INTERIOR BOARD OF INDIAN APPEALS

Estate of Theodore Samuel Breiner

63 IBIA 217 (07/12/2016)

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 THEODORE SAMUEL BREINER	)	Order Docketing Appeal and Affirming Denial of Rehearing
	)	
	)	Docket No. IBIA 16-068
	)	
	)	July 12, 2016

On May 16, 2016, the Board of Indian Appeals (Board) received a notice of appeal from Katharine M. Breiner, Carolyn J. Breiner, and Alexandra J. Breiner (collectively, Appellants), through Theodore A. Breiner, Esq. (Attorney Breiner). Appellants seek review of an Order Denying Petition for Rehearing (Order Denying Rehearing) entered on April 8, 2016, by Administrative Law Judge (ALJ) R. S. Chester in the estate of Theodore Samuel Breiner (Decedent).[1] The Order Denying Rehearing left in place the ALJ's Decision, entered on March 20, 2015, and the ALJ's Notice of Referral of Inventory Challenge to the Standing Rock Agency Superintendent (Superintendent), Bureau of Indian Affairs (BIA), also issued on March 20, 2015. The inventory challenge was raised by Decedent's wife, who asserted that Decedent had deeded certain trust property (Property) in the estate inventory to his brother, Alfred W. Breiner (Alfred). The ALJ denied, for lack of standing, a petition for rehearing submitted by Attorney Breiner (Alfred's son), who asserted that Alfred had transferred the Property to him as custodian for Appellants (Alfred's grandchildren). But the ALJ noted that, because it was unclear whether the Superintendent had yet decided the inventory challenge, he was issuing, in conjunction with the Order Denying Rehearing, a Second Notice of Referral of Inventory Challenge to the Superintendent. We docket this appeal but summarily affirm the Order Denying Rehearing. Regardless of whether Appellants had standing to seek *rehearing*,[2] the ALJ lacked jurisdiction to adjudicate the inventory dispute and therefore Appellants did not state any proper ground for rehearing.

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[1] Decedent was a Standing Rock Sioux Indian. The probate number assigned to Decedent's case in the Department of the Interior's probate tracking system, ProTrac, is No. P000114185IP.

[2] The ALJ did not purport to decide that Appellants, as purported owners of the Property, lack standing to participate in the *inventory challenge* proceeding.

In their notice of appeal, Appellants contended that Attorney Breiner filed the petition for rehearing on their behalf and that they have standing to seek rehearing because they are "asserting a claim against a decedent's estate," within the meaning of 43 C.F.R. § 30.101 (definition of "interested party"),[3] for the Property. Notice of Appeal, May 9, 2016, at 1. Appellants further contended that the Order Denying Rehearing should be "reversed" because, as was asserted in the petition for rehearing, Decedent's wife had presented "credible evidence" that Decedent transferred the Property to Alfred and there is "no contrary evidence." *Id.* at 1 & Exhibit 2 at 2 (Petition for Rehearing, Apr. 20, 2015). Thus, Appellants apparently sought confirmation, by the Board, of the transaction.

On receipt of the appeal, the Board issued a pre-docketing notice and order[4] advising Appellants that, to the extent they were "asserting a claim against" Decedent's estate for the Property, their claim was without merit because trust real property is not subject to claims. *See* 43 C.F.R. § 30.146. Nor, according to the Decision, were any claims filed against Decedent's estate. *See id.* § 30.140(a) (requiring that claims "must" be filed "before the conclusion of the first hearing").

Although Appellants apparently desired a decision by the Board on the transaction in the first instance, they did not allege any error by the ALJ in referring the inventory challenge, for lack of jurisdiction, to the Superintendent. Thus, the Board ordered Appellants to show cause why the Order Denying Rehearing should not be summarily affirmed for failure to state any proper ground for rehearing. The Board explained that the probate regulations require that when, during a probate proceeding, "an error in the estate inventory is alleged, the [Office of Hearings and Appeals (OHA)] deciding official *will refer the matter to BIA for resolution* under 25 CFR part 150, 151, or 152 and the appeal procedures at 25 CFR part 2." 43 C.F.R. § 30.128(b) (emphasis added). And because the ALJ lacks jurisdiction to consider inventory challenges under § 30.128(b), Appellants' petition did not appear to state a proper ground for rehearing.[5] *See* 43 C.F.R. § 30.240(a).

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[3] Section 30.101 defines "interested party" to mean "(1) Any potential or actual heir; (2) Any devisee under a will; (3) Any person or entity asserting a claim against a decedent's estate; (4) Any tribe having a statutory option to purchase the trust or restricted property interest of a decedent; or (5) Any co-owner exercising a purchase option."

[4] Pre-Docketing Notice, Order for Appellants to Serve ALJ, and Order for Appellants to Show Cause, May 23, 2016. Appellants have certified completion of service.

[5] The Board also ordered Appellants to show cause why the appeal should not be summarily dismissed for lack of jurisdiction. The term "OHA deciding official" in § 30.128(b) includes the Board, which is part of OHA. *See Estate of Eva Maria MacArthur*, 59 IBIA 22, 23 (2014). Therefore, the Board, like the ALJ, lacks jurisdiction to consider an inventory challenge. *See id.*

In response to the Board's order, Appellants do not allege any error in the ALJ's referral of the inventory challenge to BIA; they assert that this appeal from the Order Denying Rehearing should be stayed pending the Superintendent's decision on the inventory dispute. Letter from Attorney Breiner to Board, June 30, 2016, at 2.

We deny Appellants' request for a stay and we summarily affirm the Order Denying Rehearing. Appellants' request for a stay is predicated on the merits of the inventory dispute. *See id.* at 2-3. As explained above, the Board lacks jurisdiction to consider Appellants' challenge to the inventory of Decedent's estate through this appeal from a probate decision. Instead, the dispute must first be addressed through a decision by BIA,[6] from which BIA's appeal regulations provide an eventual right of appeal to the Board. If, at the conclusion of the administrative proceedings, reopening of the estate is warranted, the matter must then be properly presented to the ALJ, as the ALJ correctly noted. *See* Second Notice of Referral of Inventory Challenge, Apr. 8, 2016 (citing 43 C.F.R. § 128(b)(2)(ii)). Thus, the request for a stay is denied.

The ALJ correctly concluded that he lacked jurisdiction over the inventory challenge. *See* 43 C.F.R. § 30.128; *see also Estate of Celestus Arrowtopknot*, 54 IBIA 120, 123 (2011); *Estate of William Earl Moore, Jr.*, 51 IBIA 98, 99 (2010); *Estate of Frances Marie Ortega*, 50 IBIA 322, 325-26 (2009). And the Board has held that claims disputing BIA's inventory of a decedent's trust estate did not state a proper ground for rehearing. *Estate of Moore*, 51 IBIA at 99. For these reasons, we summarily affirm the Order Denying Rehearing.

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 dockets this appeal and affirms the ALJ's order denying Appellants' petition for rehearing, for failure to state any proper ground for rehearing.

I concur:

// original signed	//original signed
Thomas A. Blaser	Steven K. Linscheid
Administrative Judge	Chief Administrative Judge

[6] In the event that no such decision has issued, and if Appellants believe that issuance of a decision by BIA has been unreasonably delayed, Appellants are referred to the procedures and requirements in 25 C.F.R. § 2.8 for appealing alleged inaction.