



INTERIOR BOARD OF INDIAN APPEALS

Estates of Benjamin Harrison Stowhy and Mary G. Guiney Harrison

3 IBIA 243 (02/04/1975)

Also published at 82 Interior Decisions 55

Related Board case:

1 IBIA 269

Consent decree, *Goheen v. Morton*, Civ. No. 2879 (E.D. Wash. Dec. 23, 1974)



United States Department of the Interior

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

ESTATE OF BENJAMIN HARRISON STOWHY

(DECEASED YAKIMA ALLOTTEE NO. 2455)

and

ESTATE OF MARY G. GUINEY HARRISON

(DECEASED COLVILLE ALLOTTEE NO. S-925)

IBIA 72-23 (Supp.)

Decided February 4, 1975

This decision is issued pursuant to the consent judgment of the United States District Court, Eastern District of Washington, in the case of Goheen, et al. v. Morton, et al. v. Tahkeal, et al., Civil No. 2879, issued December 23, 1974, wherein the court approved a stipulation for settlement entered into by the parties.

Remanded.

1. Indian Probate: Generally--Indian Probate: Judicial Review

Where the constitutionality of the Act of December 31, 1970
(25 U.S.C. § 607,

84 Stat. 1874) is challenged in court, the parties are not precluded from entering into a stipulation for settlement upon which the court may enter a consent judgment rendering a ruling upon the constitutional issue unnecessary.

APPEARANCES: C. James Lust, Attorney for the plaintiffs as realigned, except the Plaintiff Rosemary Kalama appearing by attorney Gilbert H. Kleweno; Patrick Cockrill, attorney for the intervenor Esther E. Monjarez; the defendants Rogers C. B. Morton and Martina Guiney Grey were represented by Dean C. Smith, United States Attorney before the Court, but he does not appear before the Department. It is anticipated that Rogers C. B. Morton, Secretary of the Interior, will be represented by the Solicitor for the Department and that Martina Guiney Grey will be represented by an attorney yet to be named.

ORDER BY CHIEF ADMINISTRATIVE JUDGE MCKEE

[1] This Board issued its decision in the two estates on June 30, 1972, 1 IBIA 269, 79 I.D. 428 (1972), in which it denied

jurisdiction to pass upon the constitutionality of a statute of Congress, the Act of December 31, 1970 (25 U.S.C. § 607, 84 Stat. 1874), in its application to the passing of the land interests on the Yakima Reservation owned by Benjamin Harrison Stowhy, an enrolled Yakima Indian on his death on March 8, 1968, and the passing of such interests plus additional interests upon the death of his wife, Mary G. Guiney Harrison, a Colville enrollee who died December 2, 1968. The Board directed that the Judge's orders approving the wills of the two decedents should be affirmed after modification of the order of distribution of the estate of the wife from which a devise to Margaret McDonald had been omitted.

Certain relatives of the decedent, Benjamin Harrison Stowhy, filed an action in the United States District Court for the Eastern District of Washington claiming to be heirs under the Act of August 9, 1946 (25 U.S.C. § 607, 60 Stat. 968) amended by the Act of December 31, 1970, supra, and alleged the amendment deprived them of the property which they had inherited under the 1946 Act. They challenged the constitutionality of the 1970 Act on that ground. The original plaintiffs joined others known to have relationship to the decedent, Benjamin Harrison Stowhy, as third-party defendants, all of whom except three were realigned by the Court as plaintiffs. Those not

realigned were personally served, and upon failure to appear were adjudged by the Court to be in default.

Esther E. Monjarez, also known as Esther Simmons Monjarez, intervened contesting the validity of the will of Mary G. Guiney Harrison on its merits alleging mistake and undue influence, and she remained designated as an intervenor. The defendant, Martina Guiney Grey, a devisee named in the will of Mary G. Guiney Harrison remained as the sole defendant having an interest in the estate with the defendant Secretary Rogers C. B. Morton being named in his official capacity only.

During the course of the litigation the interested parties, except those adjudged to be in default, entered into a stipulation for settlement subject to approval by the Secretary of the Interior, of the attorneys' fee provision therein, and subject to the approval of the Court. The Secretary issued his approval of the provision for attorneys' fees, and the Court approved the balance of the stipulation without reference to the fees in its Consent Judgment entered December 23, 1974. By this judgment the Secretary of the Interior is directed to issue those orders necessary to implement both the Consent Judgment and the stipulation. No stay of execution of the Consent Judgment is afforded the parties.

NOW, THEREFORE it is ORDERED by authority of the Court as aforesaid and by the authority of 43 CFR 4.1(5) that the Administrative Law Judge having the probate authority over the estates of deceased Indians on the Yakima and Colville Reservations shall take the following action:

A. In the Estate of Benjamin Harrison Stowhy, Probate No. IP PO 88K 71:

1. He shall enter an order to the Bureau of Indian Affairs directing immediate payment from the funds in the estate account of the claims against the Estate previously approved.

2. He shall enter an order to the Bureau of Indian Affairs directing the immediate payment from the funds in the estate account of the total sum of \$6,000, said payment to be made \$5,000 to Esther E. Monjarez, also known as Esther Stowhy Monjarez (Intervenor) personally, and \$1,000 to Patrick Cockrill, her attorney, said payment to be for attorney fees hereby approved;

3. The balance of the funds in the estate account on December 23, 1974, shall be immediately divided into two equal parts to be paid separately: one half as provided in paragraph 7 hereof

to the group named in the consent judgement of December 23, 1974, as plaintiffs 1/ in shares to be determined upon establishment of the plaintiffs' individual rights as heirs of the decedent under the laws of descent of the State of Washington, after hearings, as hereinafter provided in paragraph 4 hereof; and one half to the account of the Estate of Mary G. Guiney Harrison, deceased Colville allottee in Probate No. IP PO 120K 71 (April 11, 1972);

4. He shall order distribution from the land inventory in this estate the decedent's interest in Yakima allotment described as that portion of tract number 124-2454 described as NE 1/4 SW 1/4 sec. 25, T. 11 N., R. 18 E., W. M. Washington, containing 40 acres more or less and Yakima allotment described as tract number 124-2455 described as S 1/2 SW 1/4 sec. 25, T. 11 N., R. 18 E., W. M. Washington containing 80 acres more or less to the group named in the consent judgment of December 23, 1974, as plaintiffs, as tenants in common, in shares to be determined upon establishment of their

1/ The group designated in the Consent Judgment to receive distribution from this estate as plaintiffs, although all are not realigned, are individually named as follows: Maggie E. Goheen, Charles P. Eyle, Elizah Lewis, Elsie Sam, John T. Eyle, Jr., Evans Lewis, Edgar Lewis, Ernest Lewis, Franklin Carl Nash, Dennis Frank Nash, Edith Mae Nash, Gloria E. J. Nelson aka Joan Graham, William Eyle, Sr., Rosaline Yallup Napoleon, Dixie Eyle Ham, Cindy Rae Eyle (a minor) and Rosemary Kalama.

individual fractional rights as heirs of this decedent under the Act of August 9, 1946, supra, in force at the date of decedent's death and the laws of descent of the State of Washington after hearings; 2/

5. He shall order distribution from the land inventory in this estate subject to the provisions of paragraph 8 herein the decedent's interest in Yakima allotment described as tract number 124-2453 described as S 1/2 NW 1/4 of sec. 25, T. 11 N., R. 18 E., W.M. Washington, containing 80 acres more or less and Yakima allotment described as tract number 124-1819 described as SW 1/4 NE 1/4, NW 1/4 SE 1/4 sec. 2, T. 10 N., R. 17 E., W.M. Washington, containing 80 acres more or less to the living successor in interest, Martina Guiney Grey, a Colville enrollee, as the devisee of the land interests named in the will of Mary G. Guiney Harrison, a Colville enrollee, the subsequently deceased widow and sole devisee of this decedent;

2/ The Judge shall follow the applicable procedure provided for determination of heirs and probate of Indian estates appearing as 43 CFR §§ 200 et seq.; the decision shall be subject to the appeal provisions of that part of the regulations; and the defaulted defendants Allen Tahkeal, Alexander Eyle, Jr. and Florence Stover, or their successors, shall not be included to share in the distribution.

6. The stipulation for settlement provided for allowance of attorneys' fees which is hereby approved for the respective parties (no provision is made for the defendant Martina Guiney Grey, represented by Dean C. Smith, United States Attorney). The stipulation provided for payment of fees which are held to be individual obligations and not claims against the estate: for C. James Lust, attorney for the plaintiffs except Rosemary Kalama represented by Gilbert H. Kleweno, the sum of \$22,500 including reimbursement for costs and expenses advanced; for Gilbert H. Kleweno, attorney for plaintiff Rosemary Kalama, the sum of \$250; for the intervenor's attorney, approval and payment is provided in paragraph 7;

7. The payment provided in paragraph 3 for the group identified as "plaintiffs" shall be made to their attorneys as follows: to Gilbert H. Kleweno not to exceed \$250 which shall be charged against the interest of Rosemary Kalama to be later determined; and to C. James Lust not to exceed \$22,500 to be charged against the interests of the other plaintiffs to be later determined. Nothing herein shall bar immediate payment of available funds with allocations to be made against the interests of the respective parties, except Rosemary Kalama, for whom provision is made above. Payments shall continue from time to time until the specified

amounts are reached as income is derived from the lands distributed to the plaintiffs herein;

8. The proceedings in this estate and in the Estate of Mary G. Guiney Harrison, deceased, were not complete but were pending before the Department on December 31, 1970, the date of passage of 84 Stat. 1874, and sec. 2 thereof brings this estate proceeding within the purview of that Act. Upon issuance of the order of distribution in compliance with paragraph 5 of this decision, notice thereof shall be given to the Yakima tribe. Further proceedings conducted in relation to disposition of the land interests of this decedent on the Yakima Reservation shall be governed by 43 CFR 300 et seq., effective September 30, 1974 (39 FR 31635).

B. In the Estate of Mary G. Guiney Harrison, deceased, Probate IP PO 120K 71 (April 11, 1972):

1. The interest of Esther E. Monjarez is confirmed in that part of the allotment of Cecelia Stowhy No. 124-2454 which Benjamin Harrison Stowhy, a Yakima enrollee, inherited and conveyed by deed to his wife Mary G. Guiney Harrison, a Colville enrollee, during his lifetime and which was in turn conveyed by deed during her

lifetime to Esther E. Monjarez, a Colville enrollee, said tract being five acres of the NW 1/4 SW 1/4 sec. 25, T. 11 N., R. 18 E., W.M. Washington described as:

Beginning at the northwest corner of the NW 1/4 SW 1/4 of sec. 25, T. 11 N., R. 18 E., W.M. Washington, thence south 490 feet to the true point of beginning; thence east 660 feet, thence south 330 feet, thence west 660 feet, thence north 330 feet to the true point of beginning, containing 5 acres more or less.

The Yakima tribes have no right to purchase this tract under either the Act of August 9, 1946 (60 Stat. 968) or the amendment thereof by the Act of December 31, 1970 (84 Stat. 1874), both codified as 25 U.S.C. § 607, since title passed by inter vivos conveyance and not by inheritance or by will upon death of the owner.

2. The Administrative Law Judge shall modify his order approving the will of Mary G. Guiney Harrison deceased entered April 11, 1972, Probate No. IP PO 120K 71 and his distribution of the estate to provide for distribution according to the will of two acres of the allotment of Cecelia Stowhy No. 124-2454 on the Yakima Reservation described as:

Beginning at the northwest corner of the NW 1/4 SW 1/4 sec. 25, T. 11 N. R. 18 E., W. M. Washington., thence south 358 feet to the true point of beginning; thence

continuing south 132 feet, thence east 660 feet, thence north 132 feet, thence west 660 feet to the true point of beginning, containing 2 acres more or less

said distribution to be made nunc pro tunc to the devisee Margaret McDonald, a subsequently deceased enrollee on the Colville Reservation. Upon the probate of her estate it appears the said two-acre tract will pass to her successors in interest, Esther Simmons Monjarez and Ezra M. Simmons, Jr. subject to the option of the Yakima tribe to take it as passing under the will of Mary G. Guiney Harrison, deceased, pursuant to the provisions of the Act of December 31, 1970, supra. Proceedings therefor shall be conducted in accord with the provisions of 43 CFR §§ 300 et seq. effective September 30, 1974 (39 FR 31635).

3. The distribution ordered by the Administrative Law Judge in the Estate of Mary G. Guiney Harrison, deceased, Probate No. IP PO 120K 71 on April 11, 1972, to Martina Guiney Grey, a Colville enrollee, of that part of the allotment of Cecelia Stowhy No. 124-2454 described as the NW 1/4 SW 1/4 sec. 25, T. 11 N., R. 18 E., W.M. Washington, except 5 acres conveyed as described in paragraph B-1 hereof and except two acres devised as described in paragraph B-2 hereof, containing 33 acres more or less, is confirmed. The interest of Martina Guiney Grey is held subject to the right

of the tribe arising from the Act of December 31, 1970, supra. The Judge shall notify the tribe of this right, and he shall conduct such additional proceedings as are necessary and appropriate according to the provisions of 43 CFR §§ 300, et seq. effective September 30, 1974 (39 FR 31635).

4. The Order by the Administrative Law Judge entered on April 11, 1972, in the Estate of Mary G. Guiney Harrison deceased, Probate No. IP PO 120K 71, approving the decedent's will including the residuary clause thereof and distributing the estate is approved and confirmed except as herein specifically modified, and such distribution shall be accomplished at the earliest possible date to be followed from time to time as any additional assets, real or personal, shall be discovered or shall become a part of the estate account.

It is further ORDERED that the Administrative Law Judge shall take such other and further action in addition to that provided herein as may be necessary or appropriate to satisfy the requirements of the stipulation and the consent judgment.

This decision is final for the Department subject to the right of an aggrieved party to appeal from any new decision of the Administrative Law Judge in proceedings herein required.

Done at Arlington, Virginia.

//original signed
David J. McKee
Chief Administrative Judge

I concur:

//original signed
Alexander H. Wilson
Administrative Judge