



INTERIOR BOARD OF INDIAN APPEALS

Estate of Violet Guardipee Cobell

51 IBIA 202 (04/02/2010)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF VIOLET GUARDIPEE)	Order Vacating Recommended Decision
COBELL)	and Referring Inventory Dispute to
)	Bureau of Indian Affairs
)	
)	Docket No. IBIA 08-64
)	
)	April 2, 2010

Karen Bond (Appellant) appeals the Recommended Decision Confirming Inventory (Recommended Decision) issued by Indian Probate Judge (IPJ) James Yellowtail in the estate of Appellant’s mother, Violet Guardipee Cobell (Decedent), deceased Blackfeet Indian, Probate No. P000027737IP. We vacate the Recommended Decision and refer the matter to the Bureau of Indian Affairs (BIA) because the revised Indian trust probate regulations, which became effective on December 15, 2008, and require that inventory disputes be referred to BIA for decision, preclude the Board from reviewing a probate judge’s recommended decision in an inventory dispute and limit the Board to considering the dispute only after BIA issues its decision based on the record before BIA.

Background

After the conclusion of the initial probate hearing conducted for this estate, Appellant challenged the inclusion of a 280.87-acre portion of Decedent’s allotment, Blackfeet Allotment 1552, in the Decedent’s estate inventory. Appellant averred that this land had been the subject of a gift deed application to her submitted by Decedent to the Blackfeet Agency, BIA, on May 21, 2001, but that BIA did not act on the application before Decedent’s death on March 5, 2005. Appellant contended before the IPJ that the gift deed should be retroactively approved and that the affected tract should be removed from the inventory of Decedent’s estate.

In accordance with the Board’s standing order in *Estate of Douglas Leonard Ducheneaux*, 13 IBIA 169 (1985), which authorized probate judges to consider inventory disputes that arose during a probate proceeding, the IPJ held additional hearings to receive evidence on Appellant’s objection to the inventory.

The IPJ issued his Recommended Decision on November 29, 2007. After summarizing the testimony received at each of the hearings, the IPJ determined, based on his credibility findings and all the evidence, that the presumption of undue influence applicable to the approval of wills was also relevant to the retroactive approval of gift deed applications and supported denial of Appellant's request for retroactive gift deed approval because Appellant held Decedent's power of attorney, had filled out the gift deed application, and was the recipient of the gift deed. He also found that the record was devoid of any evidence that BIA had made the determinations necessary to justify approval of the gift deed application, i.e., that BIA had discussed the proposed gift deed with Decedent to ascertain her understanding and intent and had determined that the gift deed would be in Decedent's best interest. The IPJ concluded that Appellant had not met her burden of proving by a preponderance of the evidence that BIA Blackfeet Agency employees either had done something they should not have done or had not done something they should have done, and that such error was responsible for the failure to complete the gift deed application during Decedent's lifetime. The IPJ therefore rejected Appellant's request that the gift deed application be retroactively approved, and affirmed the inventory submitted with Decedent's estate.

Appellant submitted objections to the Recommended Decision, which she captioned a petition for rehearing, challenging the IPJ's application of the doctrine of presumptive undue influence to a gift deed. The IPJ denied the petition for rehearing on the ground that an objection to the Recommended Decision had to be filed with the Board and that, therefore, he had no jurisdiction to address the matter. Appellant appealed the Recommended Decision to the Board.¹

While the appeal was pending before the Board, the Department promulgated revised Indian trust probate regulations, which became effective on December 15, 2008. *See* 73 Fed. Reg. 67,256 (Nov. 13, 2008). In relevant part, these regulations provide:

§ 30.128 What happens if an error in BIA's estate inventory is alleged?

This section applies when, during a probate proceeding, an interested party alleges that the estate inventory prepared by BIA is inaccurate and should be corrected.

¹ Appellant filed her appeal from a February 20, 2008, Order Denying Rehearing, but as explained by the IPJ and by the Board in its April 18, 2008, Pre-Docketing Notice, Appellant's "petition for rehearing" to the IPJ was actually a challenge to his Recommended Decision, and the subsequent Order Denying Rehearing was limited to the inventory dispute.

(a) Alleged inaccuracies may include, but are not limited to, the following:
(1) Trust property interests should be removed from the inventory because the decedent executed a gift deed or gift deed application during the decedent's lifetime, and BIA had not, as of the time of death, determined whether to approve the gift deed or gift deed application;

....

(b) When an error in the estate inventory is alleged, the OHA [(Office of Hearings and Appeals)] deciding official will refer the matter to the BIA for resolution under 25 CFR parts 150,^[2] 151,^[3] or 152^[4] and the appeal procedures at 25 CFR part 2.

43 C.F.R. § 30.128.

Discussion

In *Estate of James Jones, Sr.*, 51 IBIA 132 (2010), the Board addressed the question of whether the revised regulation requiring alleged errors in estate inventories to be referred to BIA for resolution, 43 C.F.R. § 30.128(b), applies to probate proceedings completed by a probate judge but pending on appeal before the Board on the effective date of the revised regulations.⁵ The Board concluded that the regulation does apply because the Board is part of OHA and thus should be considered an "OHA deciding official" under § 30.128. 51 IBIA at 135. The Board further determined that,

[a]s we held in *Estate of Ortega*, when section 30.128 became effective, the Board's standing order in *Ducheneaux* was superseded and dissolved. Although the inventory dispute in the present case was initiated, hearings were held, and a recommended decision was issued before the revised

² Regulations governing land records and title documents.

³ Regulations governing land acquisitions.

⁴ Regulations governing the issuance of patents in fee, certificates of competency, removal of restrictions, and sale of certain Indian lands.

⁵ The Board had previously held that the Board's standing order in *Ducheneaux* had been superseded and dissolved by operation of law when section 30.128 became effective and that the revised regulation applied to inventory disputes which had been initiated and the subject of hearings held prior to the effective date of the revised regulations. *Estate of Francis Marie Ortega*, 50 IBIA 322, 326 (2009); see also *Estate of John Henry Nicholson*, 51 IBIA 126, 127-28 (2010); *Estate of William Earl Moore, Jr.*, 51 IBIA 98, 99 (2010).

regulations became effective, the revised regulations do not “grandfather” *Ducheneaux* proceedings that were pending when the regulations took effect. *See Estate of Ortega*, 50 IBIA at 326. In the absence of such a provision, the otherwise clear language of the regulation controls, and requires us to refer the matter to BIA for a decision.

51 IBIA at 136. Our role therefore is limited to considering the dispute only after BIA has issued its decision and to deciding the matter based on BIA’s administrative record. *Id.* at 133; *see Estate of David Bravo*, 51 IBIA 198, 201 (2010).

As we acknowledged in *Estate of Ortega*, 50 IBIA at 326, the IPJ and BIA have exerted substantial effort in collecting evidence and developing a record, and nothing in our decision precludes BIA from accepting the evidentiary record developed by the IPJ as the record for considering the inventory dispute or prevents BIA from adopting the IPJ’s Recommended Decision, in whole or in part, as BIA’s decision. However, should BIA decide to adopt the conclusions in the Recommended Decision in whole or in part, its decision must be based on *BIA’s* own review and consideration of Appellant’s arguments and of the record. BIA’s decision must also advise interested parties of their appeal rights as required by 25 C.F.R. § 2.7(c). *See Estate of David Bravo*, 51 IBIA at 201.

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 vacates the Recommended Decision and refers the matter to the Rocky Mountain Regional Director for a decision by BIA.⁶

I concur:

// original signed
Sara B. Greenberg
Administrative Judge*

// original signed
Debora G. Luther
Administrative Judge

*Interior Board of Land Appeals, sitting by designation.

⁶ We leave it to the Regional Director to decide whether the initial BIA decision should be made at the agency or regional level. *See Estate of David Bravo*, 51 IBIA at 201 n.6; *Estate of Ortega*, 50 IBIA at 327 n.8.