



INTERIOR BOARD OF INDIAN APPEALS

Estate of Verna Mae Pepion Hill Hamilton

45 IBIA 58 (06/14/2007)



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 VERNA MAE PEPION)	Order Affirming Decision on Rehearing
HILL HAMILTON)	and Modifying Original Decision
)	
)	
)	Docket No. IBIA 05-46
)	
)	June 14, 2007

Appellant Sharon Hamilton appeals from an Order Affirming Decision After Rehearing issued by Administrative Law Judge Robert G. Holt (ALJ) on January 5, 2006, in the Estate of Verna Mae Pepion Hill Hamilton (Decedent), deceased Blackfeet Indian, Probate No. RM-201-0299. The order affirmed a June 21, 2004, decision entered in the probate proceedings by the ALJ, in which the ALJ (1) declined to approve Decedent's will because it had not been proven and because it did not purport to devise trust or restricted real property and (2) distributed Decedent's interest in trust property located on the Blackfeet Reservation in equal shares to Decedent's six children: Appellant; Arthur E. Hamilton III (Arthur); Mary Kathleen Hamilton (Mary); Michael Hill (Michael); Susan Plunkett (Susan); and Georgianna Hill Tiger Dunbar (Georgianna). Appellant sought rehearing to challenge the ALJ's decision declining to approve the will and to assert a claim for compensation against Decedent's estate.

We affirm the ALJ's order because Appellant has not met her burden of showing error in the ALJ's decision on rehearing. We also exercise our authority under 43 C.F.R. § 4.318 to correct a manifest error and modify the ALJ's June 21, 2004, decision to distribute funds on deposit in Decedent's Individual Indian Money (IIM) account at the time of Decedent's death and in accordance with the laws of intestate succession of the State of Maryland, where Decedent resided at the time of her death.

Background

Decedent died on October 23, 2001, at Baltimore, Maryland. At the time of her death, Decedent owned an interest in trust or restricted property located on the Blackfeet Reservation in Montana, and \$14.95 was on deposit in her IIM Account.

Decedent executed a will on May 18, 1994. Relevant provisions of the will devised \$3,000 to Michael and “[a]ll of [Decedent’s] furniture, furnishings, household effects, silverware, pictures, rugs, jewelry and all other physical personal property of every kind, including any automobiles . . . , together with all insurance policies and proceeds relating to such property . . . to [Arthur, Mary, and Appellant].” Will, Second & Third Clauses, respectively. The fourth clause of the will provided that, “[f]or reasons known to them, [Decedent] make[s] no provisions . . . for [her] daughters, SUSAN . . . and GEORGIANA” (Emphasis in original.) The will appointed Arthur as Decedent’s “personal representative” and authorized him to “sell any property, real or personal, belonging to [her] estate and not specifically herein devised or bequeathed, for the purpose of settlement of [her] estate, or for any other purpose necessary to carry out the provisions of this Will.” Will, Sixth Clause. The will did not contain a specific residuary clause and it did not make specific mention of the funds in Decedent’s IIM account or Decedent’s interests in property in Montana. Two witnesses — Patricia A. Kleiderlein and J. Joseph Kleiderlein — signed the will. They both signed next to the following statement on the last page of the will: “SIGNED, SEALED, PUBLISHED AND DECLARED, as and for [her] Last Will and Testament, by the above-named Testatrix, VERNA MAE HAMILTON, in the presence of us, who at her request, in her presence, and in the presence of each other hereunto subscribe our names as witnesses.” (Emphasis in original.) The will was not accompanied by any affidavits.

On February 25, 2004, BIA forwarded Decedent’s probate file, which included the will and a facsimile copy of Decedent’s death certificate,¹ to the Office of Hearings and Appeals (OHA) for proceedings to probate Decedent’s trust assets. The ALJ gave notice of and scheduled a hearing on May 20, 2004, in Browning, Montana, to probate the trust estate. No one attended the hearing.²

On June 21, 2004, the ALJ issued his decision in the probate of Decedent’s estate. The ALJ found that Decedent died possessed of interests in trust or restricted property on the Blackfeet Reservation in the State of Montana, but the decision did not mention the funds on deposit in Decedent’s IIM account. The ALJ determined that the will was not self-proved, and was not proved by written affidavits or by oral testimony of the subscribing

¹ The facsimile itself showed a transmission date of February 19, 2004.

