



INTERIOR BOARD OF INDIAN APPEALS

Estate of Delmer Arrow

37 IBIA 211 (04/10/2002)

Related Board case:
38 IBIA 60



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF DELMER ARROW : Order Docketing Appeal and Affirming
: Denial of Rehearing but Vacating
: Determination of Heirs
:
: Docket No. IBIA 02-72
:
: April 10, 2002

Appellant Elmer Arrow seeks review of a February 11, 2002, order denying rehearing issued by Administrative Law Judge Marcel S. Greenia in the estate of Decedent Delmer Arrow. For the reasons discussed below, the Board of Indian Appeals (Board) docketed this case and affirms the Judge's order, but nevertheless remands this matter for further consideration.

A hearing to probate Decedent's trust or restricted estate was held on July 26, 2001. On September 20, 2001, Administrative Law Judge David A. Clapp issued an order finding that a handwritten document dated May 20, 1994, and purported to be Decedent's will, was not properly witnessed and therefore could not be admitted to probate. Judge Clapp found that Decedent died intestate and that, under the laws of the State of South Dakota, all of his trust land and part of his trust funds passed to his surviving spouse, Vivian Rouse Arrow, and that the remainder of his trust funds passed to ten of his children, including Appellant.

Three of Decedent's children, including Appellant, sought rehearing. In his petition for rehearing, Appellant requested that Vivian, who is not Appellant's mother, be given a life estate in Decedent's lands with, apparently, the remainder interest going to Decedent's children.

In his February 11, 2002, order denying rehearing, Judge Greenia found that none of the three petitions for rehearing alleged any legal or factual errors in the September 20, 2001, initial order, but instead objected to the distribution scheme established in the South Dakota laws of intestate succession. Judge Greenia found that the petitions did not set forth any grounds for rehearing, and therefore denied rehearing.

In his notice of appeal, Appellant again objects only to the distribution scheme established under South Dakota law. Both Administrative Law Judges properly determined that the intestate succession laws of the State of South Dakota applied in this case. Therefore, the Board affirms Judge Greenia's denial of rehearing.

However, despite the fact that Appellant cannot succeed on the merits of his appeal, the Board finds that there is a question concerning the determination of heirs in this case. Therefore, it exercises the inherent authority of the Secretary of the Interior, delegated to it under 43 C.F.R. § 4.318, to correct a manifest injustice or error.

Judge Clapp determined that Decedent and Elizabeth Whirlwind Soldier were the parents of ten children, including Appellant. These are the ten children whom he found to be heirs to one-half of a portion of Decedent's trust funds. However, he also found that Decedent and Vivian were the parents of two children, Selmer and David. Without explanation or discussion, these two children were not included in the list of Decedent's heirs. The Board has reviewed the relevant South Dakota statutes on intestate succession, and has not been able to determine the reason why Selmer and David were not included as heirs of their father.

Under these circumstances, the Board vacates Judge Clapp's order determining Decedent's heirs and remands this matter to Judge Greenia for a determination of the basis on which Selmer and David were excluded as heirs of their father or, if their omission was inadvertent, to correct the determination of heirs.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. §§ 4.1 and 4.318, this appeal from Judge Greenia's February 11, 2001, order denying rehearing is docketed, and that order is affirmed. However, Judge Clapp's September 20, 2001, determination of heirs is vacated and this matter is remanded to Judge Greenia for the sole purpose of reexamining the determination of Decedent's heirs. 1/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

1/ On Apr. 1, 2002, the Board received notification from Appellant that Vivian passed away on Mar. 26, 2002. The fact that Vivian is now deceased does not change the distribution of Decedent's estate. Any trust assets which she inherited as a result of this probate will pass in accordance with the probate of her estate.