



INTERIOR BOARD OF INDIAN APPEALS

Estate of David L. Moran

62 IBIA 180 (02/17/2016)

Petition for Reconsideration Dismissed:

63 IBIA 1



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
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ARLINGTON, VA 22203

ESTATE OF DAVID L. MORAN)	Order Affirming Order Reopening
)	Estate to Clarify Decision
)	
)	Docket No. IBIA 14-123
)	
)	February 17, 2016

The Bureau of Indian Affairs (BIA) sought clarification of the original Order Approving Will and Decree of Distribution (Decision) entered in the estate of David L. Moran (Decedent) on January 29, 1982. Specifically, BIA asked whether title to Decedent’s land interests passed to Decedent’s children as tenants in common or as life estates with the right of survivorship. In his Order Reopening Estate to Clarify Decision (Clarification), entered July 31, 2014, Indian Probate Judge (IPJ) Albert C. Jones confirmed that upon the death of Decedent’s widow, who inherited a life estate in Decedent’s land interests, the children each inherited an equal share as joint tenants with the right of survivorship. Shane C. Moran, Shannon A. Moran, Sharlotte L. Cayko, and Sharlene E. Gjermundson (collectively, Appellants), who are the children of Decedent’s deceased son, Walter Moran, have appealed to the Board of Indian Appeals (Board) from the IPJ’s Clarification. We affirm the Clarification as consistent with the Decision. We decline Appellants’ invitation to exercise plenary authority to consider whether we agree with the effect given to Decedent’s will in the 1982 Decision.

Facts

Decedent, a Turtle Mountain Chippewa Indian, died testate on January 23, 1981.¹ He was survived by his second wife, Emma Allard Moran, and seven children (Walter Moran, Gary Moran, Lorraine Moran Axelson, Dorothy Moran St. Germaine, Patricia Betty Moran McKenzie, Leona Moran Olson, and Gertrude Julia Moran Wilkie). At the time of his death, Decedent owned his own allotment, No. 2126, on the Turtle Mountain

¹ Decedent also was known as David L. Morin and the underlying probate proceedings refer to him as David L. Morin. The case number assigned to his probate in the Department of the Interior’s probate tracking system, ProTrac, is No. P000108876IP; prior to the development of the ProTrac system, Decedent’s probate was assigned No. IP BI 273A 81.

Reservation. He also owned 1/2 of Allotment No. 449, also located on the Turtle Mountain Reservation that he inherited from his first wife, Ida Belgarde Moran.

Decedent's will was probated soon after his death, and the Decision, authored by Administrative Law Judge Keith L. Burrowes, issued on January 29, 1982. The Decision awarded a life estate to Decedent's widow, and a remainder interest was awarded to Decedent's children as follows:

A LIFE ESTATE in any and all trust property owned by the decedent, subsequent to a renunciation by or the death of the widow with right of survivorship, the title to vest in the last surviving child of this decedent.

Decision at 2 (emphasis in the original). None of Decedent's children nor his widow ever sought rehearing nor have any sought to reopen Decedent's probate to challenge the Decision.

Over the years, several heirs have died, including Decedent's widow and Appellants' father, Walter.² Walter died in January 2012. *See* Appellants' Brief (Br.) at 4. Walter was survived by his widow, Gilberta Lea LaDue Moran, and by Appellants.³

For reasons not evident in the record, it appears that BIA recorded title differently with respect to the two allotments. Decedent's 1/2 interest in Allotment No. 449 presently is divided into equal life estates among Decedent's seven children with title to vest in the last surviving child. *See* Title Status Report (TSR) for Allotment No. 449, Apr. 10, 2014 (Administrative Record (AR) 30); Individual/Tribal Interests Report, Dec. 9, 2011 (AR 44). In contrast, Decedent's 100% interest in his own allotment, No. 2126, was divided equally among his seven children as tenants in common. *See* Letter from BIA Superintendent to Heirs of David Moran Estate, Jan. 16, 2013 (AR 39) (An "erroneous encoding to [Allotment No. 2126] distributed the property to [Decedent's] children in Joint Ownership and not Life Estates, with [title to] the land to be vested in the last living child"); *see also* List of Real Property Assets for Dorothy M. St. Germain, Feb. 28, 2011, *Estate of Dorothy M. St. Germain*, No. P000096826IP; Inventory of Decedents Interests, Dorothy M. St. Germain, *Estate of St. Germain*, July 8, 2011 (the latter two documents

² It appears that Decedent's widow died on January 4, 1983. Three of Decedent's daughters—Lorraine M. Axelson, Dorothy St. Germain, and Gertrude Julia Wilkie—died in 2011, 2010, and 2013, respectively.

³ The record does not inform us whether Walter had any surviving children other than Appellants.

show that BIA recorded a 1/7 ownership interest in Allotment No. 2126 in Decedent's daughter, Dorothy, not a life estate).⁴

In January 2013, subsequent to an inquiry from the Office of the Special Trustee (OST), *see* emails between OST and BIA, 2011-2012 (AR 43), BIA corrected its title records to conform to the distribution ordered in the Decision, i.e., BIA removed any interest in Allotment No. 2126 from the estate inventories of those children of Decedent who had died, including Walter, and amended its title records for Allotment No. 2126 to reflect that the living children (Gary, Leona, and Patricia) shared a life estate in the allotment with title to vest in the last surviving child. *See* Letter from BIA Superintendent to Heirs of David Moran Estate (AR 39). BIA notified "Decedent's heirs" by letter dated January 16, 2013, of this change in recorded title for the allotment. *Id.* However, the letter did not contain any appeal rights and it is unclear whether Appellants received a copy of this letter.⁵

On or about March 28, 2014, Walter's heirs, including Appellants herein, filed an appeal with BIA to challenge the deletion of the 1/7th interest from Walter's inventory.

⁴ A copy of these two documents from Dorothy's probate proceedings has been added to the record in this appeal.

⁵ The letter states that copies were sent to Dorothy Moran Estate, Gertrude Wilkie, Patricia McKnezie (sic), Leona Olson, Gary Moran, Walter Moran Estate, Lorraine Axelson Estate, and Craig Wilkie. There is no way to determine from this letter or the record to whom, if anyone, a copy of the letter was sent on behalf of the estates of Dorothy, Walter, or Lorraine. The letter may only have been included in a copy of the probate files for these decedents, which without more would not satisfy due process obligations. In addition, the absence of any appeal rights in the letter—a letter that advised of the removal of an interest in real property from the trust real property accounts of Decedent's children—violates due process principles. *See Estates of Thurman Parton and Arnita Lois Parton Gonzales*, 60 IBIA 172, 184 (2015) ("BIA's record of ownership of Allotment 722-D is changed, which is why the Department [of the Interior] *must* afford due process to Appellant . . . by affording him [a] right of appeal." Emphasis added). The absence of any requirement in BIA's land titles regulations, 25 C.F.R. Part 150, to give notice and an opportunity to appeal when BIA amends its errors in recording title does not absolve BIA of its responsibility to do so. In particular, when BIA identifies a recordation error in the inventory of a deceased Indian whose estate has not yet been probated, it must provide notice to the putative heirs with appeal rights.

That appeal apparently remains undecided, pending the outcome of the present appeal to the Board.

Subsequently, on April 14, 2014, BIA submitted a memorandum to the Office of Hearings and Appeals entitled “Petition for Reopening” Decedent’s estate. This one-page document, to which various records were attached, states in its relevant entirety that BIA seeks reopening

pursuant to 43 C.F.R. § 30.243 to review the [Decision] to clarify whether [Decedent’s] children hold Life Estates with the Right of Survivorship and not as Tenants in Common as stated in the Second Devise [of Decedent’s will].

The Last Will and Testament, approved in the probate order, lists the word “desire” in the Third, Fourth, and Fifth Devises, in reference to land owned by the decedent.

Petition for Reopening, Apr. 14, 2014 (AR 26).⁶ The IPJ reviewed BIA’s petition and issued his Clarification on July 31, 2014.

