



INTERIOR BOARD OF INDIAN APPEALS

Estate of George W. Mackey

54 IBIA 221 (01/20/2012)



We conclude that the ALJ erred as a matter of law in failing to follow the Board's standing order, then in effect, for resolving inventory disputes arising in probate. Therefore, we also vacate the Decision. *See Estate of Leonard Douglas Ducheneaux*, 13 IBIA 169 (1985), *rev'd on other grounds sub nom., Ducheneaux v. Secretary of the Interior*, 645 F. Supp. 930 (D.S.D. 1986), *rev'd*, 837 F.2d 340 (8th Cir. 1988). However, because the Board's standing order has been superseded and dissolved by operation of law, *see* 43 C.F.R. § 30.128 (2011), we do not remand the inventory dispute, but instead refer this matter, in accordance with § 30.128, to BIA for the exercise of its discretionary authority over this issue. In addition, we remand this probate matter to the Probate Hearings Division to decide the distribution of Decedent's Individual Indian Money (IIM) account and certain real property interests newly added to Decedent's estate.

### Facts

On April 17, 2001, and in the presence of his attorney, Decedent executed a gift deed application in favor of Decedent's fellow Rosebud tribal member, David Keester, "for all land on the Rosebud Reservation in which I have an interest [as reflected on the attached listing]." Gift Deed Application at 1 (unnumbered), Probate Record (PR) Tab 17. Decedent explained in his application, "I am dying and I do not want my children to inherit this land as they do not care about me and have never helped me. David Keester always takes care of me." *Id.* at 2 (unnumbered). Decedent's attorney, Jane Colhoff, testified that she met with Decedent at least twice, and discussed with him in detail why he wanted his land to go to Keester and not to his children. In particular, Colhoff testified that she "made sure [on] each occasion and in several different ways that [Decedent] understood what he was doing." Hearing Transcript (Tr.), 3:3-6 (PR Tab 1); *see also* Affidavit of Jane Colhoff, Oct. 6, 2008 (PR Tab 12), at 1 ("I had a deep and serious discussion with [Decedent] to be absolutely sure he knew what he was doing."). Colhoff notarized Decedent's signature, and presented the application to BIA for further action with a cover letter dated April 18, 2001 (April 18 Letter). PR Tab 71. Apparently attached to the gift deed application was a BIA Title Status Report (TSR) for Decedent's mother, Roberta Guerue His Blue Horse, which listed mineral and surface interests in 12 trust allotments all located on the Rosebud Reservation in South Dakota. According to the September 30, 1998, probate decision in *Estate of Roberta Guerue His Blue Horse*, Probate No. P000024949IP, IP TC 122T 97, Decedent inherited all of his mother's trust interests. The collective value of the interests shown on the TSR was \$16,016.48.<sup>3</sup>

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<sup>3</sup> The TSR included estimates of value for each property interest. The largest interest was a 38 percent interest in Allotment No. 22475. None of the remaining interests was greater than 6.2 percent.

The April 18 Letter included the following plea to BIA:

Due to [Decedent's] extremely poor health, I respectfully request that you take action on this application immediately. [Decedent] needs to be assured that his land will pass to David Keester prior to his death, as he is very worried about his children getting the land against his wishes. Please let me know as soon as possible if this application is approved. I am leaving on April 25, 2001[,] and will not return until May 6, 2001. I would very much appreciate it if this application could be approved prior to the 25<sup>th</sup> so I can advise [Decedent] before I leave that he no longer has to worry about it.

PR Tabs 53, 71. BIA did not respond to Colhoff's request for approval prior to April 25, 2001.

Colhoff testified that a few days before he died on May 12, 2001, Decedent asked her to draft a will for him. She drafted a will, which left Decedent's property to Keester's wife and mother-in-law. The record does not reflect whether the drafting of the will was to cover any other property that Decedent might have other than the property included in the gift deed application or whether it reflected a change of mind by Decedent as to the gift deed application. Colhoff was unable to deliver the will to Decedent to sign prior to his death.

On May 11, 2001, the Superintendent approved Decedent's gift deed application.

Although BIA was well aware of Decedent's extremely poor health and his sense of urgency, BIA did not provide deeds to Decedent for his signature.

Decedent's estate was submitted for probate in 2006. Another TSR was generated for purposes of probate, and consisted of the same land interests that were reflected on the TSR apparently submitted with Decedent's gift deed application plus two additional interests in allotments on the Rosebud Reservation.<sup>4</sup> Hearings were set on three dates and notices thereof were sent to Decedent's children and to Lavina Mackey, who was reported

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<sup>4</sup> It appears that seven additional interests remain to be or have been added to Decedent's estate as the result of further administrative modifications filed in his mother's estate. These additional interests, plus the 2 additional interests on the TSR prepared for the probate of Decedent's estate, range from 0.37 percent down to 0.014 percent. All but one of the interests are in allotments located on the Rosebud Reservation; the one exception is a small interest in an allotment on the Pine Ridge Reservation.

to be Decedent's wife on the heirship information form (Form OHA-7) submitted to the ALJ by BIA. No one attended the first two hearings.

By letter dated November 3, 2006, Colhoff filed an appearance on behalf of Keester in the proceedings to probate Decedent's estate. She informed the ALJ of the gift deed application, and urged the ALJ to give effect to Decedent's wishes as stated in the application. The ALJ scheduled a third hearing for March 22, 2007, and subpoenaed the attendance of the Realty Officer at BIA's Rosebud Agency. The subpoena informed the Realty Officer that his attendance was required at "the [s]upplemental [h]earing pertaining to the [g]ift [d]eed [p]rocess for [Decedent]." Subpoena, Mar. 8, 2007 (PR Tab 58). The probate record does not contain any notice to BIA or to the putative heirs-at-law of an actual inventory dispute.

At the third hearing, the ALJ heard testimony from Colhoff and from the Realty Officer. Colhoff testified about her preparation and submission of the gift deed application, the preparation of the unsigned will, and Decedent's wishes. The Realty Officer testified about the "byzantine" gift deed process. Tr., 4:8-10, 8:25 (PR Tab 1). When the ALJ mused that, in light of BIA's approval of the gift deed application, "the issuance of deeds pursuant to the approved application is really ministerial," the Realty Officer agreed and answered, "Ministerial." *Id.*, 10:14-16.

The ALJ issued his Decision on July 23, 2007. The ALJ determined that Decedent was single at the time of his death<sup>5</sup> and he determined that Decedent's heirs-at-law, pursuant to South Dakota law, would be his three children, Alan Saul High Hawk (a.k.a. Allen Saul Mackey), Monique Mackey, and Edie Mackey.<sup>6</sup> The ALJ found that "[t]he

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<sup>5</sup> Mackey asserted on his gift deed application that he was single and his death certificate listed "divorced" as his marital status.

<sup>6</sup> In December 2007, Lavina Mackey wrote to the Office of Hearings and Appeals (OHA) and asserted that she was "still married" to Decedent at the time of his death. Letter to OHA from Lavina Mackey, Dec. 11, 2007 (PR Tabs 22, 27). Even though the letter was received nearly five months after the ALJ's decision, the IPJ construed it as a petition for rehearing and not as a petition to reopen. *Compare* 43 C.F.R. § 4.241 (2007) *with id.* § 4.242 (2007). On February 22, 2008, the IPJ denied the petition without making any determination concerning Decedent's marital status at the time of death, holding that the issue was irrelevant because the gift deed application to Keester depleted Decedent's estate. In closing, the IPJ reminded BIA to complete the gift deed process. Lavina did not appeal the denial of her petition.

[D]ecedent did not intend to leave his property to his children,” and that the evidence showed that the gift deed process should continue. Decision at 2 (PR Tab 25). Therefore, the ALJ “ordered [BIA] to complete the gift transactions . . . by preparing and executing the gift deeds to David Keester.” *Id.* BIA did not seek rehearing of this decision.

In March 2008, BIA filed a petition to reopen the estate pursuant to 43 C.F.R. § 4.242(e) (2007), which permitted BIA to seek reopening within 3 years of the date of the final probate decision to prevent manifest error.<sup>7</sup>

The IPJ gave notice to interested parties of BIA’s petition and provided an opportunity to respond. No responses came from Lavina or from Decedent’s children, but Colhoff and Keester both responded. On May 22, 2009, the IPJ denied BIA’s petition to reopen, finding that he did not have authority to grant reopening of the estate. Order Denying Reopening at 6. In particular, the IPJ determined that BIA did not allege any newly discovered evidence, that it had notice of and was aware of the proceedings in Decedent’s estate, and that BIA should have submitted a petition for rehearing within 60 days pursuant to § 4.241. The IPJ also went on to rule in the alternative that, even assuming he had authority to grant BIA’s petition to reopen, he would still deny it. The IPJ stated that it is BIA’s responsibility as well as his own responsibility, as a probate judge, to give effect to the final wishes of a decedent regarding the distribution of the decedent’s property. He found that Decedent’s intent to leave his trust estate to David Keester was clear and he found no evidence of undue influence, fraud, or lack of testamentary capacity.

BIA has now appealed to the Board. BIA filed a brief; no responses were received from the interested parties.<sup>8</sup>

### Analysis

BIA maintains that the IPJ erred in denying its petition to reopen Decedent’s estate as a matter of law because BIA had demonstrated manifest error in the underlying Decision by the ALJ. BIA argues that it cannot comply with the ALJ’s Decision because (1) Decedent never executed the requisite gift deeds, (2) BIA did not provide an estimate of

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<sup>7</sup> In December 2008, new probate regulations became effective and § 4.242(e), now § 30.243(a)(2), was modified. Unless otherwise stated, we refer to the 2007 version of the probate regulations in our decision.

<sup>8</sup> Decedent’s children have not participated in any aspect of the probate of their father’s estate.

value to Decedent of his land and mineral interests, and (3) approval or disapproval of gift deeds transferring interests in trust real property is reserved to BIA, including the exercise of discretion in rendering that decision. We agree with BIA that the IPJ erred in denying reopening, but on different grounds: First, the IPJ erred in denying reopening for lack of jurisdiction. The regulations allowed BIA to seek reopening and imposed no limitation on issues that BIA could raise in such a petition. Without doubt, the IPJ had authority to grant BIA's petition. Second, the IPJ's alternative ruling to deny the petition failed to recognize that the ALJ, in effect, conducted a *Ducheneaux* proceeding<sup>9</sup> but without giving clear notice of the inventory dispute to the interested parties, including BIA, and without affording BIA an opportunity to formally state a position on whether or not the gift deed process should be completed. Nor did the ALJ follow the proper procedures by issuing a recommended decision on the inventory dispute with appeal rights to the Board. Therefore, we vacate the IPJ's Order Denying Reopening and the Decision; to the extent that the IPJ's Denial of Rehearing is construed to order BIA to complete the gift deed process, we strike any such language. Because the regulations have now changed to repose jurisdiction in BIA over inventory disputes, we refer the gift deed application issue to BIA and we remand this matter to the Probate Hearings Division for entry of an order disposing of Decedent's trust assets that are not in dispute.<sup>10</sup>

The IPJ erred in holding that, because BIA had notice of the probate proceedings, it was required to petition for rehearing within the applicable time period. He further erred holding that BIA's failure to do so deprived BIA of the right to seek reopening and deprived the IPJ of authority to consider such a petition. Nothing in the regulations required BIA to exhaust its remedies in this manner. Moreover, at the time the IPJ issued his Order Denying Reopening, new probate rules were in effect that should have been

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<sup>9</sup> In *Estate of Ducheneaux*, 13 IBIA 169, the Board issued a standing order that authorized probate judges to consider inventory disputes arising in the course of a probate proceeding. The process outlined in the standing order is referred to as a *Ducheneaux* proceeding.

<sup>10</sup> The Decision determined who "would have been" Decedent's heirs had Decedent not completed the gift deed application, but because the ALJ expected the gift conveyance to deplete the estate, the Decision did not purport to enter an actual decree of distribution to those intestate heirs. Decision at 2. Therefore, we remand this matter for the distribution of funds accrued to Decedent as of the date of death in his IIM account and the distribution of additional property, consisting of interests in allotments on both the Rosebud and Pine Ridge Reservations, that are not included in the gift deed application or otherwise contested by Keester. On remand, the probate judge may, as appropriate, consider or reconsider the issue of whether Decedent was survived by a lawful spouse.

applied to BIA's petition. *See* 73 Fed. Reg. 67,256 (Nov. 13, 2008); *see also Estate of Benson Potter*, 49 IBIA 37, 41 (2009) (Board vacated and remanded petition to reopen for considered under new regulations that became effective while appeal was pending before Board). Pursuant to these rules, BIA may seek reopening within 3 years after the original decision "[t]o correct an error of fact or law." 43 C.F.R. § 30.243(a)(2)(i) (2011). There is no requirement that BIA file a petition for rehearing, and the IPJ erred in holding otherwise.

Ordinarily, we might remand this matter for further consideration but, because we conclude that this appeal turns on an error of law, we proceed to consideration of the merits. We find that the ALJ erred in failing to follow the *Ducheneaux* procedures that were then in effect for challenging an estate inventory, and that his failure to do so was material because he failed to provide BIA and other interested parties clear notice and an opportunity to address whether the gift conveyance could or should be completed by BIA.

The procedures for conducting a *Ducheneaux* proceeding commenced with notice to the interested parties and to "the appropriate agency Superintendent, Area [now Regional] Director, and the Deputy Assistant Secretary – Indian Affairs (Operations)." *Estate of Ducheneaux*, 13 IBIA at 177. Notice to BIA was intended to facilitate a "full consideration of the [inventory] issue and participation in the case by . . . BIA officials." *Id.* At the conclusion of the *Ducheneaux* proceeding, the ALJ was to issue a "recommended decision" that advised the parties that objections could be filed with the Board. *Id.* The recommended decision was not subject to a right of rehearing or reopening, and became the decision of the Board if no objections to the recommended decision were filed. *Id.* at 178.

The ALJ did not follow this protocol. No notice of an inventory dispute appears in the probate record and the ALJ's Decision makes no reference to any such notice being given. Even assuming that Colhoff's November 3, 2006, letter could be construed as providing sufficient notice, it was not served on anyone other than Keester. The subpoena issued by the ALJ to the Realty Officer does not provide either the requisite notice of the dispute nor informs the persons required to be notified. Consequently, we find that no one in BIA nor Decedent's putative heirs-at-law received the notice they should have received concerning the inventory dispute and the nature of that dispute. Thus, it appears that no person with proper authority in BIA was provided the opportunity to submit a formal position on whether the gift conveyance could or should be completed. And, ultimately, the ALJ did not issue a recommended decision that informed the parties that objections to the recommendation could be filed with the Board.

These errors are significant and grounds for vacating the Order Denying Reopening and the Decision; we strike any suggestion in the IPJ's denial of Lavina's petition that BIA is required to comply with the Decision. However, we do not remand this matter because a new regulation now directs inventory disputes to be referred to BIA for resolution. *See* 43 C.F.R. § 30.128.

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 Order Denying Reopening, and vacates the Decision; we strike any language in the denial of Lavina's petition that may be construed to require BIA to comply with the Decision. We refer the inventory dispute to the Superintendent of BIA's Rosebud Agency for a decision with appropriate appeal rights, and we remand this matter to the Probate Hearings Division for the entry of an appropriate order to dispose of property in Decedent's trust estate that is not subject to the inventory dispute.

I concur:

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Debora G. Luther  
Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge