



INTERIOR BOARD OF INDIAN APPEALS

Estate of Josephine J. Palone

59 IBIA 49 (07/24/2014)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
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ESTATE OF JOSEPHINE J. PALONE)	Order Affirming Denial of Rehearing
)	and Dismissing Appeal in Part
)	
)	Docket No. IBIA 12-043
)	
)	July 24, 2014

Appellant Dianne T. Palone Moccasin (Appellant), pro se, appealed to the Board of Indian Appeals (Board) from an Order Denying Rehearing, entered on November 11, 2011, by Administrative Law Judge (ALJ) Richard D. Hines in the estate of Appellant’s aunt and stepmother, Josephine J. Palone (Decedent).¹ The Order Denying Rehearing left in place a May 24, 2010, Decision (Decision) by Indian Probate Judge (IPJ) Melanie M. Daniel that distributed Decedent’s interests in trust and restricted property to the Quechan Tribe of the Fort Yuma Indian Reservation, California & Arizona (Tribe) pursuant to the American Indian Probate Reform Act (AIPRA), 25 U.S.C. §§ 2206(a)(2)(B) and (D). Appellant contends on appeal that she is the rightful heir of Decedent’s estate because she was raised by Decedent as Decedent’s daughter. Appellant also contends that, as a co-owner of trust land in Decedent’s estate, she has standing to appeal and was not provided notice of her right as a co-owner to make an offer to purchase Decedent’s trust land interests at probate.

We conclude that on Appellant’s heirship claim, the ALJ correctly determined that Appellant cannot be Decedent’s heir as her daughter because Appellant cannot legally be considered Decedent’s daughter under Federal probate law. Appellant’s second claim on appeal—that as a co-owner of the land in Decedent’s estate, she was not provided with proper notice and an opportunity to exercise a co-owner’s option to purchase Decedent’s interests at probate—was not raised in the petition for rehearing, and thus is not properly before the Board. We dismiss that portion of the appeal.

¹ Decedent, a.k.a., Josephine C. Palone, was a Quechan (Fort Yuma) Indian. Her probate case is assigned Probate No. P000065203IP in the Department of the Interior’s probate tracking system, ProTrac.

We thus affirm the ALJ's Order Denying Rehearing with respect to Appellant's opposition to the Tribe's inheritance of Decedent's land holdings, and we dismiss the appeal in remaining part.²

Background

Decedent died intestate (i.e., without a will) on October 23, 2007. At the time of her death, she was a resident of the State of California. The inventory submitted to the Office of Hearings and Appeals (OHA) by BIA at the time the IPJ issued her decision includes trust real property located on the Tribe's reservation.

After hearing, and based on the evidence and record, the IPJ concluded that Decedent died a widow, and left no surviving issue. The IPJ also determined that Decedent's parents and siblings predeceased Decedent. Decision at 1. The IPJ concluded that Decedent's trust estate passed to the Tribe pursuant to AIPRA.

Appellant's daughter, Georgianna M. Moccasin Face-White Pigeon filed a request for rehearing, dated June 16, 2010, on behalf of herself and Appellant. Georgianna stated, *inter alia*, that:

By law, and in the eyes of the legal system, [Appellant], and her sisters . . . were nieces of Josephine C. Palone. We, the children of [Appellant and her sisters] have grown up having and acknowledging one Grandmother and that is Josephine Palone. . . . I have many fond cherished memories of being raised by my Grandmother, and saw her on a daily basis through most of my life. I am sure that the people who made up these new laws did not have the privilege or opportunity of growing up with or getting to know the traditional and cultural beliefs of our tribal elders. Many of their beliefs did not include the need for legal written documentation, such as legal adoption papers, written wills and other matters of this sort. Many elders believed their words were as binding as a written contract. She told us all this and never felt the need to have a written will stating her wishes.

² After this appeal was filed, the Bureau of Indian Affairs (BIA) submitted a petition to reopen the estate, dated December 1, 2011, to the Probate Hearings Division (PHD) to add trust real property interests not originally included in BIA's inventory of Decedent's estate submitted to PHD during the underlying probate proceedings. PHD returned the petition because of the pendency of this appeal, and BIA subsequently transmitted the petition to the Board. The petition for reopening is not within the scope of this appeal, and the Board is forwarding it to PHD for action.

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. . . We strongly disapprove of the judge’s decision in the Probate Hearing of Josephine Palone. We believe she would strongly disapprove [of] this ruling also. She always believed her land holdings would be passed down to her children. This is why we are entering our petition for a rehearing

Petition for Rehearing, June 16, 2010, at 1, 3 (unnumbered). Another petition for rehearing was filed by Paula Matthews, who did not claim an interest in the estate but asserted that Appellant and two other nieces of Decedent should inherit Decedent’s estate because Decedent had acknowledged them as her daughters.

The ALJ denied rehearing on November 11, 2011, on the grounds that neither petitioner was an “interested party,” as defined by 43 C.F.R. § 30.101 and within the meaning of the regulation authorizing petitions for rehearing, *see* 43 C.F.R. § 30.238.³ The ALJ described the definition of “interested party” as including “any potential or actual heir,” and “any co-owner exercising a purchase option.” Order Denying Rehearing at 1-2. It is unclear whether the ALJ treated Appellant as one of the petitioners, but in any event he also concluded that the petitions had failed to establish any error in the factual findings and conclusions of the IPJ in her decision. *Id.* at 2. In particular, the ALJ noted that Decedent had never legally adopted Appellant or Decedent’s other nieces, and that in the absence of a legal adoption, the law does not recognize them as Decedent’s children for purposes of heirship. *Id.*

On appeal, Appellant asserts, *inter alia*,⁴ that she is the rightful heir to Decedent’s estate because Decedent took Appellant in from an early age and raised Appellant as if Appellant were Decedent’s actual daughter. Notice of Appeal, Dec. 7, 2011, at 2; Opening Brief (Br.) at 11 (styled “Appeal,” rec’d May 3, 2012). Appellant also takes issue with the

³ The ALJ cited “§30.239,” but apparently intended to refer to § 30.238.

⁴ Appellant raises several other issues before the Board which were not presented to the ALJ at the rehearing stage. The Board “normally decline[s] to consider an issue presented for the first time on appeal.” *Estate of Drucilla (Trucilla) W. Pickard*, 50 IBIA 82, 91 (2009). Although the Board has discretionary authority to correct a manifest injustice or error, reviewing the issue and information presented by Appellant, we find no basis for exercising such authority in this case.

Appellant also submitted a motion to stay the ALJ’s decision with her notice of appeal. We noted in our Order Concerning Appellant’s Motion to Stay, December 20, 2011, that 43 C.F.R. § 4.314 automatically stays the effectiveness of a decision while the appeal is pending.

ALJ's finding that the petitioners seeking rehearing had not asserted any facts to show that they have standing. Appellant contends that she has standing because she is a co-owner of allotment interests that Decedent owned. As a co-owner, she argues that she had purchase option rights for which she did not receive notice from BIA, and has been injured as a co-owner because she was not provided a proper opportunity to exercise the purchase option. Opening Br. at 12.

Discussion

The Board has articulated its standard of review and scope of review in *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62 (2012), as follows:

The Board reviews factual determinations by the probate judge to determine whether they are substantially supported by the record. *Estate of Samuel Johnson (John) Aimsback (Aims Back)*, 45 IBIA 298, 303 (2007). We review legal determinations and the sufficiency of the evidence *de novo*. *Estate of Laberta Stewart*, 54 IBIA 198, 203 (2012). The burden lies with Appellant[] to show error in the [probate judge's order]. *See Estate of Margerate Arline Glen*, 50 IBIA 5, 21 (2009).

I. Under AIPRA, Appellant Cannot Inherit as Decedent's Daughter.

Appellant admits that she is not a biological child of Decedent, but nonetheless contends that because she was raised by Decedent and Decedent treated her as Decedent's own child, Appellant should be recognized as having been equitably adopted by Decedent. Opening Br. at 8, 11. Appellant asserts that, having been equitably adopted by Decedent, she should receive Decedent's trust lands instead of the Tribe. *Id.* at 11, 14.

The Board is bound by 25 U.S.C. § 372a, as was the ALJ. Section 372a is the Federal statute that governs the determination of heirs by adoption in Indian probate matters under the exclusive jurisdiction of the Secretary of the Interior. This statute provides, in relevant part, as follows:

In probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption—

(1) Unless such adoption shall have been—

(a) by a judgment or decree of a State court;

(b) by a judgment or decree of an Indian court;

(c) by a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or

the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or

(d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or

(2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this Act[, January 8, 1941,] or in the distribution of the estate of an Indian who has died prior to that date

Appellant did not offer any evidence in her request for rehearing, nor do we find any such evidence in the record, which would demonstrate that any of the requirements cited above have been met.⁵ Accordingly, while we do not take issue with Appellant’s personal characterization of her relationship with Decedent as “mother-daughter,” the Board cannot recognize Appellant as having been legally adopted by Decedent. As the IPJ explained at the initial hearing in this case, when she stated that Decedent’s trust estate would pass to the Tribe, OHA is obligated to apply Federal probate law, and does not have discretion or equitable powers to address Appellant’s argument that the outcome in this case is not fair. *See* Transcript of Hearing, May 5, 2010, at 7. Under Federal law, as the ALJ concluded in the Order Denying Rehearing, Appellant is Decedent’s niece and not her daughter.

Nothing in AIPRA changes this result. Although AIPRA does not define “child,” the Department’s regulations do—“*Child* means a natural or adopted child.” 43 C.F.R. § 30.101. And “*Eligible heir* means, for the purposes of [AIPRA], any of a decedent’s *children*, . . .” *Id.* (emphasis on “children” added). Appellant admits that she is not a natural child of Decedent, and has not demonstrated that she is a legally adopted child of Decedent. Because Appellant is not a child of Decedent, the ALJ correctly concluded that Appellant cannot inherit Decedent’s Indian estate, under AIPRA, as Decedent’s daughter, and that Decedent’s land holdings therefore pass to the Tribe.⁶

⁵ Appellant contends that the State of California recognizes equitable adoptions, but whether or not that is the case, the record does not contain any state court judgment or decree finding that Appellant was adopted by Decedent.

⁶ The fact that the Tribe may not have attended or shown any interest in the probate proceedings, *see* Opening Br. at 15, is not relevant to the determination of heirship. And because the Tribe inherits Decedent’s land holdings as a matter of law, it was not, as Appellant suggests, required to submit a request to purchase those interests. *See id.*

(continued...)

II. Regardless of Whether Appellant Would Have Standing as a Co-Owner to Have Exercised a Purchase Option, Her Lack-of-Notice Claim is not Properly Before the Board.

Appellant contends on appeal that she is a co-owner in several allotments that Decedent owned, and that because she is a co-owner, she was adversely affected by the failure of BIA to notify her of her right to purchase Decedent's allotment interests. Although Appellant acknowledges that a notice of the purchase option is included in the probate record, she contends that she did not receive such notice, and that if she had known of her purchase rights, she would have sought to purchase Decedent's interests in order to keep the interests in the family instead of allowing them to pass to the Tribe.

Appellant did not raise this claim in a petition for rehearing, and because it is raised for the first time on appeal, it is not properly before the Board. *See* 43 C.F.R. § 4.318 ("An appeal will be limited to those issues that were before the administrative law judge . . . [in] the petition for rehearing"); *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA at 62. We note that regardless of any notice that Appellant may or may not have received from BIA, the IPJ's original Decision in this case expressly noted that the estate includes interests that are subject to the option to purchase. *See* Decision at 2. Nonetheless, and without addressing either Appellant's standing to raise the claim or the merits of her lack-of-notice contention, we also note that, with exceptions not relevant here, before a co-owner may purchase trust real property from an estate, the heir(s) of that interest must grant their consent. *See* 25 U.S.C. § 2206(o)(3)(A)(ii). Nothing in the record indicates the Tribe granted or would have granted consent to Appellant's purchase of interests from Decedent's

(...continued)

At the probate hearing, in her petition for rehearing, and on appeal, Appellant contended that Decedent suffered from Alzheimer's disease during the last years of her life, when the intestacy provisions of AIPRA became effective. *See* Secretary's Certification of Notice for AIPRA, 70 Fed. Reg. 37107 (June 28, 2005) (making most of AIPRA's provisions effective on June 20, 2006). Prior to that, according to Appellant, Decedent had declined to make a will because she understood that her estate would pass to her nieces ("daughters") under then-existing law. To the extent Appellant contends that an "unfair" result in this case rises to the level of a due process violation, the Board has no authority to declare a Federal statute unconstitutional. *See Estate of Roland Dean DeRoche*, 53 IBIA 114, 115-116 (2011).

estate, had Appellant attempted to exercise a purchase option in the proceedings below, thus arguably making her claim of injury on appeal speculative.⁷

Because Appellant has not met her burden of establishing that the ALJ erred, we affirm the Order Denying Rehearing with respect to the determination that Appellant is not Decedent's daughter as a matter of law, and thus cannot inherit as such, and we dismiss the appeal in remaining part.

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 Denying Rehearing and dismisses the appeal in remaining part.

I concur:

// original signed
Scott K. Fukumoto
Acting Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

⁷ We express no opinion on whether Appellant must be given a new opportunity to exercise the co-owner purchase right with respect to the apparently significant number of trust real property interests that were omitted from the original inventory and which are the subject of BIA's petition for reopening. *See supra* note 2.