



INTERIOR BOARD OF INDIAN APPEALS

Estate of Harrison H. Yazzie

51 IBIA 307 (06/18/2010)

regulations, we reject Appellant’s argument that the Board may consider the dispute through this probate appeal. We find, however, that Judge Joe erred in dismissing the proceedings “for lack of remedy” and by not referring the matter to BIA for a decision. Appellant has a procedural remedy — a right to have BIA decide whether to approve the purported gift conveyance, with a right of appeal to the Board. And it is that decision-making process that will decide whether Appellant is entitled to substantive relief.

Background²

The Order Determining Heirs recited that records in BIA’s Eastern Navajo Agency (Agency) office showed that Decedent had executed a gift deed for Allotment 1461 but that it had not been approved by the Agency. Judge Stancampiano subsequently reopened the estate on his own motion, finding that it would be manifest error not to allow BIA to act on Decedent’s gift deed. Judge Stancampiano issued several interim orders directed to BIA regarding the gift deed transaction. In response to one of those orders, the Agency Superintendent submitted a memorandum to the IPJ, dated September 5, 2007. The Superintendent summarized evidence in BIA’s files concerning the gift deed transaction and found that there was no valid reason to conclude that the “purported gift deed was or is a valid conveyance,” relying in part on some uncertainty over whether Appellant was Decedent’s biological daughter.

Additional evidence apparently resolved the paternity issue, and Judge Stancampiano then issued an interim order instructing the Agency to forward the gift deed documents to the BIA Navajo Regional Office for approval and directing the Regional Office “to take action on approving the gift deed within thirty days from the date [of the order].” Order to Agency and Region Concerning Gift Deed, Oct. 11, 2007. BIA apparently did not respond, and Judge Stancampiano then issued a notice for a *Ducheneaux*³ hearing, which was held in January of 2008. No *Ducheneaux* recommended decision was ever issued.

² Because we are summarily deciding this appeal, we have not ordered the probate record. Our recitation of the facts is based on the procedural history provided in Judge Joe’s Decision and the materials (including several probate orders) attached to Appellant’s notice of appeal.

³ In *Estate of Douglas Ducheneaux*, 13 IBIA 169 (1985), the Board authorized probate judges to consider inventory disputes that arose during probate and to issue recommended decisions, which were appealable to the Board.

In December of 2008, revised Departmental probate regulations became effective. One section in those regulations, 43 C.F.R. § 30.128, supersedes the *Ducheneaux* procedures, divests probate judges (and the Board) of jurisdiction over inventory disputes arising during a probate proceeding, and requires that such disputes be referred to BIA for a decision. See Decision at 5, citing 43 C.F.R. § 30.128; *Estate of James Jones, Sr.*, 51 IBIA 132 (2010); *Estate of Francis Marie Ortega*, 50 IBIA 322 (2009).

Discussion

Appellant acknowledges the fact that section 30.128 supersedes and replaces the *Ducheneaux* procedures. But Appellant argues that the Board nevertheless may adjudicate the merits of the gift deed dispute in this probate appeal because (1) BIA already made a final decision, as evidenced by the Superintendent's September 5, 2007, memorandum to Judge Stancampiano; (2) BIA refused to respond to Judge Stancampiano's orders to act on the gift deed transaction, and there is no recommended decision awaiting review or further action by BIA; and (3) this case lost its character as an inventory dispute because the *Ducheneaux* process dissolved and the case is no longer about altering Decedent's inventory, but requires only an order from the Board requiring BIA to transfer the property to Appellant.

None of Appellant's arguments provides a basis for the Board to adjudicate the gift deed dispute through this probate appeal.

First, even assuming that the Superintendent intended his September 5, 2007, memorandum to the IPJ to constitute a decision,⁴ the Board would lack jurisdiction to review that decision. With exceptions not relevant here, a decision by a Superintendent is not appealable to the Board; instead, it is appealable to the Regional Director. See 25 C.F.R. § 2.4; *Demery v. Standing Rock Superintendent*, 50 IBIA 136, 137 (2009), and cases cited therein.⁵

⁴ The Superintendent's memorandum makes certain "findings," but concludes with "recommendations."

⁵ Of course, if the Superintendent's memorandum is treated as a decision, the time period for filing an appeal would have been tolled unless the Superintendent also complied with 25 C.F.R. § 2.7 by advising Appellant of her appeal rights. Cf. *Estate of Norma A. Tsoodle*, 50 IBIA 129 (2009) (referring appeal to the Regional Director; Superintendent's decision rejecting inventory challenge failed to include the required appeal instructions).

Appellant's two remaining arguments similarly fail because they cannot overcome the fact that, fairly characterized, the dispute was and remains an inventory dispute, and thus governed by section 30.128. Whether or not BIA ignored Judge Stancampiano's interim orders, and whether or not a *Ducheneaux* recommended decision ever issued, do not alter the effect of section 30.128 on these proceedings. And dissolution of the *Ducheneaux* proceedings did not divest this dispute of its character as an inventory dispute. Allotment 1461 apparently⁶ was included in Decedent's estate inventory. Unless the inventory is modified to remove Allotment 1461, e.g., because BIA decides to approve the gift deed transaction retroactively, it remains subject to the Order Determining Heirs, which decreed that Decedent's interest in that allotment passed in equal shares to his three children as his heirs. Moreover, the only way that Appellant may receive the relief that she seeks is to have the gift deed transaction approved, and the authority to make that decision lies with BIA, subject to a right of appeal to the Board.

Although Appellant's arguments fail to convince us that we can consider the gift deed dispute in this appeal, we do find that Judge Joe erred in dismissing the matter outright without referring it to BIA. Even accepting the fact that a gift deed had not been located, the issue of whether that precluded BIA from approving a conveyance goes to the merits of the dispute, over which the probate judge lacked jurisdiction. And, of course, a referral to BIA provides an additional opportunity for BIA to determine whether a deed or additional evidence regarding an intended conveyance can be located.⁷ Therefore, we refer the dispute to the Navajo Regional Director for issuance of a decision. In BIA's decision(s), BIA must advise interested parties of their appeal rights, in compliance with 25 C.F.R. § 2.7.⁸

⁶ We say "apparently" only because we do not have the estate inventory. The Order Determining Heirs, however, expressly identifies Allotment 1461. Moreover, if BIA did not consider Allotment 1461 as being included in Decedent's estate inventory, the reopening and *Ducheneaux* proceedings held to consider Appellant's claim would have been moot.

⁷ Several BIA documents refer to the "gift deed" as having been forwarded for approval. Appellant contends that BIA lost the gift deed.

⁸ We leave it to the Regional Director to decide whether the initial BIA decision should be made at the agency or regional level. If the decision is made at the regional level, the Regional Director must afford Appellant a reasonable opportunity to present her case, including disputing the Superintendent's September 5, 2007, memorandum to the IPJ.

(continued...)

