



INTERIOR BOARD OF INDIAN APPEALS

Estate of Pearl Big Bow Aungkotoye Nahno Kerchee

18 IBIA 153 (02/15/1990)



United States Department of the Interior

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

ESTATE OF PEARL BIG BOW AUNGKOTOYE NAHNO KERCHEE

IBIA 89-89

Decided February 15, 1990

Appeal from an order denying rehearing issued by Administrative Law Judge Sam E. Taylor in Indian Probate IP OK 25 P 87-1.

Affirmed.

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

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

2. Indian Probate: Wills: Testamentary Capacity: Generally

To invalidate an Indian will for lack of testamentary capacity, it must be shown that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property. Furthermore, it must be shown that this condition existed at the time the will was executed.

APPEARANCES: Rick D. Moore, Esq., Chickasha, Oklahoma, for appellant; Nelson Big Bow, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Berdina Lopez, Walter N. Kerchee, Jr., Belva Lopez, Lorene Pewewardy, Betty Crocker, and Melvin Kerchee, Sr., seek review of a July 7, 1989, order denying rehearing issued by Administrative Law Judge Sam E. Taylor in the estate of Pearl Big Bow Aungkotoye Nahno Kerchee (decedent). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

Decedent, a Kiowa Unallottee, was born on December 18, 1914, and died on May 10, 1986. Hearings to probate her trust estate were held before Judge Taylor on May 20, 1987; and March 9, May 17, and June 14,

1988. Evidence was presented at those hearings concerning decedent's family relations; a purported February 24, 1986, last will and testament; and decedent's testamentary capacity.

Based on the evidence presented at the hearings, on April 24, 1989, Judge Taylor issued an order finding that decedent was survived by a husband, Walter Nahno Kerchee, who died before the entry of a decision in decedent's probate; 2 sisters; 4 brothers; 5 nieces and nephews, who were the children of a predeceased sister; and 11 grandnieces and nephews, who were the children of two predeceased nephews. Judge Taylor found that these persons would have been decedent's heirs had she died intestate. However, the Judge also found that decedent had testamentary capacity and thus approved her will and ordered the distribution of her estate in accordance with its terms. Under the will, all of decedent's trust property was left to her sisters Lucille Bigbow Poolaw and Lorene Bigbow Horse, a.k.a. Ella Faye Bigbow Horse; her brother Nelson Big Bow; and her nephews Ricky Horse and Billy Joe Bigbow.

On June 21, 1989, Judge Taylor received a document which he treated as a petition for rehearing. The petition was filed by appellants, who are the children of decedent's subsequently deceased husband, Walter Nahno Kerchee. By order dated July 7, 1989, Judge Taylor denied rehearing on the grounds that the petition was not in compliance with the regulatory requirements, and new evidence was being offered that was not supported by affidavits or any statement as to why it was not presented at one of the hearings. These defects were stated to be in violation of 43 CFR 4.241(a).

The Board received appellants' notice of appeal from Judge Taylor's decision on September 5, 1989. The appeal was docketed on September 26, 1989, after receipt of the administrative record. Briefs were filed on appeal by appellants and Nelson Big Bow.

Discussion and Conclusions

Appellants contend that on February 24, 1986, the date of the document purported to be her will, decedent lacked the requisite testamentary capacity to execute a will. This contention is based upon their allegation that decedent steadily declined in her mental abilities after she suffered a stroke in 1984, until by early 1986 she was incapable of transacting business, did not remember friends and family members, suffered loss of memory in other areas of life, and had poor hearing and eyesight. They note that decedent was very ill with several problems that affected her mental abilities, including diabetes, and cite the testimony of decedent's physician to the effect that he did not believe she had testamentary capacity when she was admitted to the hospital in April 1986, shortly before her death.

[1] In support of their arguments, appellants cite Oklahoma State law and 25 CFR 11.31(b). As the Board has previously discussed, the statutory scheme under which the estates of Indians dying possessed of trust property are probated by the Department of the Interior requires the application of state laws of intestate succession to determine the heirs of a decedent who

