



INTERIOR BOARD OF INDIAN APPEALS

Estate of Florence Night Chase

38 IBIA 188 (11/05/2002)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF FLORENCE NIGHT CHASE : Order Affirming Decisions as Modified
: in Part, Vacating Decisions in Part,
: and Remanding Matter to Adminis-
: trative Law Judge
:
: Docket No. IBIA 02-148
:
: November 5, 2002

Appellant Conrad Black Bear, aka Season Sun Hawk, seeks review of a July 24, 2002, order denying rehearing issued by Administrative Law Judge Marcel S. Greenia in the estate of Decedent Florence Night Chase. IP TC 012 T 98. The Judge's denial of rehearing let stand a March 19, 2002, order determining Decedent's heirs. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the March 19, 2002, and July 24, 2002, orders in part as modified in this decision, vacates them in part, and remands this matter to the Administrative Law Judge.

Decedent died on April 11, 1995. Hearings to probate her trust or restricted estate were held on June 15 and August 7, 1998. Two separate issues were raised in the hearings. Those issues are whether Decedent died intestate and the determination of her intestate heirs. The Board first addresses the determination of heirs.

In his March 19, 2002, order, Judge Greenia found that Decedent had been married twice. He further found: Decedent's first marriage was to Herbert E. Black Bear. Two children were born of this marriage: Appellant and Herbert D. Black Bear, who predeceased Decedent without issue. The marriage ended in divorce. Decedent's second marriage was to Kam Yin Lau. Two children were born of this marriage: Kam Yin Lau, Jr., and Leatrice Fedila Lau Broyles. Decedent's second marriage also ended in divorce. Evidence showed that Decedent had another child: Aloha or Lola Night Chase, aka Loraine (Lorraine) Marie Hawk Ghost. This child predeceased Decedent, leaving as issue Lawrence James Dubray, Jr., aka Lawrence James Smith; Lester John Dubray; and Rachel Smith. Judge Greenia found that Decedent's heirs were her three surviving children and the three children of Decedent's previously deceased daughter, Hawk Ghost.

However, in a memorandum of law accompanying the March 19, 2002, order, Judge Greenia stated that Decedent had three children with Black Bear--Appellant, Herbert D., and Hawk Ghost. Two dates are shown in the probate record for Hawk Ghost's date of birth. One

date of birth, shown on Hawk Ghost's death certificate, is 1935, three years prior to Decedent's marriage to Black Bear. The second date, shown on the family history data sheet provided to the Judge by the Bureau of Indian Affairs, indicates that Hawk Ghost was born in 1944, more than a year after Decedent's divorce from Black Bear. The family history data sheet also indicates that Hawk Ghost's father was unknown.

Because of the questions raised by the discrepancies in the findings of fact between the Judge's order and his memorandum of law, the Board finds that it must vacate that part of the Judge's March 19, 2002, order which determined Decedent's heirs. It takes this action under 43 C.F.R. § 4.318, which allows it to exercise the inherent authority of the Secretary of the Interior to correct a manifest injustice or error. This estate will be remanded to Judge Greenia for issuance of a consistent statement as to his findings concerning Hawk Ghost.

The family history data sheet indicates that Decedent also had another child; i.e., Primo Tusi Ieremia. Other materials in the record suggest that Ieremia was actually the daughter of Decedent's previously deceased sister, Helen Night Chase. Judge Greenia did not discuss any possible relationship between Decedent and Ieremia, although he found that Decedent had not adopted any children. It is possible that the Judge found that the family history data sheet was incorrect and decided that it was unnecessary to address this matter in his order.

The Board might not have found it necessary to require the Judge to review his findings about any possible relationship between Decedent and Ieremia had that been the only problem here. However, because Judge Greenia will already be looking at the heirship question in regard to the number and identity of the children born of Decedent's relationship with Black Bear, in order to prevent possible confusion in future probates, he should also include a clear statement concerning Ieremia.

The Board now turns to the second question, i.e., whether Decedent died intestate. No will was introduced at the hearings. However, Appellant asserted that Decedent had executed two wills leaving her trust land to him. He stated that the first will was executed in 1969, and was subsequently lost, and that the second will was executed in 1974, and was subsequently destroyed in a fire. In support of his assertions, Appellant presented a document which he entitled "Affidavit." In addition to Appellant's signature, the document contains the signatures of five individuals whom Appellant asserted had witnessed Decedent's 1974 will. 1/

1/ This document is not under oath. It is notarized on the back. The notary's statement reads: "This certifies that this is an original document certified on this 27th day of January, 199? (rest of date is off the page)." The Board cannot find that this document meets the legal definition of an affidavit.

In addition, the five individuals signing the document made no independent statement, but instead merely signed their names on a document written by Appellant. The only indication of what these individuals believed their signatures to mean is Appellant's statement in the

In addressing the issue of the lost will in his March 19, 2002, order, Judge Greenia applied South Dakota State law to find that Appellant had failed to carry his burden of proving a lost will. The Judge therefore found that Decedent had died intestate.

Appellant sought rehearing on the issue of Decedent's lost will. As grounds for rehearing, he asserted that the transcript of the June 15, 1998, hearing had been lost and that the August 7, 1998, hearing had been incorrectly transcribed. Appellant again alleged that Decedent had prepared two wills, and stated that two of the witnesses to the 1974 will had testified at the second hearing. Referring to the "affidavit" discussed above, Appellant relied on South Dakota State law in arguing that a will could be proven by affidavit.

By notice dated June 4, 2002, Judge Greenia gave other parties an opportunity to show why Appellant's petition for rehearing should not be granted. Kam Yin Lau, Sr., Decedent's ex-husband, and the two children from that marriage opposed the petition for rehearing. Among other things, they asserted that Decedent and Appellant had not had a good relationship in the years immediately preceding Decedent's death.

On July 24, 2002, Judge Greenia denied rehearing. He found:

[C]areful review of the Petition for Rehearing discloses no new facts or issues. The contention that there were two (2) Last Will and Testaments, the first lost during [Appellant's] Merchant Seaman service and the second lost in a fire, were fully addressed and resolved in the principal hearing and the supplemental hearing. [Appellant] did not meet his burden of proof that there was actually a Last Will and Testament in existence at the time of the decedent's death, nor was he able to prove with direct, clear and convincing evidence the entire contents of the Will. The requirements of 43 C.F.R. § 4.241 are not met on the principal issue.

July 24, 2002, Order Denying Rehearing at 1.

Appellant appealed to the Board. Upon receipt of the probate record, the Board noted that the transcripts of the two hearings were not present. By order dated September 30, 2002, it requested the transcripts. Judge Greenia's response indicates that both the transcripts and the tape recordings from the hearings were lost. It appears that the transcripts were lost and later, in the move of Judge Greenia's office from St. Paul, Minnesota, to Rapid City, South Dakota, the tapes were also lost. The Judge stated that a diligent search in both offices had not located the tapes.

fn. 1 (continued)

body of the document that Decedent "made it [the second will] in front of witness their names are below."

In attempting to determine what its next step in this matter should be, the Board reviewed the entire probate record. The record clearly shows the absence of the transcripts of the hearing(s) at which Appellant's witnesses testified concerning the execution of the 1974 will. Both the probate record and Appellant's notice of appeal show Appellant's reliance on testimony presented at the hearings, and disagreement with Judge Greenia's statements as to the content of that testimony.

Under these circumstances, the Board would normally be inclined to vacate both orders in this estate and remand the matter for a new hearing. However, the Board also reviewed Appellant's notice of appeal. That review convinced the Board that, despite the lack of transcripts for the hearings, there is no scenario under which Appellant can prevail in this appeal. Because it sees no purpose that would be served by maintaining this case on its docket, the Board addresses the matter immediately.

Appellant argues that the children from Decedent's second marriage should not share in her estate because they have no ties to the Rosebud Sioux Reservation and did not attend either hearing; alleges bias on the part of Judge Greenia because the Judge's decision was contrary to Appellant's interests as a Native American; and contends that Judge Greenia failed to give proper weight to his evidence concerning the execution of Decedent's 1974 will.

Appellant's first two arguments can be dealt with expeditiously. There is no requirement that a deceased Indian's heirs have ties to the reservation. Neither is there a requirement that a person must attend the hearing(s) in order to take either as an intestate heir or under a will. The Board therefore finds Appellant's first argument unpersuasive.

Appellant's bare assertion that Judge Greenia's decision is contrary to Appellant's interests as a Native American is not sufficient to show bias on the Judge's part. ^{2/} Nothing in the orders which Judge Greenia issued in this estate shows any bias against Appellant. At most, the Judge rejected Appellant's legal arguments. The Board also finds this argument unpersuasive.

Appellant's only substantive argument is that the oral and written testimony of the will witnesses should be sufficient to find that Decedent had executed a will. This is not the issue. The issue is whether Decedent had a valid will at the time of her death. Even if the Board were to accept that Decedent had executed a will or wills during her lifetime, the fact of the matter here is that no will was presented for probate. Appellant, as the proponent of a will which was

^{2/} The Board notes in passing that the children born of Decedent's second marriage are also Native American. The family history data sheet indicates that Decedent had a 4/4 degree blood quantum. If this is correct, and assuming that Decedent's second husband had no Native American blood, it appears that their children have a 1/2 degree blood quantum.

not presented and which he admits no longer exists, had the burden of proving not only that a will was executed, but also that that no-longer-extant will should nevertheless be admitted to probate.

Judge Greenia informed Appellant that he was required to prove a lost will under South Dakota State law, and discussed the evidence Appellant presented under that law. This is not correct. Although Federal law provides that the intestate heirs of a deceased Indian are to be determined under state law, it does not provide that a will disposing of trust or restricted property is subject to state law. Compare 25 U.S.C. §§ 348 and 372 with 25 U.S.C. § 373. The Department has consistently held that the execution and interpretation of a will disposing of trust or restricted property are questions of Federal, not state, law. See, e.g., Estate of Teresa Mitchell, 25 IBIA 88 (1993); Estate of Pearl Big Bow Aungkotoye Nahno Kerchee, 18 IBIA 153 (1990); Estate of Reuben Mesteth, 16 IBIA 148 (1988); Estate of Winona June Little Hawk Garcia, 14 IBIA 106 (1986); Estate of Roger Wilkin Rose, 13 IBIA 331 (1985), appeal dismissed, Pagonis v. United States Department of the Interior, No. CIV-86-265E (W.D. Okla. Dec. 10, 1986); Estate of William Mason Cultee, 9 IBIA 43 (1981), aff'd, 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); Estate of Loretta Pederson, 1 IBIA 14, 77 I.D. 270 (1970); Estate of Lucy (Grace Medicinebird Lefthand, Bitner, Ridgby, White Plume or Geary) Feathers, 1 IBIA 336, 79 I.D. 693 (1972); Estate of Ute, IA-143 Supp. (Aug. 25, 1955).

Just as state law does not apply in regard to the execution and interpretation of a will devising trust or restricted property, it also does not apply in deciding any other question relating to such a will, including, as relevant here, whether a lost will can be admitted to probate. Instead, all questions relating to a will disposing of trust or restricted property are decided under Federal law.

Although proof of lost wills is not a topic that has been raised frequently on appeal, the Department has addressed it. The Acting Solicitor for the Department considered a challenge to the approval of a lost will in Estate of Ute, IA-143 (1955). He stated:

The evidence upon which the Examiner [of Inheritance] based his decision is positive and uncontradicted. It shows that the decedent's will was properly prepared and attested; that its provisions were definitively proved, and that the will was lost or destroyed through no fault of the testator, and without his knowledge and consent. The will was prepared by a member of the Oklahoma Legislature in his real estate office and witnessed by two Arapaho Indians who could speak the Arapaho language, and who acted as interpreters. Their uncontradicted testimony shows conclusively that the decedent possessed testamentary capacity and that the testator was free from undue influence, coercion, fraud, or duress. The provisions of the will were verified by the scrivener's notes on a list of the decedent's property prepared by the Indian Agency, and verified by the testimony of the two attesting witnesses. The record includes testimony which

discloses that the decedent had a logical reason for leaving his estate to [the devisees], as he had made his home with them since 1936 and [one of the devisees] had taken care of him from that time until his death in 1950.

Apr. 1, 1955, Decision at 2. See also Estate of Henry Chasing Hawk, P.R. #737 (9781-35) (Oct. 9, 1935) (lost will approved on the testimony of three disinterested persons, each of whom had participated in the will preparation and testified identically to the terms of the will, which was executed approximately one month before the testator's death); Estate of John Slow Bear, P.R.S. #3122 (17646-35) (June 26, 1935) (lost will not approved when the specific terms could not be proven); Estate of Day or Anpetu or Joshua or David Day, CC #332 (67558-31) (Sept. 6, 1932) (lost will not approved when the terms of the will were not proven, proper execution was not shown, and there was no way to determine whether the testator had cancelled the purported will during his lifetime).

These decisions show the Federal law on the question of whether a lost will should be admitted to probate. Although this Federal law is essentially the same as South Dakota State law, it is Federal, not state, law that is to be applied.

Judge Greenia based his decision not to admit Decedent's lost will to probate on a South Dakota statutory requirement that testimony on the contents of a lost will must be given by two disinterested witnesses. The Board found no case in which the Department admitted a lost will to probate without the testimony of more than one witness. Under these circumstances, the Board finds that South Dakota and Federal law are similar enough so that the Judge's analysis under South Dakota law can be read as an analysis under Federal law.

Judge Greenia found that the only witness who testified as to the contents of the 1974 will could not, or did not, provide testimony concerning all of the will's provisions:

The testimony presented at the hearing established that the will was executed in 1974. The will was already prepared prior to the arrival of the witnesses. The testimony, at the hearing, by one witness, revealed that the decedent was going to leave the land to her son, [Appellant]. Yet she was the only witness to testify that she saw the contents of the will as it related to the land. The witness indicated that the land was to go to [Appellant] but did not testify as to the remaining contents of the will. She also indicated that the decedent was not happy and was thinking about wanting to take care of her other children. The second witness testified that she did not see the contents of the will. Thus, the statutory requirement that the provisions of the purported will be clearly and distinctly proved by two witnesses is clearly lacking.

Mar. 19, 2002, Memorandum of Law at 2.

Appellant contends that Judge Greenia's account of the testimony was inaccurate. He argues that his witnesses testified that they were with Decedent when the will was written and did not testify that Decedent was unhappy with the provisions of the will. He also contends that the Judge did not give proper weight to his affidavit.

For purposes of this decision, the Board gives Appellant the benefit of every doubt and assumes that all of his assertions concerning the testimony are correct. However, Appellant has not challenged the essence of Judge Greenia's decision, *i.e.*, that only one person testified about the contents of the will and that witness could not, or did not, testify concerning the entire contents of the will.

Consideration of the "affidavit" does not help Appellant. In that document, Appellant states that Decedent's 1969 will gave him Decedent's land holdings on "the Reservation in South Dakota"; 3/ gives reasons for the execution of a second will, but does not mention the contents of that will; and comments: "She made the second [will] because something might happen in the future. [Decedent] no other will would supercede this will she made to her son [Appellant]." The Board finds that Appellant's "affidavit" does not show the entire contents of Decedent's 1974 will and is, in fact, less detailed than the testimony of Appellant's witness, as described by Judge Greenia. Therefore, even though Judge Greenia applied the wrong law in this case and did not specifically mention Appellant's "affidavit," his ultimate decision not to admit Decedent's lost will to probate was correct. 4/

3/ The inventory of Decedent's trust or restricted land holdings, prepared by the Bureau of Indian Affairs, indicates that Decedent owned interests in trust land on both the Rosebud Sioux Reservation and the Pine Ridge Reservation. Both of these reservations are in South Dakota.

4/ The Board finds that it can affirm that part of Judge Greenia's orders dealing with the lost will on the grounds just discussed. However, it feels compelled to address another issue.

The Board did not find in the probate record the date of the fire that destroyed Decedent's 1974 will. However, it notes that a long period of time passed between the execution of that document in 1974 and Decedent's death in 1995. It also notes that there was an alleged estrangement between Decedent and Appellant in the years preceding her death. Facts such as these raise questions when viewed in light of Decedent's failure to execute a new will containing the dispositive provisions which Appellant asserts were in the 1974 lost will. The passage of a large amount of time between the loss or destruction of a will and the testatrix's death presents the possibility that the testatrix may have changed her mind about the dispositive scheme in that will and may have, in essence, ratified the loss or destruction of the will through failure to execute a new will with the same dispositive scheme. (When the Department admitted a lost will to probate in Estate of Henry Chasing Hawk, *supra*, only a month had passed between the execution of the will and the testator's death. The amount of time between either the execution or loss of the will and the testator's death is not stated in Estate of Ute, but the Acting Solicitor

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms, as modified in this decision, those parts of Judge Greenia's March 19, 2002, and July 24, 2002, orders relating to Decedent's lost will. It vacates that part of the March 19, 2002, order relating to the determination of Decedent's heirs, and remands this estate to Judge Greenia for the issuance of a new determination of Decedent's heirs. 5/

//original signed

Kathryn A. Lynn
Chief Administrative Judge

//original signed

Anita Vogt
Administrative Judge

fn.4 (continued)

commented that the will had been lost "without [the testator's] knowledge or consent.") The Board would take a hard look before admitting to probate a lost or destroyed will that had been executed and/or lost or destroyed a considerable length of time prior to the testatrix's death. As Appellant stated in his "affidavit," "something might happen in the future" that would change the testatrix's intent with regard to the dispositive provisions of the lost or destroyed will. This is precisely the reason that a will does not take effect until the date of death, and can always be superseded by a new will.

5/ The Board's affirmance of those parts of Judge Greenia's orders relating to the lost will means that the only issues that can be appealed following the issuance of Judge Greenia's order on remand are those relating to the determination of Decedent's heirs.