² Decedent’s six surviving children apparently resided out-of-state at the time of the hearing: one each in Vermont, Pennsylvania, Colorado, and Arizona, and two in Maryland.

witnesses to the will.³ The ALJ declined to approve the will. The ALJ also determined that the will purported to devise only personal property and did not either specifically or in a residuary clause purport to devise interests in real property. The ALJ therefore concluded that Decedent did not intend the will to devise trust land and determined that Decedent's trust real property should be distributed in accordance with Montana laws on intestate succession. He then concluded that, under Montana law, Decedent's heirs were her six surviving children, including Appellant, and distributed Decedent's estate to her six children in equal shares. The ALJ's decision did not address the funds in Decedent's IIM account.

On July 30, 2004, Appellant filed a petition for rehearing with the ALJ. Appellant argued that the ALJ erred in interpreting Decedent's will so as to only devise personal property. Appellant asserted that the will specifically authorized Arthur to sell real and personal property, and therefore, the will was intended to apply to both real and personal property. Appellant also asserted that Decedent did not intend for Susan and Georgianna to inherit any of Decedent's trust property because she stated in her will that she was making "no . . . provisions in her Will for them." Appellant's Petition for Rehearing at 1.

Appellant also argued that she had been Decedent's primary caregiver for 13 years and that she had expected and was entitled to compensation for her services. She asserted that Decedent had told her that "she had land in Montana and that 1/3 of this land was [Appellant's]." *Id.* at 2. Appellant attached letters from Joseph Lucas, William M. Burns, and Arthur, in support of her claim for compensation. Both Lucas and Burns asserted that they had known Appellant and Decedent for many years and that Appellant had taken care of Decedent. They also asserted that Decedent had stated on several occasions that Appellant would receive one-third of Decedent's interest in land in Montana as compensation for taking care of Decedent and because Appellant was a "direct beneficiary" of Decedent. Letter from Lucas to ALJ, July 28, 2004; Letter from Burns to ALJ, July 27, 2004. Arthur identified himself as the personal representative of Decedent's estate and stated that, in return for taking care of Decedent for 13 years, Appellant expected to receive

³ A "self-proved will" is one that avoids the formalities of proving a will by including the affidavits of attesting witnesses in a form prescribed by regulation or statute. *See* 43 C.F.R. § 4.233(a); *see also* Black's Law Dictionary 1630 (8th ed. 2004). A will that is not self-proved must be authenticated as, or "proved" to be, the final will and testament of the decedent through the testimony, either by affidavit or by oral testimony at the probate hearing, of the subscribing witnesses. *See Estate of Larry Michael Oskolkoff*, 37 IBIA 291, 298-99 (2002).

compensation in the form of a one-third interest in Decedent's trust or restricted property in Montana.⁴

Arthur also filed a separate petition for rehearing with the ALJ. Arthur asserted that Decedent's will clearly stated her intention to devise her trust property to him, to Mary, and to Appellant.

By letter dated August 3, 2004, Patricia A. Kleiderlein, one of the witnesses to Decedent's will, advised the ALJ that, before Decedent signed her will, the Kleiderleins had read the will to Decedent and Decedent said it was "exactly what she wanted." Letter from Kleiderlein to ALJ, Aug. 3, 2004, at 2. In a separate statement enclosed with her letter, Kleiderlein stated that Decedent understood the contents of her will and signed it willingly. Kleiderlein further stated that it was Decedent's intent to leave her entire estate, including real and personal property, to Arthur, Mary, and Appellant.

On August 25, 2004, the ALJ issued an order scheduling a second hearing on December 10, 2004, in Browning, Montana, on the petitions for rehearing filed by Appellant and by Arthur. The order also allowed parties to submit briefs in response to the petitions.⁵ No one attended the December 10, 2004, hearing.

On January 5, 2005, the ALJ issued an Order Affirming Decision After Rehearing. The ALJ first noted that Appellant's and Arthur's petitions were not filed under oath, as is required by 43 C.F.R. § 4.241(a), and therefore could be dismissed on that ground. The

⁴ Appellant also separately submitted a letter to the ALJ from Decedent's doctor, Colleen Christmas, MD, dated August 19, 1997, stating that Appellant was Decedent's primary caregiver.

⁵ On November 29, 2004, the ALJ received a response brief from Susan and Georgianna, through counsel. Susan and Georgianna argued that the will was not self-proved and that the will only applied to personal property and not trust real property. They also argued that Decedent's claim for compensation was untimely under 43 C.F.R. § 4.250 and that Appellant had not established by clear and convincing evidence that Appellant's services were given on a promise of compensation and that compensation was expected. Included with the response brief were letters to the ALJ from Susan, Georgianna, and Michael, summarizing their relationship with their mother and asserting that Decedent was ill and frail at the time she executed the will. Also attached to the response brief were two letters from two other individuals describing Susan's and Georgianna's relationship with Decedent.

ALJ then determined that, because Decedent had died on October 23, 2001, an interim version of 43 C.F.R. § 4.250, promulgated on June 18, 2001, and made effective immediately, applied to Appellant's claim for compensation. *See* Interim Rule with Request for Comments, 66 Fed. Reg. 32,884 (June 18, 2001), codified at 43 C.F.R. § 4.250 (2001). The ALJ concluded that Appellant's claim for compensation was untimely under subsection 4.250(a), because it had not been filed within 60 days from the date BIA received verification of Decedent's death. The ALJ noted that the record submitted by BIA contained a death certificate which was received by facsimile transmission on February 19, 2004. The ALJ determined that the faxed copy of the death certificate was sufficient proof of death to satisfy 25 C.F.R. § 15.101(b). The ALJ determined that Appellant had not filed her petition for rehearing until July 30, 2004, which was more than 60 days after BIA had notice of Decedent's death and therefore Appellant's claim for compensation was untimely.⁶

The ALJ again concluded that, pursuant to 43 C.F.R. § 4.233, Appellant's will could not be approved. The ALJ observed that the will was not self-proved under 43 C.F.R. § 4.233(a) because affidavits of the testator and the attesting witnesses were not attached to the will. The ALJ also concluded that the will could not be approved under 43 C.F.R. § 4.233(c) because no one appeared at the hearings to prove the testamentary capacity of Decedent or to prove execution of the will through proof of Decedent's handwriting. The ALJ noted that although Kleiderlein had stated that Decedent had been read the will and understood its contents, Kleiderlein's statements "provide few facts from which a conclusion about Decedent's competency can be made." Order Affirming Decision After Rehearing at 7. He noted that Michael and Susan had stated that Appellant was ill and suffered from dementia when the will was executed. The ALJ concluded that it was Appellant's and Arthur's initial burden to prove the testamentary capacity of Decedent, and

⁶ The ALJ also determined that, even if Appellant's claim had been timely filed, Appellant's claim must still be denied. The ALJ noted that, under 43 C.F.R. § 4.250(d), a claim for compensation for caregiving services must be supported by clear and convincing evidence that the care was given on a promise of compensation and that compensation was expected. The ALJ explained that the evidence of Decedent's statements to Appellant about Decedent's care were "not well-substantiated[, and t]he statements in the letters are made in the form of conclusions." Order Affirming Decision After Rehearing at 4. The ALJ noted that there was "no clear statement that [Appellant] expected compensation[, which] is necessary to distinguish the care that is given for compensation from the care that a child may give to a parent out of love or affection." *Id.* The ALJ concluded that Appellant had failed to prove that Decedent promised to give Appellant compensation or that Appellant expected compensation, and denied Appellant's claim.

that they had not offered sufficient proof that Decedent possessed testamentary capacity at the time the will was signed.

Finally, the ALJ reasoned that, even if Decedent's will were adequately proven, it only devised Decedent's personal property, and thus did not apply to the proceedings to probate Decedent's Indian trust land. The ALJ determined that because the will was not ambiguous as to whether it applied to real property, he could not consider the extrinsic evidence offered by Appellant to show Decedent's intent. The ALJ noted that the clause devising "physical personal property" was by its terms limited to personal property. The ALJ also determined that the clause extending authority to the personal representative to "sell any property, real or personal," did not add ambiguity because "[o]nly the Secretary of the Interior, acting through [BIA] has the power to sell Indian trust or restricted land." *Id.* at 8. Because the will only applied to physical personal property, the ALJ concluded the provision excluding Susan and Georgianna did not affect their right to inherit an interest in Indian trust or restricted land. Therefore, the ALJ affirmed his original decision.

The ALJ did not mention the funds in Decedent's IIM account in the Order Affirming Decision Upon Rehearing, nor did he make a determination, assuming the will had been adequately proven, as to whether Decedent's will would have applied to the funds in Decedent's IIM account.

Appellant appealed the ALJ's order to the Board of Indian Appeals (Board) and included her arguments in her notice of appeal. The Board did not receive any briefs.

Discussion

A. Introduction

An appellant bears the burden of showing that an order on rehearing was in error. *See Estate of Samuel R. Boyd*, 43 IBIA 11, 15 (2006), and cases cited therein. The Board's review of probate decisions is governed by 43 C.F.R. § 4.318 (2005), which provides that

[a]n appeal will be limited to those issues that were before the administrative law judge or Indian probate judge upon the petition for rehearing * * *. However, * * * the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

"Manifest injustice" or "manifest error" arise when the injustice or the error is obvious. *Estate of Anthony "Tony" Henry Ross*, 44 IBIA 113, 119 (2007); *cf. Estate of Glenn Begay*,

16 IBIA 115, 118 (1988) (the Board has authority “in extraordinary cases” to correct manifest error).

Appellant argues that the ALJ erred in (1) rejecting her claim for compensation, (2) determining that Decedent’s will was not valid, and (3) concluding that the will did not devise trust real property. Appellant also argues that Decedent disinherited Susan and Georgianna in her will and it would be against her wishes to let property pass to them. We conclude that the ALJ properly rejected Appellant’s claim for compensation because it was untimely under 43 C.F.R. § 4.250(a) (2001). We also conclude that the ALJ correctly determined that Decedent’s will does not apply to Decedent’s interest in trust or restricted real property in the State of Montana. We reject Appellant’s argument that Susan and Georgianna are precluded, by the terms of Decedent’s will, from inheriting any part of her estate. Based on the record presently before us, we conclude that the terms of the will would not affect the disposition of the appeal brought by Appellant. Therefore, we need not reach the issue of whether the ALJ correctly determined that the will was not proved.

Although the ALJ correctly decided the issues raised by Appellant, he apparently overlooked the balance of funds in Decedent’s IIM account on the date of her death. Exercising our inherent authority to correct a manifest error where appropriate, 43 C.F.R. § 4.318, we find that the ALJ erred in not making a finding and conclusion for distributing the funds in Decedent’s IIM Account.⁷ We conclude that the terms of the will, with the possible exception of the \$3,000 bequest to Michael, do not apply to the funds in the IIM account. Because Michael never asserted a claim to any funds in Decedent’s trust estate nor did he appear at either probate hearing to prove the will, these funds must be distributed in accordance with the laws of intestate succession of the state of Decedent’s domicile.

We first address each argument raised by Appellant. We then address the disposition of the balance of \$14.95 that was on deposit in Decedent’s IIM account at the time of her death.

⁷ Although the ALJ’s order to distribute “the estate” according to the findings and conclusions therein, in which distribution of “the estate” was to go to Decedent’s children in equal shares, it is clear from the Decision that the ALJ only considered the trust real property and the law of intestacy applicable to that real property, which is the law of the state where the real property is located (Montana). The law that applies to the distribution of Decedent’s personal property, while the same in its outcome as the distribution of real property, is the law of the state where Decedent resided when she died (Maryland).

B. Appellant's Claim for Compensation

Appellant contends that her claim for compensation was timely and supported by clear and convincing evidence, and therefore the ALJ erred in rejecting her claim. We affirm the ALJ's conclusion that Appellant's claim was untimely under the applicable regulations and therefore must be denied. Because we dispose of Appellant's claim on timeliness grounds, we need not determine whether it was supported by clear and convincing evidence.

The ALJ determined that because Decedent died on October 23, 2001, 43 C.F.R. § 4.250(a), published at 66 Fed. Reg. 32,884, 32,889 (June 18, 2001), applied to the timeliness of Appellant's claim. That subsection requires that all claims against the estate of a deceased Indian held by creditors chargeable with notice of the decedent's death must be filed with the agency (BIA) within 60 days from the date BIA receives verification of the decedent's death. In addition, 25 C.F.R. § 15.303(c) (2001),⁸ part of BIA's probate regulations, imposes the same 60-day deadline for submission of claims against a deceased Indian's estate: If a creditor wishes to make a claim against the estate of a decedent, BIA must receive the claim within 60 days from the date BIA receives verification of the decedent's death to be included in the probate package that is transmitted to OHA.

The ALJ determined that BIA received verification of Decedent's death on February 19, 2004, based on the transmission date of a facsimile copy of the death certificate. The ALJ also determined that Appellant did not submit her claim until she filed her petition for rehearing on July 30, 2004. The ALJ concluded that because July 30, 2004, was more than 60 days after February 19, 2004, Appellant's claim was untimely.⁹

⁸ Subsection 15.303 now appears at 25 C.F.R. § 15.202.

⁹ We note that in December 2001, subsection 4.250(a) was amended to add a second filing period for creditors' claims: "Within 20 days from the date the creditor is chargeable with notice of the decedent's death." See 66 Fed. Reg. 67,652, 67,662 (Dec. 31, 2001), *codified at* 43 C.F.R. § 4.250(a) (ii) (2002). In *Estate of Bertha Mae Tabbytite*, 45 IBIA 10, 21 n.14 (2007), the Board held that, in accordance with the preamble of the regulation, amended section 4.250(a) applied to creditors of decedents who died after the publication of the rule on December 31, 2001. See 66 Fed. Reg. at 67,652. Such creditors could submit their claims within 60 days from the date BIA received verification of a decedent's death or within 20 days from the date the creditor learned of decedent's death, "whichever of [the two] dates is later." 43 C.F.R. § 4.250(a) (ii).

Appellant contends that, because the ALJ concluded that BIA was notified of Decedent's death by a facsimile copy of Decedent's death certificate, "according to 25 C.F.R. Section 15.101, BIA has not been actually notified of decedent's death." Notice of Appeal at 1. Appellant appears to be arguing that, because BIA did not receive a certified copy of Decedent's death certificate nor an affidavit confirming her death, *see* 25 C.F.R. § 15.101, the 60-day period for filing a claim against Decedent's estate never began to run. Appellant states, "[a]t the time of the filing of this Appeal, Appellant is contemporaneously notifying BIA in accordance with 25 C.F.R. Section 15.101 by an appropriate means and will certify to this court when BIA is properly notified." Notice of Appeal at 1.¹⁰

Appellant misreads subsections 15.303(c) and 15.101. Under subsection 15.303(c), the time frame for submitting claims is triggered by BIA's receipt of "verification" of the death of an Indian under subsection 15.101. Regardless of whether 25 C.F.R. § 15.101 allows BIA to demand a certified copy of the death certificate from a person reporting a death, we do not read subsection 15.303(c) as granting a creditor the right to insist on any particular form of verification of death when it is undisputed that BIA has received documentation that it considered sufficient to constitute "verification" of death and sufficient to initiate the probate process. Appellant offers no evidence or argument that her mother's death was inaccurately reported or that the facsimile copy of the certified copy death certificate was fraudulent.¹¹ Appellant also does not argue that BIA erred in commencing the probate process when it received the facsimile copy of the certified copy of the death certificate. Accordingly, where there is no dispute that Decedent died and that a facsimile of a certified copy of a death certificate is accurate, we decline to disturb the ALJ's decision to accept the copy as sufficient verification of Decedent's death under 25 C.F.R. §§ 15.101 and 15.303(c).

The transmission date on the facsimile of the certified copy of the death certificate is February 19, 2004, and the Superintendent of the Blackfeet Agency, BIA, certified the probate package on February 25, 2004, for transmission to the ALJ. Therefore, we conclude that, at the latest, BIA received verification of Decedent's death on February 25,

¹⁰ Although not relevant to our decision, the Board has not received any communication from Appellant concerning any notification she may have made to BIA.

¹¹ Indeed, no challenge to the fact of Decedent's death or to the death certificate itself appears in any of the statements submitted to the ALJ by the interested parties and their witnesses. Therefore, it is undisputed that Decedent died on October 23, 2001, it is undisputed that the death certificate facsimile is accurate, and an original certified death certificate therefore would only confirm these undisputed facts.

2004.¹² Thus, under 25 C.F.R. § 15.303(c) (2001) and 43 C.F.R. § 4.250(a) (2001),¹³ the 60-day period for Appellant to file a claim against Decedent's estate began to run, at the latest, on February 25, 2004, and Appellant was required to submit her claim to BIA no later than April 26, 2004. Appellant's petition for rehearing was not filed until July 30, 2004, as evidenced by the postmark on the envelope bearing her petition. Because July 30, 2004, is more than 60 days after February 25, 2004, Appellant's claim was untimely under subsection 4.250(a) and subsection 15.303(c). We therefore affirm the ALJ's decision to deny Appellant's claim based on its untimely submission.¹⁴

C. Distribution of Decedent's Trust or Restricted Property

1. Summary

The ALJ declined to approve Decedent's will because it was not adequately proven and because it did not apply to Decedent's interests in trust real property located on the Blackfeet Reservation. Accordingly, he distributed Decedent's interest in trust or restricted real property on the Blackfeet Reservation in accordance with Montana law on intestate succession. First, we affirm the ALJ's decision without reaching the issue of whether the ALJ properly declined to approve the will because we conclude that its terms do not devise Decedent's real property interests. Second and pursuant to our inherent authority under

¹² It is evident that the death certificate was transmitted by facsimile on February 19, 2004, presumably to BIA but we cannot determine the identity of the recipient of the facsimile. What we do know is that BIA received the facsimile death certificate by February 25, 2004, when it was included in the probate package that was sent to the ALJ.

¹³ Apart from the December 2001 amendment to 43 C.F.R. § 4.250(a), discussed above, 25 C.F.R. §§ 15.101, 15.303(c) and 43 C.F.R. § 4.250(a) remained unchanged between June 2001 and 2004.

¹⁴ Even assuming Appellant's claim was timely filed, we agree with the ALJ that it should still be denied. Under 43 C.F.R. § 4.250(d), claims for care may not be allowed except upon clear and convincing evidence that the care was given on a promise of compensation and that compensation was expected. The burden is on the creditor to prove the claim. *Estate of Phillip Quaempts*, 41 IBIA 252, 257 (2005). Although Appellant provides a number of witness statements stating that Decedent wanted Appellant to receive a third of her trust land, the record is devoid of evidence of any specific agreement between Decedent and Appellant concerning the promise of land in return for specific caregiving services.

43 C.F.R. § 4.318, we order the distribution of Decedent's IIM account in accordance with Maryland law, with interest accrued. Finally, we determine that Georgianna and Susan are not precluded by Decedent's will from sharing in the intestate distribution of Decedent's trust assets.

2. Construction of Indian Wills

Consistent with 25 U.S.C. § 373, the Board has held that the execution and interpretation of a will disposing of trust or restricted property are questions of Federal, not state law. *See Estate of Florence Night Chase*, 38 IBIA 188, 192 (2002), and cases cited therein. The principal consideration in construing a will is to ascertain the intention of the testator, if that intention can be reasonably ascertained. *Estate of Margaret Fisher Leader Molina*, 27 IBIA 254, 259 (1995) (citing *Estate of Paul Wilford Hail*, 13 IBIA 140, 143 (1985)); *Estate of Teresa Mitchell*, 25 IBIA 88, 94 (1993); *see also* 95 C.J.S. *Wills* § 590 (1957). The starting point for discerning Decedent's intent is the language of the will. *See* 80 Am Jur. 2d *Wills* § 1011 (2002); 95 C.J.S. *Wills* § 591; *see also Hall-Houston Oil Co. v. Acting Western Regional Director*, 42 IBIA 227, 232 (2006). The intention of a testator should be gathered from the whole will, and from a consideration of all the provisions of the instrument, taken together. 80 Am. Jur. 2d *Wills* § 1013. The words used in a will are to be interpreted according to their ordinary and natural meaning. *Id.* § 1018; 95 C.J.S. *Wills* § 599. Extrinsic evidence can be considered to determine the meaning of language used in a document only when that language is ambiguous. *Hall-Houston Oil Co.*, 42 IBIA at 232; *see also* 80 Am. Jur. 2d *Wills* § 997; 95 C.J.S. *Wills* § 636a.

Where a will has been executed, there exists a presumption that the testator intends to dispose of her entire estate and not die intestate as to any part of her estate. 80 Am. Jur. 2d *Wills* § 1037. The presumption should not be applied to override the clear language of the will and if it appears that a will cannot reasonably be validated or that partial intestacy cannot reasonably be avoided, the presumption is not applied. *See* 95 C.J.S. *Wills* § 615a. In particular, "where the testator fails to dispose of all of his property in the specific devises and bequests in his will, and there is no residuary clause, he must be held to have died intestate as to such property." *Id.* § 615c.

3. Decedent's Trust Real Property

We assume without deciding that Decedent's will is or could be proved, and first address whether the will applies to trust real property. We conclude that the will fails to provide for the disposition of any real property interests owned by Decedent and, therefore,

affirm the ALJ's decision that this property passes by intestacy pursuant to the law of the state where the property is located, which is Montana.

Only two provisions in Decedent's will purport to devise property, and neither specifically refers to real property. The second clause of the will devises the sum of \$3,000 to Michael, if he survives Decedent. The third clause devises

[a]ll . . . furniture, furnishings, household effects, silverware, pictures, rugs, jewelry and all other physical personal property of every kind, including any automobiles. . . , together with all insurance policies and proceeds relating to such property . . . to [Arthur, Mary, and Appellant].

We read this clause to devise only physical personal property plus any insurance policies and proceeds. "Personal property," when used in a will, excludes real estate unless a different meaning is apparent from context. 96 C.J.S. *Wills* § 759e (1957); *see also* Black's Law Dictionary 1254. There is nothing in the third clause that suggests that the Decedent intended for this clause to devise any real property. We conclude that this clause is unambiguous and that it does not devise any real property nor can it reasonably be construed to devise real property.

The sixth clause of the will supports our understanding of the third clause. In the sixth clause, Decedent authorized her Personal Representative to "sell any property, real or personal, belonging to [her] estate and not specifically herein devised or bequeathed." The sixth clause therefore demonstrates that Appellant was aware of the distinction between real and personal property, and contemplated that there may be both real and personal property for which no bequest was made.¹⁵

For these reasons, we conclude that Decedent's will, when considered as a whole, does not devise trust real property, and therefore affirm the ALJ's denial of rehearing on that ground.

¹⁵ We reject Appellant's argument that the sixth clause of Decedent's will authorizes Arthur to dispose of Decedent's real property and, therefore, constitutes a residual clause. First, Appellant has not shown or asserted that Arthur authorized her to represent him in this appeal nor does she purport to represent Arthur. Therefore she is not authorized to raise claims on behalf of Arthur in this appeal. *See Clifford Murray v. Phoenix Area Director*, 26 IBIA 291 (1994). Second, the will does not provide for the distribution of the proceeds from any sale of real property interests, even assuming Arthur were authorized to sell the trust real property interests.

4. Decedent's IIM Account

We next turn to Decedent's IIM account, the disposition of which was overlooked by the ALJ in his decision. We first determine whether the will has any applicability to the funds on deposit in Decedent's IIM account. None of the will's provisions specifically devise the IIM funds. The second clause of the will devises a specific sum of money, \$3,000, to Michael and does not identify the source(s) from which the cash bequest is to be funded. Michael, however, did not attempt to obtain fulfillment of the \$3,000 bequest in the course of the proceedings to probate his mother's trust assets: He did not seek to prove his mother's will nor did he contest the ALJ's conclusion that the will was not proved. Because it appears that Michael received notice of the probate proceedings in this matter,¹⁶ he would now lack standing to assert any claim, if in fact he had not otherwise received the full amount of the bequest.

The third clause, quoted above at 69, also does not apply to the funds in the IIM account. As previously explained, "personal property" generally refers to all property belonging to an individual that is not real property. *See* Black's Law Dictionary 1254 ("Any movable or intangible thing that is subject to ownership and not classified as real property"). Therefore, "personal property" includes both tangible matter (furniture, pictures, automobiles) as well as intangibles (money, stocks, insurance). However, Decedent qualified the bequest by devising only her "physical" personal property. "Physical" is commonly understood to be corporeal, substantive, material, and tangible. *See* Webster's II New Riverside University Dictionary, 887 (1984). An IIM account, on the other hand, is best characterized as "intangible" or "nonphysical" personal property.¹⁷ *Estate of Boyd*, 43 IBIA at 21. Consistent with this definition, Decedent described the items she was devising as "[a]ll . . . furniture, furnishings, household effects, silverware, pictures, rugs, jewelry . . . and automobiles." These items are tangible items.

Given the foregoing, we conclude that Decedent intended the third clause of her will to be a residuary clause but only as to her tangible property and not as to any intangible

¹⁶ Michael submitted a written opposition to the petitions for rehearing brought by Appellant and Arthur.

¹⁷ Intangible property is "[p]roperty that lacks a physical existence." Black's Law Dictionary 1253. *Cf. id.* at 1254 (defining "tangible property" as "[p]roperty that has physical form and characteristics").

property.¹⁸ Our conclusion is buttressed by the additional phrase in the third clause, “*together with* all insurance policies and proceeds relating to such property” (emphasis added). The use of the phrase “together with” instead of, e.g., “including” convinces us that the Decedent fully intended to dispose of all of her tangible property and that Decedent recognized that insurance policies and proceeds therefrom were of a different character than her tangible assets. What is unclear — not because of any ambiguity in the will but because of its silence — is Decedent’s intent with respect to her residual intangible property. Therefore and based on the record before us, we conclude that the will does not apply to the funds in Decedent’s IIM account.

Because Michael did not assert any rights to Decedent’s estate or attempt to prove her will and because the remaining provisions in Decedent’s will do not apply to the funds on deposit in her IIM account at the time of her death, those funds, plus any accumulated interest, must be distributed in accordance with the laws of intestate succession of the state where Decedent was domiciled. *Estate of Boyd*, 43 IBIA at 21. Evidence in the record shows that Decedent was domiciled in Maryland. *See* Decedent’s Death Certificate, Oct. 23, 2001 (identifying the location of Decedent’s death as Baltimore, Maryland); Declaration by Georgianna, Nov. 23, 2004, at 1 (stating that Decedent lived at an address in Baltimore County, Maryland, until her death); Letter from Decedent’s Doctor to Whom It May Concern, Aug. 19, 1997 (identifying Decedent as her patient, and on letterhead from a hospital in Baltimore, Maryland); Decedent’s Will, May 18, 1994 (Decedent identified herself as resident of Baltimore County, Maryland). Accordingly, Maryland laws on intestate succession govern the distribution of Decedent’s IIM account. Under Maryland law in effect at the time of Decedent’s death, Decedent’s heirs were her six surviving children. Md. Code Ann., Estates and Trusts § 3-103 (2001). Accordingly, we conclude that the funds in Decedent’s IIM account at the time of her death, plus any interest thereon, should be distributed in equal shares to Decedent’s six surviving children.¹⁹

¹⁸ Also known as the doctrine of *ejusdem generis*, this canon of construction in contracts and wills provides that where a general word or phrase is used to describe or categorize a list of specifics that precedes or follows the general word or phrase, the general word or phrase will be interpreted only to include similar items to those listed. *See* Black’s Law Dictionary 556; 80 Am. Jur. 2d *Wills* § 1007.

¹⁹ Decedent’s estate is fixed at the time of death, and therefore income that accrued after Decedent’s death from Decedent’s trust property was never the personal property of Decedent and instead attached to the allotments themselves. *Boyd*, 43 IBIA at 23. Therefore, any income that accrued after Decedent’s death from Decedent’s trust property
(continued...)

5. Rights of Susan and Georgianna to Inherit from Decedent

Appellant contends that Decedent intended to “disinherit” Georgianna and Susan as evidenced by the provision specifically excluding them in the will. Notice of Appeal at 2. She argues that it would be “unjust, inequitable and against the decedent’s express desire and will to leave any property, regardless of the nature of the property to these children.” *Id.* We view Appellant’s argument from two perspectives: (1) Whether, assuming the will is not valid, effect should nevertheless be given to Decedent’s wishes with respect to any inheritance by Georgianna and Susan and (2) whether, even if the will were proved, Susan and Georgianna are precluded from sharing in the intestate distribution of Decedent’s Indian trust assets. We conclude, under both perspectives, that Georgianna and Susan may share in Decedent’s Indian trust estate.

Where a will has not been proved or is otherwise invalid, effect may not be given to any of its provisions. It is as if the will never existed. *See* 80 Am. Jur. 2d *Wills* § 903 (“The laws of [intestacy] apply where a will is set aside, not because the will is vacated, but because there never was a will”). Therefore, where a will is found to be unproved or invalid, no credence or effect may be given to any provisions or statements therein, including any statement purporting to disinherit legal heirs. The will simply does not exist.

On the other hand, if we assume that Decedent’s will were proved, our conclusion would not change. First, the law presumes that a testator does not intend to disinherit his or her legal heirs unless expressed in clear language. 95 C.J.S. *Wills* § 616; 80 Am. Jur. 2d *Wills* § 1038. Second, where a will (1) fails to devise all property in a decedent’s estate, (2) fails to contain a residuary clause, and (3) cannot reasonably be construed to devise such property, a “disinherited heir may take a share of the estate through the operation of an applicable intestacy statute.” 80 Am. Jur. 2d *Wills* § 1538; *see also* 96 C.J.S. *Wills* § 1225. Thus, a will that “exclud[es] the heirs . . . from all share in the estate is inoperative unless some valid disposition is made of the property.” 96 C.J.S. *Wills* § 718.

As set forth above, we conclude that the will does not preclude Susan and Georgianna from inheriting by intestacy an equal share in Decedent’s estate as Decedent’s legal heirs along with Arthur, Michael, Mary, and Appellant. If the will is unproved, it is as if the will never existed and we cannot give any effect to any of its provisions, including Decedent’s statement concerning her decision not to make any provision for Susan and

¹⁹(...continued)

passes to the heirs of Decedent’s real property interests, in this case, the same individuals who inherit funds from Decedent’s IIM account.

