



INTERIOR BOARD OF INDIAN APPEALS

Estate of William Fox

60 IBIA 16 (02/05/2015)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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ESTATE OF WILLIAM FOX ) Order Affirming Decision  
)  
) Docket No. IBIA 12-130  
)  
) February 5, 2015

Judith A. Robbins (Appellant) appealed to the Board of Indian Appeals (Board) from an Order Denying Petition for Rehearing (Order Denying Rehearing) entered on June 25, 2012, by Administrative Law Judge (ALJ) Thomas F. Gordon in the estate of William Fox (Decedent).<sup>1</sup> The ALJ concluded that a letter signed by Decedent, expressing Decedent’s wish to have his Indian trust estate pass to Appellant and her son, did not constitute grounds for granting rehearing because it did not meet the requirements of a valid will. The ALJ left in place his March 23, 2012, Order Determining Heirs, which concluded that Decedent’s trust personalty was inherited by his surviving siblings, and his trust real property—a 0.0208333 interest in Spokane Allotment 605 (Sally Fox)—was inherited by the Spokane Tribe.

On appeal, Appellant submits a copy of a “pour-over will” executed by Decedent that leaves the residue of his estate to a Revocable Living Trust created by Decedent, which names Appellant and her son as the beneficiaries. As a general rule, the Board does not consider new evidence presented for the first time on appeal, nor does the Board adjudicate, in the first instance, the validity of a will, which is a determination made after a hearing by a probate judge. Because Appellant has not demonstrated that the ALJ made an error based on the record that was before him, we affirm the Order Denying Rehearing without prejudice to any right that Appellant may have to submit a petition to reopen Decedent’s estate based on the newly presented evidence.

## Background

Decedent died on July 21, 2009. Certificate of Death, July 23, 2009 (Administrative Record (AR) Tab 10). Decedent’s spouse, Lillian Mae Lewis, who was

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<sup>1</sup> Decedent was a Spokane Indian, and was also known as William Henry Fox and William H. Fox. Decedent’s probate case is assigned No. P000083107IP in the Department of the Interior’s probate tracking system, ProTrac.

Appellant's mother, predeceased him. *See* Letter from Appellant to BIA, Feb. 1, 2010 (AR Tab 8). In the proceedings below, Appellant contended that she should be found to be Decedent's daughter and heir because Decedent considered her to be his daughter and he was the only father she ever knew. *See id.* However, Appellant was born during her mother's previous marriage, Decedent is not listed as Appellant's father on her birth certificate, and Decedent apparently never formally adopted Appellant. *See id.*

At the time of his death, Decedent owned trust personalty in an Individual Indian Money (IIM) account, and also owned an undivided 1/48 (0.0208333) trust interest in Spokane Allotment 605 (Sally Fox (Cockrell)), an 80-acre parcel of land. BIA Inventory of Decedent's Estate, June 17, 2011 (AR Tab 8); Order Reopening Estate of William Russell Fox, Jan. 18, 2007 (AR Tab 8).

Following a hearing, the ALJ issued the Order Determining Heirs on March 23, 2012. Order Determining Heirs (AR Tab 6). The ALJ determined that Decedent died intestate (i.e., without a will) and was survived by five siblings. *Id.* at 1 (unnumbered). The ALJ concluded that the siblings inherited Decedent's trust personalty under the American Indian Probate Reform Act (AIPRA). *Id.* at 2 (unnumbered); *see also* 25 U.S.C. § 2206(a)(2)(B)(iv). The ALJ also concluded that Decedent's trust real property interest, constituting less than 5% of the allotment, was inherited by the Spokane Tribe under AIPRA. Order Determining Heirs at 1-2 (unnumbered); *see also* 25 U.S.C. § 2206(a)(2)(D)(iii)(IV).

Appellant filed a petition for rehearing, pursuant to 43 C.F.R. § 30.238. Petition for Rehearing, Mar. 28, 2012 (AR Tab 5). In seeking rehearing, Appellant relied on a notarized letter signed by Decedent, which she characterized as his "will," expressing his wishes and intent to leave his Indian trust property to Appellant, Appellant's son, and Appellant's grandchildren. *Id.* at 1 (unnumbered); *see also* Letter To Whom This May Concern from Decedent, Nov. 6, 2007 (2007 Letter) (AR Tab 8).<sup>2</sup> Appellant stated that the original of the 2007 Letter had been sent to the Bureau of Indian Affairs (BIA), and that she did not have further evidence, at the time, to provide. Petition for Rehearing at 1 (unnumbered). Appellant also argued that her relationship with Decedent was that of a father-daughter, and that Decedent treated her, *see supra* note 2, and introduced her to others, as his daughter, not as his stepdaughter. Petition for Rehearing at 1 (unnumbered).

On June 25, 2012, the ALJ denied Appellant's petition for rehearing, finding that she had not presented "any evidence or arguments which would support the conclusion that

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<sup>2</sup> In the letter, Decedent states that he "would like and want" to have his "daughter: Judy Robbins," his "grandson: (Judy's son) Henry D. Lewis," and Henry's children "added" to his shares of "the Indian Trust." 2007 Letter.

[the Order Determining Heirs] was either factually or legally incorrect.” Order Denying Rehearing, June 25, 2012, at 1-2 (unnumbered) (AR Tab 3). The ALJ reasoned that Decedent’s 2007 Letter,

may not be approved as a will because it was not witnessed by two witnesses as required by 25 C.F.R. § 15.4. In the absence of a valid will, the undersigned has no authority to order a distribution of [D]ecedent’s Indian trust estate which differs from the intestate provisions of the [AIPRA].

*Id.* at 1 (unnumbered). The ALJ also found that the evidence did not support a finding that Appellant was Decedent’s daughter, as a matter of law, while also stating that his determination should not be construed as minimizing the relationship between Decedent and Appellant. *Id.* at 1-2 (unnumbered).

Appellant appealed to the Board, and filed an opening brief. Notice of Appeal, June 29, 2012; Opening Brief (Br.), Dec. 20, 2012. On appeal, Appellant does not contend that the ALJ erred based on the record that was before him when he issued his ruling. Instead, Appellant contends, for the first time, that Decedent executed a will on October 20, 2000 (2000 Will), and Appellant provides a copy of the will with her notice of appeal.<sup>3</sup> *See* Notice of Appeal; *Id.* (2000 Will). The 2000 Will devises the residue of Decedent’s estate to a trust that was established by Decedent on the same day that he executed the 2000 Will.<sup>4</sup> *Id.* (2000 Will). The trust documents provide that upon the death of both Decedent and Decedent’s wife, the trustee shall distribute the principal of the trust and any accrued or undistributed income in equal shares to Appellant and her son, Henry D. Lewis. Opening Br. (Trust Agreement). Appellant explains that she did not previously notify BIA or the ALJ of the existence of the 2000 Will because she and Decedent were under the mistaken understanding that Indian trust property could not be devised through this will and they instead thought that the 2007 Letter was the proper mechanism for transferring the property. Notice of Appeal. Appellant states that, if the 2007 Letter is invalid, she hopes the 2000 Will can effect Decedent’s wishes to devise the trust property to her and her son. *Id.*; *see also* Opening Br. (stating that 2000 Will and Trust Agreement should be honored).

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<sup>3</sup> The 2000 Will is signed by Decedent and two witnesses, and also contains a self-proving clause, signed by Decedent and two witnesses and notarized. Notice of Appeal (2000 Will).

<sup>4</sup> Appellant attached a copy of the William H. Fox and Lillian M. Fox Revocable Living Trust Agreement to her Opening Brief. Opening Br. (Trust Agreement). Decedent and his wife are the named beneficiaries of the trust and Appellant and her son are the named successor trustees. *Id.* (Trust Agreement).

## Discussion

Appellant bears the burden of demonstrating error in the probate judge's order. *Estate of Josephine J. Palone*, 59 IBIA 49, 52 (2014). "The Board reviews factual determinations by the probate judge to determine whether they are substantially supported by the record. We review legal determinations and the sufficiency of the evidence *de novo*." *Id.* (quoting *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62 (2012)) (internal citations omitted).

Based on the evidence before the ALJ, we find no error in the Order Denying Rehearing, and Appellant does not argue otherwise. The ALJ correctly determined that the 2007 Letter did not meet the requirements of a valid will. And, in the absence of a valid will, Decedent's trust property passed to his heirs as determined by AIPRA, in this case his surviving siblings (trust personalty) and the Tribe (less-than-5% trust realty interest). Because the 2000 Will was not presented to the ALJ, he had no opportunity to consider whether it might be approved as a valid will for the disposition of Decedent's trust property.

"Precedent of long standing directs that newly discovered evidence shall be presented [to the probate judge] and will not be considered on an appeal." *Estate of Mitchell Robert Quaempts*, 6 IBIA 10, 15 (1977) (citing *Estate of Louis Harvey Quapaw*, 4 IBIA 263, (1975)); *see also* 43 C.F.R. § 4.318 ("An appeal will be limited to those issues that were before the administrative law judge or Indian probate judge upon the petition for rehearing . . ."). Even if we deemed it appropriate to consider the 2000 Will, we could not determine, in the first instance, whether the 2000 Will is valid. Such a determination must first be made by a probate judge. Because the 2000 Will was not presented to the probate judge, we will not consider it on appeal and we affirm the ALJ's Order Denying Rehearing, based on the record that was before him.

Our affirmance is without prejudice to Appellant's ability to exercise any rights she may have to seek reopening of the probate case, pursuant to 43 C.F.R. § 30.243, with a properly supported petition for reopening.<sup>5</sup>

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<sup>5</sup> Under 43 C.F.R. § 30.243, BIA also has authority to seek reopening, if it believes that the circumstances warrant reopening, and the probate judge has authority to reopen a probate case on his or her own motion.

## 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 ALJ's June 25, 2012, Order Denying Rehearing.<sup>6</sup>

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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//original signed  
Thomas A. Blaser  
Administrative Judge

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<sup>6</sup> We decline to directly refer Appellant's appeal documents to the Probate Hearings Division (PHD) for consideration as a petition for reopening, as we recently did in another probate appeal. *See Estate of Lillian Addell Corbine*, 59 IBIA 280 (2014). In *Estate of Corbine*, the absence of the *original* will (and apparent inability to account for it) was central to the probate judge's decision, and the appellant in that case then submitted the original will to the ALJ, who transmitted the submission to the Board as a possible appeal. *Id.* at 281-82.

If Appellant decides to submit her appeal documents to PHD as a petition for reopening, she should also carefully review the requirements of 43 C.F.R. § 30.243 to determine whether additional evidence, documentation, or explanation is required.