitt*, these interests "should be re-titled to the rightful heirs through [BIA's] administrative procedures for returning the ILCA escheated lands." *Id.*

Appellant appealed the denial of reopening to the Board of Indian Appeals (Board) as to Decedent's interests in land on the Standing Rock Reservation, and filed an opening brief. No other briefs were received by the Board.

Discussion

An appellant bears the burden of showing that a denial of reopening was erroneous. *Estate of Martha Marie Vielle Gallineaux*, 44 IBIA 230, 234 (2007). We conclude that Appellant has not met this burden.

On appeal, Appellant does not address that portion of Judge Tah-bone's decision regarding Appellant's notice of the original proceedings. Instead, he argues that the Adoption Decree should not affect his ability to inherit from his biological father because: (1) the Adoption Decree was obtained in violation of due process, without personal and subject matter jurisdiction, and was based on extrinsic fraud; (2) one of the purposes of ICWA is the protection of the relationship between the Tribe and its children; and (3) Decedent's parental rights were not "terminated," for the purposes of the Standing Rock Act, but were voluntarily relinquished. Appellant also contends that the Order Denying Reopening was in error because it allowed Many Horses, an individual "who did not even attend the probate hearing and who was not the biological child of [Decedent]" to inherit from Decedent. Opening Brief at 11. Because we conclude that Appellant had notice of the original probate proceedings in 1990 and received a copy of the probate decision, we affirm Judge Tah-bone's decision denying rehearing and do not reach the merits of Appellant's remaining arguments.⁹

Petitions for reopening filed more than three years after the final probate decision may only be allowed upon a showing that the petitioner had no actual or constructive notice of the original proceedings. 43 C.F.R. § 4.242(h)(2004). It is well established that a petition for reopening filed by a petitioner with notice of the original proceedings must be dismissed for lack of standing. See *Estate of Gallineaux*, 44 IBIA at 236; *Estate of Katie Crossguns*, 10 IBIA 141, 144 (1982).

⁹ Appellant also asserts that "[t]his case is in need of an evidentiary hearing." Opening Brief at 15. Appellant has not articulated the grounds for his request for a hearing nor has he argued that any material facts are in dispute. *Estate of Gallineaux*, 44 IBIA at 238. Accordingly, we conclude that Appellant has not carried his burden of showing that the case should be referred for a hearing.

Where an estate has been closed for more than three years, 43 C.F.R. § 4.242 does not create any exception to the notice requirement based on the discovery of new evidence or arguments that would lead a petitioner to question the original decision. Under subsection 4.242(h), a necessary element is whether the individual seeking to reopen the estate did not have notice of the original proceedings. The Board has explained the rationale behind subsection 4.242(h):

The rules developed during years of Indian probate decision-making . . . have resulted in an appropriate and fair balance between the need for finality in probate decisions and the need to correct errors in the decisions. Numerous decisions denying reopening, in some cases even though the probable validity of a claim was recognized, have been grounded on a recognition 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.”

Estate of Gallineaux, 44 IBIA at 235 (quoting *Estate of George Dragswolf, Jr.*, 17 IBIA 10, 12 (1988)).

Although Appellant was not mailed a copy of the notice of the probate hearing held in 1990 by Judge Rausch to probate Decedent’s estate, we nevertheless conclude that Appellant had actual notice of the proceedings based on Appellant’s May 1, 1990, statement and the mailing of the Order Determining Heirs to Appellant. It is evident that the May 1 statement was prepared for Decedent’s probate hearing: Appellant asserts in the statement that the adoption should never have occurred and that the “law concerning adopted children not eligible to inherit his rightful heritage is discriminatory and genocidal in content, to destroy the cultural connection to the land that is to be passed to him by a natural father, as a caretaker.” Statement by Appellant, May 1, 1990, at 2. Many Horses submitted the statement to Judge Rausch on May 16, 1990. Therefore, Appellant was aware of and, through his statement, participated in Decedent’s probate proceedings.

In addition, both the Order Determining Heirs and the accompanying Notice provided accurate instructions for appealing the decision. The Notice shows that a copy of the decision was mailed to Appellant’s post office box address in Winslow, Arizona, which Appellant said has been his post office box since 1980. Although Appellant did not respond to Judge Tah-bone’s order to state when he received notice of that decision, there is no indication in the record that the Order Determining Heirs was returned by the postal authorities. On appeal, Appellant does not address this issue.

We therefore affirm Judge Tah-bone's denial of reopening on the grounds that Appellant had notice of the original proceedings.

Conclusion

We conclude that Appellant lacked standing to petition for reopening because he had notice of the original proceedings and we affirm Judge Tah-bone's denial of reopening.

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 Tah-bone's denial of reopening.

I concur:

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Debora G. Luther
Administrative Judge

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Steven K. Linscheid
Chief Administrative Judge