



INTERIOR BOARD OF INDIAN APPEALS

Estate of Joseph Alexander Harrison

61 IBIA 238 (08/28/2015)



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 JOSEPH ALEXANDER)	Order Affirming Order Denying
HARRISON)	Reopening
)	
)	
)	Docket No. IBIA 13-116
)	
)	
)	August 28, 2015

David Esau, Sr. (Appellant) appealed to the Board of Indian Appeals (Board) from an Order Denying Petitions to Reopen (Order Denying Reopening) entered on June 4, 2013, by Administrative Law Judge (ALJ) Richard L. Reeh in the estate of Joseph Alexander Harrison (Decedent).¹ The Order Denying Reopening left in place a March 1, 1976, Order Decreeing Distribution (Decision),² and denied requests submitted by Appellant and his brother, Daniel Esau (Daniel), to reopen Decedent’s estate for the purpose of adding them as heirs and to distribute to them a share of Decedent’s estate.³

The Board affirms the Order Denying Reopening because Appellant’s petition failed to show error in the ALJ’s determination that Appellant did not exercise due diligence in prosecuting his claim against the estate, and because the petition failed to satisfy the requirements for reopening a closed probate by an interested party. The record shows that Appellant and Daniel attended their father’s funeral in June 1975, and presented themselves at the Winnebago Agency to assert that they were sons of Decedent in January 1976, but

¹ Decedent was a Winnebago Indian. The probate number assigned to Decedent’s case in the Department of the Interior’s probate tracking system, ProTrac, is No. P000095472IP. The original number assigned to the probate of Decedent’s estate was IP-TC-7S-76.

² The Decision was issued by ALJ Frederick W. Lambrecht.

³ On December 17, 2012, the ALJ denied a petition for reopening submitted by the Winnebago Agency Superintendent, Bureau of Indian Affairs (BIA), which requested that Appellant and Daniel be recognized as potential omitted heirs to Decedent’s estate. In his appeal to the Board, Appellant does not refer to the BIA’s petition for reopening or to the ALJ’s decision denying reopening based on BIA’s petition.

made no attempt to pursue any claim of heirship to Decedent's estate until May 2013, over 37 years later. As Decedent's son, Appellant should have been aware that he was a potential heir to Decedent's estate, and his failure to assert his claim in a timely manner precludes reopening the estate now for that purpose.

Background

Decedent died intestate on June 14, 1975. Decision, Mar. 1, 1976, at 1 (unnumbered) (Administrative Record (AR) Tab 28). Decedent was married to Lucinda St. Cyr from 1935 to 1937, and the marriage produced two children, a son, Joseph Frank Harrison, and a daughter, Wilda Harrison, who died as an infant in 1938. Data for Heirship Finding and Family History, June 30, 1975, at 1 (AR Tab 32). After Decedent's divorce from Lucinda, he fathered two children with Lavina Esau, Daniel Esau and Appellant. Data for Heirship Finding and Family History, May 10, 2011, at 1 (AR Tab 15).

A probate hearing was held on November 13, 1975, before ALJ Lambrecht, in which Joseph Frank Harrison testified that to his knowledge, Decedent had no other living children. Hearing Transcript (Tr.), Nov. 13, 1975, at 3 (AR Tab 33). Appellant and his brother were not given personal notice of the hearing. Notice of Hearing, Oct. 17, 1975 (AR Tab 34). Thereafter on March 1, 1976, ALJ Lambrecht entered the Decision distributing Decedent's entire estate to Joseph Frank Harrison. Decision at 1.

Although it appears that neither Appellant nor Daniel were provided personal notice of the probate hearing or of the Decision, they were aware of their father's death, and notice of the probate hearing was posted at the Winnebago Agency and several U.S. Post Offices in the vicinity. Notice of Hearing (AR Tab 34). Daniel stated in his petition seeking reopening of the estate, that he accompanied his mother and brother to attend his father's funeral in Winnebago, Nebraska. *See* Daniel Esau Petition to Reopen, May 21, 2013, at 1 (AR Tab 5). The record includes a copy of Decedent's obituary indicating that services were held June 19, 1975, at a private residence, followed by burial at the Winnebago Cemetery. Obituary (AR Tab 36). The record also shows that on January 28, 1976, before the Decision was entered, Appellant and his brother appeared at the Winnebago Agency and asserted that they were Decedent's children. *See* Handwritten Note, Jan. 29, 1976 (AR Tab 30). The agency notified ALJ Lambrecht of the visit by phone, and 2 days later, a Winnebago Agency realty officer mailed the Esaus' birth certificates to ALJ Lambrecht. Letter from Humphrey to Lambrecht, Jan. 30, 1976 (AR

Tab 29).⁴ The cover letter noted that the Esaus lived in Macy, Nebraska. *Id.* Despite having been notified of additional heirs, ALJ Lambrecht, without explanation, failed to include Appellant and his brother as heirs and beneficiaries in the distribution of Decedent's estate, and they did not receive personal notice⁵ of the Decision. Notice of Decision, Mar. 1, 1976 (AR Tab 28).

Over three decades later, BIA submitted a petition for reopening to “add two omitted probable heirs to the probated estate of Joseph A. Harrison.” BIA's Petition for Reopening, May 10, 2011 (AR Tab 16). BIA's petition did not include any justification or explanation for reopening, but noted that “[t]he estate of Joseph A. Harrison currently has no outstanding trust assets.” *Id.* An updated OHA-7 Form was also provided, which included entry of the common law marriage of Decedent and Lavina Esau and the names of Appellant and Daniel as children of Decedent. Data for Heirship Finding and Family History, May 10, 2011 (AR Tab 15). Appellant and Daniel were both included on the distribution list for BIA's petition and the updated OHA-7 Form, although the address for Appellant was incorrect.⁶

ALJ Reeh denied BIA's petition for reopening on December 17, 2012. Order Denying Petition to Reopen at 2 (Order Denying BIA Petition) (AR Tab 9). The ALJ reasoned that because Appellant and his brother had not “taken any action whatsoever in pursuing a claim to the decedent's estate after the Decision issued,” *id.* at 1, and because

⁴ The birth certificates are not attached to the cover letter, but appear separately in the record. A copy of Appellant's birth certificate issued after the Decision was entered is also included in the record, and it is therefore unclear whether the birth certificates were provided to ALJ Lambrecht as indicated in the cover letter or whether this copy was produced at a later time for the record. *See* Copy of Birth Certificate of David Esau (AR Tab 27); *see also* Original Birth Certificate of David Esau (AR Tab 43); Original Birth Certificate of Daniel Esau (AR Tab 48).

⁵ We note that the transcript of the probate hearing indicates that Decedent's sister, Lorraine Harrison Smith, attended the hearing, *see* Hearing Transcript, Swearing-In signatures (unnumbered) (AR Tab 33), and received formal notice of the Decision, *see* Notice of Decision, Mar. 1, 1976 (AR Tab 28). Lorraine's address is listed as Winnebago, Nebraska. Daniel refers to meeting his aunt, Lorraine Harrison Smith, through his cousin, “several years ago” and that he also learned at that time of the death of Joe Harrison, Jr., Decedent's son and sole beneficiary recognized in the Decision. Daniel's Petition for Reopening at 1 (AR Tab 5).

⁶ The lists provide the correct street address and number but have the location as Sioux City, IA rather than Omaha, NE. *See, e.g.*, BIA Petition for Reopening (AR Tab 16).

BIA provided “no explanation why the Agency believes Judge Lambrecht erred in his Decision . . . or why the Agency believes the standard in the regulations for reopening has been met,” *id.* at 1-2, the interest in the finality of probate decisions outweighed any argument for reopening the estate, *id.* at 2. The ALJ also noted that Decedent’s named heir, Joseph Frank Harrison, died on August 23, 1986, and that BIA’s petition had been filed “after the death of those individuals who might have opposed [it].” *Id.*

Appellant and Daniel Esau received notice of the order denying BIA’s petition, and subsequently filed their own petitions for reopening on May 21, 2013.⁷ Both petitioners claimed not to have known of the original probate proceeding conducted in November 1975, and requested reopening so that they could share in the distribution of the estate. Daniel Esau Petition for Reopening at 1 (AR Tab 5); David Esau Petition for Reopening at 1 (AR Tab 6). Neither petition stated when the brothers learned that they were not included in the Decision, and neither petition addressed any of the deficiencies identified by the ALJ in BIA’s petition for reopening. *Id.*

ALJ Reeh denied the Esaus’ petitions in an order issued June 4, 2013. Order Denying Reopening (AR Tab 3). Rather than repeating his reasoning from the first order, the ALJ simply noted that “[n]either petition raises any question of law or fact not addressed in the Order issued December 17, 2012. Both petitions should, therefore, be denied as failing to state any grounds upon which relief may be granted.” *Id.* at 1.

On June 24, 2013, the Office of Hearings and Appeals (OHA) received a letter from Appellant, which was treated as a notice of appeal and forwarded to the Board for review. Memorandum from Reeh to Board, June 24, 2013. The letter repeats Appellant’s contention that he was not notified of the probate proceedings in 1975, and explains that he would like to obtain his share of the estate to pass on to his children. Letter from Appellant to OHA, June 21, 2013, at 1 (unnumbered) (Notice of Appeal). Appellant also states that Decedent resided with him for 9 months prior to his death, and that on Father’s Day he received a phone call from the police stating that his father had passed away. *Id.* at 1-2 (unnumbered). Appellant requests that the probate of Decedent’s estate be reopened so

⁷ It appears that the notice may have been sent to an incorrect address for Appellant in Sioux City, IA, and Appellant denies having resided in that city. *See* David Esau Petition for Reopening at 1. The distribution list for the order denying BIA’s petition for reopening, however, records the same address in Omaha, NE as that used by Appellant in his submissions to the Board. Order Denying BIA Petition, Distribution List (AR Tab 9). Appellant apparently received notice of the order denying BIA’s petition as it is referenced in his petition.

that he and his brother, both of whom are now retired, might benefit from their father's estate. *Id.*

Standard of Review

We review factual determinations by the probate judge to determine whether they are substantially supported by the record. *Estate of Josephine Eunice Mechance*, 60 IBIA 247, 250 (2015); *Estate of Edward Teddy Heavyrunner*, 59 IBIA 338, 346 (2015). We review legal determinations and the sufficiency of the evidence de novo. *Estate of Mechance*, 60 IBIA at 250. Appellant bears the burden of showing that the Order Denying Reopening is in error. *Estate of George Umtuch, Jr.*, 58 IBIA 205, 207 (2014). Disagreement with, or bare allegations concerning, a challenged decision are insufficient to satisfy an appellant's burden of proof. *Id.*

Discussion

The Board affirms the Order Denying Reopening because Appellant has not shown that the ALJ's decision was in error. The ALJ determined that the petitions for reopening filed by Appellant and Daniel failed to "raise[] any question of law or fact not addressed in the Order [Denying BIA's Petition to Reopen] issued December 17, 2012." Order Denying Reopening. In his Order Denying BIA's Petition for Reopening, the ALJ concluded that BIA provided "no argument for why reopening outweighs the interest in finality and no argument for why leaving the estate closed would result in a manifest injustice." Order Denying BIA Petition at 2.

We agree that Appellant has failed to bring forward any question of law or fact that was not addressed in the Order Denying BIA's Petition for Reopening, which Order was not appealed by Appellant or Daniel, despite having received notice of both BIA's petition seeking reopening to add them as heirs to Decedent's estate, and the ALJ's decision on that petition. The ALJ was correct in finding that Appellant failed to exercise due diligence in pursuing his claim. In this context, the need for finality in probate decisions outweighs Appellant's interest in reopening the estate over three decades after it was distributed to an heir who has since passed away. Appellant's petition for reopening was also procedurally deficient.

I. Appellant Failed to Exercise Due Diligence

Appellant's failure to exercise due diligence in discovering and prosecuting his claim against the estate precludes his ability to reopen the estate at this late date. The requirement that a petitioner show due diligence is well established. *Estate of George Dragswolf, Jr.*, 17 IBIA 10, 12 (1988); *Estate of Carl Sotomish*, 52 IBIA 44, 46 (2010); *Estate of James*

Bongo, Jr., 55 IBIA 227, 230 (2012). The petitioner must provide compelling proof that any delays in requesting relief were not occasioned by a lack of diligence on the part of the petitioner. *Estate of Dragswolf*, 17 IBIA at 12. This requirement respects the need to balance the substantial interest of Indian heirs and devisees in the finality of probate decisions against the injustice that would result from failure to correct an alleged error. *Estate of Sotomish*, 52 IBIA at 46. Where the petitioner had knowledge necessary to question the initial decision for many years prior to filing the petition, reopening has generally been denied. *Estate of Dragswolf*, 17 IBIA at 12.

The facts of this case are similar to those in *Estate of Sotomish*. In that case, the petitioner learned of his father's death in 1958, but did not seek reopening until 2008, 50 years later. *Estate of Sotomish*, 52 IBA at 45. The petitioner argued that his petition should not fail for lack of due diligence in part because he lacked knowledge of the law and procedures governing the probate of Indian estates. *Id.* at 47. The Board rejected this justification, concluding that "Appellant knew or should have known that if he was Decedent's son, he might have been entitled to a share of Decedent's estate because it is common knowledge that the property of a deceased person may pass to that person's heirs, who typically can include the deceased person's children." *Id.* The Board found that the petitioner's "apparent failure to make any inquiry – to BIA, tribal elders, or family members – about Decedent's estate within a reasonable time . . . undermines his attempt to demonstrate that he exercised due diligence in pursuing his rights to participate in Decedent's estate." *Id.*

The same considerations apply in the present case. Appellant claims not to have known about the probate proceedings following Decedent's death, and now argues that the estate should be reopened to include him and his brother as heirs to the estate. Appellant admits, however, that he knew of Decedent's death in June 1975, and the record shows that he presented himself to BIA as Decedent's son in January 1976, 2 months after the probate hearing and a month prior to issuance of the Decision. Thus, even if he did not understand the probate process or receive personal notice of the original probate hearing, Appellant knew or should have known that as Decedent's son, he was a potential heir to the estate. Appellant's failure to make any inquiry about Decedent's estate over the last three decades precludes his ability to show that he exercised reasonable diligence in pursuing his alleged rights to a share in the estate. Appellant has not shown that the ALJ erred in his determination and the Order Denying Reopening must be affirmed.

II. Appellant's Petition Does Not Satisfy Interested Party Requirements for Reopening

Appellant, as a potential or actual heir, is an interested party as defined by the probate regulations. *See* 43 C.F.R. § 30.101. An interested party seeking to reopen an estate must file a petition in accordance with the requirements of 43 C.F.R. § 30.243. The

regulation provides that where an estate has been closed for more than 3 years, an interested party must file the petition “within 1 year after the petitioner’s discovery of an alleged error.” 43 C.F.R. § 30.243(a)(3).⁸ To warrant approval, the petitioner must show that reopening is required “[t]o correct an error of fact or law in the original decision which, if not corrected, would result in a manifest injustice.” *Id.* “All grounds for reopening must be set forth fully in the petition.” *Id.* § 30.243(b). In addition, an interested party must include with the petition all evidence relevant to when the petitioner discovered the alleged error in the decision, and, if the error is based in fact, the petition must be supported by affidavit. *Id.* § 30.243(c).

Appellant’s petition for reopening failed to comply with these requirements. First, Appellant contends that he had no knowledge of the probate proceedings at the time of the Decision in 1976, but does not state when he discovered the alleged error in the Decision. Appellant acknowledges in his petition that he was notified of his father’s death the day after Decedent’s passing and that he contacted his aunt, Lorraine Harrison Smith, to learn whether “[his] Dad and Aunt had plans, if just in case . . . anything happen[ed] to him.” Notice of Appeal at 2 (unnumbered). As noted *supra* at n.5, Lorraine Harrison Smith received notice of and attended the probate hearing in her brother’s estate. Appellant does not refute the ALJ’s determination that Appellant and Daniel submitted a handwritten note asserting their relationship to Decedent at the Winnebago Agency on January 28, 1976, 2 months after the probate hearing and 6 months after attending their father’s funeral, yet took no action to pursue their claims of heirship after the Decision was issued. *See* Order Denying BIA Petition at 1; Handwritten Note (AR Tab 30). Absent any evidence or information on this critical requirement, neither the ALJ nor this Board has grounds for concluding that the petition was filed within 1 year of Appellant’s discovery of the error, as required by the pertinent regulation. *See* 43 C.F.R. § 30.243(a)(3).

Second, the petition does not assert adequate grounds for reopening, beyond stating that Appellant and his brother, as sons of Decedent, should have participated in the distribution of Decedent’s estate. In particular, the petition does not explain how failure to correct this error 37 years after distribution of Decedent’s estate would result in manifest injustice and outweigh the public interest in finality of this probate decision.

⁸ The regulations do not apply the same 1-year time period to petitions for reopening filed by BIA. *See* 43 C.F.R. § 30.243(a)(2). The ALJ therefore did not address timeliness of filing as a factor in denying BIA’s petition, and focused instead on the lack of evidence of due diligence on the part of the “omitted heirs” in determining that BIA had failed to show why leaving the estate closed at this late date would result in a manifest injustice. Order Denying BIA’s Petition at 2.

For the foregoing reasons, we affirm the ALJ's denial of Appellant's petition to reopen Decedent's estate.

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 Reopening.

I concur:

// original signed
Robert E. Hall
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge