INTERIOR BOARD OF INDIAN APPEALS

Estate of Teresa Mitchell

25 IBIA 88 (12/17/1993)

Judicial review of this case:

Affirmed, *Mitchell v. Bureau of Land Management*, CIVS-90-1159 MLS/EM (E.D. Calif. June 13, 1995)

# United States Department of the Interior

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


## ESTATE OF TERESA MITCHELL

IBIA 93-59 Decided December 17, 1993

Appeal from an order denying reopening issued by Administrative Law Judge William E. Hammett in Indian Probate IP SA 98N 79.

Affirmed as modified.

1. Indian Probate: Reopening: Generally

   A person seeking reopening of an Indian estate closed for more than 3 years should set forth all of the issues he/she intends to raise in the petition for reopening.

2. Indian Probate: State Law: Applicability to Indian Probate, Testate--Indian Probate: Wills: Execution

   Whether an Indian decedent has executed a will passing trust property is a question of Federal, not state, law.

APPEARANCES: Jack L. Schwartz, Esq., Los Angeles, California, for appellant.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Edward M. Mitchell, Jr., seeks review of a February 8, 1993, order denying reopening issued in the estate of Teresa Mitchell (decedent) by Administrative Law Judge William E. Hammett. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that order as modified by the additional discussion in this decision.

### Background

The present case is part of a controversy that resulted from the issuance of two trust allotments to appellant's grandmother, Nancy Burrill. One of the allotments contained 20 acres on the Hoopa Valley Reservation, and was allotted on June 15, 1899; the other, consisting of 160 acres, was from the public domain and was allotted on September 23, 1907. The Board will not recount the entire history of this controversy.

In order to correct the error that resulted in Burrill's receiving two allotments, in 1956 BIA recommended that the 160-acre allotment be cancelled and reallotted to decedent or one of her family members. This recommendation was based primarily on BIA's findings that a fee patent had been issued for the 20-acre allotment in 1919, and that decedent had lived on t he 160-acre allotment since 1907. In addition, although there were at that time approximately 20 heirs of Burrill who had an interest in the 160-acre allotment, only decedent was actually using the property.

The 160-acre allotment was cancelled by the Bureau of Land Management (BLM) on May 16, 1957. Appellant and Irene Mitchell Pallin, his sister, each applied for an allotment of the tract under 25 U.S.C. § 334 (1988). 1/ On July 5, 1960, trust patents were issued to both Pallin and appellant. Each allotment consisted of 80 of the original 160 acres. The Secretary of the Interior (Secretary) affirmed BLM's decision on September 21, 1960. Pallin filed suit in Federal District Court against the United States and appellant. The matter was ultimately remanded to the Department. Pallin v. United States, 496 F.2d 27 (9th Cir. 1974). On remand, both patents were cancelled.

Pallin and appellant filed new allotment applications. BLM rejected Pallin's application for the 160-acre tract, but allotted her a 40-acre tract. It rejected appellant's application on the grounds that he was ineligible to receive an allotment from the public domain because he was residing on a reservation. These decisions were appealed to the Interior Board of Land Appeals (IBLA).

The IBLA issued a decision on May 14, 1984, in which it held that "[t]he determinative issue * * * concerns the cancellation of [Burrill's] trust patent on May 16, 1957. The issue is whether or not the cancellation was valid and effective" (Irene Mitchell Pallin, Edward E. Mitchell, Jr., 80 IBLA 383, 387 (1984)). The IBLA found no evidence that regular procedures were followed in the cancellation, or that Burrill's heirs had been notified of the proposed cancellation. It held that the failure to afford Burrill's heirs an opportunity to contest the cancellation violated due process. The IBLA concluded:

> Since Burrill died before the putative cancellation of her trust patent, the heirs of the deceased allottee must be

---

1/ Section 334 provides in pertinent part:

"Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this Act for Indians residing upon reservations * * *."

Unless otherwise noted, all further references to the United States Code are to the 1988 edition.

> identified. Upon the death of an Indian allottee, the decedent's interest passes to the heirs or devisees. 25 U.S.C. §§ 348, 372, 373 (1976). This should have been done when Burrill died.
>
> Accordingly, on remand, BLM's first obligation, in cooperation with BIA, is to identify the heirs of Burrill, and if necessary, their heirs, and their respective interests. BLM then may proceed in accordance with due process either to cancel the trust patent, or to issue a fee patent to the heirs and partition the tract, or to sell the tract and distribute the proceeds to competent heirs and retain the proceeds of any incompetent heirs in trust, or take any other appropriate action authorized by law. [Emphasis in original.]

(80 IBIA at 391-92).

The present appeal is part of the attempt to identify Burrill's heirs. A related case is pending in Federal District Court. Mitchell v. Bureau of Land Management, Civil No. S-90-1159 MLS (E.D. Calif.). The Board understands that this matter has been informally stayed pending resolution of the present appeal.

Decedent, Yurok Allottee 202-T, died testate on October 4, 1978. A hearing was held to probate her trust estate on April 10, 1979. Paragraph 2 of decedent's will provided that “any and all interests that I may possess in the Mary Big Prairie Allotment, Eur-125 and the Maggie George Allotment, 229-T,” were to be divided equally among her six children, Annie Love, Ervin (Irvin) Mitchell, Curtis Mitchell, Pallin, appellant, and William Willson. The will also contained a residuary clause under which the rest and residue of decedent's estate, real, personal, and mixed, was left equally to her son, William Willson, and her grandsons, Preston George Willson, Thomas Edward Willson, and Patrick Warren Willson. Appellant was present and testified at the probate hearing.

By order dated October 30, 1979, Judge Hammett approved decedent's will, and ordered distribution of her trust estate in accordance with its provisions.

On June 19, 1992, the Manager, Titles and Records, for the Portland Area Office of the Bureau of Indian Affairs (BIA), entered an administrative modification of decedent's estate, adding a 1/21 interest in the 160-acre allotment. This action was taken in accordance with authority vested in BIA by 43 CFR 4.272. 2/ The modification stated that "[d]istribution of said additional property is in accordance with" Judge Hammett's

---

2/ Section 4.272 provides in pertinent part: "(a) When, subsequent to the issuance of a [probate] decision * * *, it is found that trust property or interest therein belonging to a decedent

October 30, 1979, order. Appellant states that he was informed that BIA distributed the interest to the residuary devisees under decedent's will.

On January 5, 1993, appellant sought reopening of decedent's estate. Judge Hammett denied reopening on February 8, 1993, holding that appellant did not meet the requirements for seeking reopening set forth in 43 CFR 4.242(h), 3/ because he had participated in the original hearing.

Appellant appealed this order to the Board. Only appellant filed a brief. Appellant requested expedited consideration of this appeal because of the pending Federal court litigation. Expedited consideration is hereby granted.

## Discussion and Conclusions

Appellant does not dispute Judge Hammett's finding that he had participated in the original hearing to probate decedent's estate. Under 43 CFR 4.242(h), therefore, appellant lacks standing to petition for reopening. Estate of Little Snake (John Smith), 24 IBIA 121 (1993), Estate of Richard Lipp, 15 IBIA 97 (1987).

In essence, appellant seeks relief from the standing requirements of section 4.242(h), contending that because no one knew at the time of decedent's original probate that the allotment would be part of decedent's trust estate, he should be allowed to raise issues relating to it. Substantively, he argues:

> (1) the probates of Teresa Mitchell, Ed Mitchell, Sr., and Nancy Burrill should be re-opened; [4/] (2) Burrill's interest in the ranch passed to Ed Mitchell, Sr. by gift, oral will and family

---

fn. 2 (continued)
has not been included in the inventory [of the decedent's trust estate], the inventory can be modified * * * administratively by the Commissioner of the Bureau of Indian Affairs * * * to include such omitted property for distribution pursuant to the original decision."

3/ Section 4.242(h) provides in pertinent part:
"If a petition for reopening is filed more than 3 years after the entry of a final decision in a probate, it shall be allowed only upon a showing that a manifest injustice will occur; that a reasonable possibility exists for correction of the error; that the petitioner had no actual notice of the original proceedings; and that petitioner was not on the reservation or otherwise in the vicinity at any time while the public notices [of the probate proceeding] were posted. A denial of such petition may be made by the administrative law judge on the basis of the petition and available [BIA] records."
(Emphasis added.)

4/ The probate records for the estates of Burrill and Ed Mitchell, Sr., are not before the Board because they were not previously at issue. The Board cannot, therefore, determine whether appellant would have standing under 43 CFR 4.242(h) to seek reopening of these estates.

> agreement; (3) by adverse possession, Teresa and Ed Mitchell, Sr. obtained full interest in the entire ranch; (4) by the laws of community property, the ranch should have passed from Ed Mitchell, Sr., to Teresa; and (5) appellant, and not the residuary heirs, should have gotten the ranch in the probate of Teresa Mitchell's estate.

(Opening Brief at 6-7). As relief, appellant requests that the Board grant ownership of the entire allotment to him, or that it remand the case with instructions to reopen the three probates.

[1] The issues appellant raises on appeal go far beyond those raised in his petition for reopening. Giving appellant the benefit of the doubt, it is possible that he intended to address the additional issues in a brief before Judge Hammett. Under 43 CFR 4.242(h), however, the Judge can deny a petition for reopening on the basis of the petition and BIA records. If appellant intended to raise additional issues, he should at least have mentioned those issues in his petition.

Appellant also raises different issues in his notice of appeal and brief before the Board. In his notice of appeal, appellant contended that decedent was not of sound mind when she executed her will; that the probate of decedent's estate ignored a gift of the property to appellant by decedent "before the probate was commenced;" and that decedent's estate included less interest in the allotment than decedent had acquired through adverse possession, community property, and incorrect distributions under previous probates. The first two issues are not addressed in appellant's brief, and the Board concludes that appellant has abandoned them on appeal. 5/ The third issue forms the basis for appellant's brief.

The Board has consistently held that it is not required to consider issues raised for the first time on appeal. See Estate of Herbert Brant, Sr., 23 IBIA 97 (1992); Estate of Warren Lewis Lincoln, 19 IBIA 118 (1990). Nevertheless, the Board has occasionally addressed such issues when not to do so would only unnecessarily delay final resolution of a matter. See, e.g., Hayes v. Anadarko Area Director, 25 IBIA 50 (1993).

Under the circumstances of this case, and considering the pendency of a closely related matter in Federal court, the Board believes it to be in the best interest of all concerned for it to address the issues raised. For purposes of this discussion only and at the risk of issuing an advisory opinion, 6/ the Board will assume that appellant has standing to

---

5/ Even if these issues were not abandoned, appellant has presented no arguments or evidence in support of them and has, therefore, failed to carry his burden of proving the error in the original decision. Estate of Thomas Sun Goes Slow, 23 IBIA 99 (1992), and cases cited therein.

6/ See Baker v. Muskogee Area Director, 19 IBIA 164, 181 (1991), and Grand Traverse Band of Ottawa and Chippewa Indians v. Acting Deputy to the Assistant Secretary - Indian Affairs (Tribal Services), 18 IBIA 450, 453 (1990), concerning the Board's lack of authority to issue advisory opinions.

seek reopening of the three estates and that all issues were properly raised.

Appellant first argues that the allotment passed in its entirety from Burrill to Ed Mitchell, Sr. (Mitchell), by way of gift, oral will, and/or family agreement. In support of this argument, appellant contends that the primary consideration in probating an estate is the intent of the decedent, and that evidence presented at Burrill's 1916 probate hearing showed that she wanted Mitchell and decedent to have the allotment.

[2] Appellant argues that the Departmental hearing examiner should have applied California law concerning oral wills and family settlements to find that Burrill passed the allotment to Mitchell. 25 U.S.C. § 373, which allows trust property to be passed by will, does not incorporate state law concerning the execution or construction of such wills. Therefore, whether an Indian decedent has properly executed a will passing trust property is a question of Federal, not state, law. Estate of William Mason Cultee, 9 IBIA 43 (1981), aff'd sub nom. Cultee v. United States, No. 81-1164C (W.D. Wash. Sept. 14, 1982), aff'd, 713 F.2d 1455 (9th Cir. 1983), cert. denied, 466 U.S. 950 (1984). The Board concludes that the Department lacked authority to apply California law to find that Burrill had made an oral will or that a family settlement had been executed.

Appellant has cited no Federal statute or regulation which, in 1916, authorized the Department to recognize an oral will or a family settlement. Neither is the Board aware of any such statute or regulation. In fact, oral wills and family settlements are still not recognized in Indian probate. See 43 CFR 4.260 (authorizing wills in writing and attested by two disinterested witnesses), Estate of Baz Nip Pah, 22 IBIA 72, 74 (1992) ("Oral wills cannot be recognized for the purpose of conveying trust or restricted property"); and 43 CFR 4.207 (allowing compromise settlements only in the event of a dispute between the parties). Therefore, the Board also concludes that no Federal statute or regulation authorized oral wills or family settlements when Burrill's estate was probated.

Appellant alternatively contends that Burrill gave Mitchell the allotment as a gift. In support of this argument, appellant cites California law relating to oral gifts of real property. Appellant overlooks the fact that conveyances of trust property must be approved by the Secretary. See, e.g., 25 CFR 152.17 ("trust or restricted lands acquired by allotment * * * may be * * * conveyed by the Indian owner with the approval of the Secretary * * *); 25 CFR 152.22(a) ("Trust or restricted lands, except inherited lands of the Five Civilized Tribes, or any interest therein, may not be conveyed without the approval of the Secretary"); Estate of Gus Four Eyes, Jr., 20 IBIA 22 (1991).

The approval of inter vivos conveyances of trust property is discretionary with BIA, and is not normally part of the probate process. See Estate of Arthur Wishkeno, 8 IBIA 147 (1980), 11 IBIA 73 (1983); Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21,

89 I.D. 655 (1982), 11 IBIA 70 (1983). Neither Judge Hammett nor the Board has authority to approve an alleged inter vivos conveyance of the allotment under the circumstances present here.

Appellant next argues that decedent and Mitchell obtained the full interest in the allotment through adverse possession. Again, appellant bases his argument on California law.

This argument seeks a determination of Mitchell's title in the allotment as against other heirs of Burrill, and other co-owners of the allotment. Appellant does not question any decision made by a BIA official or an Administrative Law Judge. As the Board has repeatedly stated, it is not a court of general jurisdiction, but has only that authority delegated to it by the Secretary. Gosuk v. Juneau Area Director, 25 IBIA 62 (1993); Welmas v. Sacramento Area Director, 24 IBIA 264, 268 (1993), and cases cited therein. Appellant's request falls outside of the Board's delegated authority. Accordingly, the Board lacks jurisdiction over this aspect of appellant's appeal.

Appellant next argues that the entire allotment should have passed as community property to decedent in the probate of Mitchell's estate. Appellant bases this argument on either California or tribal law, both of which he contends recognize community property.

Because the Board does not have Mitchell's probate record before it, it has only limited information concerning Mitchell's estate. It appears, however, that this argument is based on appellant's prior argument that Mitchell acquired title to the entire tract through adverse possession. As previously discussed, the Board lacks jurisdiction over this argument.

Finally, appellant contends that he, rather than the residuary devisees under decedent's will, should have received title to the allotment in the probate of decedent's estate. This argument is based on appellant's contention that the evidence indicates that decedent wanted Mitchell, not her residuary devisees, to have the allotment. Appellant contends that the primary consideration in construing a will is to ascertain the intention of the testatrix. While this is certainly the case, the Department is not free in "construing" a will to write a new will for the testatrix. Cf. Tooahnippah v. Hickel, 397 U.S. 598 (1970) (holding that the Department was not free to rewrite an Indian will to conform with its notions of fairness). Doing what appellant suggests, i.e., passing the allotment to him as if this devise were set forth in decedent's will, is clearly writing a new will for decedent. The Board declines to do this.

Based on this discussion, the Board concludes that appellant has raised no grounds to justify reopening any of the three estates, or to grant ownership of the allotment to him.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 8, 1993,

decision of Judge Hammett is affirmed as modified by the additional discussion in this decision.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge