



INTERIOR BOARD OF INDIAN APPEALS

Estate of Louis Harvey Quapaw

4 IBIA 263 (12/23/1975)

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# United States Department of the Interior

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

## ESTATE OF LOUIS HARVEY QUAPAW

IBIA 75-63

Decided December 23, 1975

Appeal from an Administrative Law Judge's order determining heirs after rehearing.

Affirmed.

1. Indian Probate: Appeal: Matters Considered on Appeal

Jurisdiction is fundamental to the Board's reviewing authority and it will be examined on appeal even though not raised as an issue previously.

2. Indian Probate: Secretary's Authority: Generally--Indian Probate:  
Trust Property: Generally

The Act of June 25, 1910 (36 Stat. 855), 25 U.S.C. § 372 (1970), gives the Secretary of the Interior statutory authority to determine heirship whether an estate is a trust allotment or a restricted allotment.

3. Indian Probate: Secretary's Authority: Generally

The Act of June 25, 1910, confers jurisdiction upon the Secretary to determine heirs beyond a proceeding involving the original allottee. The Secretary's responsibility under the Act is to determine heirship of all Indians who die intestate possessed of trust or restricted property and such responsibility does not terminate until the trusteeship or period of restriction expires.

4. Indian Lands: Allotments: Generally

The Quapaw Indians were allotted under the Act of March 2, 1895, 28 Stat. 876, 907. The initial period of restrictions against alienation contained in this Act was extended by subsequent amendments to March 3, 1971.

5. Indian Probate: Generally

Indians specifically excluded from the General Allotment Act are precluded from invoking rights extended by the Act or any amendment thereto. However, simply because the Quapaws were allotted under a separate act of Congress does not support a conclusion that the heirship provisions of the General Allotment Act cannot be applied to them.

6. Indian Probate: Generally--Indian Probate: State Law: Generally

Where no section of the General Allotment Act suggests that the Quapaws were to be excluded from the Act's provisions and where no section of the Quapaw Allotment Act suggests the inapplicability of the General Allotment Act to allotted Quapaw lands, there lies a reasonable basis for jointly interpreting these acts. The correctness of applying the heirship provisions of the General Allotment Act to the Quapaws is conclusively established because the Quapaw Allotment Act fails to adopt state law.

7. Indian Probate: Appeal: Matters Considered on Appeal--Indian Probate: Evidence: Newly Discovered Evidence--Indian Probate: Rehearing: Generally

Newly discovered evidence is to be presented in support of a petition for a rehearing and will not be considered on an appeal.

8. Indian Probate: Children, Illegitimate: Generally--Indian Probate:  
Evidence: Presumptions

In a case of illegitimacy, it is a reasonable presumption that an unmarried father may refrain from widely proclaiming parenthood.

APPEARANCES: John G. Ghostbear, Attorney for Louis Wayne Ballard, appellant; James Vollintine and Michael J. Frank, Attorneys for Russell Lee Quapaw, appellee.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This case involves an appeal from a decision rendered after a rehearing. On December 1, 1972, an Order Determining Heirs was entered in the estate of Louis Harvey Quapaw, deceased Quapaw unallotted, in which it was adjudged that Russell Lee (Hollandsworth) Quapaw, an illegitimate son, was the sole and only heir of the decedent. On April 2, 1973, an Order Denying Petition for Rehearing was entered. Thereafter, this Board entered an Order Granting a Rehearing De Novo, dated May 22,

1973, on its own motion. The scope of the rehearing was limited by the Board's order to the single issue of Russell Lee Quapaw's paternity.

Administrative Law Judge John F. Curran held a second hearing in this case on January 30, 1975. On February 27, 1975, Judge Curran entered an Order Determining Heirs on Rehearing in which Russell Lee Quapaw was again adjudged to be the son of the decedent and the only heir at law. Louis Wayne Ballard, a nephew of the decedent, through his attorney, filed a timely notice of appeal of the above order on April 25, 1975. The appeal was docketed by the Board on June 5, 1975, and both parties to the appeal have furnished briefs for the Board's consideration.

The Board has decided that the Administrative Law Judge's Order Determining Heirs on Rehearing should be affirmed. The grounds for appeal set out by Louis Wayne Ballard are briefly discussed below as a means of reporting the Board's disposition of this case.

#### Jurisdiction

[1] As his first basis for appeal, the appellant claims that the Secretary of the Interior is without jurisdiction to

decide the descent and distribution of an estate belonging to an unallotted Quapaw Indian who dies intestate. Although this question was not raised prior to the appeal, 1/ the Board recognizes that jurisdiction is fundamental to its reviewing authority and this issue is therefore addressed.

[2] Appellant's reply brief argues at page 2 that the estate in question does not involve a "trust patent," in which legal title to land remains in the United States, but rather a restricted fee, in when the allottee or his heirs hold a legal fee with a restriction on alienation. The appellant does not question the authority of the Secretary to determine heirs of allotments held by trust patents, but construes the provisions of the Act of June 25, 1910 (36 Stat. 855), 25 U.S.C. § 372 (1970), as precluding the Secretary from rendering heirship determinations when estates are held under a restricted fee. The Supreme Court ended this quarrel long ago in United States v. Bowling, 256 U.S. 484 (1921), an heirship case in which a tract of restricted fee land in Oklahoma was deemed covered by the terms of 25 U.S.C. § 372 (1970) as fully as trust allotments.

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1/ 43 CFR 4.290 provides: \* \* \* "The scope of the review on appeal shall be limited to those issues which were before the Administrative Law Judge when he ruled upon the petition for rehearing or reopening."

[3] Secondly, the appellant contends that 25 U.S.C. § 372 (1970) does not confer jurisdiction upon the Secretary to determine heirs beyond a proceeding involving the original allottee, in this case, Dick Quapaw, who died in 1918. The interpretation which courts and administrative bodies have implicitly given to the Act of June 25, 1910, supra, has consistently been that the Secretary of the Interior bears the responsibility of determining heirs to allotted land as long as the allotment is held in a trust or restricted status. See Bertrand v. Doyle, 36 F.2d 351 (10th Cir. 1929), in which the court states that the Act of June 25, 1910, "clearly applies to both past and future allotments and to all questions of heirship of the allottee arising within the trust period." (Emphasis added.) See also, Estate of Theodore Shockto (Deceased Unallotted Prairie Band Potawatomi Indian), 2 IBIA 224, 81 I.D. 177 (1974), and footnote 2, infra.

The Secretary's duty, therefore, extends beyond the determination of heirs of the original allottee to the determination of heirs of all Indians "who die intestate possessed of trust property" (43 CFR 4.202), except as otherwise provided by statute. The Board is not aware of any federal statute which divests the Secretary of the responsibility to determine heirs of Quapaw Indians who die intestate possessed of restricted property.

Appellant maintains that allotted Quapaw lands should be probated by the state courts of Oklahoma (Appeal Brief, p. 4). It is clear, however, that the object of the Act of June 25, 1910, is to grant to the Secretary of the Interior exclusive jurisdiction to determine heirship of deceased Indians, including deceased Quapaw Indians, who die possessed of trust or restricted property; the Secretary's exclusive power to determine heirs does not terminate until the trusteeship or period of restriction expires. Larkin v. Paugh, 276 U.S. 431 (1928); Redeagle v. Channing, 294 P. 93, 146 Okl. 288 (1930) 2/; Arenas v. United States, 95 F. Supp. 962 (S.D. Cal. 1951).

In a further attack on the jurisdiction of the Secretary in this case, the appellant claims that the period of restriction affecting the decedent's land expired prior to his death, thereby depriving the Secretary of authority to determine heirship.

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2/ In the Redeagle case the Oklahoma Supreme Court specifically held that state courts have no jurisdiction to entertain a suit by an Indian heir of a deceased Quapaw Indian involving lands allotted pursuant to the Quapaw Allotment Act unless the trust period has expired. In the same manner, the Oklahoma courts have consistently recognized that the restrictions imposed by the Quapaw Allotment Act are not personal to the named allottee, but run with the land and operate on heirs of the allottee as well. Ashton v. Noble, 162 P. 784 (1917); In re Long's Estate, 249 P.2d 103.

[4] The Quapaw Indians were allotted under the Act of March 2, 1895, 28 Stat. 876, 907. This Act contained a restriction against alienation of patents issued pursuant to the statute for a period of 25 years. The Act of March 3, 1921, 41 Stat. 1248, as amended, November 18, 1921, 42 Stat. 1570, extended the period of restriction for 25 years, or until March 3, 1946. The Act of July 27, 1939, 53 Stat. 1127, extended the restrictions on Quapaw allotments "for a further period of 25 years from the date on which such restrictions, limitations and exemptions would, otherwise expire." The date upon which restrictions "would otherwise expire" was March 3, 1946. Thus, the most recent Act extended the restricted period to March 3, 1971. Since the decedent in this case died on September 29, 1970, his death preceded the expiration of the restricted period imposed on Quapaw allotments and only the Secretary of the Interior is authorized to render the determination of heirship.

#### Issue of Paternity

Appellant's other two grounds for appeal are 1) that the finding of the Administrative Law Judge that Russell Lee Quapaw was the natural son of Louis Harvey Quapaw, decedent, was not based upon a fair preponderance of the evidence or conclusive facts, and 2) that new evidence has been discovered which conclusively establishes that the decedent was not the father of Russell Lee Quapaw.

Before responding to these two claims, the Board will first, address an overall objection raised by the appellant on appeal which goes to the authority of the Secretary to confer an inheritance right upon an illegitimate. The appellant submits that the provisions of 25 U.S.C. § 371 (1970), an amendment to the General Allotment Act, supra which permits an illegitimate child to inherit from the father, are not applicable to Quapaw Indians because the Quapaws were not allotted under the General Allotment Act. 3/

By its order of May 22, 1973, granting a rehearing and limiting the issue thereon, the Board has already indicated its position that 25 U.S.C. § 371 (1970) applies in this case. In view of the statute, the above order states that the issue of legitimacy in the father's estate is moot.

Appellant refers to Porter v. Wilson, 239 U.S. 170 (1975), for the proposition that 25 U.S.C. § 371 (1970) only applies to Indians who are covered by the prior sections of the General Allotment Act. Specifically, the Court's holding in Porter,

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3/ Appellant characterizes this objection as jurisdictional. If the contention is valid, however, the Secretary must still determine decedent's lawful heirs. Accordingly, this allegation is treated in this Opinion as potentially a limited error of law in the Administrative Law Judge's decision rather than as a complete jurisdictional defect.

supra, an heirship case involving Creek Indians, rests on the fact that by Section 8 of the Act of February 8, 1887 (25 U.S.C. § 339 (1970)), "the territory occupied by the \* \* \* Creeks \* \* \* in the Indian territory" was expressly excepted from the provisions of the General Allotment Act. At 174.

[5] The Board agrees that Indians specifically excluded from the General Allotment Act are precluded from invoking rights extended by the Act or any amendment thereto. However, simply because the Quapaws were allotted under a separate act of Congress does not support a conclusion that the heirship provisions of the General Allotment Act cannot be applied to them.

[6] Moreover, where no section of the General Allotment Act suggests that the Quapaws were to be excluded from the Act's provisions and where no section of the Quapaw Allotment Act suggests the inapplicability of the General Allotment Act to allotted Quapaw lands, there lies a reasonable basis for jointly interpreting these Acts. In the problem at hand, determining what laws to follow in determining heirship for the allotted land of a deceased Quapaw Indian, the correctness of applying the heirship provisions of the General Allotment Act to the Quapaws, it is conclusively established because the Quapaw Allotment Act fails to adopt state law.

Since state law cannot be made applicable to allotted Indian land except to the extent so authorized by Congress, 4/ and since tribal powers do not extend to determining heirs of trust or restricted property, 5/ the decedent's estate must be probated in accordance with federal requirements, including the requirement that illegitimate children may inherit interests in an allotment. This result is consistent with the premise that statutes legitimatizing children should be liberally construed. Estate of Harry Colby, 69 I.D. 113, 116 (June 29, 1962).

#### Evidence of Paternity

It appears to be undisputed by the parties that Russell Lee Quapaw's mother was Opal Hollandsworth, now deceased, and that Opal was not married to the decedent, Louis Harvey Quapaw, at any time. The factual controversy throughout the proceedings in this case has been whether Opal Hollandsworth conceived Russell Lee (Hollandsworth) Quapaw through intercourse with the decedent, Louis Harvey Quapaw, or through Tom Panther, who was tried in the District Court for Ottawa County, Oklahoma, for the alleged rape of Opal Hollandsworth.

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4/ Chemah v. Fodder, 259 F. Supp. 910, D.C. Okl. 1966.

5/ 25 CFR 11.31.

Irrespective of whether Tom Panther was in fact guilty of the rape charge, the Administrative Law Judge concluded that it would not have been possible for the alleged rape to have resulted in the birth of Russell Lee Quapaw. The evidence substantiated that Russell Lee Quapaw was born September 13, 1923. 6/ The alleged rape occurred April 15, 1923. Since the average gestation period is medically considered to be 10 lunar months (280 days) from the last menstrual period and 266-270 days from conception, 7/ Judge Curran notes that "the conception must have occurred long prior to April 15, 1923, to result in the birth on September 13, 1923." (Decision on Rehearing, p. 2.) In addition, the appellee's analysis of the state court documents examined from the Tom Panther case correctly points out that the defendant, at the most, was convicted of "assault with intent to commit rape," rendering the claim of the appellant in this proceeding all the more untenable. 8/

There is sufficient affirmative evidence in the record that Russell Lee Quapaw is the natural son of the decedent that it could

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6/ Although the appellant questions the validity of this conclusion, appellee's date of birth is corroborated by the statement of his aunt, Ida Reynolds, who was present when he was born, and the delayed birth certificate of Russell Lee Quapaw.

7/ See Whitney v. Whitney, 337 P.2d 219; Dazey v. Dazey, 122 P.2d 308.

8/ See appellee's discussion of the Panther records, p. 9, Answer to Appeal of Louis Wayne Ballard.

still outweigh proof of a rape of the appellee's mother by Tom Panther at a time which might have resulted in the birth of a child in September 1923. Ida Reynolds, twin sister of Opal Hollandsworth and appellee's aunt, stated that the decedent acknowledged that Russell Lee was his son, that the decedent and Russell Lee were similar in appearance and that the decedent was known in the community to be the father of Russell Lee Quapaw. Ruth Hampton, sister-in-law of appellee's mother, testified to the same effect on deposition. In addition, the original record in this case contains a copy of an application for the admission of Russell Lee Quapaw into the Seneca Indian School when the appellee was 7 years old. This document shows Russell Lee's father to be the decedent. Appellee's delayed birth certificate, dated November 21, 1972, shows the decedent was his father and the appellee states that all his life he has regarded the decedent as his father.

#### Newly Discovered Evidence

The appellant claims that there is newly discovered evidence which establishes that Russell Lee Quapaw is not the son of the decedent. Generally, the evidence referred to is limited to the issue of community reputation.

[7] It is noted that the appellant received timely notice of the rehearing in this case. Accordingly, the witnesses who have been discovered should have been produced by the appellant at the January 30, 1975, hearing. Newly discovered evidence is to be presented in support of a petition for a rehearing and will not be considered on an appeal. 43 CFR 4.241; Estate of Shows in a Crowd, A-24813 (February 25, 1948).

[8] If the Board were authorized to consider the latest evidence of the appellant, there would still be no basis for doubting the correctness of the Administrative Law Judge's findings. The record already contains conflicting evidence on community reputation and it comes as no surprise to the Board that the appellant can produce more names of persons who have no knowledge that the decedent fathered an illegitimate child. In a case of illegitimacy, it is a reasonable presumption that an unmarried father may refrain from widely proclaiming parenthood.

#### Conclusion

On the basis of the foregoing conclusion's and factual review of the record, the Board is satisfied that Russell Lee Quapaw is the son of the decedent and legally entitled to the privileges of a sole heir.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order Determining Heirs on Rehearing, dated February 27, 1975, be, and the same is hereby, AFFIRMED.

This decision is final for the Department.

Done at Arlington, Virginia.

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//original signed  
Mitchell J. Sabagh  
Administrative Judge

I concur:

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//original signed  
William Philip Horton  
Alternate Member