



INTERIOR BOARD OF INDIAN APPEALS

Estate of Arthur Wishkeno

8 IBIA 147 (08/08/1980)

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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

IN THE MATTER OF THE ESTATE OF : Docket No. IBIA 80-13
ARTHUR WISHKENO :
Deceased Prairie Band :
Potawatomi Allottee 330 : August 8, 1980

ORDER

Arthur Wishkeno, a resident of Kansas, died on May 13, 1978. After a hearing held on April 4, 1979, at Topeka, Kansas, Administrative Law Judge Sam E. Taylor issued an order on July 19, 1979, disapproving will and determining heirs wherein he found that Arthur Wishkeno, hereinafter referred to as decedent, died intestate and pursuant to the laws of descent for the State of Kansas, was survived by the following heirs at law:

Wesley Wishkeno	Son	12/84
Mary Wishkeno Delg	Daughter	12/84
Alethia Wishkeno Bedwell	Daughter	12/84
Virginia Wishkeno Cadue	Daughter	12/84
Wilma Wishkeno Anquoe	Daughter	12/84

Children of predeceased son, Ivan Wishkeno, Sr.
(deceased February 23, 1975)

Ivan C. Wishkeno, Jr.	Grandson	4/84
Marilyn Wishkeno	Granddaughter	4/84
Calvin William Wishkeno	Grandson	4/84

Children of predeceased son, Calvin Wishkeno
(deceased February 22, 1952)

Vivian Lea Wishkeno McKinney	Granddaughter	6/84
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During the course of the aforementioned hearing, Virginia Cadue submitted a copy of a purported last will and testament. Evidence presented failed to disclose the whereabouts of the original. Some evidence submitted indicated the will may have been destroyed. Absent the original of the will and absent evidence that the will had been lost, the Judge found that the copy of said will was invalid and should not be approved. After a full review of the complete record, the Board concurs in Judge Taylor's findings that said will was invalid.

Virginia Cadue also submitted a copy of a warranty deed, purportedly executed by the decedent and dated November 1, 1968, which purported to convey certain trust and fee lands of the decedent referred to therein to Virginia Cadue. The purported deed was never submitted to the Secretary of the Interior or to his authorized subordinate for approval as provided for by statute and Departmental regulations. Accordingly, Judge Taylor found said purported warranty deed invalid and ineffective to convey title to the trust property described therein to Virginia Cadue.

Wesley Wishkeno petitioned for rehearing on August 28, 1978, because he strongly felt that only the immediate living heirs should be entitled to decedent's estate.

Judge Taylor denied the petition for the reason that Kansas laws of descent as set forth in said order permit the child or children of a predeceased child to take the share of the predeceased child. ^{1/}

An appeal was then filed by Wilma Anquoe, Alethia Bedwell, Virginia Cadue, Mary E. Delg, and Wesley Wishkeno.

The main thrust of appellants' argument is that the purported warranty deed referred to, supra, should receive subsequent approval by the Secretary of the Interior and be upheld as a valid instrument. Appellants cite several state and Federal cases in support of their position. One in particular, Lykins v. McGrath, 184 U.S. 169 (1902), held that:

Consent of the Secretary of the Interior to a conveyance by an Indian patentee whose patent prohibits alienation by him or his heirs without such consent may be given after death of the Indian grantor, and when so given is retroactive in its effect, and relates back to the date of the conveyance, so as to cut off any claim of the heirs of such grantor to the land.

Whether the purported warranty deed is null and void or whether it was lawful or at least voidable and, therefore, subject to ratification is appropriately a matter for the Commissioner of Indian Affairs to decide, not this Board. See 25 CFR Part 121.

^{1/} Kan. General Stat. Ann. § 59-506 provides in pertinent part:

“If the decedent leaves a child, or children, or issue of a previously deceased child or children, and no spouse, all his property shall pass to the surviving child, or in equal shares to the surviving children and the living issue, if any, of a previously deceased child, but such issue shall collectively take only the share their parent would have taken had such parent been living * * *.”

Because this matter is within the purview of the Commissioner of Indian Affairs, it is referred to the Commissioner for expeditious resolution and return. The decision should include findings of fact and conclusions for incorporation in a final decision by the Board for the Department regarding decedent's estate.

NOW, THEREFORE, the matter of whether the purported warranty deed is null and void or whether it was lawful or at least voidable and therefore subject to ratification by the Secretary of the Interior or his authorized subordinate is referred to the Commissioner of Indian Affairs for expeditious resolution and return to this Board for incorporation in its decision disposing of the overall matter of decedent Arthur Wishkeno's estate.

//original signed
Mitchell J. Sabagh
Administrative Judge

We concur:

//original signed
Franklin Arness
Administrative Judge

//original signed
Wm. Philip Horton
Chief Administrative Judge