



INTERIOR BOARD OF INDIAN APPEALS

Estate of Beverly M. Howard

55 IBIA 300 (09/24/2012)



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 BEVERLY M. HOWARD) Order Affirming Decision
)
) Docket No. IBIA 11-003
)
) September 24, 2012

Leroy R. Red Horse, Jr. (Leroy Jr.), Stacey A. Red Horse (Stacey), and Roddy D. Red Horse (Roddy) (collectively, Appellants) appealed to the Board of Indian Appeals (Board) from an order reopening the estate of Appellants’ grandmother, Beverly M. Howard (Decedent).¹ An earlier decision had found that Appellants were Decedent’s only grandchildren and her only heirs.² The Reopening Order granted a petition by the Bureau of Indian Affairs (BIA) Standing Rock Agency Superintendent (Superintendent) to recognize Lloyd Vernon Red Horse, Jr. (Lloyd Jr.), as an additional grandchild of Decedent and also an heir. On appeal, Appellants argue that: (1) they did not receive notice before the IPJ granted reopening; (2) Lloyd Jr. should not be added as an heir because he failed to make a timely “claim” to Decedent’s estate; and (3) “there are serious questions as to whether or not” Lloyd Jr. is Decedent’s grandson. Notice of Appeal at 2.

We affirm the Reopening Order because (1) Appellants have not shown how they were prejudiced by not receiving notice when the reopening petition was filed (assuming that to be the case), because they have not identified any evidence they would have submitted to the IPJ in response to the petition; (2) the Superintendent’s reopening petition was timely, and the IPJ’s Reopening Order was not dependent upon Lloyd Jr. having made a “claim;” and (3) the record supports the IPJ’s paternity determination and Appellants have offered no evidence to the contrary.

¹ The Order Granting Reopening and Modifying Decision (Reopening Order) was entered on August 30, 2010, by Indian Probate Judge (IPJ) Albert C. Jones. Decedent was a Standing Rock Sioux, and her probate was assigned No. P000071000IP in the Department of the Interior’s probate tracking system, ProTrac.

² The earlier probate decision (Decision) was issued by the IPJ on May 18, 2009, and is the decision that was modified by the Reopening Order.

Background

Decedent died on July 29, 2008. In the Decision, the IPJ found that Decedent had two sons, Leroy Red Horse, Sr. (Leroy Sr.) and Lloyd Vernon Red Horse (Lloyd Sr.), both of whom predeceased her. According to information compiled by BIA and provided by Appellants' stepfather at the probate hearing, only Leroy Sr. (Appellants' father) had children, and Lloyd Sr. died without issue (i.e., without children). Based upon this information, the IPJ concluded that Appellants were Decedent's only heirs, and he ordered the distribution of Decedent's trust property pursuant to the American Indian Probate Reform Act (AIPRA), *see* 25 U.S.C. § 2206, and the Standing Rock Heirship Act, Pub. L. No. 96-274.³

On March 12, 2010, the IPJ received a petition for reopening from the Superintendent, based on newly discovered evidence. The Superintendent reported that Lloyd Sr. had not, as previously understood, died without issue but had a son, Lloyd Jr., who survived him. Petition, Mar. 10, 2010 (Administrative Record (AR) Tab 10). The Superintendent submitted a birth certificate for Lloyd Jr., which identifies Lloyd Sr. as his father. AR Tab 12. The Superintendent also submitted a paternity affidavit that was executed by Lloyd Sr. shortly after Lloyd Jr.'s birth. AR Tab 13.

The IPJ found that the Superintendent's request had merit and issued an order to show cause (OSC) why Decedent's estate should not be reopened and Lloyd Jr. added as an heir. OSC, July 20, 2010 (AR Tab 9). The distribution list for the OSC indicates that it

³ At the time the Decision was issued, the only property included in the inventory of Decedent's estate was trust personalty, trust interests in land on the Standing Rock Reservation, and trust interests in land on the Fort Peck Reservation that constituted 5% or more in the respective parcels. All of the property was divided equally among Appellants pursuant to the applicable statutes. Subsequently, BIA identified additional Standing Rock property interests, and also interests in trust land on the Pine Ridge Reservation and in an area referred to as Cheyenne River Off-Reservation. The Pine Ridge and Cheyenne River interests were less than 5% of the respective parcels, resulting in a different rule of descent under AIPRA. The IPJ determined that those interests passed to Decedent's eldest grandchild, Leroy Jr., in accordance with AIPRA's "single heir rule." *See* 25 U.S.C. § 2206(a)(2)(D)(iii)(II). The additional Standing Rock interests were divided equally among Appellants pursuant to the Standing Rock Heirship Act.

was mailed to Appellants at the same address that their representative provided at the probate hearing, and the same address used by their representative for this appeal.⁴ The OSC provided interested parties with 20 days to respond. After the time for responses expired and no responses had been received, the IPJ issued the Reopening Order granting the Superintendent's petition and adding Lloyd Jr. as an additional grandchild and heir of Decedent.⁵

Appellants appealed to the Board. After receiving Appellants' appeal, the Board first addressed the issue of whether the appeal was timely, because it was filed more than 30 days after the Reopening Order was mailed with accurate appeal instructions. The Board solicited further information from Appellants and was informed that Roddy was on active duty in the military during the time period for filing an appeal. The Board concluded that the appeal was timely for Roddy by operation of the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. App. § 501 *et. seq.* Order Finding Appeal Timely, Nov. 29, 2010, at 2 (citing *Dean v. United States*, 92 Fed. Cl. 133, 150 (2010) (SCRA "protects members of the military from expiring statutes of limitation while on active duty") (internal quotations omitted)); *see also Arcoven v. Deputy Assistant Secretary – Indian Affairs (Operations)*, 13 IBIA 307, 308-09 (1985).⁶

⁴ Appellants' appeal was filed by their stepfather, Wayne T. Harper. The record contains powers of attorney executed by each Appellant in 2008 giving Harper authority to represent Appellants in legal matters. *See* AR Tabs 36, 38, and 40. We assume, for purposes of deciding this appeal, that the powers of attorney were not revoked prior to the filing of this appeal.

⁵ Lloyd Jr. is younger than Leroy Jr., and thus the addition of Lloyd Jr. did not alter the distribution of Decedent's less-than-5% interests in non-Standing Rock trust land, i.e., the interests subject to the "single heir rule." *See* supra note 3. But for Decedent's remaining property, the addition of Lloyd Jr. meant that Decedent's property would be divided among four heirs, rather than three.

⁶ The tolling provision of the SCRA, 50 U.S.C. App. § 526(a), provides:

The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

Because we concluded that the appeal was timely for Roddy, we found it unnecessary to address whether the appeal was timely with respect to Leroy Jr. and Stacey, who jointly filed the appeal with Roddy.

On appeal, Appellants argue that: (1) they did not receive notice before the IPJ granted reopening; (2) Lloyd Jr. failed to make a timely “claim” to Decedent’s estate; and (3) “there are serious questions as to whether or not” Lloyd Jr. is Decedent’s grandson. Notice of Appeal at 2. Appellants did not file an opening brief, and thus we review the appeal based upon the allegations of error and arguments contained in their notice of appeal to the Board. No other pleadings were filed with the Board.

Standard of Review

Appellants have the burden of showing that the Reopening Order is in error. *See Estate of Verna Mae Pepion Hill Hamilton*, 45 IBIA 58, 63 (2007). Simple disagreement with or bare assertions concerning a challenged decision are insufficient to carry this burden of proof. *Estate of John Squally Kalama*, 49 IBIA 201, 204 (2009).

Discussion

I. Lack of Notice

When a probate judge finds that a petition for reopening shows merit, the judge must provide notice to interested parties and an opportunity to respond. 43 C.F.R. § 30.244(b); *Estate of George Laverne Francis*, 54 IBIA 149, 151 (2011); *see also Estate of Amos Sidney Bearshield, Jr.*, 55 IBIA 10, 12 (2012).

Appellants argue that on July 20, 2010, “a show cause hearing was held without notification to all parties as required by law.” Notice of Appeal at 1. There was no “hearing” held on July 20, 2010, but that is the date that the IPJ issued the OSC. We assume that Appellants contend that they did not receive the OSC and thus were denied an opportunity to respond to the Superintendent’s petition.

The record indicates that the IPJ mailed the OSC to Appellants at the same address to which previous mailings from the IPJ had been sent, which was the address provided by Appellants’ representative at the hearing. There is a rebuttable presumption that notice sent to a party at his or her last known address and not returned has been received. *Estate of Rose Hyson Hardick Sparlin*, 19 IBIA 153, 155 (1991). To rebut the presumption, the party may show that the address used was not his or her correct current address and specifically contest receiving notice. *Id.* There is no evidence in the record that the copies of the OSC that were mailed to Appellants were returned to the IPJ, and Appellants submit no further

details regarding their argument that they did not receive notice. Thus, if we apply the presumption, we would reject Appellants' contention that they did not receive the OSC.

However, even if we assume that Appellants did not receive the OSC, Appellants have not, on appeal, offered any evidence that they contend they would have presented to the IPJ in response to the OSC and BIA's petition to reopen the estate, had they received the OSC. And to the extent that one of Appellants' arguments on appeal is a legal argument—that Lloyd Jr. failed to make a timely "claim"—that is an issue that the Board may consider and decide on appeal, and thus Appellants' rights are protected through their right of appeal to the Board.

An appellant who contends on appeal that his procedural rights were violated in the proceedings below must show how he was adversely affected by the alleged violation. *See Estate of Cyprian Buisson*, 53 IBIA 103, 109 (2011) (an appellant claimed that he believed that a follow-up hearing would be held, but failed to show how the absence of a second hearing prejudiced him; no offer of evidence or testimony was made, and the appellant thus failed to demonstrate any due process violation); *see also Estate of Edwin Melvin Long Soldier*, 52 IBIA 239 (2010) (an appellant who contended that he had not received notice of a probate hearing was required, in seeking rehearing, to offer evidence that he would have presented if he had received notice).

In the present case, Appellants have not identified or offered any evidence that they might have submitted to the IPJ for consideration, had they received the OSC. Thus, they have failed to demonstrate, on appeal, that they were prejudiced by the alleged failure to receive the OSC.

II. Timeliness of Reopening

Appellants contend that Lloyd Jr. failed to make a timely "claim" to Decedent's estate, and thus they appear to be arguing that the IPJ should not have granted reopening because Lloyd Jr.'s "claim" as an heir was untimely. Appellants misunderstand the rules governing reopening of an estate, and the nature of a proceeding in which an individual may be added as an heir.

First, Appellants' use of the word "claim" suggests that they may misunderstand the nature of a proceeding to reopen an estate to add an heir. The word "claim," in a probate proceeding, is a term of art that refers to creditors seeking payment, from trust personalty in the estate (i.e., Individual Indian Money account), for a debt that is due from a decedent to the creditor. *See* 25 C.F.R. § 15.302. Creditor claims against an estate are governed by

a deadline that expires in the course of the initial probate proceedings. *See id.* § 15.304; 43 C.F.R. § 30.140.

In contrast, the rights of heirs of a decedent to receive a share of property in a decedent's estate are not based on a debt owed to them by the decedent, and thus not based upon a creditor "claim" or subject to the deadlines for filing such a claim. Thus, Lloyd Jr.'s ability to be added as an heir was not dependent upon him filing a "claim." Instead, the proceedings to add an heir are governed by the regulations for reopening an estate.

The regulations that apply for reopening an estate do include a deadline for an *individual*, such as Lloyd Jr., to file a petition for reopening: within one year after the individual's discovery of an alleged error. 43 C.F.R. § 30.243(a)(3). The regulations do not include the same deadline for a petition filed by BIA. *See id.* § 30.243(a)(2).⁷ In the present case, however, it would not have mattered who filed the petition for reopening—BIA or Lloyd Jr.—because the petition was filed less than one year after the Decision was issued that omitted Lloyd Jr. as an heir. Thus, there is no issue regarding the timeliness of the petition.

III. Evidence of Paternity

Appellants' third argument on appeal is that "there are serious questions as to whether or not [Lloyd Jr.] is in fact the grandson." Notice of Appeal at 2. Appellants provide no explanation for why they believe such questions exist nor have they identified any evidence to support their assertion. In support of the petition to reopen, the Superintendent submitted both a birth certificate that identifies Lloyd Sr. as Lloyd Jr.'s father and an affidavit of paternity signed by Lloyd Sr. shortly after Lloyd Jr. was born. *See* AR Tabs 12 & 13. In the absence of contrary evidence, this evidence is undoubtedly sufficient to support the IPJ's finding of paternity and the Reopening Order. Appellants' bare assertion that there are "serious questions" about whether Lloyd Jr. is Decedent's grandson does not satisfy their burden on appeal of demonstrating error in the IPJ's Reopening Order. *See Estate of Kalama*, 49 IBIA at 204.

⁷ There is a higher *standard* for granting reopening if a petition for reopening is filed more than 3 years after the original decision, but there is no *deadline* which, if not met, bars BIA from filing a petition for reopening. *See* 43 C.F.R. § 30.243(a)(2).

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 affirms the Order Granting Reopening and Modifying Decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Debora G. Luther
Administrative Judge