



INTERIOR BOARD OF INDIAN APPEALS

Monica Begay v. Navajo Regional Director, Bureau of Indian Affairs

62 IBIA 346 (03/31/2016)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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MONICA BEGAY,)	Order Affirming Decision
Appellant,)	
)	
v.)	Docket No. IBIA 14-100
)	
NAVAJO REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	March 31, 2016

Monica Begay (Appellant) appealed to the Board of Indian Appeals (Board) from an April 3, 2014, decision (Decision) of the Navajo Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to restrict, through supervision, the Individual Indian Money (IIM) account of Appellant’s uncle, Herbert Morgan, Jr. (Morgan), an adult Navajo Indian under a legal disability. Appellant opposes the restriction, arguing that, as the court-appointed legal guardian of Morgan, she has demonstrated her fitness to oversee the account in Morgan’s best interest. While Appellant also asserts that she had agreed to the restriction based on her understanding that there would be “minimal oversight” of the account by BIA, and that this has not been the case, on appeal she opposes any supervision of the account, in effect seeking the disbursement of Morgan’s entire IIM account to her, as his guardian.

We affirm the Regional Director’s decision to restrict Morgan’s IIM account through supervision. Appellant does not meet her burden on appeal to demonstrate that the Regional Director did not properly exercise her discretion. And we will not set aside the Regional Director’s decision based solely on Appellant’s disagreement with the restriction.

Regulatory Framework

BIA maintains interest-bearing trust accounts—IIM accounts—for funds held for the benefit of individual Indians. Regulations governing IIM accounts are found in 25 C.F.R. Part 115. IIM accounts may be unrestricted (i.e., the account holder has unlimited access

to his/her funds), or they may be restricted through an administrative restriction, supervision, or encumbrance.¹ See 25 C.F.R. § 115.701 (table).

Section 115.102 concerns disbursements from an IIM account of an adult Indian who is non-compos mentis² or under other legal disability.³ It provides:

The funds of an adult who is non[-]compos mentis or under other legal disability may be disbursed for his benefit for such purposes deemed to be for his best interest and welfare, or the funds may be disbursed to a legal guardian or curator under such conditions as the Secretary [of the Interior (Secretary)] or his authorized representative may prescribe.

25 C.F.R. § 115.102 (emphases added). The Board has held that BIA has discretion under this provision in determining whether to disburse funds from the IIM account of a legally incompetent adult Indian or of an adult Indian found to be in need of assistance with his/her financial affairs. *Jackson County, Oregon v. Phoenix Area Director*, 31 IBIA 126, 134 (1997) (construing 25 C.F.R. § 115.5, redesignated without change as § 115.102, see 66 Fed. Reg. 7068, 7097 (Jan. 22, 2001)). The Board has also held that, although a “best interest” standard is not expressed in the emphasized language above concerning disbursements to legal guardians, BIA neither abuses its discretion nor violates the law by considering an account holder’s best interest in deciding whether to disburse his/her entire IIM account to a court-appointed guardian. See *Jackson County*, 31 IBIA at 138. Whether expressed or not, BIA’s primary obligation as a fiduciary is to act in the best interest of the account holder. See *id.*

¹ Prior to the appointment of Appellant as Morgan’s legal guardian, Morgan’s account was apparently subject to an administrative restriction for lack of an address of record, referred to as “whereabouts unknown.”

² “Non-compos mentis” is defined as “a person who has been determined by a court of competent jurisdiction to be of unsound mind or incapable of managing his or her own affairs.” 25 C.F.R. § 115.002. “Court of competent jurisdiction” includes a tribal court with jurisdiction. *Id.*

³ “Legal disability” is defined as “the lack of legal capability to perform an act which includes the ability to manage or administer his or her financial affairs as determined by a court of competent jurisdiction or another federal agency” 25 C.F.R. § 115.002.

The regulations further provide that “[i]f under § 115.102 or § 115.104,⁴ the BIA has . . . decided to supervise [an] IIM account,” BIA is required to provide the account holder or guardian, as applicable, with notice and an opportunity to challenge the decision, pursuant to the hearing process in 25 C.F.R. Subpart E (§§ 115.600-.620).⁵ 25 C.F.R. § 115.600. Subpart E lists the four circumstances under which BIA is authorized to restrict an IIM account through supervision, three of which correspond to, and are subsumed under, § 115.102. *Compare id.* § 115.601 *with id.* § 115.102. Relevant to this appeal, they include if BIA “(1) [r]eceives an order from a court of competent jurisdiction that [the account holder is] non-compos mentis; or (2) [r]eceives an order or judgment from a court of competent jurisdiction that [the account holder is] an adult in need of assistance⁶ because [he/she is] incapable of managing or administering property, including [his/her] financial affairs.” *Id.* § 115.601(a)(1) & (2) (internal quotation marks omitted).⁷

The notice of a decision to supervise an account must explain that the IIM account will be restricted 5 days after the notice was sent by certified mail to the account holder or guardian, and provide “[t]he reason for the restriction.” *Id.* § 115.605(a)(2) & (4). The notice must also explain that the account holder or guardian may request a hearing,

⁴ Section 115.104 concerns, *inter alia*, disbursements from the IIM accounts of adults whom the Secretary finds to be in need of assistance in managing his/her affairs, even though such adult is *not* non-compos mentis or under other legal disability.

⁵ When BIA first amended the Part 115 regulations to require notice and a hearing on the decision to restrict an IIM account, *see* 25 C.F.R. § 115.10(a) (1986), the requirement was intended to “apply only to access limited under [§] 115.9,” which was later redesignated as § 115.104. 51 Fed. Reg. 2873, 2873 (preamble) (Jan. 22, 1986); 66 Fed. Reg. at 7075, 7097 (redesignation). The amendment was to “provide the due process procedure which in *Kennerly v. United States*, 721 F.2d 1252 (9th Cir. 1983), was found to be wanting in the existing regulations with respect to the payment of claims from [IIM] accounts as authorized by [§] 115.9.” 51 Fed. Reg. at 2873. In 2001, BIA amended the regulations concerning the so-called *Kennerly* process for restricting an IIM account, expressly requiring notice and a hearing for a decision to limit access under § 115.102, for an adult under a legal disability. *See* 66 Fed. Reg. at 7077 (preamble), 7101 (§ 115.600).

⁶ “Adult in need of assistance” is defined as “an individual who has been determined to be ‘incapable of managing or administering his or her property, including his or her financial affairs’ either (a) through a BIA administrative process . . . or (b) by an order or judgment of a court of competent jurisdiction.” 25 C.F.R. § 115.002.

⁷ The other two circumstances for supervising an IIM account are listed in 25 C.F.R. § 115.601(a)(3) and (a)(4), and provide for supervision based on Federal administrative determinations.

conducted by BIA, to challenge the decision.⁸ *Id.* § 115.605(a)(5)-(7). BIA will record the hearing “so that it will be available for review if the hearing process is appealed,” and the hearing record “must be preserved as a trust record.” *Id.* §§ 115.613-.614.

BIA’s final written decision “will include . . . [a] detailed justification for the supervision . . . of the IIM account, where applicable.” *Id.* § 115.616(b). If BIA’s decision is to supervise the account, it will consult with the account holder or guardian to develop a distribution (i.e., spending) plan, which will be valid for 1 year. *Id.* § 115.617.

Background

Appellant is a niece of Morgan, who is an adult Navajo living at a long-term care center in New Mexico. Decision, Apr. 3, 2014, at 1-2 (Administrative Record (AR) 2). On March 27, 2013, the Navajo Nation Family Court, District of Window Rock, Arizona (Tribal Court), granted a petition by Appellant for legal guardianship of Morgan. *In re Adult Guardianship of Herbert George Morgan, Jr.*, No. WR-FC-1001-12 (Mar. 27, 2013) (Adult Guardianship Decree) at 1 (hereinafter Tribal Court Order) (AR 4). The Tribal Court found that Morgan was diagnosed with a traumatic brain injury, hemi-paralysis, and a seizure disorder that left him “incapable of making meaningful decisions that affect his health and welfare.”⁹ *Id.* The Tribal Court also found that, based in part on a report from the Navajo Division of Social Services, Appellant was “capable of assuming . . . the duties of a guardian for [Morgan].” *Id.* at 1-2. The Tribal Court noted that Appellant had assisted in Morgan’s care since 2004, and was familiar with his condition and needs. *Id.* at 1. The Tribal Court authorized Appellant to “manage the personal, medical, financial and other such affairs of [Morgan].” *Id.* at 2.

Upon receipt of the Tribal Court Order, BIA conducted a social services assessment. *See* Social Services Assessment Form, Feb. 3, 2014 (AR 5). BIA’s Navajo Regional Social Worker (Social Worker) noted that Morgan was receiving retirement income, which was directed to his long-term care facility, and that there was a balance in his IIM account. *Id.* at 1. The Social Worker also noted that the Tribal Court had appointed Appellant as Morgan’s legal guardian, and she found that supervision by BIA was warranted because Morgan was not capable of managing his own financial affairs. *Id.* The Social Worker

⁸ A court order or judgment cannot be challenged in the *Kennerly* process; if a hearing is requested, and evidence of an appeal is presented, the hearing will be postponed until there is a final order from the court. 25 C.F.R. § 115.609.

⁹ Apparently, Morgan was previously appointed a legal guardian, who died in late 2011. Tribal Court Order at 1.

recommended that BIA supervise Morgan's IIM account "as a non-compos mentis adult," citing 25 C.F.R. § 115.601(a)(1). *Id.* at 2.

The Regional Director concurred with the recommendation. *Id.* at 2. On February 3, 2014, the Regional Director sent, to Appellant as Morgan's legal guardian, a notice of intent to supervise the account. Notice of Intent, Feb. 3, 2014, at 1 (AR 6). The notice stated that Morgan had been found to be non-compos mentis by a court of competent jurisdiction, that "[n]o funds may be withdrawn from [his] IIM account without consultation with Human Services and approval by the Regional Director," that a distribution plan would be prepared in consultation with Appellant, and that the account would be reviewed every 6 months "to see if continued supervision of the account is needed and to ensure that the funds spent from [the] IIM account were used for [Morgan's] benefit."¹⁰ *Id.* The notice included instructions for Appellant to request a hearing on behalf of Morgan. *Id.* at 2.

Appellant requested a hearing, which was conducted by the Regional Director on March 21, 2014. Letter from Appellant to BIA, Feb. 20, 2014 (AR 7); Hearing Transcript (Tr.), Mar. 21, 2014, at 1 (AR 11). At the outset, BIA explained the basis for its initial decision to supervise Morgan's IIM account. The Social Worker stated that the decision was based on 25 C.F.R. Part 115, the Tribal Court guardianship order, BIA's fiduciary trust responsibility, and "the fact that [Morgan] is not competent, and that he is in a nursing home." Hearing Tr. at 2-3. The Social Worker also stated that supervision was specifically authorized under § 115.601(a)(1), "because he's non[-]compos m[e]ntis according to the court order." *Id.* at 5. She disclaimed any reliance on § 115.601(a)(2) (court order or judgment that the account holder is an "adult in need of assistance"). *Id.*

Appellant initially objected to any BIA supervision of the IIM account, arguing that it was unnecessary because she had a previous history of caring for Morgan, and she had proven to the Tribal Court that she was fit to be Morgan's legal guardian for medical, financial, and other decisions. *Id.* at 7-10. She also protested that the supervisory process was unduly burdensome in light of her schedule as a resident physician and her trips to visit Morgan, and the funds remaining in his IIM account.¹¹ *Id.* at 10-12. Although the hearing transcript appears to be incomplete in this regard, it is undisputed, as discussed further *infra*, that Appellant ultimately acquiesced to the continued supervision of Morgan's account.

¹⁰ It is unclear whether BIA has conducted any such reviews, nor is a distribution plan contained in the administrative record.

¹¹ It is unclear from the record what the potential future deposits into the account may be. *See* Hearing Tr. at 12-13.

On April 3, 2014, the Regional Director issued her decision to continue supervision of Morgan's IIM account by BIA. Although the Decision attempts to summarize the hearing, it incorrectly states that the Social Worker identified the regulatory basis for BIA's initial decision to supervise Morgan's IIM account as § 115.601(a)(2), when as explained *supra*, a different basis for supervision was cited by the Social Worker. *See* Decision at 2 (unnumbered). The Regional Director relied instead on § 115.601(a)(2). *See id.* In reaching her decision, the Regional Director explained that "it is part of BIA's fiduciary trust responsibility to [e]nsure individuals in [Morgan's] capacity with trust assets such as an IIM account, are managed and protected for his benefit and welfare." *Id.*

The Regional Director further stated that,

[b]ased upon the information and guidance presented at the hearing by the Regional Social Worker, [Appellant] indicated her understanding of the purpose for the IIM account restriction and therefore[] verbally consented to the supervised account; allowing that such supervision is handled in a professional manner, imploring consistent guidance, ability to fax or email necessary documents and when appropriate mail delivery of sensitive documents.

Id. at 3 (unnumbered). The Regional Director also stated that her decision to continue supervision of the account was made "after careful review of relevant materials, regulations, testimony, and the legal guardian's verbal consent to the supervision of [Morgan's] IIM account." *Id.* The Regional Director closed by instructing that the Social Worker "will provide consistent guidance and support to [Appellant as the legal guardian], insuring that the process for any distribution of funds and the monitoring of the account is carried out . . . in the best interest of [Morgan]." *Id.*

Appellant appealed to the Board and included a statement of reasons with her notice of appeal. Appellant also attached several documents, including a report by the Navajo Division of Social Services and affidavits of consent from family members to Appellant's guardianship, which are not contained elsewhere in BIA's record,¹² but which the Regional Director referred to during the hearing.¹³ *See* Notice of Appeal, Apr. 21, 2014,

¹² The record includes a complete copy of the notice of appeal, pursuant to 43 C.F.R. § 4.335(b)(2).

¹³ BIA is reminded that it must preserve the hearing record and include that record in the administrative record that is submitted to the Board. *See* 25 C.F.R. § 115.614; 43 C.F.R. § 4.335(a).

Attachments (AR 3); Hearing Tr. at 14. The Regional Director filed an answer brief. The Board granted Appellant an extension to file a reply brief, but the Board received none.

Discussion

On appeal, Appellant argues that she has provided sufficient evidence that she is fit to oversee Morgan's IIM account in his best interest, without any supervision by BIA. *See* Statement of Reason for Appeal at 1-2 (unnumbered) (AR 3). In effect, Appellant seeks the disbursement of Morgan's entire IIM account to her, as his guardian.

Appellant also asserts, "As previously noted in the [Decision], I did come to an understanding that if I were to agree to supervision, that there would be minimal oversight in my case. However, . . . there was no such change in the oversight, which was not what I had agreed on beforehand." *Id.* Appellant does not support her assertion that BIA failed to conduct supervision in the manner to which she agreed with further explanation or evidence, for which reason we construe her assertion as simple disagreement with the Decision. And simple disagreement with or bare assertions concerning BIA's decisions are not enough to sustain an appellant's burden on appeal.¹⁴ *See, e.g., Hall v. Great Plains Regional Director*, 59 IBIA 136, 142 (2014) (citation omitted); *Preservation of Los Olivos v. Pacific Regional Director*, 58 IBIA 278, 306 (2014). Therefore, we summarily reject Appellant's assertion as a ground for vacating the Decision.

On appeal, the Regional Director likewise notes that Appellant "seeks sole supervision of [Morgan's] IIM account without BIA oversight." Answer Brief (Br.), Sept. 26, 2014, at 4. The Regional Director responds that the decision to continue supervision of the account is supported by Morgan's need for a legal guardian to make financial decisions on his behalf, the Part 115 regulations, and the Secretary's fiduciary trust responsibility. *See id.* at 2-4. In her brief as in the Decision, the Regional Director cites as authority for the restriction § 115.601(a)(2) (court order or judgment that the account holder is an "adult in need of assistance"). *Id.* at 2. For the following reasons, we affirm the Decision.

I. Regulatory Basis for the Decision

To the extent that the Regional Director's decision reaches a legal conclusion, the Board has authority to review that conclusion. *See Muscogee (Creek) Nation v. Muskogee Area Director*, 28 IBIA 24, 31 (1995). Although, after the notice of the initial decision to

¹⁴ Moreover, the Board lacks supervisory authority over BIA, for example, it cannot order BIA to communicate with Appellant in a "professional manner."

restrict Morgan's IIM account and the hearing, the Regional Director changed, without explanation, the specific circumstance on which BIA relies for continuing the restriction on Morgan's IIM account, from the circumstance listed in 25 C.F.R. § 115.601(a)(1) to the circumstance listed in § 115.601(a)(2), we can find no reason to disturb the Decision on that ground. Appellant did not raise the issue on appeal. And even had Appellant done so, we would reject the argument in this case. As we have explained, *see supra* at 348, both § 115.601(a)(1) and § 115.601(a)(2) correspond to, and are subsumed under, 25 C.F.R. § 115.102, which is the regulation that prompted the restriction.¹⁵ Section 115.102 affords BIA discretion to determine whether to disburse funds from the IIM account of an adult Indian who is *either* non-compos mentis *or* determined by a court of competent jurisdiction to be in need of assistance. Thus, we find no material distinction between the two circumstances that were cited by BIA in this case. Moreover, whether or not the Tribal Court guardianship order supported BIA's initial reliance on § 115.601(a)(1)—an issue we need not decide—it is undisputed and clear from the Tribal Court Order that Morgan is an “adult in need of assistance” within the meaning of § 115.601(a)(2), which was cited in the Decision.

II. Appellant Does Not Meet Her Burden on Appeal

Appellant argues that she has demonstrated that she is fit to oversee Morgan's IIM account in his best interest, without any supervision by BIA. Appellant largely reiterates the arguments that she made at the hearing that she has a proven record of caring and providing for Morgan, that she has the endorsement of family members, that the Tribal Court deemed her fit to be Morgan's legal guardian for financial and other decisions, and that supervision by BIA is time consuming and onerous. Statement of Reason for Appeal at 1-2 (unnumbered). Appellant states that she “understand[s] why the BIA has these rules and regulations in place for such individuals that might be taken advantage of and be extorted for their funding,” and argues that she became Morgan's guardian “to safeguard him from such family members that would take advantage of my uncle for such reasons.” *Id.* at 1.

The Regional Director's decision to supervise Morgan's IIM account does not call into question Appellant's integrity or intentions to assist her uncle, nor does the record cast any doubt in this regard. Nevertheless, as the Board has previously explained, “[a] higher level of BIA scrutiny necessarily is required when it is requested to disburse funds to a private guardian as opposed to a public guardian.” *Runsabove v. Rocky Mountain Regional*

¹⁵ Although the Regional Director did not cite § 115.102, it is incorporated by reference in the Subpart E hearing regulations, which BIA cited in the notice (while also providing a copy of Part 115), at the hearing, and in the Decision.

Director, 46 IBIA 175, 182-83 (2008). As the Board explained further in *Jackson County*, if a guardian is inexperienced, not bonded, or not fully accountable to the court that appointed him/her, the trust responsibility “requires BIA to monitor disbursements more closely.” 31 IBIA at 139. “However, if the guardian is experienced, bonded, and fully accountable to a court,” which may be a safe initial assumption in the case of a public guardian, “BIA does not violate its trust responsibility by disbursing funds to the guardian with less close monitoring and supervision.” *Id.* In *Jackson County*, the Board remanded the matter for BIA to consider the qualifications of the guardian—who was a public guardian and who, like Appellant, sought disbursement of the entire IIM account—in determining whether to disburse funds to that guardian. *Id.*

Unlike the public guardian in *Jackson County*, Appellant is a private guardian, and we can find no indication in the record, nor has Appellant argued, that she is bonded or fully accountable to a court, such that BIA may apply less close monitoring and supervision of Morgan’s IIM account—much less no supervision at all. The Decision calls for “consistent” guidance and assistance to Appellant as Morgan’s guardian, and the use of electronic communications when appropriate, while still ensuring that “the process for any distribution of funds and the monitoring of the account is carried out . . . in the best interest of [Morgan].” Decision at 3 (unnumbered). Appellant has not shown that the terms of the restriction are unreasonable. Accordingly, we conclude that Appellant does not meet her burden on appeal to show that BIA did not properly exercise its discretion. *See Rumsabove*, 46 IBIA at 183; *Blaine v. Great Plains Regional Director*, 37 IBIA 149, 151 (2002).

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 affirms the Regional Director’s April 3, 2014, decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Robert E. Hall
Administrative Judge