



INTERIOR BOARD OF INDIAN APPEALS

Estate of Benson Potter

49 IBIA 37 (03/31/2009)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF BENSON POTTER) Order Vacating Denial of Reopening
) and Remanding
)
) Docket No. IBIA 08-115
)
) March 31, 2009

On July 28, 2008, the Board of Indian Appeals (Board) received an appeal from the Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA), from a May 27, 2008, Order Denying Petition for Reopening issued by Administrative Law Judge (ALJ) Thomas F. Gordon in the estate of Benson Potter (Decedent), deceased Round Valley Indian, Identification No. 540U000226 or 635J000084,¹ Probate No. P-00002-6556-IP. The Regional Director sought to have Decedent's estate reopened because the original Order Determining Heirs, dated February 22, 2002, ordered distribution of two-thirds of Decedent's estate to two individuals (one-third to each) who were incapable of inheriting an interest: two predeceased sons of Decedent, Floyd and Van John ("Johnny").² When the Regional Director requested reopening by the ALJ, Decedent's estate had been closed for more than 3 years, and the ALJ denied reopening as beyond his jurisdictional authority, on the ground that the petition did not satisfy the lack-of-notice requirement in the probate regulations that were then in effect.

The Regional Director sought review from the Board of the denial of reopening, and the matter was pending when the Department of the Interior (Department) promulgated revised Indian probate regulations, which omit lack of notice as a prerequisite to the ability of an ALJ (or an Indian Probate Judge) to reopen an Indian trust estate that has been closed

¹ The Order Denying Reopening refers to both identification numbers. The Order Determining Heirs issued on February 22, 2002, used the identification number 540U226. The Department's probate tracking system, ProTrac, uses the identification number 635J000084.

² A third son, Warner, also predeceased Decedent, but that fact was accounted for in the Order Determining Heirs, and therefore the one-third interest that otherwise would have passed to Warner passed instead by representation to Warner's daughter, Linda Patereau.

for more than 3 years. *See* 43 C.F.R. § 30.242, 73 Fed. Reg. 67,302 (Nov. 13, 2008) (effective Dec. 15, 2008).³ We conclude that the new provision, section 30.242, now governs the Regional Director's request to reopen Decedent's estate, and that under section 30.242, the ALJ has the authority to consider the request. Therefore, we vacate the ALJ's denial of reopening and remand the matter for further consideration.

Background

Decedent died intestate on January 15, 1975. In a February 22, 2002, Order to Show Cause and Order Determining Heirs, and based on information provided at the time from BIA,⁴ ALJ William E. Hammett found that Decedent was survived by three individuals who, under applicable California law, were entitled to inherit equal shares in Decedent's Indian trust estate: Floyd (son); Johnny (son); and Linda Patereau (granddaughter). Judge Hammett therefore ordered Decedent's Indian trust estate, consisting of funds in an Individual Indian Money account, to be distributed accordingly to these three individuals.

In February of 2008, Judge Gordon received notice from BIA that both Floyd and Johnny had, in fact, predeceased Decedent, which made them incapable of inheriting his interests.⁵ Judge Gordon construed the notice as a petition to reopen the case. Applying the regulatory provisions that were then in effect for reopening an Indian trust estate after 3 years, Judge Gordon concluded that he lacked authority to reopen the estate because one of the requirements of 43 C.F.R. § 4.242(i) (2007) — lack of notice — was not satisfied.⁶

³ The revised probate regulations currently are published only in the Federal Register, but will be codified in a new Part 30 of Volume 43 of the 2009 edition of the Code of Federal Regulations. The regulations include substantive revisions to implement the American Indian Probate Reform Act of 2004, 25 U.S.C. § 2201 *et seq.*, but also include procedural revisions.

⁴ No one appeared at the probate hearing.

⁵ Nor could the interests be considered part of their estates because an estate is fixed at the time of death. *See Estate of Pollack*, 47 IBIA 147, 153 (2008).

⁶ Section 4.242(i) provided that a petition for reopening filed after 3 years, will be allowed *only* upon a showing that:

- (1) A manifest injustice will occur;
- (2) A reasonable possibility exists for correction of the error;
- (3) The petitioner had no actual notice of the original proceedings; *and*

(continued...)

The Regional Director timely appealed Judge Gordon’s denial of reopening to the Board. On November 13, 2008, while the appeal was pending, the Department published the revised probate regulations, which became effective on December 15, 2008, and which revised and replaced former 43 C.F.R. § 4.242 (2007). 73 Fed. Reg. 67,256, 67,302 (Nov. 13, 2008). The final rule eliminates lack of notice as an unqualified requirement for reopening an estate after 3 years. *See* 43 C.F.R. § 30.242, 73 Fed. Reg. 67,302.⁷

Discussion

Under certain circumstances, the enactment of a statute or the promulgation of a rule may raise questions about whether a particular provision should be applied to a pending case, or whether such application would have an impermissible “retroactive” effect. Of course, if the language of a statute or regulation clearly requires or limits its application, that controls the inquiry. Otherwise, the determination of whether to apply a new statute or new rule to a pending case will depend on rules of construction and related considerations. In the present case, new section 30.242 does not directly address whether it should be applied to a petition for reopening that is pending on the date the rule becomes effective.⁸ Nonetheless, resolution of the issue is not difficult.

The lack-of-notice requirement in former 43 C.F.R. § 4.242(i) (2007) limited the authority of a probate judge to reopen an Indian estate after 3 years. New section 30.242 eliminates the requirement that a party seeking to reopen an estate after 3 years must not have had either actual or constructive notice of the original proceedings. In addition, unlike former section 4.242(i), new section 30.242 allows a probate judge to reopen an estate after 3 years on his or her own motion.

In *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the Supreme Court noted that it had “regularly applied intervening statutes conferring or ousting jurisdiction, whether or

⁶(...continued)

(4) The petitioner was not on the reservation or otherwise in the vicinity at any time while the public notices were posted.
43 C.F.R. § 4.242(i) (2007) (emphases added).

⁷ Notice may still be relevant for determining whether it is appropriate to grant reopening, but it no longer factors as a possible jurisdictional bar to a probate judge’s authority to consider reopening.

⁸ Although the ALJ denied the petition for reopening, an ALJ’s order, if timely appealed to the Board, is not final unless made final and effective by the Board. *See* 43 C.F.R. § 4.314.

not jurisdiction lay when the underlying conduct occurred or when the suit was filed.” *Id.* at 258, citing *Bruner v. United States*, 343 U.S. 112 (1952) (ordering dismissal when jurisdictional statute was repealed after the action was filed) and *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604 (1978) (holding that failure to allege jurisdictional amount in a complaint became irrelevant when statute eliminated the amount-in-controversy requirement for federal-question cases). The Court stated that application of a new jurisdictional rule usually takes away no substantive right, but instead speaks to the power of the tribunal rather than to the rights or obligations of the parties, and that “[c]hanges in procedural rules may often be applied . . . without raising concerns about retroactivity.” 511 U.S. at 258.⁹

As applied to the present case, we conclude that new section 30.242 may be applied by the ALJ to the Regional Director’s petition for reopening, without giving rise to concerns about impermissible retroactivity. The reopening provisions are procedural in nature and simply remove an obstacle to the ability of an ALJ or IPJ to reopen an estate in order to modify a probate order which, if not corrected, would result in manifest injustice. Applying new section 30.242 to the Regional Director’s petition for reopening does not change the legal consequences of acts completed before their effective date. The provisions do not alter in any way the substantive law that applies to the distribution of Decedent’s estate, or an individual’s right to inherit property from the estate. Moreover, quite independent of whether consideration of the Regional Director’s petition for reopening is governed by the former or current reopening provisions, the current reopening provisions undoubtedly apply prospectively to the reopening of an estate on the probate judge’s own motion, which yields the same jurisdictional result: the probate judge has the authority to consider whether to reopen this estate.¹⁰ Thus, a failure to show lack of notice, as applied

⁹ On other hand, if giving effect to a statute would “change[] the legal consequences of acts completed before its effective date,” such application will be deemed retroactive, and is impermissible without clear congressional expression to the contrary. *Id.* at 269-70 & n.23. The Court cautioned that “the mere fact that a new rule is procedural does not mean that it applies to every pending case.” *Landgraf*, 511 U.S. at 275 n.29. *See also Martin v. Hadix*, 527 U.S. 343, 361 (1999) (“it is not enough to attach a label (e.g., ‘procedural,’ ‘collateral’) to the statute”); *but cf. Republic of Austria v. Altmann*, 541 U.S. 677, 694 (2004) (“Under *Landgraf*, . . . it is appropriate to ask whether the Act affects substantive rights . . . or addresses only matters of procedure.”).

¹⁰ Of course, the judge’s *authority* to reopen the estate is a question distinct from whether reopening is appropriate. For estates that have been closed more than 3 years, the stringent “manifest injustice” standard still applies. *See* 43 C.F.R. § 30.242(a), 73 Fed. Reg. 67,302.

to the Regional Director's pending petition for reopening, is "now of no moment." *Landgraf*, 511 U.S. at 258, quoting *Andrus*, 436 U.S. at 607-08 n.6.

Application of the current reopening provisions to the Regional Director's petition for reopening makes particular sense in this case. The Order Determining Heirs ordered two-thirds of Decedent's estate to be distributed to predeceased individuals who, because they were no longer living at the time of Decedent's death, were ineligible to be heirs and, more importantly, incapable of receiving the property. Thus, notwithstanding the Order Determining Heirs, the property remains in Decedent's estate, and only through reopening may it be distributed.

Whatever regulatory procedural and jurisdictional hurdles previously existed under the lack-of-notice requirement for reopening an estate after 3 years, we conclude that they no longer apply to the Regional Director's petition to reopen this estate, or to the ALJ's authority to do so. Instead, new section 30.242 now governs this matter and gives the ALJ the authority to consider the petition.

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 vacates the ALJ's May 27, 2008, Order Denying Petition for Reopening, and remands the matter to the Probate Hearings Division for further proceedings consistent with this decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge