



INTERIOR BOARD OF INDIAN APPEALS

Estate of Doris Mae Wilkie Klatt

53 IBIA 223 (6/24/2011)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF DORIS MAE WILKIE)
KLATT) Order Docketing and Dismissing
) Appeal as Premature and
) Remanding
)
) Docket No. IBIA 11-110
)
) June 24, 2011

This appeal by Simone Kilbourn (Appellant) was filed with the Board of Indian Appeals (Board) pursuant to appeal instructions in a decision by an administrative law judge (ALJ), which was issued after de novo review of a summary probate decision in the estate of Doris Mae Wilkie Klatt¹ (Decedent), deceased Turtle Mountain Chippewa Indian, Probate No. P000075526IP. We conclude that the appeal instructions were incorrect and that Appellant was required to first seek rehearing from the ALJ to correct alleged errors in the ALJ's decision. An ALJ's decision issued after conducting a de novo review of a summary probate decision is not appealable to nor reviewable by the Board. Therefore, we dismiss this appeal for lack of jurisdiction and remand the matter to the Probate Hearings Division for consideration of Appellant's challenge as a petition for rehearing.

Background

The regulations of the Department of the Interior (Department) governing the probate of trust or restricted Indian property allow for a summary probate proceeding, without a formal hearing, to distribute an all-cash trust estate that does not exceed \$5,000 on the date of death. *See* 43 C.F.R. § 30.200. A summary probate decision is subject to a party's right to seek de novo review by an ALJ or an Indian Probate Judge (IPJ), who must review the merits of the case, conduct a hearing as necessary or appropriate, and issue a new decision. *Id.* § 30.206.

¹ A.k.a. Dawn Delores Wilkie, a.k.a. Dawn Klatt Kilbourn, a.k.a. Delores Mae Wilkie.

In the present case, Decedent's estate apparently consists of approximately \$0.16.² A summary probate decision by Attorney Decision Maker (ADM) Leah Harjo Ware concluded that Decedent had five children, all of whom survived Decedent, and the ADM ordered that Decedent's estate be distributed equally among them. *See* Order Determining Heirs at 2. The ADM's decision also discussed conflicting and inconclusive evidence suggesting that Decedent may have had three other children, and invited parties with additional evidence to submit such evidence along with a request for de novo review. *See id.*

One party submitted a timely request for de novo review of the ADM's decision, and various parties submitted additional evidence. Relevant to the present appeal, after conducting a de novo review of the case, ALJ Richard L. Reeh concluded that Decedent did in fact have three other children, including a pre-deceased daughter, Debra Jean Martin (Debra). The ALJ found that Debra had two children, who were thus entitled to share in Decedent's estate, but he also found that no evidence had been presented to establish that Debra had a third child, Appellant. *See* Order of Modification Upon Request for de novo Review (Order on De Novo Review), May 3, 2011, at 2 ("No evidence was presented to support a finding that [Appellant] was either a biological or adoptive child of [Decedent's] pre-deceased child, Debra Jean Martin."). Citing 43 C.F.R. § 30.245 (2010), a regulatory provision that applies to reopening proceedings for closed probate cases, the ALJ advised the parties that the Order on De Novo Review would become final for the Department unless an appeal was filed with the Board within 30 days from the date the order was issued.

Thereafter, and within the 30-day time period, Appellant filed her appeal with the Board, consistent with the instructions provided by the ALJ. Appellant enclosed with her appeal various documents offered to establish that she is Debra's biological child.

Discussion

The Board's jurisdiction over appeals in probate matters is specifically prescribed by regulation and is limited to appeals from decisions or orders (1) on a petition for rehearing, (2) on a petition for reopening, (3) regarding purchase of interests in a deceased Indian's estate, or (4) regarding modification of the inventory of an estate. *See* 43 C.F.R. § 4.320, *as amended*, 76 Fed. Reg. 7500, 7505 (Feb. 10, 2011). The ALJ's decision does not fall within any of these categories.

² *See* Order Determining Heirs and Summary Distribution, Sept. 29, 2010 (Order Determining Heirs). The ADM's signature on the Order Determining Heirs, and a certificate of service on the distribution list, are both dated September 29, 2010, although a certificate of service on an accompanying Notice of Decision in Summary Proceeding is dated September 28, 2010. The ALJ's decision identifies that date of the ADM's decision as September 28, 2010.

Although the ALJ's decision is styled as an "Order of Modification," it is not a modification of *an inventory estate*, and thus does not fall within the category of "modification" orders over which § 4.320 grants the Board jurisdiction. Moreover, while the ALJ's decision referred to § 30.245 as the source of Appellant's appeal rights, that section provides for a right of appeal from a decision on reopening a closed probate case. *See* 43 C.F.R. §§ 30.243 - 30.246, as redesignated and amended, 76 Fed. Reg. at 7507-08. An ALJ's decision on de novo review is not a decision on reopening a closed case. Instead, when a timely request is made for de novo review of a summary probate decision, the request prevents the summary probate decision from becoming final, *see id.* § 30.207, and the de novo proceedings conducted by the ALJ or IPJ are for a still-open probate case. Thus, the ALJ's decision was not an order on reopening and the Board's jurisdiction to review orders on reopening does not apply.

In a prior case involving an ALJ's dismissal of a request for de novo review, we held that the Board's jurisdiction does not include the authority to review orders issued by ALJs or IPJs in response to requests for de novo review of an ADM's decision in an informal probate proceeding. *See Estate of Robert Ray Limpy*, 50 IBIA 1 (2009). In *Estate of Limpy*, the Board explained that an ALJ's order denying de novo review of an ADM decision is "subject to and initially reviewable through a petition to the ALJ for rehearing." *Id.* at 2. The Board further noted that "[o]nly after an order on the petition for rehearing is issued is the matter appealable to the Board." *Id.* *See also Estate of Owen Snez*, 40 IBIA 96 (2004) (referring appeal from an ALJ's decision issued after de novo review to the ALJ for consideration as a petition for rehearing).

In *Estate of Limpy*, we analyzed the issue under a previous version of the Department's probate regulations, but we noted that the former and current regulations were not materially different in deciding whether the Board had jurisdiction. *See Estate of Limpy*, 50 IBIA at 2 n.2. The revised probate regulations retained procedures for informal resolution of certain cash-only Indian trust estates through summary probate proceedings, and retained a right of de novo review by an ALJ or IPJ. Although the language was modified in some respects,³ the revised regulations do not provide for a right of direct appeal to the Board from a decision on de novo review, nor do any of the other revisions lead to a different result than the result we reached in *Estate of Limpy*.

³ *See, e.g.*, 71 Fed. Reg. 45174, 45190 (Aug. 8, 2006) (describing the proposed regulations that would replace 43 C.F.R. § 4.215 and noting that the section describing "What happens after I file a request for de novo review?" will be changed only to reflect the "plain language"); 76 Fed. Reg. at 7503 (explaining that certain regulations were renumbered because a new section was added).

Former § 4.215 expressly provided that when a party requested de novo review of an informal probate proceeding, the ALJ must issue a decision “in accordance with § 4.240 [(2008)].” 43 C.F.R. § 4.215(f) (2008). Former § 4.240 applied to decisions in formal probate proceedings, and as we explained in *Estate of Limpy*, “the first level of review from a decision issued under [§] 4.240 is through a petition for rehearing.” *Estate of Limpy*, 50 IBIA at 3.

Current § 30.206(b) provides that when a party requests de novo review, “[t]he judge will review the merits of the case, conduct a hearing as necessary or appropriate under the regulations in this part, and issue a new decision under this part.” Unlike the former regulations, § 30.206(b) does not refer to a specific section, such as former § 4.240, under which the ALJ (or IPJ) issues a decision after conducting a de novo review. Instead, § 30.206(b) refers more generally to a decision “under this part,” which could include any applicable provisions in part 30. But the subpart that governs summary probate proceedings, and which provides for a right to de novo review, contains no other provisions that govern the issuance of a decision after de novo review. *See* 43 C.F.R. §§ 30.200 - 30.207 (subpart I). Thus, we construe the reference to a “new decision under this part” to refer to a decision issued by an ALJ or IPJ under the procedures in part 30 that govern formal probate proceedings, i.e., subpart J, because the regulations contain no other provisions that could be construed as applying to the issuance of a decision on de novo review. And an initial probate decision issued under subpart J is subject to a petition for rehearing. *See id.* § 30.238, as redesignated and amended, 76 Fed. Reg. at 7508; *see also Estate of Owen Snez*, 40 IBIA at 97. Thus, when a request is made for de novo review, the decision that the ALJ or IPJ issues after conducting a de novo review is in the same procedural posture as a decision issued by an ALJ or IPJ in a formal probate proceeding, even though de novo review does not necessarily require a hearing.⁴ “In both cases, an aggrieved party must first seek rehearing before the ALJ, before being permitted to appeal to the Board.” *Estate of Owen Snez*, 40 IBIA at 97.

Because the Board lacks jurisdiction over an appeal from the ALJ’s decision on de novo review, we must dismiss the appeal. And because the ALJ’s decision on de novo review should have advised Appellant that review must first be sought through a petition for rehearing filed with the ALJ, we must remand the case to the Probate Hearings Division for further proceedings.

⁴ A request for de novo review of a summary probate proceeding does not automatically trigger a full-scale formal probate proceeding; instead, the ALJ or IPJ is only required to conduct a hearing “as necessary or appropriate.” *See* 43 C.F.R. § 30.206(b).

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 docketed but dismisses this appeal as premature, and remands the matter to the Probate Hearings Division, for consideration of Appellant's submission as a petition for rehearing.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge