



INTERIOR BOARD OF INDIAN APPEALS

Estate of Dewey Cleveland

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United States Department of the Interior

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

ESTATE OF DEWEY CLEVELAND

IBIA 76-8

Decided April 15, 1976

Appeal from a decision denying petition to reopen.

Affirmed

1. Indian Probate: Indian Reorganization Act of June 18, 1934 (25 U.S.C. § 464 et seq.): Generally

The Indian Reorganization Act recognizes two classes of persons who may take testator's lands by devise, that is, any member of the tribe having jurisdiction over such lands and legal heirs of the testator.

2. Indian Probate: Indian Reorganization Act of June 18, 1934 (25 U.S.C. § 464 et seq.): Construction of Section 4

The words "or any heirs of such member" found in section 4 (25 U.S.C. § 464 (1970)) were early concluded by the Solicitor to mean those who would, in absence of the will, have been entitled to share in the estate.

APPEARANCES: C. Richard Neely, Esq., of the Portland Regional Solicitor's Office, for the Superintendent, Western Washington Agency, appellant.

OPINION BY ADMINISTRATIVE JUDGE WILSON

The above-entitled matter comes before this Board on an appeal taken by the Superintendent of the Western Washington Agency, through his attorney, C. Richard Neely of the Portland Regional Solicitor's Office, from Administrative Law Judge Robert C. Snashall's denial to grant a reopening of the estate herein.

The record indicates an Order Approving Will and Decree of Distribution was issued by the Judge on March 17, 1975. In the said order the Judge found and declared the fourth, fifth, sixth, seventh and eighth clauses of the decedent's will of February 19, 1969, devising lands to his grandchildren, Josephine Carrie Penn, Donneen Ivy Penn, Stanley Penn, Francine Penn and Frank Penn, of

no force and effect since they were neither heirs at law of the testator nor members of the Quinault Tribe as required by section 4 of the Act of June 18, 1934, 48 Stat. 985, 25 U.S.C. § 464 (1970), hereinafter referred to as the Act.

Thereafter, on May 14, 1975, Emily Cleveland Cooper, for herself and as guardian ad litem for the minors, Josephine Carrie Penn, Donneen Ivy Penn, Frank Ross Penn, along with Stanley William Penn and Francine R. Wilkin through their attorneys, Roche and Roche, filed a petition for rehearing. The petitioners alleged that the notices of hearing mailed were inadequate to put them on notice that issues concerning construction of the will of decedent were to be tried and that they were not afforded opportunity to obtain counsel to represent them in the hearing which in effect was a will contest.

The Judge on May 30, 1975, denied the petition for rehearing on the basis that the petitioners had failed to offer documentation and other evidence in support of their contentions or allegations. No appeal was taken by the petitioners from the said denial for rehearing.

On July 28, 1975, a petition to reopen the estate was filed by S. A. Lozar, Superintendent of the Western Washington Agency, pursuant to the provisions of 43 CFR 4.242(d) alleging error on the part

of the Administrative Law Judge in interpreting section 4 of the Act of June 18, 1934, supra, so as to preclude the testator's grandchildren from receiving devises under his will involving lands situated on the Quinault Indian Reservation, Washington.

The Judge on August 12, 1975, denied the petition to reopen on past precedent of the Department. The Judge in his denial further stated that he was without authority to rule in contradiction of the established decisions of the Department, citing in support thereof the Estate of Emma Blowsnake Goodbear Mike a/k/a Emma Walking Priest, IA-916 (October 26, 1960); Estate of Rose Josephine LaRose Wilson Eli, 2 IBIA 60, 80 I.D. 620 (1973) and the Solicitor's Opinion, 54 I.D. 584 (1934).

Thereafter, on August 25, 1975, the Superintendent of the Western Washington Agency, Bureau of Indian Affairs, through his attorney, C. Richard Neely, Assistant Regional Solicitor, Portland, filed a notice of appeal from the Administrative Law Judge's denial of August 12, 1975.

Appellant as basis for the appeal states:

The Administrative Law Judge erred in voiding those portions of decedent's will which devised trust allotted lands situated on the Quinault Indian

Reservation to his grandchildren based upon his interpretation that they were not heirs or eligible devisees under Section 4 of the Indian Reorganization Act of 1934 (now codified 25 U.S.C. § 464).

The appellant along with the notice of appeal filed a memorandum of authorities in support of the appeal.

As stated in appellant's memorandum, the only issue in the appeal herein is whether Dewey Cleveland's grandchildren come within the meaning of the phrase "any heirs of such member" as used in section 4 of the Indian Reorganization Act which in relevant part provides:

* * * and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or such corporation or any heirs of such member: * * *.

The term "heirs of such member," was interpreted by the Assistant Secretary of the Interior to mean "heir of the testator," 54 I.D. 584, 585 (1934). The Secretary in regard thereto stated:

I am of the opinion that * * * the testator may devise to his own heirs * * * but that outside the circle of heirs, the testator may devise only to fellow-members of his tribe or corporation.

[1] The Department has since construed 25 U.S.C. § 464 (1970) as limiting testamentary disposition of lands subject to the Act of 1934, supra, to (1) a member of the tribe, or (2) an heir of the testator. Estate of John Moccasin, IA-1395 (June 30, 1966).

In light of the foregoing decision since the grandchildren are not members of the Quinault Tribe, it is necessary to determine if they fall within the class of "heirs" in order to qualify as eligible devisees under the testator's will.

In order to make that determination we must look to the existing laws of descent and distribution of the state where such lands are situated to ascertain to whom such land descends in the absence of a will since there are no Federal laws of descent and distribution applicable to Indian trust lands.

The Revised Code of Washington, 11.02.005(6) (1965) defines heirs as:

"Heirs" denotes those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on his death intestate.

The foregoing definition is in line with the interpretation given and followed by the Department in its decisions involving section 4 of the Act since 1934.

The Board is not unmindful of the term "any heirs" as it appears in section 4 of the Act. However, regarding the term, the Secretary on p. 584 of the 1934 opinion in dealing with the question of what persons other than members of the testator's tribe may lawfully be designated as devisees of his restricted property stated:

* * * If "such member" refers to the testator himself, then the class of nonmembers entitled to receive restricted Indian property will be limited to those who through marriage, descent or adoption have acquired a relationship to the testator sufficient to constitute them heirs at law. [Emphasis supplied.]

Moreover, on page 585 of the same opinion the Secretary went on to state:

* * * I am of the opinion * * * that the testator may devise to his own heirs * * *.

In considering the term "or any heirs of such member" the Secretary in referring to the legislative history, page 586 of the opinion, concludes:

* * * It seems clear that the purpose of these legislative afterthoughts was not to alter fundamentally the intent and scope of the original restriction but rather to provide for the exigencies of a special case that had not been distinctly considered, namely, the case of an Indian testator desiring to divide his

estate by will among those who would, in the absence of a will, have been entitled to share in the estate namely, his own heirs.

On the same page of the opinion the Secretary makes reference to an explanatory statement made to the House of Representatives by the Chairman of the House Committee on Indian Affairs as follows:

* * * It, [Section 4] however, permits the devise of restricted lands to the heirs, whether Indian or not. * * *

It is the contention of the appellant that the term "any heirs" as used in the Act is ambiguous in identifying those persons to whom a living testator may devise land since technically a living person has no heirs but only heirs apparent or presumptive heirs. Accordingly, the appellant argues that the Department in its past interpretation of "any heirs" in limiting or restricting the devise of lands to those persons who would take the land if the Indian died without a will is too narrow and overly restrictive, thus, prohibiting a devise of land to more remote, presumptive heirs in those instances where there is an intermediate living person more closely related to the testator as a presumptive heir.

The appellant further contends that such prohibition against devising the land to more remote, presumptive heirs is in direct conflict with the expression given in the 1934 opinion of the Secretary

permitting the devise of such land to any person who is a natural heir within the testator's "circle of heirs."

In essence, the appellant contends that the term "any heirs" means "presumptive heirs" and that the grandchildren, children of the living daughter of the testator, fall within the meaning of presumptive heirs and, therefore, are eligible to take the lands situated on the Quinault Reservation.

We disagree with the appellant's contention that the grandchildren in the appeal herein fall within the meaning of presumptive heirs as that term is commonly defined.

In the first instance the Secretary in his opinion of 1934 as indicated elsewhere herein used the term "heir at law" as well as in his reference therein to the legislative history where he concluded:

* * * to divide his estate by will among those who would, in the absence of a will, have been entitled to share in the estate, namely, his own heirs. [Emphasis supplied.]

Clearly, the foregoing indicates the term "any heirs" to have a limited meaning, that is, restricting devises of lands subject to the

Act to those persons to whom a decedent's property passes under applicable laws of descent in the absence of a will.

The foregoing interpretation was clearly spelled out in the Estate of Left Hand or John (Johnson) Left Hand, 11223-39 (June 17, 1940), wherein the Department held that:

A grandson was not an heir at law of the testator, being the son of a decedent's living son and therefore not qualified under section 4 of the Act of June 18, 1934 (48 Stat. 984).

The Department further held in the same case that the "rights of all parties under the will must be determined as of testator's death."

In the Estate of Emma Blowsnake Goodbear Mike a/k/a Emma Walking Priest, supra, it was stated:

[2] It is clear from the foregoing quotation [54 I.D. 585-6] that the phrase in [the] section reading "or any heirs of such member" was early concluded by this office to mean those who would, in the absence of a will, have been entitled to share in the estate. * * *

The term "legal heir" was used therein to designate to whom lands could be devised.

Likewise, in the Estate of John Moccasin, *supra*, it was held that a legal heir could take as a devisee under section 4. The Estate of Rose Josephine LaRose Eli, *supra*, held that "as long as the intermediate parent is still living it is undisputed that the grandchild of a decedent cannot be the heir of the decedent under the laws of the state of Montana."

Appellant, in the face of the foregoing decisions, nonetheless urges that the words "any heirs" as used in the Indian Reorganization Act should not be given the alleged narrow and unrealistic meaning heretofore given thereto by the Department and that it be given the ordinary or popular meaning of the word "heir" which would permit presumptive heirs to be named as eligible devisees in an Indian will regardless of their degree of relationship to the testator or the fact that there are living persons more closely related to the testator. Under the foregoing interpretation the appellant contends that Dewey Cleveland's grandchildren are clearly presumptive heirs of the testator and the devise of land to them on the Quinault Reservation is valid notwithstanding the fact their mother survived the testator and who is still living.

An "heir presumptive" is defined as:

The person who, if the ancestor should die immediately, would, in the present circumstances of things, be his heir, but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child."

Black's Law Dictionary, Revised 4th Edition (1968) citing various case authority; Ballentine's Law Dictionary, 3d Edition (1969).

The above definition expresses what we consider the most commonly and widely accepted construction of the term "heirs presumptive." As has been indicated elsewhere herein, the Department in its decisions, though not using the term "heirs presumptive" the use of the terms "heir at law or legal heir," is in keeping with the definition above-stated and with the intent of Congress as expressed in the legislative history of the Act. Any interpretation to the contrary, such as the appellant urges, would be inconsistent with the commonly accepted legal usage of the term.

Accordingly, we find that the grandchildren of Dewey Cleveland in the case at bar do not fall within the meaning of the term "any heirs" of the Act and, therefore, are ineligible to take the lands situated on the Quinault Reservation under the testator's will.

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 Denying Petition to Reopen issued under date of August 12, 1975, by Administrative Law Judge Robert C. Snashall be, and the same is hereby AFFIRMED,

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Alexander H. Wilson
Administrative Judge

We concur:

//original signed
Wm. Philip Horton
Board Member

//original signed
Mitchell J. Sabagh
Administrative Judge