



INTERIOR BOARD OF INDIAN APPEALS

Estate of Mary Soulier

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF MARY SOULIER

(Red Cliff Chippewa Allottee No. 80 (180), Deceased)

IBIA 74-30

Decided March 5, 1974

Petition for reopening to modify the Secretary's August 6, 1923, order directing the sale of land pursuant to decedent's will.

Denied.

Indian Probate: Board of Indian Appeals: Generally--Indian Probate: Reopening:
Generally

Under the delegations of authority by the Secretary to the Board of Indian Appeals in 43 CFR 4.1, the Board has authority and jurisdiction to correct or modify prior Secretarial orders issued in probate of Indian

trust estates in accord with the statutes, court decisions and a showing of later-discovered facts.

Indian Probate: Secretary's Authority: Generally

A provision in a will executed pursuant to 25 U.S.C. § 373 (1970) requiring sale of land interests held in trust is to be carried out by the Secretary in those situations where a refusal to do so would be an arbitrary or capricious abuse of discretion by the Secretary within the rule of Tooahnippah (Goombi) v. Hickel, 397 U.S. 598, 90 Sup. Ct. 1316 (1970).

Indian Probate: State Law: Applicability to Indian Probate, Testate

A provision in a will executed pursuant to 25 U.S.C. § 373 (1970) appointing an executor shall not be approved insofar as it would be effective upon property held in trust,

but as to such property, the duties and directions given by the testator to the executor may be carried out by the Secretary to avoid a defeat of the testator's intent, provided that the Secretary's function is in no way subject to the provisions or requirements of any state court or statute limiting or regulating the power and authority of a personal representative.

Indian Probate: Trust Property: Generally

Following the doctrine of equitable conversion, a provision in a will executed pursuant to 25 U.S.C. § 373 (1970) requiring sale of land interests held in trust with the proceeds to be distributed, has the effect of changing the interests in the affected property from land to personalty requiring that the land if unsold or the proceeds of sale be distributed as personalty.

APPEARANCES: John D. Niemisto and John M. Wiley, Attorneys at Law for Alice Daley Niemisto, Franklin R. Basina, Constance Basina

Kosberg, Idell Basina Duffy, Catherine Gordon, Frederick Gordon, Jr., William Gordon, Frank Gordon, Elizabeth Gordon, Lawrence Gordon and Marvin Gordon, and Elizabeth Hawkes, Attorney at Law for John Emmett Daley, petitioners; and

Mariana R. Shulstad of the Office of the Field Solicitor, Twin Cities, Minn., for Reginald P. Miller, Superintendent, Great Lakes Agency, Wisconsin, respondent.

OPINION BY MR. McKEE

This is a proceeding before the Board of Indian Appeals upon a petition dated December 18, 1973, enclosed in a memorandum dated December 26, 1973, from Judge Vernon J. Rausch of Twin Cities, Minnesota. The petition includes the following language in the prayer:

WHEREFORE, your petitioners request an order vacating the Secretarial Order dated August 6, 1923 approving the Will of Mary Soulier and further disapproving of said Will, thereby permitting the lands owned by Mary Soulier at the time of her death to descend to her heirs.

In the memorandum of December 26, 1973, from Judge Rausch the said petition is correctly determined by him to be a petition

for reopening of a probate which had been decided for more than three years. The Judge referred the petition to the Board under the provisions of 43 CFR 4.242(h) by which reopening authority of such estates is reserved to this Board.

The record submitted in connection with the petition includes pertinent parts of the probate proceedings in the Estate of Mary Soulier. It also includes the full record of the proceedings before Judge Rausch which were initiated by the Superintendent of the Great Lakes Agency upon the filing of his combined petition for correction of inventories in eight completed probates of estates of subsequently deceased individuals ^{1/} who were either legatees, or the successors in interest of deceased legatees of the said Mary Soulier. The Superintendent's petition was directed to the elimination from the inventories in those estates of any interests in the lands which had purportedly descended to or passed under the wills of legatees of said Mary Soulier.

^{1/} ESTATES OF: Susan Soulier Daley Stute, Red Cliff Chippewa, Probate A-71-53; Theresa Agnes Soulier Basina, Red Cliff Chippewa, Probate A-60-58; Thomas H. Soulier, Red Cliff Chippewa, Probate A-155-58; John Soulier, Red Cliff Chippewa, Probate A-61-63; Susan J. Soulier Sagasunk Griffin Schaeffer, Red Cliff Chippewa, Probate A-45-66; Antoine Edward Basina, Red Cliff Chippewa, Probate A-162-66; Duwayne Marshall Soulier, Red Cliff Chippewa, Probate A-7-69; Patrick William Daley, Red Cliff Chippewa, Probate IP TC 85R 72.

The petition for reopening filed in this proceeding would appear to be collateral to those proceedings initiated by the Superintendent in estates all of which have been closed for more than three years. A finding is made that all proceedings are subject to consolidation and determination by single decision issued by this Board. Accordingly:

NOTICE IS HEREBY GIVEN TO: All of the known and unknown heirs, legatees, devisees, and successors in interest of Mary Soulier deceased; to the Bureau of Indian Affairs; to all attorneys of record; and particularly to the petitioners and respondents, that this proceeding is hereby docketed under the above number.

STATEMENT OF FACTS

Mary Soulier, Allottee No. 80 (180) of the Red Cliff Band of Lake Superior Chippewa Indians received as her allotment the S1/2 SE1/4, Sec. 1, T. 51 N., R. 5 W., of the 4th P.M. in Bayfield County, Wisconsin, consisting of 80 acres for which a restricted fee patent, dated May 8, 1897, was issued under the provisions of the Treaty of September 30, 1854. She had 12 children, six of whom predeceased her. From one, Akin Lamorie, Allottee No. 74 (153),

she inherited the allotment described as Lot 1, Sec. 8, T. 51 N., R. 3 W., and Lot 1, Sec. 36, T. 52 N., R. 5 W., both of the 4th P.M. in Bayfield County, Wisconsin, consisting of 67.24 acres. She also held certain other properties not here at issue.

On October 12, 1911, Mary Soulier executed a will which included the following provision:

3d I direct that my allotment on the Red Cliff Reservation, Bayfield County, Wisconsin, described as the South half of South East quarter of Section one (1) town (sic) fifty-one North of Range five West and the allotment of my son Akin Lamorie deceased of whom I am sole heir described as follows: Lot one of Section eight (8) township fifty-one North of Range three (3) West and Lot one (1) of section thirty-six, town fifty-two North of Range five West, be sold without unnecessary delay and the proceeds of such sale be divided equally among all my living children after first deducting therefrom one hundred (\$100.00) which I dedicate for Masses by the local pastor of the Catholic Church.

She died on April 16, 1914, and on August 4, 1923 her will was recommended for approval in accordance with the Act of June 25, 1910, 36 Stat. 855, as amended by the Act of February 14, 1913, 37 Stat. 678, by E. B. Merritt, Assistant Commissioner. On August 6, 1923, the will was approved by F. M. Goodwin, Assistant Secretary of the Interior, who included the following order in his approval:

The estate of the decedent, consisting of her original allotment and her inherited interest in the allotment of her deceased son, Akin Lamorie, are directed to be sold by the Superintendent of the LaPointe Agency, Wisconsin, and all just debts against her estate be paid, including funeral expenses, if any, and \$100.00 be given to the local pastor of the Catholic Church, and the remainder of the cash divided among her devisees as above set forth. No rights of an executor will be recognized. (Emphasis added.)

For reasons unclear at this time, the Superintendent of the LaPointe Agency did not comply with the order of sale which has remained unchanged for 50 years. At the hearing held April 4, 1973 by Judge Rausch it was speculated that due to the inaccessibility of the land no buyer could be found.

It should be noted that no protest or appeal of the order for sale was filed following entry of the order approving the will. There has been no order of distribution of any money or of these interests in the land to any legatee, devisee, or heir. The purported distributions of the interests of legatees and devisees subsequently deceased is challenged by the Superintendent's action.

During the 50 years since the approval of the will of Mary Soulier, four of the six beneficiaries designated in paragraph

3d of the will have died, 2/ and at least four of the descendants of her children have died some testate and some intestate. There are now at least 60, 3/ including one or more non-Indians, individual successors in interest who have claims against the estate under the will. In the probate of the estates of the subsequently deceased interest holders, the interests derived from the decedent under this will were treated as interests in the land itself, and in 1970 a resume of the fractional interests of the purported tenants in common ranged downward from a 1/6 each in the surviving sons to a 1/1296 each in several of the more remote claiming relatives. An almost intolerable management and ownership situation thus exists as to both allotments.

The two surviving sons, James Curtain and Fred Curtain, 4/ have pressed the Superintendent of the Great Lakes Agency for a number of years to sell the land and distribute the money to them alone as the "living children" in compliance with the will and the order approving the will. A prospective purchaser was

2/ Since the filing of the petition the Board is advised that Frederick J. Curtain, one of the two surviving children of Mary Soulier died testate January 1, 1974. No proceedings in probate of this estate have yet been instituted.

3/ Notice of the death of Angeline Basina Vandervanter on May 20, 1973 was received by the Board February 4, 1974. There may have been other deaths not yet reported.

4/ See note 1.

found, and in an attempt to remove a cloud from the title, the Superintendent requested Judge Rausch to proceed under 43 CFR 4.273 to delete the record of land interests from the estates of those decedents who have died since the approval of the will. Accordingly, after issuance of a show cause order, a proper notice of a combined hearing was issued, and a hearing was held April 4, 1973. In addition to the Curtain brothers, certain of the other interest holders appeared at the hearing pro se, and by attorney to resist the Superintendent's proposal to sell the land.

No order was issued by the Judge as to the eight estates in question following the hearing. This was for the reason that following the hearing, the resisting interest holders filed a consolidated motion for dismissal and this was in turn followed with their petition of December 18, 1973, seeking reopening of this estate pursuant to the provisions of 43 CFR 4.242(h). Since the final decision herein had been issued more than three years prior to the filing of the petition, the Judge properly transmitted the petition and the record to this Board.

The record includes the transcript of the hearing of April 4, 1973. Those opposing the Superintendent's proposed sale were represented variously by John M. Wiley, John Niemisto, a relative of one

of the parties, and by Elizabeth Hawkes, all attorneys at law. Some parties including the Curtain brothers appeared pro se, or by non-attorney family members. The Superintendent was not present or represented although two agency employees appeared as witnesses. The Field Solicitor, appearing for the first time for the Superintendent, has filed a brief opposing the petitioner's motion to dismiss.

We note no dispute of any material issue of fact.

POINTS IN ISSUE

The petitioners oppose the sale, and seek to set aside the Secretary's order for sale issued August 6, 1923, on the following grounds:

That there are upwards of 60 "heirs" who claim an interest in the land in place of the 6 original beneficiaries named in the will resulting in fractional claims now as small as 1/1296 (the rationale of this argument escapes us here); that the land value has appreciated; that the sale will pass the land irretrievably to non-Indian people, contrary to federal policy; that the present communal use of the land (there is no allegation as to the number of users) would be destroyed; that permanent improvements placed

on the land by at least one claimant would be lost; that the claimants have believed over the years that they held interests in the land; and that a sale would be improvident (without giving reasons).

The brief filed by the Field Solicitor for the respondent Superintendent was prepared prior to the filing of the petition to reopen, and it is, therefore, directed more to the issues originally raised in the effort to delete the lands from the eight inventories. However, upon review of the record as a whole, it is not now considered necessary to further enlarge the issues or to provide opportunity for the filing of additional briefs.

The brief filed by the Field Solicitor raises several points including the proposition that estoppel is no bar to the proposed sale; that adverse possession against the U.S. does not mature into title or create rights; that "this tribunal" does have jurisdiction to modify inventories; that "this tribunal" has no jurisdiction to change a Secretarial order; and that none of the eight decedents in question held any interest in the real estate through the decedent's will.

The Field Solicitor's attack upon the jurisdiction of "this tribunal" to act for the Secretary in all of these matters is made without regard to the delegations of authority included in 43 CFR 4.1 and is unsupportable. Without dwelling on the issue unduly, it should be pointed out that precedent therefor does exist. In the past when probate jurisdiction was delegated to an Assistant Secretary, time limitations were waived, and new and different action was taken in the name of the Secretary, Estate of Eliza Yellow Fox (44953-35) (December 15, 1936); when delegated to the Solicitor, Estate of Es Sun E Cly or Old Lady Sam, IA-1278 (June 29, 1966); when redelegated by the Solicitor to a Regional Solicitor, Estate of Charles Dowan, or Itoyewanjina, IA-D-32 (September 29, 1969); and when delegated to the Board of Indian Appeals, Estate of Eliza Shield Him, 1 IBIA 80 (March 24 1971). The new issues raised in each case were completely disposed of. Modifications of the findings and the distribution of the estates have been necessary in numerous instances to conform to later discovered facts or even subsequently issued court rulings.

The Field Solicitor does make a point which is to be considered here as controlling,

IV. None of the eight decedents held any interest in the subject real property at the time of their deaths.

DISCUSSION

This brings the requirement in this decedent's will into consideration when she said,

3d I direct that my allotment * * * and the allotment of my son * * *
be sold * * * and the proceeds be divided among all my living children * * * .

This provision was implemented by the Assistant Secretary's Order approving the will,
Estate of Mary Soulier, 120899-14 (August 6, 1923) where he said,

The estate of the decedent, consisting of (allotments) * * * are directed
to be sold * * *. No rights of an executor will be recognized.

The directive in the will was in our opinion sufficient to convert the interest of the
testatrix in the land to interests in personal property in accord with the doctrine of equitable
conversion stated in the Chapter, "Conversion By Will" 5 Bowe-Parker: Page on Wills

§ 46.1 Nature and definition

Under proper circumstances * * * a direction in a will to change property
from one legal class to another, as from

real to personal or personal to real, will have the effect, in equity, of changing the legal character of such property at once before it is actually changed in fact. This doctrine, known by the name of equitable conversion, rests upon the maxim that equity looks upon that as done which ought to be done. * * * It applies wherever an obligation to sell or exchange land is created by contract, will, or court order. Prior to the actual sale or exchange and while the obligation continues in force, the courts will adjudicate the rights of the parties as they would have been if the conveyance had actually been made. [Principal footnote references omitted.]

The statement in the text is supported by the decision In re Bisbee's Estate. Runke v. Bisbee, 177 Wis. 77, 187 N.W. 653 (1922), cited in the footnote; and

§ 46.9 Effect of Conversion:

The effect of equitable conversion of property is to impress the property converted with the character of the property into which it is to be converted, even before a change in form, as far as is necessary to carry out the intention of the testator. If the will directs a conversion of realty into personalty, such realty must be distributed as if it were personalty. When conversion of realty has been effected, the devisees or heirs of the testator have no claim on the realty as such, * * *. The executor is entitled to such income as an asset of the estate. * * * Likewise, other statutory provisions relating to gifts of realty do not apply to a gift of the proceeds when the realty has been converted by a mandatory power of sale. * * * [Principal footnote references omitted.]

The statement in the text is supported by the decision In re Schilling's Will. Schilling v. Schilling, 205 Wis. 259, 75 ALR 184, 237 N.W. 122 (1931) cited in the footnote.

In her will the testatrix appointed her son-in-law, Frank Basina, as executor. The Field Solicitor's memorandum would suggest that the title to the real estate did not vest in the distributees named to receive the land sale proceeds, and with this we agree. However, it is not suggested where the title to the real estate reposed following the death of the testatrix in 1914 or even from the date of the approval of the will by the Secretarial order entered in 1923. "There is no such legal entity as an 'estate'" ^{5/} capable of receiving, holding or conveying title, and the title to personal property reposes in the executor until a conveyance document such as a deed, a bill of sale, or an order of distribution is issued. (In the majority of states, the title to real property vests in the devisees at the date of death of the testator.) In this situation the Assistant Secretary's approval of the will specifically provided "no rights of an executor will be recognized." In this situation we are confronted with no other alternative than the conclusion that the title vested in the United States with the Secretary performing the functions and duties of an executor, and that such title has there reposed to this date subject to the provisions of the will as approved. However, he is in no way limited to or bound by any state statute regulating the power or authority of an executor.

^{5/} Black's Law Dictionary, Revised Fourth Edition (1968) p. 643 and cases cited.

The rights created in the six surviving children of the testatrix who should properly be designated as "legatees" of the personal property consisted only of the right to the distribution of the proceeds of sale when received by the Secretary (or the officer holding the delegated authority to sell and issue necessary conveyances).

It is, therefore, concluded that as a matter of law the inventories prepared in the estates of subsequently deceased legatees should not have included any apparent interest in the lands which had been directed to be sold. Distribution of personal property rights so acquired by inheritance by the heirs and legatees of the subsequently deceased legatees should have been made in accordance with the laws governing distribution of personal property. Nothing herein should be construed as a determination that the trust character of the personal property was lost.

The petitioners herein, who oppose the sale which the Superintendent proposes to make pursuant to the directives in the will and the Secretary's original order of 1923, would have us completely thwart the intent of the testatrix in the disposition of the property and its distribution. Her intent was properly honored by the Secretarial order approving the will, and if we were to follow the suggestions of the petitioners, we would act contrary to the spirit

and text of 25 U.S.C. § 373 (1970) as such statute was interpreted in Toohnippah (Goombi) v. Hickel, 397 U.S. 598 (1970). To act otherwise than to approve the will and carry out the directives thereof would be an arbitrary and capricious exercise of the very limited discretion vested in the Secretary by the statute as interpreted by the court.

As it appears necessary upon an analysis of the Wisconsin law governing distribution of personal property at the respective dates of death of the successors in interest, modifications of the orders of distribution should be entered in all successor estates.

Authority is hereby granted to the Administrative Law Judge to modify existing probate orders to make such proper distribution. Thereupon, when the proceeds of sale are available, they will be disbursed to those who are legally entitled thereto including the church provided it can be identified and is capable of rendering the service indicated in the will.

The petitioners' plea that we consider their individual past understandings that they owned interests in this real estate, and their contention that there were certain of them who enjoyed a communal use of the property is disposed of by the rule which we have here found to be controlling.

Those arguments made in the Field Solicitor's brief in behalf of the Superintendent that estoppel will not operate against the United States, and that no claim in property can be acquired by adverse use or possession against the United States is recognized as also controlling in this matter.

It is likewise true that, in the absence of a statute a policy cannot be recognized as paramount over an individual's rights of sale. The procedures for sale of the land here involved by the Secretary are set forth in the regulations, and there is certainly no ban against the submission of a bid by one or more Indian people, or by the tribe itself.

Any improvements placed on the land by individual interest holders shall be considered their individual non-trust personal property subject to removal prior to sale or subject to separate sale by those entitled thereto or to abandonment in place.

It is indicated in the record that some part or portion of the interest in sale proceeds may have passed by inheritance or will to persons not of Indian blood. If patents in fee for such interests have been mistakenly issued, it will be incumbent upon the Solicitor to confer with the Department of Justice concerning the institution of the necessary court proceedings for the cancellation

of such patents and the cancellation of any tax or other liens. If no patent in fee has been issued, then under the doctrine of Chemah v. Fodder, 259 F. Supp. 910 (W.D. Okla. 1966), it is not necessary to do other than to distribute the proceeds of sale to those who can establish ownership of such interests.

NOW, THEREFORE, by virtue of the authority delegated by the Secretary of the Interior, 43 CFR 4.1, the petition for reopening in the estate of Mary Soulier is here DENIED; and

IT IS FURTHER ORDERED that the petition for correction of any inventory of the estate of a person who purportedly held through and under the will of Mary Soulier which includes any interests in the lands directed by her to be sold, shall be corrected by order of the Administrative Law Judge nunc pro tunc to eliminate such lands from such inventories, and to also correct the orders of distribution of the interests of such decedents to include a provision for the distribution of the proceeds of the sale of lands, when received, as personal property in trust; and

IT IS FURTHER ORDERED that the Administrative Law Judge shall be and he is hereby delegated such authority as may be necessary to issue such additional and further orders in related matters as

may be necessary to accomplish purposes of this order in accordance with the views herein expressed.

Notice of the issuance of this decision now and of the corrective implementing orders when issued pursuant to this decision shall be mailed by the Administrative Law Judge to the respective parties in interest, to their attorneys, and to the officers of the Bureau of Indian Affairs where Appropriate. A record of such mailing shall be preserved in this and related cases.

This decision is final for the Department.

//original signed
David J. McKee, Chairman

We concur:

//original signed
Alexander H. Wilson, Member

//original signed
Mitchell J. Sabagh, Member