



INTERIOR BOARD OF INDIAN APPEALS

Estate of Victoria Irene Martin and Estate of Leonard Old Rock Martin, Sr.

47 IBIA 250 (09/29/2008)

Related Board cases:

39 IBIA 1

39 IBIA 80

Reconsideration denied, 39 IBIA 86



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF VICTORIA IRENE)	Order Docketing and Dismissing
MARTIN)	Objection and Dismissing Referral
)	of Petition for Reopening
ESTATE OF LEONARD OLD ROCK)	
MARTIN, SR.)	Docket No. IBIA 08-150
)	
)	September 29, 2008

On September 22, 2008, the Board of Indian Appeals (Board) received an “Order Denying Rehearing and Referring Claim to the Board of Indian Appeals” (Order and Referral) from Indian Probate Judge (IPJ) James Yellowtail, which the IPJ issued on September 19, 2008. In the Order and Referral, the IPJ responded to two letters he received on September 3, 2008, from Agnes “Micki” Diserly, who is the child of Leonard Old Rock Martin, Sr., deceased, from his first marriage, to Irene Brown.

The IPJ construed Diserly’s letters as possibly (1) seeking rehearing from a July 9, 2008, Decision Distributing the Estate of Leonard’s second wife, Victoria Martin, deceased Fort Peck Indian, Probate No. P 0000 35401 IP; (2) objecting to a July 9, 2008, Recommended Decision Confirming the Inventory (Recommended Decision) in Victoria’s estate;¹ and (3) seeking the reopening of Leonard’s estate, Probate No. TC-235-R-97. The IPJ (1) denied Diserly’s request for rehearing for lack of standing, (2) referred one of Diserly’s letters to the Board as a possible objection to the Recommended Decision, and (3) also referred to the Board Diserly’s request to reopen Leonard’s estate.

Only the second and third actions by the IPJ — the referrals — are presently before the Board.² We docket the referral but dismiss as untimely Diserly’s objection to the IPJ’s

¹ Both the Decision Distributing the Estate and the Recommended Decision were incorporated into a single order styled “Decision and Recommended Decision.”

² The Order and Referral states that, with respect to the denial of rehearing, a written notice of appeal rights would be provided to Diserly. A denial of rehearing may be appealed to the Board within 60 days from the date of the order denying rehearing. *See* 43 C.F.R. § 4.320(b). To date, the Board has received no appeal from the denial of rehearing.

Recommended Decision because it was not filed with the Board within the 60-day deadline from the date of the Recommended Decision. We also dismiss the IPJ's referral of Diserly's request for reopening, because the Board does not have original jurisdiction to consider a petition for reopening. However, because the IPJ's Order and Referral also contained language that denied Diserly's request for reopening, the Board advises Diserly that she has 60 days from the date of the IPJ's order, or until November 18, 2008, to file a notice of appeal with the Board from the denial of reopening.

Dismissal of Objection to Recommended Decision

The history of the IPJ's Recommended Decision in Victoria's estate, and Diserly's objection to that Recommended Decision, goes back to the probate of Leonard's estate. Land in Leonard's estate was distributed to his surviving spouse, Victoria, after which Diserly filed a petition for reopening, apparently seeking to have her father's land distributed to her instead. *See* Order and Referral at 2. In April of 2003, Administrative Law Judge (ALJ) Robert Holt concluded that Diserly lacked standing and denied her petition for reopening. Diserly appealed to the Board and the Board dismissed her appeal for failure to prosecute. *See id.*; *Estate of Leonard Old Rock Martin, Sr.*, 39 IBIA 80, *recon. denied*, 39 IBIA 86 (2003).

During the subsequent probate of Victoria's estate, Diserly apparently filed a written claim for all property that Victoria had inherited from Leonard. Decision and Recommended Decision at 11. The IPJ construed the claim as a challenge to the inventory in Victoria's estate, and considered it under the procedures set forth in *Estate of Douglas Leonard Ducheneaux*, 13 IBIA 169 (1985).³ He therefore issued the Recommended Decision, which concluded that Diserly had previously fully litigated her claim administratively and that further consideration of the claim was barred by the doctrine of *res judicata*. Upon issuance of the Recommended Decision, on July 9, 2008, the IPJ gave notice that objections could be filed with the Board within 60 days from the date of the decision, and gave the Board's correct address.

Diserly did not file an objection to the Recommended Decision with the Board within the 60-day deadline, which expired on September 8, 2008. Instead, she submitted a

³ In *Estate of Ducheneaux*, the Board established a procedure for challenging the inventory in an Indian estate during the probate proceedings, under which an IPJ or ALJ could issue a recommended decision regarding the status or disposition of the property. In *Ducheneaux*, the Board allowed objections from a recommended decision to be filed with the Board within 60 days from the date of the recommended decision. *See id.* at 178.

letter to the IPJ, “appealing” the probate decision in Victoria’s estate and again asserting that she should be able to “get the land back” from Victoria’s estate. The IPJ referred the letter to the Board as a possible objection to the Recommended Decision, and the Board received it on September 22, 2008.⁴ We conclude that the objection is untimely.

The effective date for filing a notice of appeal or other document with the Board is the date of mailing or the date of personal delivery. 43 C.F.R. § 4.310(a). When an appeal is properly mailed *to the Board*, the date of mailing is the date of filing with the Board. But when an appellant has been given correct appeal information but sends his or her notice of appeal to an office other than the Board, and the appeal is subsequently transmitted to the Board, the date of filing is the date of delivery. In those cases, the Board has consistently held that the appellant bears the risk of delay, and if the notice of appeal is delivered to the Board outside the time period specified in the regulations, the appeal is untimely. *See SiJohn v. Northwest Regional Director*, 46 IBIA 304, 305 (2008); *Estate of Arlen D. Houle*, 42 IBIA 253, 253-54 & n.1 (2006). We see no reason why the same rule should not apply to objections filed to recommended decisions issued in *Ducheneaux* proceedings.

Because Diserly’s objection to the IPJ’s Recommended Decision was received by and filed with the Board on September 22, 2008, after the 60-day deadline had expired, the Board dismisses her objection as untimely.

Dismissal of Referral of Petition to Reopen Estate of Leonard Old Rock Martin, Sr.

Diserly’s second letter to the IPJ requested reopening of Leonard’s estate in order “for his land and mineral right[s] and his lease income to come back to the children of his first wife, Irene I Brown Martin.” Letter from Diserly to IPJ, received by IPJ, Sept. 3, 2008.⁵ In his Order and Referral, the IPJ noted that Diserly’s request appeared to be identical to that previously denied, that no new grounds for reopening are apparent, and that successive petitions to reopen an estate are not allowed. Order and Referral at 4. However, instead of unambiguously denying or dismissing the petition for reopening, and giving appeal rights information, the IPJ stated that “absent direction from the Board, the

⁴ The IPJ also construed this letter from Diserly as possibly seeking rehearing, which he ruled on separately.

⁵ The letter was also addressed to various offices in the Bureau of Indian Affairs and to the Chairman and Council of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana.

[IPJ] intends to take no further action,” and further stated that Diserly’s letter “shall be referred to the Board for its consideration.” *Id.* Later in the Order and Referral, the IPJ states that to the extent Diserly is seeking reopening of Leonard’s estate, “her request is denied for the reason that successive petitions to reopen the same estate are not permitted,” but he also states that Diserly’s letter seeking reopening “is referred to the Board.” *Id.* at 4-5.

As relevant to the IPJ’s referral, the Board’s jurisdiction is limited to reviewing appeals that are taken from an order on a petition for reopening. *See* 43 C.F.R. 4.320(a). The Board does not have original jurisdiction to review a petition for reopening. Nor does the Board have general authority to consider referrals from IPJs or ALJs.

In the present case, the IPJ clearly concluded that Diserly’s request to reopen Leonard’s estate should be denied. The proper procedural course under those circumstances was to simply issue a clear and unambiguous order denying the petition, and giving appropriate appeal rights. Instead, even though the Order and Referral contained language stating that Diserly’s request for reopening was “denied,” the Order and Referral also purported to take “no further action with respect to this matter” and to “refer” Diserly’s letter to the Board.

Because the Board does not have authority, outside of an appeal that has been filed by an appellant from an order on reopening, to consider a petition to reopen an estate, the Board must dismiss the IPJ’s “referral” of this matter. However, because the IPJ’s Order and Referral also contained language that denied Diserly’s request for reopening, and therefore may be construed as a formal order denying reopening, the Board advises Diserly that she has 60 days from the date of the IPJ’s order, or until November 18, 2008, to file a notice of appeal *with the Board* from the denial of reopening, should she wish to seek the Board’s review of the IPJ’s September 19, 2008, order with respect to this issue.⁶ The Board’s address is provided in the letterhead for this order.

Conclusion

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 but dismisses Diserly’s

⁶ As noted earlier, *supra* note 2, the Order and Referral indicates that the IPJ did provide appeal rights information with respect to the denial of rehearing. Because the denial of rehearing and denial of reopening were included in the same order, the period for appealing both orders to the Board is the same.

objection to the IPJ's July 9, 2008, Recommended Decision, and dismisses the IPJ's referral of Diserly's petition to reopen Leonard's estate.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge