



INTERIOR BOARD OF INDIAN APPEALS

Estate of Fannie Birds Bill Levings Benson

59 IBIA 328 (01/23/2015)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF FANNIE BIRDS BILL)	Order Affirming Reopening Order
LEVINGS BENSON)	
)	Docket No. IBIA 12-129
)	
)	January 23, 2015

Marcus Wells, Sr. (Appellant) appealed to the Board of Indian Appeals (Board) from an Order Affirming Decision After Hearing on Reopening (Reopening Order) entered on June 12, 2012, by Indian Probate Judge (IPJ) Albert C. Jones in the estate of Appellant’s grandmother, Fannie Birds Bill Levings Benson (Decedent).¹ The IPJ found that Appellant’s petition to reopen the case was untimely, but even if that were not the case, that Appellant had shown no error in the July 11, 1984, Order Approving Will and Decree of Distribution (Decision),² which distributed Decedent’s estate pursuant to her January 13, 1982, will. In his appeal, Appellant suggests that an earlier will executed by Decedent, in 1953, should be given effect; that the 1982 will was not voluntarily made by Decedent; and that the ALJ who issued the Decision accepted Appellant’s interpretation of the 1982 will but that interpretation was not properly incorporated in the Decision.

We affirm the Reopening Order. First, Appellant makes no allegation of error in the IPJ’s finding that his petition was untimely. Second, to the extent the IPJ proceeded to address Appellant’s petition on the merits and affirm the Decision, Appellant’s bare allegations on appeal that the 1953 will should be given effect, questioning the 1982 will, and asserting that the ALJ was confused by Appellant’s interpretation of the 1982 will, are insufficient to meet Appellant’s burden of proof to demonstrate error in the Reopening Order.

Background

Decedent died on December 13, 1982, and left a will executed on January 13, 1982. Reopening Order at 3. Decedent was twice married, first to Ralph Levings, and after his

¹ Decedent was a Three Affiliated Tribes Indian. Her case is assigned No. P000083832IP in the Department of the Interior’s probate tracking system, ProTrac. The original number assigned to the probate of Decedent’s estate was IP BI 645 B 83.

² The Decision was issued by Administrative Law Judge (ALJ) Daniel S. Boos.

death, to Frank Benson, Sr. Data for Heirship Finding and Family History, Sept. 21, 1983, at 1 (Administrative Record (AR) Tab 64). Both marriages produced children. *Id.* Appellant is Decedent's grandson on the Levings side of the family. *Id.*

At the probate hearing held in 1984, Appellant testified that he had received a copy of the 1982 will. Transcript, Apr. 4, 1984 (1984 Tr.), at 4 (AR Tab 56). The ALJ took testimony regarding the preparation of the 1982 will and Decedent's testamentary capacity, which was not challenged. *Id.* at 7-10. The ALJ also took testimony to resolve a conflict between two overlapping devises in the will. *Id.* at 10-14. To resolve the conflict, the ALJ adopted an interpretation of the will offered by Appellant that allowed interests subject to the overlapping devises to remain in the Benson family. *Id.*

Two other devises in the will were not identified at the hearing as ambiguous or as in conflict with other devises, nor were they objected to. One devise was to Vernon Birdsbill of Decedent's interests in the "Victor Levings" allotment (Fort Berthold Allotment No. 2015), and another devise was to Frank Benson, Jr., of Decedent's interests in the "Ralph Levings" allotment (Fort Berthold Allotment No. 730A). *See id.* at 9, 16. The will also contained additional specific devises, including devises of additional property to Appellant. *See Will*, Jan. 13, 1982, at 1 (AR Tab 67). Although a question was raised about the earlier 1953 will, and its replacement by the 1982 will, there were no objections to the 1982 will. *See 1984 Tr.* at 4, 15-16. The Decision approving the 1982 will and setting forth how the estate was to be distributed, pursuant to the 1982 will as interpreted at the hearing, was issued on July 11, 1984. As noted, Appellant participated in the hearing, and it is undisputed that he received a copy of the 1984 Decision.

On January 4, 2010, nearly three decades after the Decision became final, Appellant submitted a request to reopen the estate to the Superintendent, which apparently was forwarded to the Probate Hearings Division in the Office of Hearings and Appeals. Letter from Appellant to Superintendent, Jan. 4, 2010 (AR Tab 37). Under the probate regulations, an interested party may file a petition for reopening "within 1 year after the petitioner's discovery of the alleged error." 43 C.F.R. § 30.243(a)(3). If the petition is filed more than 3 years after the date of the original decision, the petitioner must demonstrate that a "manifest injustice" would result if an error of fact or law were not corrected. *Id.*

In a declaration to support his reopening request, Appellant asserted that Decedent's interests in Allotment Nos. 730A (Ralph Levings) and 2015 (Victor Levings) should have descended to Appellant and remained in the Levings family. Declaration of Appellant, Feb. 16, 2010, at 1 (AR Tab 36). Appellant argued that the 1982 will was created by Decedent "against her own judgment and wishes," and that the 1953 will should have been given effect. *Id.*

To obtain clarification of Appellant's petition and objections to the Decision, the IPJ held a hearing on December 15, 2010. Reopening Order at 1. At the hearing, the IPJ questioned the timeliness of Appellant's petition. Transcript, Dec. 15, 2010 (2010 Tr.), at 15-19 (AR Tab 9). Appellant contended that starting in 2005, he submitted multiple requests to reopen the estate to the Superintendent that were never acted on.³ *Id.* at 5, 9. Appellant admitted that he had received a copy of the Decision in 1984 and that he was aware of the devises of the contested allotments at that time. *Id.* at 17, 24-27.

On June 12, 2012, the IPJ issued the Reopening Order. First, the IPJ concluded that "[h]aving considered the testimony given at the hearing on reopening and having reviewed the record . . . the petition was not timely filed." Reopening Order at 2. In addition, the IPJ found that even if the petition had been timely, it would have been denied for failure to "successfully establish an error of fact or law which, if not corrected, would result in manifest injustice." *Id.* The IPJ noted that the Levings allotments identified by Appellant were "specifically devised by the Decedent," that there "is nothing unclear or ambiguous about those devises," and that Appellant "failed to present proper grounds for reopening." *Id.* at 5. The IPJ also determined that even if an error had been established, which it had not, "public policy dictates that the estate be considered final and the request for reopening be denied." *Id.* at 4-5.

Appellant appealed to the Board. Notice of Appeal, July 11, 2012. Appellant retained counsel and the Board granted Appellant three extensions of time to file an opening brief. Appellant did not file an opening brief, and thus his arguments on appeal are limited to those contained in his 1-page notice of appeal.

Standard of Review

Appellant bears the burden of proving error in the Reopening Order. *Estate of James Bongo, Jr.*, 55 IBIA 227, 229 (2012); *Estate of Carl Sotomish*, 52 IBIA 44, 47 (2010). Disagreement with, or bare allegations concerning, a challenged decision are insufficient to satisfy an appellant's burden of proof. *Estate of Gordon Lee Ward*, 51 IBIA 88, 92 (2010); *Estate of Earl Cheyenne*, 48 IBIA 205, 208 (2009).

³ In 2005, the probate regulations provided that a party who had notice of the probate proceedings was precluded from seeking reopening, but BIA was authorized to petition for reopening within 3 years after the final decision. See 43 C.F.R. § 4.242(a), (e), & (i) (2005). The regulations did not expressly address whether BIA could file a petition for reopening more than 3 years after a final probate decision had issued.

Discussion

Appellant does not challenge the IPJ's conclusion that Appellant's petition for reopening was untimely, and the record supports the IPJ's conclusion that Appellant knew of the alleged error in the Decision for many years before he filed the petition to reopen. Thus, we affirm the IPJ's finding that the petition was untimely.

In addition, to the extent the IPJ proceeded to address the merits of Appellant's petition, we also affirm the Reopening Order because Appellant has not met his burden on appeal to demonstrate error by the IPJ. As a procedural matter, Appellant appears to object to the length of time that elapsed between his filing of the petition for reopening and the Reopening Order, but that is not grounds to vacate the Reopening Order. Appellant also reiterates in general terms that Decedent's 1953 will should be given effect, that Decedent was "made" to prepare the 1982 will, and that there are "other facts" that must be brought out. Notice of Appeal at 1. Finally, Appellant contends that the ALJ was confused about Appellant's interpretation of the will, and that while the ALJ accepted Appellant's interpretation, it was not reflected in the Decision. *Id.* Appellant identifies no evidence in the record that would support his contentions.

Appellant's disagreement with the Decision, and his unsupported suggestion that the 1982 will—to which he did not object in 1984—should be set aside, are insufficient to carry Appellant's burden of proof to demonstrate that the IPJ erred in denying his petition to reopen Decedent's probate case. *See Estate of George Umtuch, Jr.*, 58 IBIA 205, 207 (2014). It is apparent that Appellant believes that the Levings allotments that Decedent devised to members of the Benson family should have remained in the Levings family. But as the IPJ noted, those devises were unambiguously set forth in the 1982 will. Appellant does not even address the IPJ's finding that finality weighs strongly against reopening the probate case, even assuming that any of Appellant's allegations had merit, which the IPJ concluded they did not. Appellant's bare assertions in his notice of appeal are insufficient to meet his burden to demonstrate error in the Reopening 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 affirms the Reopening Order.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge