



INTERIOR BOARD OF INDIAN APPEALS

Estate of Winona June Little Hawk Garcia

14 IBIA 106 (04/04/1986)



United States Department of the Interior

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

ESTATE OF WINONA JUNE LITTLE HAWK GARCIA

IBIA 85-42

Decided April 4, 1986

Appeal from an order denying rehearing issued by Administrative Law Judge Sam E. Taylor in Indian Probate No. IP OK 55 P 85, IP OK 221 P 84.

Affirmed.

1. Indian Probate: State Law: Applicability to Indian Probate, Testate--Indian Probate: Wills: Construction of

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law.

2. Indian Probate: State Law: Pretermitted Heir--Indian Probate: Wills: Children, Disinheritance of--Indian Probate: Wills: Disapproval of

Under prior holdings of the Board of Indian Appeals, the decision in Toahnippah v. Hickel, 397 U.S. 598 (1970), and in the absence of substantive probate regulations, the Department of the Interior lacks authority to disapprove an Indian will that does not provide for after-born children.

APPEARANCES: Daniel G. Webber, Esq., Watonga, Oklahoma, for appellant; Kathleen Flanagan, Esq., Walters, Oklahoma, for Rudolph Poland Harrison. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On August 19, 1985, the Board of Indian Appeals (Board) received a notice of appeal from Patricia Kay Garcia (appellant). Appellant sought review of an order denying rehearing issued on June 14, 1985, by Administrative Law Judge Sam E. Taylor in the estate of Winona June Little Hawk Garcia (decendent). Denial of rehearing let stand a November 19, 1984, order approving decendent's will. For the reasons discussed below, the Board affirms that order.

Background

Decendent, Cheyenne-Arapaho #801N5349, was born on November 25, 1921, and died on April 4, 1983. A hearing to probate decendent's Indian trust estate was held before Judge Taylor on September 25, 1984.

Testimony at the hearing showed decedent was married and divorced twice. She was divorced at the time of her death. Decedent also had four children, two with each husband. These children are Rudolph Roland Harrison, Elizabeth Ann Harrison Morlan, Thomas John Garcia, and appellant. A document dated March 15, 1961, and purporting to be decedent's last will and testament was presented at the hearing. This will, which was written approximately 3 years before the birth of appellant, left \$1 to decedent's then husband, Thomas Garcia, and the remainder of her estate equally to her three living children.

Following the conclusion of the hearing, Judge Taylor issued an order on November 19, 1984, which approved decedent's will except for the de minimus \$1 bequest to Thomas Garcia, who could not be located. The order also approved several creditors' claims, which are not at issue here. Distribution under the terms of the will had the effect of disinheriting appellant, an after-born child.

Appellant, therefore, petitioned for rehearing. After giving notice of the petition and receiving briefs both supporting and opposing the petition, Judge Taylor denied rehearing on June 14, 1985.

Appellant appealed this decision to the Board by notice of appeal received on August 19, 1985. No briefs were filed on appeal.

Discussion and Conclusions

[1] Appellant argues on appeal that the pretermitted heir statutes of the State of Oklahoma should have been applied in this case to allow her to participate in her mother's estate. The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law. ^{1/} See, e.g., Estate of William Mason Cultee, 9 IBIA 43 (1981), aff'd sub nom., Cultee v. United States, No. 81-1164 (W.D. Wash. Sept. 14, 1982), aff'd, 713 F.2d 1455 (9th Cir. 1983), cert. denied, 104 S.Ct. 2150 (1984). Therefore, Oklahoma pretermitted heir statutes do not apply.

[2] The Board discussed the plight of after-born children in Estate of Ronald Richard Saubel, 9 IBIA 94, 88 I.D. 993 (1981). The Board there held that, under the Supreme Court's holding in Tooahnippah v. Hickel, 397 U.S. 598 (1970), the Department lacked authority to disapprove an Indian will that did not provide for after-born children. This holding was based on the absence of substantive Departmental probate regulations. Although in Saubel, 9 IBIA at 100 n.6, 88 I.D. at 996 n.6, the Board noted the Supreme Court's suggestion in Tooahnippah that the Department had the authority to promulgate substantive probate regulations, no such regulations have been proposed.

^{1/} In contrast, the wills of those Indians that are by Federal statute made subject to probate in the courts of the State of Oklahoma are governed by Oklahoma law. See, e.g., 25 U.S.C. § 375 (1982).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Taylor's June 14, 1985 order denying rehearing is affirmed.

//original signed
Jerry Muskrat
Administrative Judge

I concur:

//original signed
Franklin D. Arness
Alternate Member