With respect to the request for clarification, the IPJ explained that the Decision was clear and he provided a brief explanation. *See* Clarification at 2, 3. In particular, the IPJ stated that the will must be considered as a whole and while Decedent

did indicate that his trust property be distributed to his seven children, share and share alike, he also expressed a desire that the trust property be given only to his surviving children and not to grandchildren or great-grandchildren. The Decedent clearly stated that as each child [died], his or her share was to be distributed to the surviving children of the Decedent.

Id. at 2. He concluded that “[t]he Decision, as written, is clear.” *Id.* at 2, 3; *see also id.* at 2 (“the distribution ordered in the Decision is very clear”). He confirmed that, upon the death of Decedent’s widow, each of the children would share his property equally during their lifetimes and that title would vest in the last living child.

⁶ In a second petition for reopening, BIA sought correction of Decedent’s identification number, which apparently was listed incorrectly in the Decision. *See* Petition for Reopening, Apr. 15, 2014 (AR 24). This request was granted. *See* Clarification at 3.

The IPJ considered whether to reopen the estate on his own motion but expressly concluded that he “is not inclined to reinterpret or revise the interpretation set forth so many years ago.” *Id.* at 2. He gave three reasons for declining to exercise his own authority: the passage of time without challenge to the Decision, several of the heirs were no longer living, and the interests of the heirs in finality.

This appeal followed.

Discussion

We agree with the IPJ that the Decision ordered Decedent’s estate to be divided into equal life estates among his children with title to vest in the last surviving child. Thus, we affirm the Clarification.

Absent extraordinary circumstances, our review of this appeal is limited to the issues that were before the IPJ, 43 C.F.R. § 4.318, *Estate of Freddie Azure*, 58 IBIA 220, 221 n.3 (2014), *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62 (2012), and we “normally decline to consider an issue presented for the first time on appeal,” *Estate of Drucilla (Trucilla) W. Pickard*, 50 IBIA 82, 91 (2009). Appellants bear the burden of showing that the IPJ erred in his decision. *Estate of Stevens, supra*. Here, Appellants not only fail to meet this burden, they do not take issue at all with the IPJ’s clarification of the Decision. That is, Appellants do not argue that the IPJ misinterpreted the Decision in any way and even acknowledge that the order entered by the IPJ “clarified the original probate order.” Notice of Appeal, Aug. 29, 2014, at 1 (emphasis added). Instead, Appellants argue that the Decision improperly interpreted Decedent’s will and, therefore, the Clarification is erroneous. But that is a different argument and one that was not before the IPJ or before the Board.

While the Decision is not the model of clarity that the IPJ suggests it is, its ruling is not difficult to discern. With respect to Decedent’s land interests, the Decision awarded a life estate first to Decedent’s widow and then, upon her death or renunciation, life estates to each of his seven children with rights of survivorship. That is, as each child died, that life estate interest would then be shared among the surviving children until only one child remained. Pursuant to the Decision, beneficial title and the trust title would then merge and vest in the last surviving child. Thus, we agree with the IPJ’s Clarification Order as to the form of title intended by the Decision and we affirm.

Appellants argue that the IPJ should have exercised his discretion to go beyond BIA’s request for clarification to reach the merits desired by Appellants, i.e., determine whether the original probate judge gave the legally appropriate effect to Decedent’s will. *See* 43 C.F.R. § 30.243(a)(1) (reopening on judge’s own motion). They assert that the IPJ

was unduly concerned with the length of time that the Decision had been in effect, and argue that they and their father “were entitled to rely on the TSR’s description of Walter Moran as a 1/7 undivided interest owner in Allotment [No.] 2126.” Appellants’ Br. at 13. This argument fails for two reasons. First, we have long held that reopening of an estate closed for more than 3 years “will be allowed only upon a showing that a manifest injustice will occur if the estate is not reopened [and m]anifest injustice is determined by balancing the interests of the public and heirs in the finality of long-closed probate proceedings against the interests of the petitioner and the need to correct errors.” *Estate of Carl Sotomish*, 52 IBIA 44, 46 (2010) (footnote and citations omitted). In addition, we require petitioners to show that they have exercised diligence in pursuing their claim. *Id.* at 47; *see also Estate of James Bongo, Jr.*, 55 IBIA 227, 229-30 (2012). In connection with the latter, we have stated that “an heir’s interest is derived from the original claimant’s, and it follows that an original claimant’s lack of diligence is imputed to [the claimant’s] heirs.” *Id.* at 230. Thus, Appellants’ claim derives from Walter’s claim (as a direct heir of Decedent) and Walter declined to pursue any claim during his lifetime.⁷

The IPJ was not required to reexamine the Decision and Decedent’s will. First, although BIA styled its petition as one to reopen, BIA did not seek “correction” of any error of law or fact nor did BIA argue that manifest injustice would result if the Decision was left standing. *See* 43 C.F.R. § 30.243(a)(2) (setting forth the requirements for seeking reopening “to correct an error of fact or law in the original decision”). BIA simply asked for clarification of the Decision.⁸ Second, § 30.243(a)(1) permits the IPJ to reopen a probate after more than 3 years has elapsed since the date of the original decision *if* the IPJ finds that manifest injustice would result if any error of law or fact were left uncorrected. Here, the IPJ chose not to exercise his own discretion: The Decision was over 30 years old and in that time it had never been challenged, Decedent’s widow and several of Decedent’s children had already passed away, and, ultimately, the remaining heirs are entitled to believe

⁷ We note that Walter was served with a copy of the Decision in which it is stated that, upon the death or renunciation of his mother, he and any siblings still living would share equally in Decedent’s land interests as co-owners with a right of survivorship, title to vest in the last surviving sibling. Therefore, Walter knew that he received, at minimum, a life estate and, at most, ownership of all of his father’s land interests but only if he survived all of his siblings.

⁸ The implication from BIA’s terse request is that there may have been some internal disagreement over the meaning of the Decision, at least with respect to the devise to Decedent’s children. Indeed, BIA recorded the title in the children as tenants in common with respect to Allotment No. 2126 but as to Allotment No. 449, the title inherited from Decedent was recorded as equal life estates with the beneficial title to vest in the last surviving child. *See supra* at 181-82.

that the Decision is final. We find no fault with the IPJ's conclusion that manifest injustice did not warrant reopening for purposes of reexamining Decedent's will.⁹

To the extent that Appellants seek to have the Board invoke its own plenary authority to find manifest injustice or error in the Decision, *see* 43 C.F.R. § 4.318, we decline to do so. As we have stated in the past, an error is “manifest” when it is obvious. *Estate of Anthony “Tony” Henry Ross*, 44 IBIA 113, 119 (2007). Here, any error—if error there be—is not obvious. First, the IPJ relied on the expressions of Decedent's desires in clarifying the Decision, explaining how the language supports the Decision. The IPJ considered Decedent's use of the word “desire” and it was no more obvious to the IPJ than it is to us that a manifest or “obvious” error was committed. Second, as Appellants concede, the Board has not had occasion to decide the issue of whether a decedent's expressions of “desire” in a testamentary instrument may be given effect. *See* Appellants' Br. at 9; *but see Estate of John J. Akers*, 1 IBIA 8, 10 (1970) (approving without discussion a will stating it was testator's “intention and desire to hereby limit the inheritance rights of [his] wife”). Thus, as a matter of Board precedent, there is none. Finally, we decline to exercise our authority here where Appellants' arguments have not first been presented in a petition to reopen in accordance with 43 C.F.R. § 30.243(a)(3) and where the underlying Decision has remained unchallenged for over 30 years. The circumstances are not so extraordinary that we should consider the exercise of our plenary authority.

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 July 31, 2014, Order Reopening Estate to Clarify Decision.

I concur:

// original signed
Debora G. Luther
Senior Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

⁹ We note that Appellants likely were unaware of BIA's petition for reopening—there is no indication that it was served on them—and therefore did not submit a brief to the IPJ. Therefore, the IPJ did not consider the reasons now proffered by Appellants for reopening Decedent's estate and they are presented to us for the first time.