



INTERIOR BOARD OF INDIAN APPEALS

Robert Maurer v. Secretary of the Interior

17 IBIA 129 (05/17/1989)

Judicial review of this case:

Dismissed, No. 89-C-494-E (N.D. Okla. Mar. 15, 1991)



United States Department of the Interior

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

ROBERT M. MAURER

v.

MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-9-A

Decided May 17, 1989

Appeal from a decision of the Muskogee Area Director, Bureau of Indian Affairs, concerning distribution of an Osage headright.

Remanded.

1. Indian Probate: Indian Tribes: Osage--Indians: Osage Headrights

The Department of the Interior can take appropriate action concerning the approval or disapproval of an Osage will after the entry of the Oklahoma district court's decision.

2. Administrative Procedure: Decisions--Indian Probate: Indian Tribes: Osage--Indians: Osage Headrights

The Department of the Interior has authority to reopen an Osage probate upon a showing that the approval of a will was given under a mistake of fact.

APPEARANCES: Bruce W. Gambill, Esq., Pawhuska, Oklahoma, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On January 19, 1989, the Board of Indian Appeals (Board) received an appeal from Robert W. Maurer (appellant), on transfer from the Deputy to the Assistant Secretary--Indian Affairs (Operations) pursuant to the provisions of 25 CFR 2.19 (1988). ^{1/} Appellant sought review of an October 26,

^{1/} Former section 2.19 provided in pertinent part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or Bureau of Indian Affairs official exercising the administrative review authority of the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision."

Appeals regulations in 25 CFR Part 2 and 43 CFR Part 4, Subpart D, were amended, effective Mar. 13, 1989. 54 FR 6478 (Feb. 10, 1989).

1988, decision of the Muskogee Area Director Bureau of Indian Affairs (BIA; appellee), concerning distribution of the .57499 Osage headright interest held by decedent Rosabelle H. Maurer at the time of her death. For the reasons discussed below, the Board affirms appellee's authority to issue this decision and remands the case to him for further action in accordance with this opinion.

Background

Rosabelle H. Maurer, an unallotted Osage, died on November 2, 1986. She had executed a will on October 14, 1986, which, in Clause V, devised "the rest, residue, and remainder of [her] estate, whether real or personal property, of every kind and description, wherever situated, and whether now owned or hereafter acquired * * * to [her] sons, Robert M. Maurer and Lee Maurer, in equal shares, to be theirs absolutely, subject to Clause VI hereof." Clause VI of the will provided:

In order that my children shall be treated equally, I direct that in the division and distribution of my estate, any advancements heretofore made to either of my children shall be deducted from his respective share of my estate, or if he be deceased, from the share which would have been his. I direct my executor that no loan, promissory note, claim, or evidence of debt due me at my death is to be extinguished, but same are to be considered as advancements in determining the division and distribution of my estate.

Probate of restricted Osage headrights is subject to the Act of April 18, 1912, sec. 3, 37 Stat. 86, 88, as amended by the Act of October 21, 1978, P.L. 95-496, sec. 5(b), 92 Stat. 1660, 1661, and regulations of the Department of the Interior set forth in 25 CFR Part 17. Pursuant to those procedures, on February 10, 1987, a hearing on decedent's will was conducted by the Special Attorney appointed by the Secretary of the Interior. It appears that no evidence was offered at that hearing concerning any advancements made by decedent to either of her sons.

Following this hearing, on February 25, 1987, the Superintendent, Osage Agency (Superintendent), issued an order approving decedent's will. No appeal was taken from this order.

Pursuant to the statutory requirements, decedent's will was then probated in the District Court of Osage County, Oklahoma. On October 6, 1987, the court issued a final decree setting out the distribution of decedent's estate. The court found that decedent's combined assets in Oklahoma and Kansas were valued at \$153,092.95, excluding joint tenancies, 2/ and that

2/ Appellee states that decedent held a joint tenancy certificate of deposit with appellant in the amount of \$120,000, and one with Lee Maurer in the amount of \$1,219.14, and concludes that decedent had adjusted the

decedent had made advancements to Lee H. Maurer in the sum of \$132,009.05, and had made no advancements to appellant. The court stated its finding "that, as a condition precedent to the vesting of the devise herein, the respective heir shall have an interest in excess of advancements made by testator, prior to her death, to the respective heir" (Decree at 2 (unnumbered)). The court further found that the moneys given to Lee H. Maurer during decedent's lifetime were advancements, rather than gifts, and that those advancements exceeded the interest he would take by devise. Accordingly, the court decreed:

3) That pursuant to the terms of the Last Will and Testament of the decedent, as approved by the Superintendent of the Osage Indian Agency, United States Department of the Interior on the 25th day of February, 1987, the decedent an Osage Unallotted Indian did devise her Osage Indian Headright interest to Lee H. Maurer and Robert M. Maurer, subject to the condition precedent to vesting, that the respective devisees receive only such interest in the Estate in excess of advancements made prior to testator's death.

4) That pursuant to the findings of this Court it is Ordered, that Lee H. Maurer, having received advancements in excess of one-half interest in said Estate, that all of the Estate property herein involved, is Ordered transferred, conveyed and assigned to Robert M. Maurer.

The only asset of decedent's estate subject to the Oklahoma court's jurisdiction was the .57499 Osage headright.

At some time prior to February 22, 1988, the Superintendent requested counsel for appellant to procure an order to correct the District Court's decree. Apparently no action was taken in response to this request. On February 22, 1988, the Superintendent again requested counsel to procure an order correcting the decree. As grounds for his request, the Superintendent stated at page 4:

The Osage headright vested in the two sons on the death of the Testatrix, subject only to control of the court to administer the estate. Ware v. Beach, 322 P.2d 635 (Okla. 1958).

The District Court of Osage County, Oklahoma, by its final decree of distribution in this estate, transferred, conveyed, and assigned the Osage headright interest belonging to Lee H. Maurer to Robert M. Maurer to satisfy certain advancements.

fn. 2 (continued)

advancements made to each of her sons through this means. Evidence of the existence of these certificates of deposit does not appear in the record. Neither is there evidence as to who initially put up the money for the certificates.

By virtue of § 8(a) of the 1978 Act, as amended, [3/] only non-Indians can alienate Osage headright interests; however, such alienation is subject to the approval of the Secretary of the Interior. Taylor v. Tayrien, 51 F.2d 884 (10th Cir. 1931); In re Irwin, 60 F.2d 495 (10th Cir. 1932). [4/]

The Superintendent concluded that "the order of the District Court * * * transferred, conveyed and assigned the Osage headright interest which belonged to Lee H. Maurer to Robert M. Maurer to satisfy certain advancements made to Lee H. Maurer, contrary to Federal law," Id. at 5, and again requested counsel to seek a correcting order.

Appellant sought review of this order by appellee, who by letter dated October 26, 1988, affirmed the Superintendent's legal conclusion and order. Appellant sought further review by the Washington, D.C., office of BIA. His appeal was transferred to the Board pursuant to former 25 CFR 2.19(a)(2). Only appellant filed a brief on appeal.

Issue on Appeal

Because of the complex statutory and regulatory scheme established for consideration of Osage wills, it is necessary to carefully delineate the extent of the Board's jurisdiction and the nature of the issues before it. In this case, the Board does not have jurisdiction to consider the merits of the Superintendent's approval of decedent's will. 25 CFR 17.14. Therefore, the only issues before the Board are whether the Superintendent and appellee had the authority to take action concerning the disposition of decedent's headright interest following the entry of the district court's decision, and, if they had such authority, whether the action taken in this case was appropriate.

Discussion and Conclusions

[1] The question of whether the Department can take action concerning the approval or disapproval of an Osage will after the entry of the district court's decision was implicitly answered affirmatively in Smith v. Muskogee Area Director, Bureau of Indian Affairs, 16 IBIA 153 (1988). There the Board considered whether a change in the Department's interpretation of a

3/ Section 8(a) states:

"Any individual right to share in the Osage mineral estate (commonly referred to as 'headright') owned by a person not of Indian blood may not, without the approval of the Secretary of the Interior, be sold, assigned, or transferred. Sale of any such interest shall be subject to the right of the Osage Tribe to purchase it within forty-five days at the highest legitimate price offered the owner thereof."

4/ In Taylor the Tenth Circuit Court of Appeals held that an Osage headright owned by an Indian did not pass to the Indian's trustee in bankruptcy. In Irwin, the same court held that an Osage headright owned by a non-Indian did pass to the trustee in bankruptcy.

law could be retroactively applied to an earlier case in which a will had been approved under the old interpretation of the law. The Board concluded that, although the interpretation of the law could be changed, the new interpretation should not be applied retroactively. The Board sees no reason to depart from its conclusion that the Department can take appropriate action concerning the approval or disapproval of an Osage will after the entry of the district court's decision.

In requesting appellant to secure an order correcting the district court's order of distribution, both the Superintendent and appellee noted that if they had been aware prior to approving decedent's will that she had made advancements to Lee Maurer, they would not have approved that portion of the will. ^{5/} In effect, the Superintendent and appellee found that approval of the will was based upon a mistake of fact arising from the evidence presented by the interested parties in this proceeding. Thus, the question the Board must address is whether or not the Department has the authority to reopen an Osage probate and alter the approval of a will because that approval was given under a mistake of fact.

[2] It has long been held that the Department has inherent authority to reopen the probate of an Indian estate, even in the absence of regulations stating that authority. This rule has been explicitly applied in consideration of Osage will cases. Estate of William Bigheart, Jr., IA-T-21 (Supp.), 3 IBIA 293 (1969), ^{6/} and cases cited therein, including Lane v. United States ex rel. Mickadiet, 241 U.S. 201 (1916). See also Estate of Woody Albert, 14 IBIA 223 (1986). The Board sees no reason, and none has been cited, why this rule should be changed.

The circumstances of this case, where approval of the will was given under a mistake of fact, are appropriate for reopening and correction of any error resulting from that mistake of fact. Accordingly, appellee's conclusion that approval of decedent's will must be corrected if he determines that approval was given under a mistake of fact is affirmed. Because, however, appellee's decision was not presented in the context of a decision reopening the probate and redetermining whether or not the will should be approved, the case must be remanded to appellee for such a statement. Any appeal from appellee's decision on remand would follow the normal appeal procedure for decisions approving or disapproving Osage wills. See 25 CFR 17.14.

^{5/} "There was no testimony offered at the hearing concerning advancements made by the Testatrix. Had there been evidence submitted at the hearing concerning the approval of the Testatrix's will, that portion of Article VI concerning deduction of advancements from the beneficiaries' shares of the Osage headright and income therefrom would have been disapproved" (Superintendent's Feb. 22, 1988, letter to appellant at 2; appellee's Oct. 26, 1988, letter to appellant at 1).

^{6/} Aff'd, IA-1826, 3 IBIA 274 (1969); aff'd sub nom. Bigheart v. Pappan, No. 69-C-303 (D. Okla. July 3, 1972); recon. denied, No. 69-C-303 (D. Okla. Aug. 23, 1972); aff'd, 482 F.2d 1066 (10th Cir. 1973); cert. denied, 416 U.S. 937 (1974); reh'g denied, 417 U.S. 977 (1974).

