



INTERIOR BOARD OF INDIAN APPEALS

Estate of Stella Red Star/Swift Bird

14 IBIA 140 (06/26/1986)

Related Board case:
16 IBIA 131



United States Department of the Interior

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

ESTATE OF STELLA RED STAR/SWIFT BIRD

IBIA 86-7

Decided June 26, 1986

Appeal from an order denying rehearing issued by Administrative Law Judge Elmer T. Nitzschke in Indian probate proceeding IP RC 141Z 85, IP RC 103Z 84.

Vacated and remanded.

1. Administrative Procedure: Administrative Law Judges--Indian Probate: Administrative Law Judge Indian Probate: Indian Land Consolidation Act

The fact that an administrative law judge has escheated Indian trust property to an Indian tribe under the provisions of the Indian Land Consolidation Act, 25 U.S.C. § 2206 (1982 and Supp. II, 1984), does not show bias against an individual Indian heir or devisee.

2. Board of Indian Appeals: Jurisdiction--Indian Probate: Appeal: Matters Considered on Appeal

Under 43 CFR 4.320, in reviewing a decision in an Indian probate proceeding, the Board of Indian Appeals "shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate."

3. Indian Probate: Evidence: Generally--Indian Probate: Hearing: Full and Complete

The Board of Indian Appeals will remand for further proceedings any Indian probate case in which unresolved discrepancies remain in the record and it appears that a full factual record was not developed.

4. Indian Probate: Wills: Revocation

The revocation of a will is a testamentary act as significant as the execution of a will. When an Indian will is on file with the Bureau of Indian Affairs and is destroyed in the presence of BIA personnel, care must be taken to ensure that revocation is actually

intended; if requested, a new will is expeditiously prepared; and, if no new will is executed before the old will is destroyed, the testator knows and intends that his or her trust property will descend through intestate succession or under an earlier will should he or she die before a new will is executed.

5. Indian Probate: Wills: Revocation

Revocation of a will may revive an earlier will if the testator so intends.

6. Bureau of Indian Affairs: Generally--Indians: Trust Responsibility

Charges of violation of trust responsibility through criminal actions by personnel of the Bureau of Indian Affairs must be supported by probable cause if action is to be taken.

APPEARANCES: Peter Swift Bird, Sr., pro se. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On October 18, 1985, the Board of Indian Appeals (Board) received a notice of appeal from Peter Swift Bird, Sr. (appellant). Appellant sought review of a July 15, 1985 order denying rehearing issued by Administrative Law Judge Elmer T. Nitzschke in the estate of Stella Red Star/Swift Bird (decendent). The order denying rehearing let stand an April 11, 1985 order determining decendent's heirs. For the reasons discussed below, the Board vacates the order denying rehearing and remands this case for further consideration.

Background

Decendent, Oglala Sioux OS-2664 of the Pine Ridge Indian Reservation in South Dakota, was born on March 11, 1897, and died on November 8, 1983, at the age of 86. Because decendent died possessed of land held in Indian trust status, a hearing to probate her trust estate was held on June 26, 1984, before Judge Nitzschke. Testimony introduced at the hearing showed decendent was married once, to George Swift Bird, Sr., from whom she was divorced in 1944. Seven children were born of this marriage: three of those children predeceased decendent without issue; one predeceased decendent leaving one surviving grandchild, Curtis Charles, a.k.a. Douglas Dean Swift Bird; and three, Francis Swift Bird, Joseph Swift Bird, and appellant, were living when decendent died. The testimony showed decendent had no other natural or adopted children.

Testimony was also given indicating decendent had written a will, which was destroyed at her request by employees of the Bureau of Indian Affairs

(BIA) on November 2, 1983. When appellant and Joseph Swift Bird stated their intention to challenge decedent's competence when she allegedly revoked her will, the hearing was continued until September 13, 1984.

At the September 13 hearing appellant and Joseph Swift Bird introduced a written statement signed by decedent's attending physician to the effect that she was not competent during the last two weeks of her life. The hearing was thus continued again, so that the physician could be available for cross-examination.

The hearing was concluded on February 13, 1985. At that time, the attending physician reviewed the nursing records relating to decedent's last hospitalization and indicated that, in his medical opinion, there could have been days during that period when decedent was competent.

Judge Nitzschke found that on November 2, 1983, decedent was competent to revoke her will and had done so by signing a written document stating her intention to revoke the will and by physical act. He, therefore, determined that decedent had died intestate and found her heirs to be Francis Swift Bird, Joseph Swift Bird, appellant, and Curtis Charles, a.k.a. Douglas Dean Swift Bird.

Appellant and Joseph Swift Bird petitioned for rehearing of this order. The petitioners alleged Judge Nitzschke was biased and had denied them due process. By order dated July 15, 1985, Judge Nitzschke denied rehearing, finding the petition was "not under oath and [did] not clearly and concisely set forth proper grounds to allow for rehearing. The petitioners essentially state that the decision is wrong because they disagree with its conclusion." Order at page 2. Judge Nitzschke further stated that petitioners failed to show how the records of other probate proceedings, which they requested be made part of the record in this case, were relevant and concluded that any such information could have been presented as part of the original hearing.

Appellant appealed this decision to the Board, which received the notice of appeal on October 18, 1985. Only appellant filed a brief on appeal.

Discussion and Conclusions

Appellant raises several issues in his notice of appeal and brief, not all of which strictly arise from the present probate proceeding. The arguments are also not always clearly stated. It appears appellant contends that there has never been a final resolution of the estate of his father, George Swift Bird, Sr.; Judge Nitzschke was biased against him; the decision failed to address discrepancies in the record; he was prevented from talking with certain witnesses; BIA destroyed decedent's will; BIA improperly handled certain land exchange applications he filed; and BIA is carrying out some kind of land consolidation program of its own devising on the Pine Ridge Reservation which involves the destruction of wills and the "loss" of other legal documents affecting land title.

As to appellant's contention that there has been no final resolution of his father's estate, the Board issued a decision in the Estate of George Swift Bird, Sr., on August 16, 1982. 10 IBIA 63 (1982). The decision

dismissed appellant's appeal because of procedural problems. A dissent in that case argued the Board should have addressed the merits of appellant's arguments. A dissent is, however, merely a statement of the dissenter's opinion and does not affect the finality of the decision rendered by the majority. The estate of appellant's father has, therefore, been finally resolved. Appellant cannot challenge the result in his father's estate in this proceeding.

Appellant also charges that Judge Nitzschke was biased against him. It appears appellant bases this charge on the way he believes the Indian Land Consolidation Act 1/ is being implemented on the Pine Ridge Reservation. Appellant thus states at page 2 of his notice of appeal (entitled "Petition"):

Now then; the real reason for the Judge to create this judgement is; that the Bureau of Indian Affairs had implemented a program, (Land Consolidation Act of January 12, 1983, P.L. 97-459) and it was a practice of the Pine Ridge Bureau of Indian Affairs to destroy Wills and loosing personnel Records, it got so bad that the Oglala Sioux Tribal Council was forced by political pressure to enact legislation, (Resolution No. 83-106) wherein the B.I.A. posted a notice, without date, stating that the land consolidation act of January 12, 1983 was changed as of October 30, 1984, the Oglala Sioux Tribal Council at the same special session again, enacted another resolution, Resolution No. 83-107, in view of these resolutions, the Judge, Elmer T. Nitzschke did in the Probate Case RC 99Z-84, Lillian Tobacco did order in his judgement 40-acres to be escheated to the Oglala Sioux Tribe.

Again, in his brief at page 1, appellant states he placed certain documents in evidence "to show that the Bureau of Indian Affairs is collecting all land documents and destroying them so as to implement their own land program; which is the Land Acquisition Act." Appellant further states he was given a telephone number to call as a "whistle-blower." 2/

Appellant's arguments suggest that he misunderstands the Indian Land Consolidation Act. This act, which was passed by Congress and signed into law by President Reagan on January 12, 1983, provides, among other things, for the escheat of certain small individually owned interests in Indian trust lands to the tribe. Section 207 of the Act, which sets forth the escheat provisions, was amended on October 30, 1984. Although BIA is the Federal agency required to carry out the Indian Land Consolidation Act, the Act represents a program mandated by Congress, not one initiated or controlled by BIA.

The two tribal resolutions cited by appellant show the Oglala Sioux Tribe opposes the escheat provisions of the Indian Land Consolidation Act. Resolution 83-106 states in pertinent part:

1/ Act of Jan. 12, 1983, P.L. 97-459, 25 U.S.C. §§ 2201-2211 (1982 and Supp. II, 1984), as amended by the Act of Oct. 30, 1984, P.L. 98-608.

2/ The telephone number given to appellant is that of the Rapid City Suboffice of the Minneapolis Division of the Federal Bureau of Investigation (FBI).

WHEREAS, the efforts of the Oglala Sioux Tribe to prevent implementation of Section 204 [3/] of the Indian Land Consolidation Act as it pertains to the Pine Ridge Reservation land have been unsuccessful, and

WHEREAS, the firm of * * * has indicated that it has the opportunity to present a bill to Congress to request that the provisions of Indian Land Consolidation shall not apply to the lands on the Pine Ridge Reservation, now

THEREFORE BE IT RESOLVED, that the Oglala Sioux Tribal Council requests that the firm of * * * be requested and authorized to proceed with preparation of a Bill to amend the Indian Land Consolidation Act of 1982 to provide that it shall not apply to any lands located within the Pine Ridge Indian Reservation in South Dakota.

Resolution 83-107 provides in pertinent part:

WHEREAS, the Oglala Sioux Tribe has been notified by the Office of Hearings and Appeals that inasmuch as Section 207 of the Indian Land Consolidation Act has now been implemented, and

WHEREAS, the Oglala Sioux Tribe has been notified that there is a need for the Tribe to be present at probate hearings to assert any claims it may have over land affected by Section 207, and

WHEREAS, the Oglala Sioux Tribe regards Section 207 of the Indian Land Consolidation Act is harmful to its members and has made unsuccessful efforts to have a moratorium placed on implementation of Section 207 as it applies to land on the Pine Ridge Reservation, and is presently in process of having a bill presented to Congress to make Public Law 97-459 inapplicable on the Pine Ridge Reservation, now

THEREFORE, BE IT RESOLVED, that the Oglala Sioux Tribe has determined that it will not assert any claims for land as provided for in Section 207 of the Indian Land Consolidation Act, nor will it accept any lands subject to Section 207.

Each of these resolutions was passed by a unanimous vote of 23 to 0, with no abstentions.

The BIA notice cited by appellant details the circumstances under which land may escheat to the tribe and concludes:

3/ When read in context with Resolution 83-107, quoted in the text, *infra*, this number appears to be a typographical error. Section 204 relates to the sale or exchange of tribal lands pursuant to an approved tribal land consolidation plan.

The amendments provide more flexibility for the land owner. It prevents valuable land from escheating to the Tribe, that did not earn enough income. Some examples of this are unleased land particularly business sites, timber land, valuable mineral land and owner use such as homesites.

The Act contains other features but will not be effective unless implemented by the Tribe.

The Bureau of Indian Affairs Realty Office, Pine Ridge Agency, Pine Ridge, South Dakota, can advise owners of these small undivided interests and steps they can take if they want the land to go to someone besides the Tribe. They can also help potential heirs provide evidence that the land could yield at least \$100 to the owners. Very little of the farming and grazing land of the Oglala Sioux reservation has the potential income of \$100 per year for a 2% interest. If the land has more valuable uses and contains valuable improvements the heirs should bring this to the attention of the BIA Realty Office.

[1] Judge Nitzschke is required to uphold Federal law in issuing his decisions. Federal law requires the escheat of certain interests to the tribe under specified circumstances. The Board does not have before it the probate record of the estate of Lillian Tobacco, which was cited by appellant. Even assuming, however, that the Judge escheated interests to the tribe in the probate of that estate, such a decision, and the consequences of it in light of Tribal Resolution 83-107, are irrelevant to the present proceeding. No interests in decedent's trust lands were escheated in this case. The fact that Judge Nitzschke upheld Federal law in the probating of another estate does not show bias against appellant.

[2, 3] Appellant next argues that Judge Nitzschke's decision fails to address several factual discrepancies in the record. The Board has carefully reviewed the record, appellant's allegations, and the decision in light of 43 CFR 4.320, which states: "[T]he Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate." The Board agrees with appellant that unanswered questions remain in this case. Some of these problems arise from a failure to resolve conflicts in the testimony, while others result from the failure to develop a full factual record at the hearing. Whatever the cause of the particular problems, it is necessary to remand this case for further proceedings.

The following list is provided to facilitate identification of the unresolved matters:

1. There are conflicting statements concerning the date decedent fell from her bed. This date is significant because of its relationship to decedent's testamentary actions and capacity. The BIA witnesses state decedent instructed them to destroy her will on November 2, 1983, the day after she fell from her bed, and she was not receiving anything intravenously (IV) on that date. Decedent's attending physician testified she requested the discontinuation of the IV on November 2, 1983, and appears to suggest she fell

after that time. He further indicated decedent's condition varied daily, but steadily worsened after she was taken off the IV. Although the doctor apparently testified from the nursing records of decedent's last hospitalization, these records were not made part of the probate file. ^{4/} Therefore, the record does not permit a determination of the date decedent fell from her bed or was removed from the IV or of her daily condition starting on November 2, 1983.

2. Appellant states that although he has been prohibited from examining the hospital records, he has now spoken with the nurses who were on duty during this period, and they say they did not see any BIA people with decedent. No member of the nursing staff was asked to testify at the hearing. Furthermore, the person who called BIA and asked them to come to the hospital because decedent wanted to change her will was not a witness. These people could have helped to clarify both dates and decedent's mental condition.

[4] 3. The revocation of a will is a testamentary act as significant as the execution of a will. Section XIII of the December 1971 pamphlet entitled Drafting of Indian Wills Covering Trust and Restricted Property, published by the Department's Office of Hearings and Appeals as guidance to all BIA personnel drafting Indian wills, states:

A will may be revoked by making another will or by other writing made with the same formalities as are required in the execution of a will or by physically destroying the will with the intention of revoking it. If an earlier will is in your [BIA's] possession, deliver it to the testator at the time he signs the new will so that he may destroy it. The destruction of a previous will should be done in the presence of witnesses if possible.

It is quite possible for a testator to destroy a will without witnesses and without any formal acknowledgement of the act. When, however, a will is on file with BIA and is destroyed in the presence of BIA personnel, care must be taken to ensure that revocation is actually intended; if requested, a new will has been expeditiously prepared; and, if no new will is executed before the old will is destroyed, the testator knows and intends that his or her trust property will descend through intestate succession, or under an earlier will, should he or she die before a new will is executed. This care is required not only because of BIA's general fiduciary relationship to individual Indians, but also because of its special capacity as scrivener for and custodian of an extremely important legal document having specific legal standards relating both to its execution and its revocation. The questions necessary for a finding that decedent understood and intended the results of the destruction of her will were not asked at the hearing.

In fact, the testimony of decedent's granddaughter, Wanda Barrett, suggests that decedent may not have even understood what will she was destroying. Barrett testified decedent wanted to change her will to leave all of her

^{4/} The hospital records in the probate file relate only to decedent's hospitalization in May and June of 1983.

trust property to Barrett. Decedent apparently wrote out a new will, which Barrett did not turn over to BIA or present to Judge Nitzschke. Barrett herself suggested the possibility that decedent believed she was destroying this later document. Neither BIA witness testified that the significance of her actions was explained to decedent, or that she understood and intended the consequences of the destruction of her will. Without testimony from the BIA personnel clearly showing decedent knew the contents of the will she was destroying and intended to revoke that testamentary disposition, it is not possible to state with certainty that decedent intended to alter the scheme established in that will.

4. In addition to physically destroying her will, decedent apparently signed a statement to the same effect. This statement reads in its entirety: "11-2-83--I hereby cancel my Last Will and Testament (signed) Stella Swift Bird Witnesses: Donna M. Deans." This document requires further explanation. The operative language "I hereby cancel my Last Will and Testament" is written in black pen in a hand that is apparently not the same as either that of Stella Swift Bird or Deans. The name Stella Swift Bird is also written in black pen. The date "11-2-83" is written in pencil. The word "Witness" is written in black pen with "es" added in blue pen, the same as the signature of Deans. Because of these obvious differences, the Judge should inquire further about this document in order to ascertain what it was intended to accomplish and that it was what it purported to be.

Furthermore, the will drafting manual, cited supra, indicates that a document memorializing the revocation of a will should specify how the will was revoked. See Attachment No. 4 to the manual. The statement at issue does not show how the will was revoked, but, in fact, appears itself to be the instrument of revocation. This apparent duplication should have been explained.

[5] 5. The record shows that a document entitled "Last Will and Testament, and Prayer of Gift" dated January 22, 1977, and signed by decedent and two witnesses, was accepted into evidence only as an indication of decedent's intent in January 1977. Upon remand, if Judge Nitzschke finds the 1979 will was properly revoked, he should consider whether the 1977 will was revived. The Board has recognized the concept of revival of wills. Although it has not often addressed the issue, the Board has adopted the rule that revocation of a later will does not revive an earlier will unless the testator so intends. 5/ Estate of Charles Track, 1 IBIA 216, 223, 79 I.D. 83, 86 (1972); Estate of Frank Mountain Chief, A-25668 (May 9, 1949). Despite a presumption against revival, however, it is necessary to consider whether decedent intended to revive her 1977 will when she destroyed her 1979 will.

Each of the above questions, and any others that became apparent on remand, must be addressed in the Judge's final order.

Finally, appellant alleges that BIA destroyed and/or concealed legal documents, including decedent's will in this case, as part of some unclearly

5/ See 2 Page, The Law of Wills, §§ 21.49 through 21.56 (1960), discussing the various rules regarding revival of wills followed by the courts.

described scheme apparently to prevent individual tribal members from receiving land to which they were entitled. It appears from the record that appellant believes his brother, Francis Swift Bird, has been duped into agreeing to do something to further this scheme with respect to his inheritance in decedent's trust property. Thus, appellant appears to contend that BIA destroyed decedent's will, which had left all of her property to appellant and Joseph Swift Bird, 6/ in order to have the estate pass under South Dakota laws of intestate succession so that Francis Swift Bird would receive an undivided 1/4 interest in those lands.

[6] Appellant's allegations raise charges of criminal behavior and breach of trust responsibility. The Board is not reticent to take appropriate action if such charges are verified or if there is probable cause 7/ to suspect the accusations may have merit. Here, appellant's allegations lack clarity and specificity and may result from frustration and anger over the outcomes of the probates of the estates of both of his parents. Under these circumstances, appellant's accusations do not show probable cause.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 11, 1985, order in this case is vacated and the matter is remanded to Judge Nitzschke for further proceedings consistent with this opinion. 8/

//original signed

Jerry Muskrat
Administrative Judge

I concur:

//original signed

Anita Vogt
Administrative Judge

6/ Although the issue was not decided in the course of the probate proceedings because it was not necessary to the outcome, decedent's destroyed will apparently did not contain a proper residuary clause. Therefore, even if the will had been approved, some portion of her estate may have passed through intestacy.

7/ "Probable cause" is defined in Black's Law Dictionary (Rev. 4th ed. 1968) at p. 1365 as "[a]n apparent state of facts found to exist upon reasonable inquiry which would induce a reasonably intelligent and prudent man to believe, in a criminal case, that the accused person had committed the crime charged, or, in a civil case, that a cause of action existed."

8/ Appellant also states that BIA has leased decedent's trust property. Under 25 CFR 162.2(a)(3), "The Secretary may grant leases on individually owned land on behalf of * * * the undetermined heirs of a decedent's estate." Until the completion of this proceeding, the heirs of decedent's estate have not been finally determined, and BIA has authority to lease the lands.