



INTERIOR BOARD OF INDIAN APPEALS

Estate of Reginald Dennis Birthmark Owens

45 IBIA 74 (06/14/2007)



Reservation in the State of Montana. Decedent was survived by his widow, three sons, and two daughters. Appellant is one of Decedent's daughters. On March 30, 1998, BIA certified the probate package,<sup>3</sup> which was transmitted to Judge Herbert. Pertinent to this appeal, the inventory of trust real property included Decedent's interests in Allotment No. 3394, which the inventory described as comprising three parcels totaling 360 acres: One 320-acre parcel and two 20-acre parcels.

On August 14, 1998, Judge Herbert caused a notice of the probate hearing for Decedent's estate to be mailed to Appellant and others. The notice advised that a hearing to probate Decedent's estate would be held on September 8, 1998, and that a written decision would be rendered after the hearing for the distribution of the estate. The notice also advised that a request for review of the decision must be made in writing within 60 days after the date on which the decision is mailed. Also enclosed with the hearing notice was a copy of Decedent's will, which Decedent executed on August 28, 1984. Of particular note, the second clause of the will devised to Decedent's three living sons, Alan K. Owens, Troy D. Owens, and Danny C. Owens, "each an equal share of the E½, sec. 34, T. 30 N., R. 43 E., P.M. Montana, containing 320 acres, including Minerals therein, being part of my original allotment #3394." Decedent's will also contained a residue clause, in which he left "the balance of [his] estate, real, personal, and mixed" to Appellant. Will, Eighth Clause.

The probate hearing took place as scheduled on September 8, 1998. According to the "Statement as to Evidence" form, which was completed by Judge Herbert, Appellant appeared and testified at the September 8 hearing. Judge Herbert also noted that there were no objections to Decedent's will.

On July 26, 1999, Judge Herbert issued his Order Determining Heirs in Decedent's estate. He approved Decedent's will and recited relevant portions of the will verbatim, including the provisions of the second and eighth clauses, quoted above. With respect to Allotment No. 3394, Judge Herbert decreed that "Allotment Number 3394, . . . including any income accrued after the decedent's death, shall pass [in equal shares] to: Alan K. Owens, . . . Troy D. Owens, . . . [and] D[a]nny C. Owens." Order Determining Heirs at 3. Pursuant to Judge Hebert's decision, Appellant inherited interests in Allotment

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<sup>3</sup> The probate package included the completed Data for Heirship Finding and Family History form (OHA-7 form), Decedent's will, an inventory of Decedent's trust real property interests, and Decedent's death certificate.

Nos. 3859 and 1536, but no interest in Allotment No. 3394.<sup>4</sup> The Order Determining Heirs, in bold, capital letters, advised that

THIS DECISION IS FINAL FOR THE DEPARTMENT UNLESS A PETITION FOR REHEARING IS TIMELY FILED IN ACCORDANCE WITH 43 C.F.R. § 4.241 WITHIN 60 DAYS FROM THE DATE HEREOF . . . OR UNLESS A PETITION FOR REOPENING IS FILED PURSUANT TO 43 C.F.R. § 4.242.

Order Determining Heirs at 4. The Notice attached to the Order Determining Heirs shows that Appellant and the Superintendent each were mailed a copy of the decision on July 26, 1999. The Notice also advised that the decision would become final 60 days from the date of mailing unless a petition for rehearing was filed.<sup>5</sup>

No petitions for rehearing were filed.

Sometime prior to August 30, 2004, Appellant went to BIA to inquire whether the two 20-acre parcels were leased.<sup>6</sup> As a result of her inquiry, BIA discovered a discrepancy in its records system: According to BIA's land titles records, Appellant was the owner of the two 20-acre parcels on Allotment No. 3394; according to another system of records, BIA's Integrated Records Management System (IRMS), Decedent's three surviving sons owned all three parcels comprising Allotment No. 3394.

To resolve the discrepancy in its records, the Superintendent sent a memorandum dated August 30, 2004, to Judge Holt "asking for clarification of the probate order of [Decedent's] estate in regards to his own allotment." The Superintendent explained the discrepancy concerning Allotment No. 3394 and requested Judge Holt to "advise as soon as possible" because Appellant was inquiring about the two 20-acre parcels on the allotment.

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<sup>4</sup> Appellant also inherited the balance of Decedent's Individual Indian Money account.

<sup>5</sup> The instruction set forth in the Notice is correct: Under 43 C.F.R. § 4.241 (1999), interested parties may seek rehearing within 60 days of the date of mailing of the Notice. Because the date of Judge Herbert's decision was the same as the date of the Notice, the time period to seek rehearing was the same under either instruction.

<sup>6</sup> It is unclear from the record when Appellant first learned that she was listed as the owner of the two 20-acre parcels on one set of BIA's records.

Judge Holt construed the Superintendent's request as a petition to reopen Decedent's estate and, on December 6, 2004, issued an Order to Show Cause Why Estate Should Not be Reopened and Decision Modified (Show Cause Order). Judge Holt proposed to modify Decedent's estate to pass the two 20-acre parcels on Allotment No. 3394 to Appellant. The Show Cause Order advised any party opposed to the proposed modification to file a written statement of reasons for their objection no later than 60 days from the date of the Show Cause Order.

On February 7, 2005, Alan Owens filed a timely objection to the Show Cause Order. He asserted that, because more than three years had passed since the Order Determining Heirs, during which time no objections had been submitted, the Order Determining Heirs became final and there was no good cause to reopen the estate. No other objections were received in response to the Show Cause Order.

On March 23, 2005, Judge Holt issued an Order Denying Reopening. In reference to the distribution of the two 20-acre parcels, Judge Holt observed that "an error has occurred in the interpretation of Decedent's will." Order Denying Reopening at 3. He concluded, however, that the Superintendent could not petition to reopen Decedent's estate under 43 C.F.R. § 4.242(h).<sup>7</sup>

Judge Holt found that "the Superintendent . . . had actual notice of the original proceeding and the records show that the Superintendent was mailed a copy of the [Order Determining Heirs] on July 26, 1999." *Id.* Judge Holt stated that the Superintendent's remedy would have been to petition for rehearing within 60 days of the decision or to petition for reopening within 3 years from the date of the final decision under subsection 4.242(d), neither of which the Superintendent had done. Therefore, Judge Holt denied the Superintendent's petition to reopen.

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<sup>7</sup> Section 4.242(h) (2003) provides in relevant part:

If a petition for reopening is filed more than 3 years after the entry of a final decision in a probate, it will be allowed only upon a showing that a manifest injustice will occur; that a reasonable possibility exists for correction of the error; that the petitioner had no actual notice of the original proceedings; and that petitioner was not on the reservation or otherwise in the vicinity at any time while the public notices were posted.

Appellant appealed to the Board of Indian Appeals (Board). Appellant did not file an opening brief, but instead relied on the statements in and attachments to her notice of appeal. No briefs were received by the Board.

### Discussion

Appellant bears the burden of establishing that the Order Denying Reopening was erroneous. *Estate of Martha Marie Vielle Gallineaux*, 44 IBIA 230, 234 (2007). We conclude that Appellant has not met her burden and, therefore, we affirm.

The Superintendent did not appeal from the Order Denying Reopening,<sup>8</sup> and Appellant does not dispute Judge Holt's determination that the Superintendent lacked standing to petition for reopening after the estate had been closed for three years. Instead, Appellant's sole argument on appeal is that a manifest injustice has occurred in this case because BIA led her to believe she owned the two 20-acre parcels. The "manifest injustice" standard in section 4.242(h) is not an alternative ground for reopening, but an additional prerequisite. Subsection 4.242(h) does not allow Appellant to avoid the lack-of-notice requirement found therein.<sup>9</sup> However, even if this case were to be determined by the

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<sup>8</sup> The Superintendent styled his request to Judge Holt as one for "clarification." However, because the request sought a substantive modification of the original Order Determining Heirs, Judge Holt properly construed the request as a petition to reopen the estate. The original Order Determining Heirs required no "clarification" — it was unambiguous in providing without qualification that Allotment No. 3394 passed in its entirety to Decedent's three sons. The only discrepancy appeared in BIA's records.

<sup>9</sup> It is well established that probate decisions affecting Indian trust property become final 60 days after the date of entry unless a petition for rehearing is filed within the 60-day period. 43 C.F.R. § 4.240(b); *Estate of Gallineaux*, 44 IBIA at 236; *Estate of Moses Squeoch Dick, Sr.*, 38 IBIA 56 (2002). If a petition for reopening is filed more than three years after the date the probate decision becomes final, reopening "will be allowed *only* upon a showing . . . that the petitioner had no actual notice of the original [probate] proceedings." 43 C.F.R. § 4.242(h) (emphasis added). Although the Board has recognized that BIA officials are proper parties to seek reopening in certain circumstances, *see* 43 C.F.R. § 4.242(d), *Estate of Paul Widow*, 17 IBIA 107, 113 (1989), and has recognized that the Superintendent, as the delegate of the Secretary of the Interior, has some obligation to bring errors to the attention of the probate judge to permit correction of errors, as determined to be appropriate by the judge, *see Estate of Helen Ward Willey*, 11 IBIA 43, 47

(continued...)

“manifest injustice” standard alone, we would find that Appellant has not demonstrated that such an injustice occurred. “Manifest injustice” requires that the injustice be obvious. *Estate of Anthony “Tony” Henry Ross*, 44 IBIA 113, 119 (2007). We would not conclude that manifest injustice is evident under the facts of this case. Judge Herbert’s Order Determining Heirs clearly provided that all of Allotment No. 3394 passed to Decedent’s three sons, and Appellant was advised of her appeal rights if she disagreed with that order. Regardless of whether BIA subsequently created confusion by not implementing that order, or even by leading Appellant to believe that she owned the two 20-acre parcels, Appellant cannot complain that manifest injustice will occur by leaving Judge Herbert’s order undisturbed. Appellant failed to pursue timely correction of that order.

In summary, Appellant does not dispute Judge Holt’s conclusion that the Superintendent lacked standing to petition for reopening the estate after three years because the Superintendent had notice of the original proceedings. We reject Appellant’s argument that Judge Holt could have reopened the estate based solely on her allegation of manifest injustice. Therefore and pursuant to 43 C.F.R. § 4.242(b) and (h), Judge Holt correctly denied the petition without reaching the merits of Appellant’s claims.<sup>10</sup>

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<sup>9</sup>(...continued)

(1983), the Superintendent, like other parties, remains bound by the regulations that govern the probate of the estates of Indian decedents, *see Estate of Thomas Nicholas Black Elk*, 34 IBIA 212 (2000).

Several past Board decisions held that the Board has the inherent authority, under, e.g., 43 C.F.R. § 4.318 (formerly, 43 C.F.R. §§ 4.290 and 4.320), to correct manifest injustice or error in a probate appeal for which standing to petition for reopening might otherwise be lacking. *See, e.g., Estate of Clara Seltice Sherwood*, 14 IBIA 238 (1986); *Estate of James Largo*, 12 IBIA 224 (1984). Because we determine that there is no manifest error or injustice present in the instant appeal, we need not address whether these earlier decisions remain sound.

<sup>10</sup> Section 4.242(b) requires that where the probate judge “finds that proper grounds are not shown [in the petition to reopen an estate], he or she *will* issue an order denying the petition.” (Emphasis added.)

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 Judge Holt's March 23, 2005, Order Denying Reopening.

I concur:

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Debora G. Luther  
Administrative Judge

          // original signed            
Steven K. Linscheid  
Chief Administrative Judge