



INTERIOR BOARD OF INDIAN APPEALS

Estate of Carl Sotomish

52 IBIA 44 (08/12/2010)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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ESTATE OF CARL SOTOMISH            )    Order Affirming Decision  
  )      
  )    Docket No. IBIA 08-135  
  )      
  )    August 12, 2010

Francis Thomas Buck (Appellant) has appealed the September 15, 2008, Order Denying Reopening entered by Administrative Law Judge (ALJ) Steven R. Lynch in the estate of Carl Sotomish (Decedent), deceased Quinault Indian, Probate No. P000071660IP. In the Order, the ALJ denied Appellant's request to reopen the estate, which had been the subject of an Order Determining Heirs issued on September 15, 1939, to include Appellant as a biological son and heir of Decedent, who had died in 1934. The ALJ concluded that Appellant had not exercised due diligence in seeking to establish that he was an heir of Decedent, and denied Appellant's request to reopen. Because we similarly find that Appellant has failed to demonstrate that he exercised the requisite due diligence in pursuing his rights, we affirm the Order Denying Reopening.

## Background

Decedent was born on March 16, 1905, and died on December 13, 1934. On September 15, 1939, Oscar L. Chapman, First Assistant Secretary for the Department of the Interior, issued an Order Determining Heirs for Decedent's estate, determining that Decedent's son, Lewis Hobucket, was Decedent's sole heir.

Appellant was born in 1935. Sometime in 1958, he received a copy of his birth certificate from the Bureau of Vital Statics and learned that Decedent was his biological father. Despite obtaining this knowledge of his parentage in 1958, and procuring statements from tribal elders in 1980 and 1981 confirming that he was Decedent's natural child, Appellant waited until March 25, 2008, before seeking the reopening of Decedent's estate. In his request to reopen, Appellant stated that his mother had died in 1944, that he had been raised by his maternal grandparents and aunts, that he did not know his father and had not been aware of his father's probate proceeding, and that he had not learned that

Decedent was his father until Sarah Sotomish told him that she was his biological grandmother and he received his birth certificate confirming that fact.

In his Order Denying Reopening, the ALJ cited Appellant's failure to explain why he had not sought redress during the 50-year period between 1958, when Appellant learned that Decedent was his father, and 2008, when he filed the request to reopen.<sup>1</sup> The ALJ concluded that Appellant should have requested reopening within a reasonable time after becoming aware that Decedent was his father and that waiting 50 years until March 2008 to file that request was not reasonable. The ALJ therefore determined that Appellant had not demonstrated the requisite due diligence in seeking to establish that he is an heir of Decedent and denied the petition to reopen.

On appeal, Appellant asserts that, although he learned he is Decedent's biological son in 1958, he did not know anything about appealing an Indian probate case. He explains that the distance between his home on the Quinault Indian Reservation and the Bureau of Indian Affairs (BIA) agency office serving the Reservation hampered his ability to seek BIA help with asserting his rights until 2001 when the office was relocated to the village of Tahola on the Reservation. He also contends that his inability to read or write prevented him from previously seeking and obtaining other assistance. He notes that he has now received significant aid from BIA in pursuing the reopening of Decedent's estate and avers that he would have requested reopening sooner if he had known that he could do so. Appellant further asserts that he did not realize that he was not Decedent's heir until timber from property that Decedent had owned was logged about 3-4 years ago; that he assumed that he would receive a share of the funds from the logging sale because Decedent was identified on his birth certificate; and that his inability to understand inheritance and the probate process should not prevent him from inheriting from his father's estate.

Upon receipt of the appeal, the Board of Indian Appeals (Board) issued a Pre-Docketing Notice and Order for Appellant to Show Cause, dated October 8, 2008, advising Appellant that there was a strong possibility that he had not satisfied the requirement that he provide compelling proof that he exercised due diligence in pursuing his rights as a possible heir to Decedent's estate once he discovered that he might be Decedent's son. Specifically, the Board questioned why, regardless of his lack of knowledge and understanding of the specific laws governing descent of property or the procedures for

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<sup>1</sup> The ALJ also noted that Decedent's Indian trust property had undergone several changes in ownership involving various individuals during those five decades and that it might not be possible to correct the alleged error at this time, *see* 43 C.F.R. § 4.242(i) (2007), but did not make an actual finding with respect to this issue.

seeking to reopen Decedent's estate, Appellant did not inquire sooner about (1) what property Decedent might have owned, (2) whether he had inherited property from Decedent, (3) if not, then why not, and (4) what he could do to correct the purported error in the distribution of Decedent's estate. Accordingly, the Board granted Appellant until November 14, 2008, to show cause why the ALJ's Order Denying Reopening should not be affirmed and to submit any and all reasons in addition to those previously supplied to explain why he waited until 2008 to seek reopening of Decedent's estate. Appellant did not respond the Board's order, apparently opting to rely on the reasons previously provided.

### Discussion

Both the regulation in effect at the time Appellant filed the petition to reopen, 43 C.F.R. § 4.242(i)(1) (2007), and the current revised regulation, 43 C.F.R. § 30.242(a), provide that a petition to reopen an estate that has been 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.<sup>2</sup> Manifest 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. *See Estate of Milward Wallace Ward*, 46 IBIA 5, 8 (2007); *Estate of George Dragswolf, Jr.*, 17 IBIA 10, 12 (1988). Because of the substantial interest of Indian heirs and devisees in the finality of Indian probate decisions affecting their property rights, the Board requires a petitioner, as part of the showing of manifest injustice, to demonstrate that he or she has acted with due diligence in pursuing the claim. *Estate of*

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<sup>2</sup> At the time the ALJ issued the Order Denying Reopening, the regulation governing petitions for reopening an estate filed more than 3 years after the entry of a final decision in a probate proceeding, 43 C.F.R. § 4.242(i) (2007), provided that such a petition

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
- (4) The petitioner was not on the reservation or otherwise in the vicinity at any time while public notices were posted.

The Indian probate regulations were substantially revised in November 2008. The revised regulation addressing the reopening of closed probate cases more than 3 years after the date of the original decision, 43 C.F.R. § 30.242(a), eliminated the requirements of subsections (2), (3), and (4), but retained the stringent "manifest injustice" standard. *See Estate of Benson Potter*, 49 IBIA 37, 40 n.10 (2009).

*Dragswolf*, 17 IBIA at 12; see *Estate of Albert Angus Sr. and Estate of George Angus*, 46 IBIA 90, 98-99 (2007); *Estate of George Dragswolf, Jr.*, 30 IBIA 188, 196 (1997); see also 43 C.F.R. § 30.242(a) (requiring that petitions to reopen filed by an interested party be filed within 1 year after the petitioner's discovery of an alleged error). The requirement to demonstrate due diligence reflects the necessity for "an appropriate balance between the need for finality in probate decisions and the need to correct errors in the decisions." *Estate of Dragswolf*, 17 IBIA at 12. And, although the length of time elapsing since issuance of the original probate decision is not dispositive, the longer that time period, the greater the weight in favor of finality and against reopening (and the more difficult the compelling showing of due diligence). See *Estate of George Dragswolf, Jr.*, 30 IBIA at 197-98. However, each case must be judged on its own facts. An appellant bears the burden of establishing that an order denying a petition to reopen an estate is erroneous. *Estate of Darryl Edwin Rice*, 49 IBIA 16, 18 (2009); *Estate of Ward*, 46 IBIA at 8. Appellant has failed to meet that burden here, and we affirm the Order Denying Reopening.

In this case Appellant filed his petition for reopening 69 years after Decedent's original probate decision, 50 years after he received his birth certificate identifying Decedent as his father, and 3-4 years after he realized that he was not an heir to Decedent's estate. He excuses his failure act sooner on his illiteracy, his lack of knowledge of the law governing the descent of property and the procedures for seeking reopening, and his inability to seek BIA's assistance earlier due to the distance between the Reservation and the BIA office. These excuses, however, fall far short of establishing that he exercised due diligence in pursuing his rights.

Upon receipt of his birth certificate in 1958, 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. His apparent failure to make any inquiry — to BIA, tribal elders, or family members — about Decedent's estate within a reasonable time after receiving his birth certificate undermines his attempt to demonstrate that he exercised due diligence in pursuing his rights to participate in Decedent's estate. Additionally, Appellant acknowledges that he realized 3-4 years before he filed his petition to reopen that he was not one of Decedent's heirs, yet he has not explained why he did not file his petition immediately upon learning that he was not Decedent's heir but chose to wait an additional 3-4 years before doing so. Given the significant lengths of time that have passed since the issuance of the original probate decision (69 years), Appellant's receipt of his birth certificate (50 years), and his discovery that he was not an heir (3-4 years), we conclude that Appellant's justifications for the delay

in filing the petition to reopen fail to provide compelling proof that he exercised due diligence in pursuing his rights.

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 Order Denying Reopening.

I concur:

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// original signed  
Sara B. Greenberg  
Administrative Judge\*

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

\*Interior Board of Land Appeals, sitting by designation.