



INTERIOR BOARD OF INDIAN APPEALS

Estate of Catherine Millie Janis-Red Feather

63 IBIA 195 (06/30/2016)



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 CATHERINE MILLIE)	Order Dismissing Appeal in Part and
JANIS-RED FEATHER)	Remanding this Matter to the Probate
)	Hearings Division, Reversing Order
)	Denying Rehearing, and Setting Aside
)	the Order Distributing Decedent's
)	House
)	
)	Docket No. IBIA 15-043
)	
)	June 30, 2016

Appellants Loretta Red Feather and Linda Red Feather-Garcia appeal to the Board of Indian Appeals (Board) from the November 4, 2014, Order Denying Rehearing, entered by Administrative Law Judge Larry M. Donovan in the estate of their mother, Catherine Millie Janis-Red Feather (Decedent).¹ Appellants claim—and we agree—that the Order Denying Rehearing failed to address their joint petition for rehearing (Joint Petition), which was received by the Probate Hearings Division (PHD). Because we lack jurisdiction to consider a petition for rehearing, we dismiss this appeal, insofar as it relates to the Joint Petition, and remand this matter to PHD for consideration of this petition.

To the extent Appellant Loretta also appeals from the Order Denying Rehearing, as relevant to one or more additional requests for rehearing that Judge Donovan characterized as “contest[ing] the distribution of . . . Decedent’s house to Vienna Red Feather,” Order Denying Rehearing at 1, we set aside the Order Denying Rehearing and the underlying Decision by Administrative Law Judge James Yellowtail, dated August 12, 2014, on that issue. Judge Yellowtail’s decision purported to order the distribution of Decedent’s home. But the home is not included in the inventory of Decedent’s trust property, and the authority of probate judges extends only to that property identified on the certified inventory prepared by the Bureau of Indian Affairs (BIA) or otherwise identified as trust property by BIA and, if applicable, a statement of the Decedent’s Individual Indian Money account.

¹ Probate number P000102009IP is assigned to Decedent’s case in ProTrac, which is the probate tracking system used by the Department of the Interior (Department).

Facts

Decedent Catherine Millie Janis-Red Feather, an Oglala (Pine Ridge) Sioux Indian, died testate on January 27, 2012, at the age of 90. Her survivors included 11 children, namely Vienna Red Feather-Koch, Thelma Red Feather-Clifford, Annabelle Red Feather Picket Pin, Loretta Red Feather, Linda Red Feather-Garcia, Mary Red Feather Martinez, Lula Red Feather Walking, George Red Feather, Paul Red Feather, John Red Feather, and Phillip Red Feather; two of Decedent's children, Kenneth Red Feather and Shirley Red Feather Bissonette, predeceased her. At her death, Decedent owned interests in several allotments on the Pine Ridge Reservation (Allotment Nos. 296, 299-H, 301-A, and 304-F). She apparently also owned a house on Allotment No. 296. BIA's certified inventory of Decedent's trust assets does not list the house nor is there any other statement in the record from BIA that identifies the house as a trust asset.

At the first hearing held in the probate of Decedent's trust estate, an unidentified family member introduced her representative, who in turn testified that she is a tribal advocate. Transcript (Tr.), Apr. 11, 2013, at 10-11. The presiding judge responded by stating, "I do not permit Tribal Advocates who are not attorneys to represent people [at] my hearings. [W]ith the family's consent you can sit and listen, but you will not be allowed to participate." *Id.* at 11. At the conclusion of the hearing, the representative again spoke, stating that she had done extensive research into decisions of the Board and had devoted considerable time and effort to her clients' interests in this matter. She testified that she had a Bachelor's degree, that she had nearly completed a Master's degree, and that she had been a practicing tribal advocate for 13 years. She asked what law precluded her from representing Appellants, and the judge referred her to Title 43 of the Code of Federal Regulations. Thereafter, the tribal advocate did not submit any filings nor did she attend the next scheduled hearing.

On August 12, 2014, after a second hearing, Judge Yellowtail issued his Decision in which he approved Decedent's will and distributed her estate accordingly. In particular, he rejected challenges to the will on the grounds of undue influence, and ordered the distribution of Decedent's interest in Allotment No. 296 to her surviving children.² Judge Yellowtail seemingly applied Decedent's will to order the house on Allotment No. 296 to be distributed to Vienna.

² In accordance with Decedent's will, each of Decedent's surviving sons received 3/16 of Decedent's interest in Allotment No. 296 while each of Decedent's surviving daughters received a 1/28 interest.

Several of Decedent's children—Annabelle, George, and Appellant Loretta—sought rehearing. Annabelle submitted three letters on September 5, 2014, dated August 15, 24, and 26, 2014; George and Appellant Loretta submitted separate letters on September 11 and 12, 2014, respectively.

In his November 4, 2014, Order Denying Rehearing, Judge Donovan (to whom the case was reassigned) construed the five letters to contest the distribution of Decedent's home to Vienna; he made no mention of the Joint Petition or the several arguments raised therein. Judge Donovan concluded that petitioners had failed to show grounds to overturn Judge Yellowtail's decision.

Appellants appealed the Order Denying Rehearing, contending, *inter alia*, that Judge Donovan erred in failing to address their Joint Petition and in failing to address the distribution of the house to Vienna. Appellants did not file a brief nor did any other party. The Board sought clarification from PHD concerning its receipt of Appellants' Joint Petition. PHD informed the Board that it received a copy of the Joint Petition on September 11, 2014.

Discussion

I. Summary

We dismiss this appeal in part as premature and remand this matter to PHD for consideration of Appellants' Joint Petition. To the extent Appellant Loretta appeals from Judge Donovan's denial of rehearing with respect to the distribution of Decedent's house to Vienna, we reverse and hold that there was no authority to order the distribution of the house; he was authorized only to provide a general statement of the law of descent or devise that applies to covered permanent improvements.

II. Appellants' Joint Petition

PHD received Appellants' Joint Petition but it is clear from the Order Denying Rehearing that Judge Donovan considered only the September 12th letter submitted by Appellant Loretta along with the letters received from Annabelle and George. Therefore, we dismiss this appeal in part and remand this matter for consideration of Appellants' Joint Petition.

In probate matters, the Board has jurisdiction to review appeals from four types of probate orders:

- (1) Orders on a petition for rehearing;
- (2) Orders on a petition for reopening

- (3) Orders regarding purchase of interests in a deceased Indian's estate; or
- (4) Orders regarding modification of the inventory of an estate.

43 C.F.R. § 4.320. Here, Appellants have appealed from an order denying rehearing, but it is evident that the deciding judge did not decide *their* petition for rehearing inasmuch as he does not address the issues raised by Appellants. Because the Board's authority is limited to hearing appeals from orders on rehearing and does not review petitions for rehearing in the first instance, we dismiss the appeal with respect to the Joint Petition and we remand this matter to PHD to consider Appellants' Joint Petition.

III. Order Denying Petitions for Rehearing Regarding the Distribution of the House

In his Order Denying Rehearing, Judge Donovan held that the petitioners had failed to show grounds to overturn that portion of Judge Yellowtail's Decision in which he ordered the distribution of Decedent's home to Vienna. Whether or not the petitioners articulated a proper objection to the Decision, we exercise our inherent authority under 43 C.F.R. § 4.318 to reverse the Denial of Rehearing and set aside this portion of Judge Yellowtail's Decision. The Department and its judges have authority only to order the distribution of trust assets that are listed on the certified inventory provided by BIA or otherwise identified by BIA as trust assets. 43 C.F.R. § 30.102(a); *see also id.* § 30.120(i) (Probate judges have authority, *inter alia*, to "[o]rder the distribution of trust property."). Decedent's home is not included on the certified inventory, which suggests that it is not a trust asset, nor has BIA otherwise provided any statement that it holds title to the house as trustee. Consequently, we must reverse the Order Denying Rehearing and set aside Judge Yellowtail's order directing the distribution on Decedent's house.

However, the American Indian Probate Reform Act of 2004 (AIPRA) does contain law governing the distribution of "covered permanent improvements" that are "(i) included in the estate of a decedent; and (ii) attached to a parcel of trust or restricted land that is also, in whole or in part, included in the estate of that decedent." 25 U.S.C. § 2206(a)(2);³ *see also* 43 C.F.R. § 30.101 (definition of "covered permanent improvement"). In 2011, a new section, 43 C.F.R. § 30.236, was added to the probate regulations to address the responsibility of the Department's probate judges with respect to covered permanent improvements. As set out in § 30.236 and consistent with the oft-asserted tenet that the Department only probates trust assets, probate judges are instructed as follows:

³ Section 2206(a) contains two subparagraphs that are numbered "2." We refer herein to the second § 2206(a)(2).

(d) The judge’s decision will specifically direct the distribution only of the decedent’s trust or restricted property, and not any non-trust permanent improvement attached to a parcel of trust or restricted land. However, [in relevant part,] the judge:

(1) Will include in the decision a *general statement* of the substantive law of descent or devise of permanent improvements

43 C.F.R. § 30.236 (emphasis added). Additional instructions are provided where other circumstances, such as renunciation and consolidation, occur. *Id.*

Contrary to AIPRA and § 30.236, the Decision improperly directed that “Decedent’s house located upon Pine Ridge allotment no. 344-296, *shall be distributed* to [Vienna].” Decision at 5 (emphasis added). Nothing in the existing record supports a finding that the house is a trust asset subject to probate by the Department: It is not listed on the certified inventory of Decedent’s trust assets or otherwise identified by BIA as a trust asset. *See Estate of Clifford E. Loudner, Sr.*, 55 IBIA 87, 91 (2012) (house not included in BIA’s inventory for Decedent’s trust estate and thus there was no authority to grant appellant’s request to transfer ownership of the decedent’s home). In addition, probate judges lack authority to modify estate inventories on their own motion. *See Estate of Uriah “Red” Alexander*, 59 IBIA 159, 163 (2014). Thus, the probate judge erred in ordering the distribution of this particular asset, for which reason we reverse the Order Denying Rehearing and set aside this portion of the Decision.

IV. Representation

Because we remand this matter for consideration of the Joint Petition—including, in the first instance, the issue of whether the probate judge erred in refusing to permit Appellants to be represented by their chosen tribal advocate because the advocate was not a licensed attorney—we do not decide the issue of representation. However, we are troubled by the flat refusal of the probate judge to permit Appellants to be represented by their chosen tribal advocate, especially in the absence of any express statute or regulation prohibiting the same. For more than 30 years, the Board has permitted those admitted to practice before tribal courts to practice before the Board. *See Estate of Michael Lawrence Study*, 51 IBIA 227, 227 n.1 (2010); *Estate of Baz Nip Pah*, 22 IBIA 72, 72 (1992); *Estate of Alice Jackson (John)*, 17 IBIA 162, 162 (1989); *Estate of Frank Doyeto*, 13 IBIA 237, 237 (1985); *Estate of Benjamin Kent, Sr.*, 13 IBIA 21, 22-24 & n.2 (1985). In addition, Appellants were informed on several occasions during this probate proceeding “of their right to be present at the hearing in person or by an attorney, *or other person authorized to present such evidence as each may desire.*” *See* Notice of Supplemental Hearing, Feb. 18, 2014 (Administrative Record (AR) 27) (emphasis added); Notice of Supplemental Hearing,

July 19, 2013 (AR 39); Notice of Initial Hearing, Mar. 13, 2013 (AR 47).⁴ On remand, due consideration should be given to the foregoing.

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 dismisses in part Appellants' appeal as premature and remands this matter for consideration of Appellants' Joint Petition for rehearing. In addition, the Board reverses the Order Denying Rehearing and sets aside the order in the August 12, 2014, Decision that directed the distribution of Decedent's house to Vienna.

I concur:

// original signed
Debora G. Luther
Senior Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

⁴ Prior to the establishment of the Office of Hearings and Appeals (OHA) in 1971, 25 C.F.R. § 15.7 (1970), provided that “[i]nterested parties may appear [at probate hearings] in person or by attorneys admitted to practice in the State where the hearing is held.” When OHA was created and the probate hearing regulations were rewritten and relocated to 43 C.F.R. Part 4, § 15.7 was omitted in its entirety and was not replaced.