



INTERIOR BOARD OF INDIAN APPEALS

Estate of David Joseph Berger

50 IBIA 122 (08/12/2009)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

ESTATE OF DAVID JOSEPH BERGER ) Order Affirming Decision  
)  
) Docket Nos. IBIA 08-19, 08-20  
) 08-22, 08-23  
)  
) August 12, 2009

Appellants Charles Berger (Charles), Steven Aahl (Steven), Nancy Aahl Morrison (Nancy), and Deloris Wickenhagen (Deloris) appeal to the Board of Indian Appeals (Board) from a November 19, 2007, Order Denying Reopening by Indian Probate Judge James Yellowtail (IPJ) in the estate of David Joseph Berger (Decedent), deceased Blackfeet Indian, Probate No. P-0000-39523-IP.<sup>1</sup> The Order Denying Reopening let stand a Decision entered by the IPJ on April 24, 2007, in which he approved Decedent's will and ordered the distribution of Decedent's estate in accordance with that will. Appellants, each of whom inherited an undivided  $\frac{1}{4}$  interest in Allotment No. 2705 on the Blackfeet Reservation pursuant to Decedent's will, argue that the IPJ should have reopened Decedent's estate for the sole purpose of allowing Appellants to submit for the IPJ's approval an anticipated agreement among Appellants to partition Allotment No. 2705.

We affirm the IPJ's denial of reopening because Appellants complain only of a procedural error in the original proceedings — lack of notice of those proceedings to Charles<sup>2</sup> — and do not complain of a substantive error in the IPJ's approval of Decedent's will or in the recognition of Decedent's devise to Appellants of equal shares in Allotment

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<sup>1</sup> This probate initially was assigned Probate No. P-0000-17724-IP in error. On August 13, 2007, an administrative correction was entered to change the case number to P-0000-39523-IP.

<sup>2</sup> Charles contends that the Department of the Interior had his correct address on file and erred in sending notice of the probate proceedings to an incorrect address. We assume, solely for purposes of this decision, that Charles did not receive actual notice of the original proceedings and that his failure to receive notice was attributable to an error of the Department.

No. 2705, as provided in the approved will. At most, and viewing Appellants' averments most favorably to them, the lack of notice to Charles deprived them of an opportunity to present a final partition agreement to the IPJ for approval before he issued the Decision. Leaving aside the speculative nature of these assertions — Charles's petition to reopen did not include an actual partition agreement among Appellants, only the assertion that a proposal had been circulated — the procedural error only deprived Appellants of a nonexclusive forum in which to request partition because, as the IPJ observed, Appellants could still request approval of a partition agreement from the Bureau of Indian Affairs (BIA).

Assuming that a partition agreement is a "consolidation agreement" within the meaning of the statutory authority granted to probate judges to approve such agreements, we do not construe the conferral of such authority on probate judges as affording heirs a right to return to, and to resurrect, the probate forum if the opportunity to present a consolidation agreement to the judge was not exercised before the probate decision became final. Nor do we think that the lack of notice, even if it arguably caused or contributed to the missed opportunity to present an agreement, provides a justification to reopen Decedent's closed estate. Once the probate was closed, the proper forum for seeking a partition of trust property was BIA, which has the primary authority over such property. Thus, even assuming that a probate judge has the authority, in some circumstances, to reopen a probate in order to consider a consolidation agreement, the IPJ acted well within his authority and discretion in denying reopening in the present case.

### History

Decedent died on April 5, 2006, unmarried and without issue. At the time of his death, Decedent's trust assets included Allotment No. 2705, which he owned in its entirety.<sup>3</sup> Decedent was survived by one sister (Grace Berger Aahl), two nieces (Nancy and Deloris), and two nephews (Charles and Steven). The IPJ scheduled a hearing for March 29, 2007, in Browning, Montana, to probate Decedent's estate. The notice of hearing that was sent to Charles was returned to the Office of Hearings and Appeals marked "not deliverable as addressed; unable to forward."<sup>4</sup>

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<sup>3</sup> Allotment No. 2705 is located on the Blackfeet Reservation and consists of 400 acres.

<sup>4</sup> It is unclear whether the hearing was attended by any of the heirs: The IPJ states in his April 24, 2007, Decision that the hearing was unattended and the attendance roster states, "No Parties Appeared;" however, Charles states in his petition to reopen, and in his notice

(continued...)

On April 24, 2007, the IPJ issued a decision in which he approved Decedent's will and ordered the distribution of Decedent's estate in accordance with the will. In particular, the IPJ directed that Allotment No. 2705 be distributed to Appellants in equal shares as tenants-in-common.

In late October 2007, Charles sought to reopen Decedent's estate on the grounds that he did not receive notice of the proceedings. He requested that the IPJ "accept our request to re-open the Probate . . . so that [Appellants] can submit to you each of our acreage preferences for assignment of the 400 acres (Allotment 2705)." Petition to Reopen. According to Charles, Steven spoke with the IPJ at the hearing "about assigning whole pieces of 100 acres each to the four heirs" and the IPJ told him that BIA "preferred whole pieces of inheritance, rather than fractionation." *Id.* Charles stated that he had received maps for the allotment on October 24, 2007, and that he intended to send various draft partition plans to his co-devisees for their decisions and approval. Prior to Charles's request to reopen Decedent's estate, nothing in the record states or suggests that any of the remaining Appellants informed the IPJ of any interest in partitioning Allotment No. 2705 or asked him to refrain from issuing his decision to permit Appellants time to negotiate and submit an agreement to him.

By decision issued November 19, 2007, the IPJ denied reopening. Although he found that Charles satisfied the threshold requirements set out at 43 C.F.R. § 4.242 to allow him to petition to reopen Decedent's estate,<sup>5</sup> the IPJ concluded that, after the issuance of the Decision and the distribution of the estate, "the time [had passed] for entering into

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<sup>4</sup>(...continued)

of appeal to the Board, that Steven attended the hearing and spoke with the IPJ. Steven does not state whether he attended the hearing nor does he mention that he spoke with the IPJ. It appears clear, though, that Charles did not attend.

<sup>5</sup> The IPJ found that Charles did not receive constructive or actual notice of the probate hearing and that he sought reopening within 3 years of the final probate decision. At the time the IPJ denied reopening, the regulations included the requirement that a party seeking reopening have had no notice of the probate hearing. *See* 43 C.F.R. § 4.242 (2008). The regulations have since been changed to revise this section, and the requirement of no notice has been eliminated. *See* 73 Fed. Reg. 67,256, 67,302 (Nov. 13, 2008), *to be codified at* 43 C.F.R. § 30.242. Reopening within 3 years of the original decision would be permitted to correct an error of law or of fact in the original decision. *Id.* Our analysis would be the same under either the current or previous version of the regulation governing the reopening of probates.

an agreement to partition the interests [in Allotment No. 2705] pursuant to the authority conferred in 25 U.S.C. § 2206(e).” Order Denying Reopening at 3. Section 2206(e) provides in relevant part:

The official authorized to adjudicate the probate of trust or restricted lands shall have the authority to approve agreements between a decedent’s heirs and devisees to consolidate interests in trust or restricted lands. The agreements referred to in the preceding sentence may include trust or restricted lands that are not a part of the decedent’s estate that is the subject of the probate.

Regulations implementing this subsection became effective on December 15, 2008. *See* 73 Fed. Reg. at 67,295, *to be codified at* 43 C.F.R. Part 30, Subpart F.<sup>6</sup>

The IPJ also concluded that even if he could reopen the estate solely to approve an agreement to consolidate interests, Appellants did not yet have an agreement. Rather, Charles had only recently circulated proposals among the other three heirs suggesting various ways the allotment might be partitioned among them.

After the Order Denying Reopening had been entered, each of the Appellants then wrote to the IPJ to advise him that they had reached a firm agreement to partition Allotment No. 2705, and to urge him once again to reopen the estate. The IPJ forwarded each of the documents to the Board, which has construed them as appeals from the Order Denying Reopening. Because it was unclear from their notices of appeal what actual injury they had sought to correct in their request for reopening, i.e., how they were adversely affected by the Decision for which Charles had sought reopening, the Board ordered Appellants to identify the injury resulting to them from the Decision.

Each Appellant responded to the Board’s order to show cause with the same response. They first argue that each was injured by the lack of notice to Charles of the probate proceedings because it “prevented him (and all parties) of [the] opportunity to avoid fractionation of [Allotment No. 2705].” Response to Order to Show Cause at

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<sup>6</sup> In particular, section 30.151 provides, in part:

(a) A judge may approve a written agreement among devisees or eligible heirs in a probate case to consolidate the interests of a decedent’s devisees or eligible heirs.

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(b) If the judge approves an agreement, the judge will issue an order distributing the estate in accordance with the agreement.

unpaginated 1. Second, Appellants claim that Decedent’s intent — that his heirs “derive satisfaction” from his bequest — is frustrated because fractionation of the land deprives the heirs of the “full use and independent ownership” of the land. *Id.* Third, Appellants claim that the IPJ’s decision frustrates Federal policy of reducing the fractionation of land. Finally, Appellants claim that they will suffer “undue hardship” if the IPJ’s order is affirmed because BIA’s consideration of a partition agreement could take a long time. The Board also set the matter for briefing on the merits of Appellants’ appeal. On behalf of all Appellants, Charles submitted a brief, in which these arguments are reiterated.

### Discussion

Appellants bear the burden of showing that the IPJ erred in declining to reopen Decedent’s estate. *Estate of Lizzie McBride Rhoan*, 46 IBIA 262, 264 (2008). We conclude that Appellants have not met this burden, and that the IPJ did not abuse his discretion in denying reopening.

Appellants contend that the procedural error in the original proceedings — failure to give notice to Charles — resulted in their loss of a procedural right afforded to heirs to submit their partition agreements to the probate judge for inclusion in a final decision and distribution of an estate.<sup>7</sup> But the facts that three of the Appellants did receive notice of the proceedings, and did not pursue the consolidation option in a timely manner or even

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<sup>7</sup> Appellants are not aggregating any interests in land; instead, they propose to divide their undivided interests in Allotment No. 2705 by carving the allotment into four subparcels. For purposes of our decision, we assume that Appellants’ partition agreements are included within the scope of consolidation agreements under 25 U.S.C. § 2206(e) and (j)(9).

However, we note that the partitioning proposed by Appellants arguably requires surveys and formal legal descriptions to identify the boundaries of each of the four proposed parcels. Consolidation, on the other hand, ordinarily contemplates a joining, uniting, or merging of interests, which does not necessarily implicate the creation of new parcels or boundaries. The Department’s recently published regulations define “consolidation agreement” for purposes of probate as an agreement that is “entered during the probate process . . . by which a decedent’s heirs and devisees consolidate interests in trust or restricted land.” 43 C.F.R. § 30.101 (definition of “consolidation agreement”), 73 Fed. Reg. at 67291 (Nov. 13, 2008). Notwithstanding our concerns here, we expressly decline to determine whether partition agreements fall within the scope of consolidation agreements for purposes of 25 U.S.C. § 2206(e) & (j)(9).

inform the IPJ that they needed time to negotiate an agreement,<sup>8</sup> and that even when Charles sought reopening, he did not present a final agreement for the IPJ to approve, strongly suggest that Appellants' claim that they were adversely affected by the Decision is highly speculative. That is, even if Charles had received timely notice of the proceedings to probate Decedent's estate, it appears doubtful, at best, whether Appellants would have finalized an agreement and submitted it to the IPJ before the Decision issued. And, unless a petitioner can show that he or she was adversely affected by the decision for which reopening is sought, an alleged procedural injury, standing alone, would provide no grounds for reopening an estate to effect a substantive change to the distribution of the estate. Thus, although Charles satisfied the threshold requirements in the regulations for seeking reopening, it does not follow that he was entitled to have the estate reopened based solely on the procedural error.

The procedural error, at most, deprived Appellants only of a nonexclusive forum in which to request partition because, as the IPJ observed, Appellants remain free to present their partition request to BIA for consideration. *See* 25 C.F.R. § 152.33(b).<sup>9</sup> The authority conferred on probate judges by 25 U.S.C. § 2206(e) to approve consolidation agreements does not, in our view and in the absence of any exercise of the right during the pendency of probate, afford the heirs an absolute right to return to, and to resurrect, the probate forum for the sole purpose of presenting a consolidation agreement for approval, even if a procedural error arguably caused or contributed to the missed opportunity to present an agreement prior to the final decision. Once the probate is closed, the proper forum for seeking a partition of jointly-owned trust property is BIA, which has the primary authority over such property, *see* 25 C.F.R. § 152.33(b), and can consider Appellants' arguments as related to fractionation. Thus, even assuming that a probate judge might have the authority, under some circumstances, to reopen a probate in order to consider a

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<sup>8</sup> There is no requirement in either the statute or the probate regulations that requires a probate judge to specifically advise heirs of the option of entering into a consolidation agreement and submitting it to the probate judge for approval.

<sup>9</sup> Section 152.33(b) provides:

Heirs of a deceased allottee may make written application, in the form approved by the Secretary, for partition of their trust or restricted land. If the Secretary finds the trust lands susceptible of partition, he may issue new patents or deeds to the heirs for the portions set side to them. If the allotment is held under a restricted fee title (as distinguished from a trust title), partition may be accomplished by the heirs executing deeds approved by the Secretary, to the other heirs for their respective portions.

consolidation agreement, the IPJ acted well within his authority and discretion in denying reopening in the present case.

Appellants argue that they will suffer “undue hardship” if they are not allowed to have the IPJ review their partition agreement, instead of BIA. Appellants produce no evidence in support of their contention, for which reason we reject this argument. Additionally, Appellants also argue without support that they somehow were denied the opportunity to negotiate during the actual pendency of the probate because Charles was not informed of the proceedings. It is not clear how the probate proceedings themselves interfered with Appellants’ ability to contact one another, including Charles, and negotiate an agreement. Moreover, none of the Appellants informed the IPJ that they were interested in negotiating an agreement or requested the IPJ to refrain from issuing his decision to permit the devisees time to present an agreement to him. Therefore, we reject this argument.

We reiterate that while we affirm the Order Denying Reopening, Appellants are not foreclosed from partitioning their land. They may submit their application(s) to BIA pursuant to 25 C.F.R. § 152.33(b).

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 the IPJ’s November 19, 2007, Order Denying Reopening.

I concur:

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// original signed  
Debora G. Luther  
Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge