INTERIOR BOARD OF INDIAN APPEALS

Estate of Melissa Heminger, a.k.a. Melissa Larvie

53 IBIA 241 (6/27/2011)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF MELISSA HEMINGER, a.k.a. MELISSA LARVIE	)	Order Vacating in Part the Order Granting Reopening and Remanding
	)	Docket No. IBIA 09-088
	)	June 27, 2011

At stake in this appeal is the distribution of the trust personalty of Melissa Heminger, a.k.a. Melissa Larvie (Decedent), deceased Rosebud Sioux Indian, who died intestate with $17.48 in her Individual Indian Money (IIM) account.[1] Appellant Gordon D. Larvie contests the Order Granting Reopening entered on May 11, 2009, by Indian Probate Judge (IPJ) Michael Stancampiano in which the IPJ determined that Appellant was ineligible to inherit an interest in Decedent's trust personalty (i.e., funds in or accrued to Decedent's IIM account at the time of death) because Appellant's "adoptive" father, Roger Larvie (who was Decedent's pre-deceased nephew) was Appellant's stepfather. Appellant contends that Roger was his natural father who subsequently adopted him, and submits *inter alia* a paternity affidavit executed by Roger in 1959. We vacate this portion of the IPJ's Order Granting Reopening as well as the IPJ's redistribution of Decedent's trust personalty, and remand because the IPJ determined that BIA's petition to reopen had merit

[1] Decedent also possessed several severely fractured interests in land, all of which were located on the Lake Traverse Reservation. The largest of Decedent's land interests appears to have been a 1/126 interest in an allotment consisting of 160 acres. Because all of Decedent's land interests are located on the Lake Traverse Reservation and because Decedent was not survived by any lineal descendants, spouse, parents, or siblings, Decedent's land interests escheated to the Sisseton-Wahpeton Oyate Tribe pursuant to the Act of October 19, 1984, Pub. L. No. 98-513, 98 Stat. 2411. No one contested this disposition of Decedent's land interests, as provided in the original probate decision entered in 2006. Therefore, our decision affects only the disposition of Decedent's IIM account.

and reopened the estate without giving notice to the parties of BIA's petition and providing the parties with the opportunity to respond.

Background

Decedent died intestate and a widow on March 30, 1995. She was domiciled in South Dakota, had no children, and her parents and all of her siblings predeceased her. Therefore, Decedent's heirs are the surviving descendants of her siblings who died with issue and to whom her trust personalty descends by representation. One of Decedent's predeceased siblings was her brother, Alexander. One of Alexander's children was Roger, who also predeceased Decedent. Appellant is Roger's son.

On September 8, 2006, an Order Determining Heirs and Decree of Distribution (Order Determining Heirs) issued in this estate. In the order, Appellant was determined to be one of Decedent's heirs through Roger and, therefore, entitled to inherit 1/48 of the trust personalty in Decedent's estate. In May 2007, BIA filed a petition to reopen the estate, which was served on Appellant. The petition sought to have Appellant removed as an heir because he was not a lineal descendant of Roger but instead was his adopted stepson.[2] In support, BIA attached a copy of the probate decision in Roger's estate, in which Appellant is identified as Roger's "non-Indian son." This decision contained no findings concerning Appellant's adoption or his paternity. BIA also provided a copy of the Heirship Determination (OHA-7) form prepared for the probate of Roger's estate, which contains a note stating that Appellant was adopted by Roger on March 3, 1959. BIA did not furnish any adoption records with its petition.[3]

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[2] Also in the petition to reopen, BIA sought to remove John Breast, Norma Grant, and Violet Blacksmith as heirs because they each predeceased Decedent. An amended petition to reopen, also filed in May 2007, sought to remove Mary Cummings as an heir because she too predeceased Decedent. No one appealed the Decision Granting Reopening to the extent that it modified the Order Determining Heirs to remove these four individuals as heirs. Therefore, this portion of the IPJ's Decision Granting Reopening is unaffected by our decision today.

[3] BIA also provided an improperly executed and notarized "affidavit" in support of the Petition to Reopen that was *not* signed by the affiant but was signed instead by someone else *and* the "affidavit" was signed by a notary. BIA should not be submitting, nor should

(continued...)

By letter dated May 25, 2007, Appellant responded immediately to BIA's petition, and argued that he is Roger's natural son. According to his letter, which Appellant sent to the Office of Hearings and Appeals (OHA) in care of BIA's Rosebud Agency in Rosebud, South Dakota,[4] he enclosed his adoption papers as support for his assertion. The probate record does not contain any attachments with Appellant's letter nor can we determine from the record whether BIA forwarded Appellant's May 25 letter to the IPJ.

On May 11, 2009, the IPJ granted BIA's petition in its entirety and modified the Order Determining Heirs by removing as heirs Appellant and the four individuals who had predeceased Decedent. In light of the modified heirship determinations, the IPJ also redistributed Decedent's trust personalty. The IPJ did not explain the basis for his determination that Appellant no longer was eligible to inherit from Decedent, and the Order Granting Reopening gives no indication that the IPJ was aware of Appellant's objection to the Superintendent's Petition to Reopen. The record shows that a hearing was noticed for August 3, 2007, following receipt of the Petition to Reopen, but the hearing notice gave no notice of the Petition to Reopen itself, nor did it inform the parties of their right to file a response or objection to the Petition to Reopen.[5]

Appellant timely appealed to the Board from the Order Granting Reopening.

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[3](...continued)
probate judges rely upon, affidavits that have not been signed by the individual for whose signature the affidavit was prepared.

Affidavits are the personal, sworn testimony of the person whose name *and* signature appear on the document. And the notary who signs the affidavit is testifying that the affiant personally appeared before her, was sworn by her, and "subscribed" (i.e., testified) to the facts asserted in the affidavit. *See, e.g.,* S. D. Codified Laws § 18-1-11. The testimony provided in a properly executed affidavit carries the same weight as if the affiant were present in court and testifying on the witness stand. An "affidavit" signed by someone other than the person for whom the affidavit was prepared carries no weight as a sworn document.

[4] In South Dakota, OHA's office is located nearly 200 miles away from Rosebud in Rapid City.

[5] The IPJ's staff responded to the Board's order for the record, including hearing transcripts, to advise the Board that no one attended the August 3 hearing and, thus, no transcript was generated.

Discussion

On appeal to the Board, Appellant strenuously maintains that Roger is his natural father, and he produces documentation in support of this contention, including a copy of a paternity statement executed by Roger in 1959. We do not reach the merits of Appellant's contention, but vacate in part based on a procedural error, and remand this matter to Probate Hearings Division for further proceedings: No clear notice was provided to interested parties of BIA's Petition to Reopen or of the probate judge's determination that the Petition appeared to be meritorious.

Once the IPJ determined that the Petition to Reopen might have merit, he was required to provide interested parties with a copy of the Petition and issue an order permitting responses to the Petition to Reopen Decedent's estate. *See* 43 C.F.R. § 30.243(b) (2009);[6] *Estate of Dora Ann Varela*, 51 IBIA 24, 25 (2009). Although BIA served a copy of its Petition on the interested parties, its action does not absolve the IPJ of his duty to comply with § 30.243. The regulation squarely puts the burden on the probate judge to evaluate petitions to reopen for merit. If "proper grounds are not shown" in the Petition, the probate judge may deny the petition, provide his reasons for doing so, and advise parties of their right to appeal an adverse order to the Board. 30 C.F.R. § 30.243(a). In that circumstance, the probate judge is not required to serve interested parties with a copy of the petition. *Id*. On the other hand, if the probate judge determines that the petition may be meritorious, "the judge *must* cause copies of the petition and all papers filed by the petitioner to be served on those persons whose interest in the estate might be affected if the petition is granted," and he must provide an opportunity for responses. *Id*. § 30.243(b) (emphasis added).

Because the IPJ failed to give notice of BIA's Petition to Reopen and permit responses, which is required by regulation, we must vacate and remand.

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[6] All of our references to § 30.243 are to the 2009 edition of the Code of Federal Regulations, which reflected changes to the probate regulations that became effective in December 2008. *See* 73 Fed. Reg. 67,256 *et seq*. (Nov. 13, 2008). In 2011, § 30.243 was redesignated as § 30.244. *See* 76 Fed. Reg. 7,500, 7,503 (Feb. 11, 2011) (a new section, § 30.236, was added and the remaining sections in part 30 are renumbered to accommodate the insertion of § 30.236). Section 30.243, now § 30.244, was not otherwise changed.

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 that portion of the IPJ's Order Granting Reopening in which he modifies the Order Determining Heirs to remove Appellant as an heir and we vacate the IPJ's modification of the distribution of Decedent's trust personalty. We remand this matter to the Probate Hearings Division for further proceedings consistent with our decision.[7]

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

[7] Although his Order Granting Reopening included a section entitled "Findings and Conclusions," the IPJ stated only that — with respect to Appellant — "[s]aid petition [to reopen] . . . requested that [Appellant] be omitted [as an heir] because he is non-Indian and is not of lineal descent, having been adopted by Roger Emerson Larvie." Order Granting Reopening at 1. The IPJ did not enter any finding(s) with respect to Appellant's paternity or adoption, nor did he identify any law that would preclude Appellant from inheriting a share of Decedent's trust personalty as Roger's son. *See, e.g.,* S. D. Codified Laws Ann. § 29A-2-114.