



INTERIOR BOARD OF INDIAN APPEALS

Estate of Larry Michael Oskolkoff

37 IBIA 291 (06/24/2002)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
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ARLINGTON, VA 22203

ESTATE OF LARRY MICHAEL OSKOLKOFF

IBIA 01-132

Decided June 24, 2002

Appeal from an order denying petition for rehearing in Indian Probate IP SL 010H 99.

Vacated and remanded.

1. Indian Probate: Wills: Approval of Will

Under the Department's Indian probate regulations, Indian wills are approved or disapproved as a part of the probate process. 43 C.F.R. § 4.240(a)(2); 25 C.F.R. § 15.311(2). There is no requirement for approval of an Indian will prior to the testator's death.

2. Alaska: Native Allotments--Indian Probate: Indian Reorganization Act of June 18, 1934: Construction of Section 4

Section 4 of the Indian Reorganization Act, 25 U.S.C. § 464, which places restrictions on the devise of trust or restricted property, does not apply to Alaska Native allotments.

3. Indian Probate: Wills: Proof of Will

It is an abuse of discretion for an Administrative Law Judge to find that an Indian will has been properly executed, based solely upon the testimony of individuals who stand to benefit from approval of the will.

APPEARANCES: James Vollentine, Esq., Anchorage, Alaska, for Appellants; Catherine Oskolkoff, *pro se*; Roger L. Hudson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE VOGT

This is an appeal from a May 10, 2001, order denying petition for rehearing issued by Administrative Law Judge Harvey C. Sweitzer in the estate of Larry Michael Oskolkoff (Decedent), IP SL 010H 99. Appellants are Decedent's five children, Larry E. Oskolkoff, Loretta Throop, Sharon Culhane, Judy Belcher, and Richard G. Encelewski. ^{1/} For the reasons discussed below, the Board vacates the May 10, 2001, order, as well as Judge Sweitzer's original decision in this estate, and remands this matter to him for further proceedings.

Background

On October 14, 1997, Decedent executed a document establishing the Larry M. Oskolkoff Family Trust (Family Trust), under which Appellants are the beneficiaries. Upon establishment of the trust, Decedent conveyed or assigned to it certain real and personal property, not including his 5/54 interest in an Alaska Native allotment. Also on October 14, 1997, Decedent executed a will in which he devised all his property to the Family Trust. He died on September 3, 1998. The Bureau of Indian Affairs (BIA) inventory for his estate showed that his only trust or restricted property was his 5/54 Native allotment interest.

Judge Sweitzer held a hearing in Decedent's estate on March 16, 1999, in Anchorage, Alaska. On August 18, 2000, he issued a decision in which he stated:

There were no objections to the will. Decedent's will was properly executed and at the time of execution the decedent possessed testamentary capacity and acted free of undue influence. Accordingly the will should be and is hereby approved. However, the will purports to devise decedent's Federal Trust Estate to [the Family Trust]. In order for Federal Trust property to pass out of trust status by way of devise, prior approval from the Secretary of the Interior through the local Bureau of Indian Affairs must first be granted. No such consent was sought or given. Therefore, the devise fails, and decedent's estate shall pass intestate [to Decedent's surviving spouse, Catherine Oskolkoff].

Aug. 18, 2000, Decision at 1-2.

Appellants sought rehearing, contending that Judge Sweitzer's decision was erroneous in several respects. They offered a number of theories under which Appellants could be recognized as the recipients of Decedent's Native allotment interest, through approval of the devise

^{1/} Richard G. Encelewski is Decedent's biological child but was adopted by the second husband of Decedent's first wife.

to the Family Trust or otherwise. Judge Sweitzer rejected all of Appellants' arguments and denied rehearing. Among the reasons he gave for doing so was that Decedent's devise of his Native allotment interest to the Family Trust was barred by 25 U.S.C. § 464.

Appellants appealed to the Board. BIA sought and was granted permission to file an amicus brief.

Discussion and Conclusions

BIA states that it disagrees with Judge Sweitzer "in at least two fundamental respects." BIA Brief at 4. It explicitly disputes the statement in the Judge's August 18, 2000, decision that prior approval is required for an Indian will under which trust property would pass out of trust.^{2/} Further, it contends that Judge Sweitzer's holding concerning 25 U.S.C. § 464 is erroneous.

[1] 25 U.S.C. § 373 provides that "the Secretary of the Interior may approve or disapprove [an Indian] will either before or after the death of the testator." Under the Department's probate regulations, an Indian will is approved or disapproved after the testator's death by the OHA deciding official (in this case, Administrative Law Judge) ^{3/} or BIA deciding official, as a part of the probate process. 43 C.F.R. § 4.240(a)(2); 25 C.F.R. § 15.311(2). There is no provision in the regulations for BIA approval of an Indian will prior to the testator's death. ^{4/}

^{2/} Although Judge Sweitzer spoke of trust property, BIA points out that Alaska Native allotments are not held in trust by the United States but are owned in fee by the allottees or their heirs, subject to restrictions on alienation. State of Alaska, 45 IBLA 318 (1980).

For probate purposes, trust and restricted lands are treated the same. See definition of "restricted property" in 43 C.F.R. § 4.201.

^{3/} The term "OHA deciding official" is defined in 43 C.F.R. § 4.201 as "an employee of the Office of Hearings and Appeals with the authority to make a decision on a probate matter pursuant to this subpart. The OHA deciding official may be either an administrative law judge appointed pursuant to the Administrative Procedure Act, 5 U.S.C. 3105, or an Indian probate judge."

^{4/} 43 C.F.R. § 4.260(b) provides that, when an Indian testator submits his or her will to BIA for safekeeping, BIA must forward it to the Office of the Solicitor for examination as to adequacy of form. However, such examination does not constitute approval or disapproval of the will.

Not all Indian testators submit their wills to BIA for safekeeping, and there is no requirement that they do so.

BIA suggests that Judge Sweitzer's holding may have been based on a belief that "establishment of the Family Trust involved an improper attempted *inter vivos* transfer of the allotment interests to the trust." BIA Brief at 5. As BIA notes, however, Decedent's interest in the allotment was not conveyed to the Family Trust during his lifetime. Thus, there was no attempted *inter vivos* transfer. Under the documents executed by Decedent, his restricted interest would not pass to the Family Trust until it passed under his will as a part of the residue of his estate.

Judge Sweitzer did not cite any authority for his holding that prior approval of Decedent's will was required. The Board is not aware of any such authority.

The Board finds that Judge Sweitzer erred in stating that prior BIA approval of Decedent's will was required.

[2] BIA objects to Judge Sweitzer's "identifi[cation of] 25 U.S.C. § 464 as a statutory limitation on the decedent's power to dispose of his restricted property interests as he chose." BIA Brief at 5-6. BIA contends that section 464 does not apply to any trust or restricted land in Alaska. Appellants agree and also contend that section 464 does not apply because the Alaska Native allotment at issue here is a public domain allotment.

25 U.S.C. § 464, which places restrictions on the devise of trust and restricted lands, is derived from section 4 of the Indian Reorganization Act of 1934 (IRA). Section 8 of the IRA, 25 U.S.C. § 468, provides that nothing in the Act is applicable to "Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter." Section 13 of the IRA, 25 U.S.C. § 473, provides that most of the Act's provisions, including section 4, 25 U.S.C. § 464, are inapplicable to Alaska. Although a statute enacted in 1936, now codified at 25 U.S.C. § 473a, made several IRA provisions applicable to Alaska, 25 U.S.C. § 464 was not among those provisions. It is clear from a reading of 25 U.S.C. §§ 468, 473, and 473a that 25 U.S.C. § 464 does not apply to Decedent's interest in an Alaska Native allotment. ^{5/}

^{5/} As BIA points out, Congress has more recently made the Indian Land Consolidation Act (ILCA), 25 U.S.C. §§ 2201-2219, inapplicable to land in Alaska. See 25 U.S.C. § 2219. Thus, the testamentary restrictions in section 207 of ILCA, 25 U.S.C. § 2206, like those in 25 U.S.C. § 464, are inapplicable to Alaska Native allotments. (The ILCA restrictions are not yet in effect anywhere. See "Notice of Changes Resulting from the [ILCA] Amendments of 2000," 67 Fed. Reg. 7392 (Feb. 19, 2002).)

Judge Sweitzer did not explain his reason for finding 25 U.S.C. § 464 applicable to Decedent's Native allotment interest. The Board is not aware of any basis on which he might properly have done so.

The Board finds that Judge Sweitzer erred in citing 25 U.S.C. § 464 to support the invalidation of Decedent's devise of his Native allotment interest to the Family Trust.

Both BIA and Appellants contend that Decedent's devise of his Native allotment interest to the Family Trust is valid, although both recognize that a devise of trust or restricted property to a private trust presents some difficult issues. As they did before Judge Sweitzer, Appellants offer a number of theories under which Decedent's intent could be carried out. Of the several arguments made by Appellants, the Board finds most persuasive their argument that direct distribution of Decedent's Native allotment interest to the beneficiaries of the Family Trust would be appropriate here in light of section 4.7 of the trust document.

Section 4.7 provides: “**Beneficiaries Obtaining The Age Of 25:** When each beneficiary reaches the age of twenty-five (25) years, the Trustee shall distribute to each such beneficiary one hundred percent (100%) of the then balance of the principal of that beneficiary's share of the Separate Trust Estate.”

Appellants argue:

Obviously, after the youngest beneficiary reaches age 25 the trust is terminated because the last of the corpus is depleted. This is the case here: all beneficiaries are over age 25. Accordingly, there is no need for the trust and the Secretary may convey the decedent's allotment interest directly to the beneficiaries.

Appellants' Reply Brief at 17. Appellants cite Estate of Dorothy Sheldon, 7 IBIA 11, 85 I.D. 31 (1978), in support of their argument. In Sheldon, the testatrix had devised a portion of her estate to her brother in trust for her grandniece, with a provision that, when the grandniece reached 21, all assets of the trust were to be paid to the grandniece. The Board's decision, although not as clear as it might be, in effect construed the devise as a direct devise to the grandniece. An apparent basis for that construction was the fact that “it [was] highly probable that [the grandniece] had already attained the age of 21 years on the date of testatrix' demise.” 7 IBIA at 19, 85 I.D. at 35.

In Sheldon, the Board was seeking to carry out the intent of the testatrix. 7 IBIA at 16-17, 85 I.D. at 34-35. As the Board recognized in Sheldon and later cases, the Department has a responsibility to ascertain the intent of an Indian testator and, absent some legal impediment, to carry out that intent. Estate of Margaret Fisher Leader Molina, 27 IBIA 254, 259 (1995); Estate of Paul Wilford Hail, 13 IBIA 140, 143 (1985).

In this case, the will and Family Trust document show that Decedent intended Appellants to receive his property. Appellants had all reached the age of 25 by the date of Decedent's death and were thus entitled, under section 4.7 of the Family Trust document, to receive their interests free of the Family Trust. Under these circumstances, the Board finds that Decedent's intent would best be carried out by construing his will to pass his Native allotment interest directly to Appellants, in the proportions specified in section 4.3 of the Family Trust document.

Catherine Oskolkoff, Decedent's surviving spouse, has participated in this appeal as an interested party. She makes several arguments, of which the Board addresses three in this decision.

Ms. Oskolkoff contends that some of Appellants' arguments in this appeal constitute violations of the "No Contest Clause" of the will and/or the "Incontestability" clause of the Family Trust document. Thus, she reasons, Appellants have forfeited their interests in Decedent's restricted estate. As Appellants point out, however, they are not seeking to contest these documents but to uphold them in the face of Judge Sweitzer's invalidation of Decedent's devise to the Family Trust. To the extent that Appellants may have challenged some provisions of the will or the Family Trust document in any of their arguments, the Board finds that the no contest clauses should not be enforced against them because, in light of the Judge's invalidation of Decedent's devise to the Family Trust, Appellants had probable cause to believe that there might be a legal deficiency in the will or the Family Trust document. Estate of George Levi, 26 IBIA 50, 58 (1994) ("In Indian probate cases an anti-contest clause should not be enforced against an heir or beneficiary who had probable cause to believe that there was a legal deficiency in the will").

Ms. Oskolkoff objects to Appellants' reference to her as non-Native. She appears to contend that she is an Alaska Native. Judge Sweitzer's August 18, 2000, decision described her as non-Native. She did not object to the Judge's description. If she intended to claim Alaska Native status, she should have done so before now. In any event, her status as a Native or non-Native is not relevant to any issue in this appeal.

Ms. Oskolkoff contends that Decedent's will does not reflect his intent, in that he intended to provide for her in his will. In making this argument, Ms. Oskolkoff attempts, for the first time, to challenge the will. The Board has a well-established practice of declining to consider arguments raised for the first time on appeal. E.g., Estate of Sallie Fawbush, 34 IBIA 254, 258 (2000), and cases cited therein. Even so, the Board concludes, for the reasons discussed below, that Ms. Oskolkoff's argument should be considered when this matter is remanded to Judge Sweitzer.

Decedent's will was produced for the first time at the March 16, 1999, hearing, when Larry E. Oskolkoff and Loretta Throop presented a certified copy of the document. ^{6/} Ms. Oskolkoff, who then resided in California, did not attend the hearing. There is no evidence that Judge Sweitzer informed her or any other parties that a will had been produced at the hearing. Therefore, Ms. Oskolkoff may well have been unaware that a will was being considered until the Judge issued his August 18, 2000, decision. In that decision, he approved the will but invalidated its devise of Decedent's Native allotment interest, the only property at issue in the proceeding. Thus, the result was the same as if the will had been disapproved— Decedent's entire restricted estate was held to pass to Ms. Oskolkoff. As a technical matter, if she intended to challenge the will, Ms. Oskolkoff should have sought rehearing of the part of Judge Sweitzer's decision in which he approved the will. However, her need to seek rehearing would not have been clear to her, given the result reached in the decision. Likewise, her need to appeal Judge Sweitzer's May 10, 2001, order denying rehearing would not have been clear to her.

As this matter will require further proceedings for other reasons, the Board concludes that, under the circumstances of this case, Ms. Oskolkoff should be given an opportunity to present her challenge to the will during those proceedings. *Cf. Estate of Clayton Harry*, 37 IBIA 244 (2002), in which the Board ordered further proceedings in a case where the parties' need to object to certain findings would not have been clear to them.

Ms. Oskolkoff's remaining arguments have been considered and rejected.

[3] Although no party has raised an issue concerning the proof of Decedent's will, the Board finds that it must consider the issue pursuant to its authority in 43 C.F.R. § 4.318. In his August 18, 2000, decision, Judge Sweitzer stated: "The will is not self-proving, but has been proved by family members present at the hearing." Aug. 18, 2000, Decision at 1.

Only Larry E. Oskolkoff and Loretta Throop attended the hearing. Both testified that the signature on the will was Decedent's. There was no testimony concerning Decedent's testamentary capacity or whether or not he might have been subject to undue influence. As indicated above, Judge Sweitzer approved the will after stating: "Decedent's will was properly executed and at the time of execution the decedent possessed testamentary capacity and acted free of undue influence." *Id.*

^{6/} Ordinarily, where BIA has a copy of an Indian decedent's will in its files, the Administrative Law Judge sends copies of the will to the parties with the hearing notice and advises the parties that, if they wish to challenge the will, they must do so at the hearing.

In this case, BIA did not have a copy of the will in its files.

The Department's regulation governing proof of wills appears at 43 C.F.R. § 4.233. There is no specific provision in that section concerning the proof required for a non-self-proved will. However, subsection 4.233(a), concerning self-proved wills, offers guidance. It provides:

A will executed as provided in § 4.260 [Z/] may, at the time of its execution, be made self-proved, and testimony of the witnesses in the probate thereof may be made unnecessary by the affidavits of the testator and attesting witnesses, made before an officer authorized to administer oaths, such affidavits to be attached to such will and to be in form and contents substantially as follows:

[The form affidavit for the testator is omitted. The form affidavit for witnesses provides:]

We, _____ and _____,
each being first duly sworn, on oath, depose and state: That on the ____ day of _____, 19____, _____ a member of the _____ Tribe of Indians of the State of _____, published and declared the attached instrument to be his/her last will and testament, signed the same in the presence of both of us and requested both of us to sign the same as witnesses; that we, in compliance with his/her request, signed the same as witnesses in his/her presence and in the presence of each other; that said testator/testatrix was not acting under duress, menace, fraud, or undue influence of any person, so far as we could ascertain, and in our opinion was mentally capable of disposing of all his/her estate by will.

The final sentence of subsection 4.233(a) provides: "If uncontested, a self-proved will may be approved and distribution ordered thereunder with or without the testimony of any attesting witness."

Subsection 4.233(c), concerning will contests, provides:

If the approval of a will, codicil thereto, or revocation thereof is contested, the attesting witnesses who are in the reasonable vicinity of the place of hearing and who are of sound mind must be produced and examined. If none

Z/ 43 C.F.R. § 4.260(a) provides: "An Indian 18 years of age or over and of testamentary capacity, who has any right, title, or interest in trust property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses."

of the attesting witnesses resides in the reasonable vicinity of the place of hearing at the time appointed for proving the will, the OHA deciding official may admit the testimony of other witnesses to prove the testamentary capacity of the testator and the execution of the will and, as evidence of the execution, the OHA deciding official may admit proof of the handwriting of the testator and of the attesting witnesses, or of any of them. The provisions of § 4.232 are applicable with respect to remaining issues.

This subsection, like subsection 4.233(a), is useful in determining the proof required for a non-self-proved will.

In this case, the two attesting witnesses resided in California and thus were not in the reasonable vicinity of the hearing which, as noted above, was held in Anchorage, Alaska. As far as the record shows, Judge Sweitzer made no attempt to obtain their testimony, either through affidavits or by requesting that the Administrative Law Judge with California jurisdiction hold a supplemental hearing. It appears likely that Judge Sweitzer relied on 43 C.F.R. § 4.233(c) to substitute the testimony of other witnesses for that of the attesting witnesses. In this case, however, neither of the other witnesses was a disinterested witness, because both stood to benefit from approval of Decedent's will. Judge Sweitzer did not ask them to produce any independent proof of Decedent's signature (such as a signature on another document) but asked them only if they recognized Decedent's signature. Further, as noted above, there was no testimony at all concerning Decedent's testamentary capacity.

An Administrative Law Judge has some discretion in determining what kinds of evidence will be considered. *See, e.g.*, 43 C.F.R. § 4.232(b). ^{8/} In this case, however, the Board finds that Judge Sweitzer abused his discretion by failing to seek the testimony of the attesting witnesses in any form and by relying solely upon the testimony of witnesses who stood to gain by approval of the will.

Upon remand, Judge Sweitzer shall obtain the testimony, at least in affidavit form, of the attesting witnesses. If it is not possible to obtain the testimony of the attesting witnesses, he may substitute the testimony of other witnesses, in the manner described in 43 C.F.R. § 4.233(c), as long as those witnesses are disinterested. He shall also give Ms. Oskolkoff

^{8/} 43 C.F.R. § 4.232(b) provides:

“The OHA deciding official may admit letters or copies thereof, affidavits, or other evidence not ordinarily admissible under the generally accepted rules of evidence, the weight to be attached to evidence presented in any particular form being within the discretion of the OHA deciding official, taking into consideration all the circumstances of the particular case.”

an opportunity to state her objections to the will and give other parties an opportunity to respond. He shall then issue a new decision in this estate.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Sweitzer's August 18, 2000, decision and May 10, 2001, order denying rehearing are vacated, and this matter is remanded to him for further proceedings and issuance of a new decision.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge