INTERIOR BOARD OF INDIAN APPEALS

Estate of Marilyn Jane Samuels (a.k.a. Marilyn Jane McCloud)

52 IBIA 140 (10/06/2010)

United States Department of the Interior

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ESTATE OF MARILYN JANE SAMUELS (a.k.a. MARILYN JANE McCLOUD)	)	Order Vacating Denial of Reopening and Remanding
	)	Docket No. IBIA 09-023
	)	October 6, 2010

Nadine P. McCloud Piatote (Appellant) appealed to the Board of Indian Appeals (Board) from an Order Denying Reopening, With Opportunity to Show Cause (Order Denying Reopening), entered on October 10, 2008, by Administrative Law Judge (ALJ) Steven R. Lynch in the estate of Marilyn Jane Samuels (a.k.a. Marilyn Jane McCloud) (Decedent), deceased Puyallup Indian, Probate No. P000038548IP. Judge Lynch's order let stand an Order Determining Heirs, entered on September 30, 1999, by ALJ William E. Hammett, which found that Decedent's only heirs were her spouse, Julius Samuels, and a child, Montgomery Samuels.

In July of 2008, the Superintendent of the Puget Sound Agency (Superintendent), Bureau of Indian Affairs (BIA), had transmitted to Judge Lynch a request from Appellant that Decedent's estate be reopened to add four additional children of Decedent as her heirs, including Appellant. Judge Lynch concluded that the circumstances of the case may satisfy the "manifest injustice" standard to justify reopening. But he also concluded, based on the probate regulations then in effect, that because Decedent's estate had been closed for more than 3 years, Appellant would need to show that she had not received either actual or constructive notice of the original proceedings. Judge Lynch denied reopening, while allowing an opportunity for Appellant or her siblings to demonstrate lack of notice.

We vacate the Order Denying Reopening because the only basis upon which Judge Lynch relied in denying reopening — a lack-of-notice requirement — is no longer in effect and, in addition, the revised regulations now give both BIA and the ALJ authority that they previously lacked to initiate reopening proceedings for an estate that has been closed for more than 3 years.

Background

Decedent died in 1994 and her Indian trust estate was probated in 1999. In early September of 1997, the Superintendent sent to Judge Hammett a Data for Heirship

Finding and Family History OHA-7 Form (OHA-7), which listed only Julius Samuels and Montgomery Samuels as Decedent's apparent heirs. On September 29, 1997, the Superintendent apparently sent a corrected OHA-7 to Judge Hammett.[1] The corrected OHA-7 listed four additional surviving children of Decedent: Appellant, Herman W. John or McCloud, Colleen J. McCloud, and Mary McCloud.

In the 1999 Order Determining Heirs, Judge Hammett found that Decedent was survived only by her spouse, Julius, and one son, Montgomery.[2] Judge Hammett ordered that Decedent's property be divided equally between those two according to Washington State laws of intestacy (as incorporated at the time by Federal law). It is apparent that Judge Hammett did not consider the corrected OHA-7, and the Order Determining Heirs was not sent to Appellant or her three other siblings.

On June 9, 2008, Appellant wrote to the Superintendent and to BIA's Northwest Land Title and Records Office, requesting that Decedent's estate be reopened to add the four omitted children. On July 29, 2008, the Superintendent wrote to Judge Lynch, advising him of Appellant's request, advising him of the omission in the Order Determining Heirs, and requesting advice on whether the estate could be reopened. *See* Letter from Superintendent to Judge Lynch, July 29, 2008. On October 10, 2008, Judge Lynch issued the Order Denying Reopening.

At the time Judge Lynch issued his order, the Indian probate regulations governing petitions for reopening an estate filed more than 3 years after the entry of a final decision in a probate proceeding, 43 C.F.R. § 4.242(i) (2007), included four requirements, one of which was that "[t]he petitioner was not on the reservation or otherwise in the vicinity at any time while the public notices [of the original probate proceedings] were posted." In November of 2008, the probate regulations were substantially revised and the revisions became effective on December 15, 2008. *See* 73 Fed. Reg. 67,256 (Nov. 13, 2008). The revised regulations, among other things, (1) eliminated the lack-of-notice requirement; and (2) gave probate judges authority to reopen, on their own motion, estates that had been closed for more than 3 years, to correct manifest injustice. *See* 43 C.F.R. § 30.242(a).[3]

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[1] The probate record contains copies of the Superintendent's September 29, 1997, transmittal memo addressed to Judge Hammett and the corrected OHA-7, but we cannot determine from the record whether or when it was received by Judge Hammett.

[2] Another son, Kyle R. Samuels, had pre-deceased Decedent without issue.

[3] Under the revised regulations, individual petitioners seeking reopening of an estate that has been closed for more than 3 years must still present their petition within 1 year of the petitioner's discovery of the alleged error.

In *Estate of Benson Potter*, 49 IBIA 37, 41 (2009), the Board held that, upon the effective date of the revised probate regulations, the lack-of-notice requirement in former § 4.242(i) no longer applied to a BIA petition to reopen an estate that had been closed for more than 3 years.[4] Instead, the Board concluded that new § 30.242 governs consideration of such a petition. 49 IBIA at 41. In addition, the Board noted that under § 30.242, the probate judge now has authority to reopen an estate after 3 years on his or her own motion. *Id*. at 39.

In the present case, the Superintendent asked Judge Lynch whether Decedent's estate could be reopened. Fairly construed, the Superintendent's letter may be understood as a petition to reopen the estate to add the children who were included in BIA's corrected OHA-7 prepared in 1997 and apparently submitted to Judge Hammett. We conclude, as we did in *Estate of Potter*, that any notice-based barrier that precluded the ALJ from considering the Superintendent's request to reopen Decedent's estate, or from considering reopening on the ALJ's own motion, no longer exists. We therefore vacate the Order Denying Reopening and remand this case for further proceedings.[5]

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 vacates the Order Denying Reopening and remands the case to the Probate Hearings Division for further proceedings consistent with this decision.

I concur:

// original signed	// original signed
Steven K. Linscheid	Debora G. Luther
Chief Administrative Judge	Administrative Judge

[4] In *Estate of Potter*, BIA's petition for reopening had been denied by the probate judge while § 4.242(i) was still in effect; new § 30.242 became effective while BIA's appeal from that denial of reopening was pending before the Board.

[5] Although he did not make a finding that a manifest injustice would occur in the absence of correcting the error and adding Decedent's additional children as heirs, Judge Lynch noted that the manifest injustice standard "may be met" in this case. Order Denying Reopening at 2.