



INTERIOR BOARD OF INDIAN APPEALS

Estate of Frank (Tate) Nevaquaya Tooahimpah

21 IBIA 222 (03/03/1992)

Judicial review of this decision:

Affirmed, *Pahdopony v. U.S. Department of the Interior*, No. CIV-92-641-W  
(W.D. Okla. Dec. 16, 1992)

Affirmed, 16 F.3d 417 (10th Cir. 1994)

Certiorari denied, 513 U.S. 808 (1994)

Related Board cases:

15 IBIA 258 (08/10/1987)

24 IBIA 251 (10/19/1993)



# United States Department of the Interior

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

## ESTATE OF FRANK (TATE) NEVAQUAYA TOOAHIMPAH

IBIA 91-15

Decided March 4, 1992

Appeal from a supplemental order determining remainder interest after life estate issued by Administrative Law Judge Sam E. Taylor in Indian Probate IP OK 1 P 85-1.

Affirmed in part; reversed and remanded in part.

1. Indian Probate: Appeals: Generally

The appellant bears the burden of proving the error in the decision from which the appeal is taken.

2. Indian Probate: Life Estates--Indian Probate: State Law: Applicability to Indian Probate, Intestate Estates--Indian Probate: State Law Applicability to Indian Probate, Testate--Indian Probate: Wills: Applicability of State Law--Indian Probate: Wills: Construction of

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law. However, when an Indian testator devises a life estate to a named individual with the remainder interest in the heirs of that individual's body, the remaindermen are determined with reference to state laws of intestate succession.

3. Indian Probate: Children, Adopted: Right to Inherit: Generally

Under Oklahoma law, use of the phrase "issue of" or "heirs of the body" evidences an intent to exclude adopted children from a class gift.

4. Indian Probate: Wills: Anti-lapse Policy--Indian Probate: Wills: Residuary Clause

43 CFR 4.261 should be applied to the lapse of a devise under the residuary clause of an Indian will.

APPEARANCES: John S. Campbell, Esq., Albuquerque, New Mexico, for appellant; Bill Sexton, Esq., Lawton, Oklahoma, for appellee; Carl Tahmahkera, pro se.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Debra Sue Pahdopony seeks review of a supplemental order determining remainder interest after life estate entered on September 25, 1990, by Administrative Law Judge Sam E. Taylor in the estate of Frank (Tate) Nevaquaya Tooahimpah (decedent). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that order in part, and reverses and remands it in part.

Background

This estate has previously been before the Board. The background of the case is set forth in the Board's prior decision, and will be repeated here only to the extent necessary for an understanding of this decision. See Estate of Frank Tooahimpah, 15 IBIA 258 (1987).

Decedent, Comanche Allottee No. 146, died on July 15, 1966. Under his May 21, 1965, will, decedent, inter alia, devised a life estate in certain of his trust or restricted property to his natural daughter, Lois Tooahimpah Pahdopony. The remainder interest was devised to the "heirs of her body."

Appellant was born on September 16, 1954. She is the natural daughter of Geneva Otipoby Navarro, who is the natural daughter of Esther Tooahimpah Brace, who is the natural daughter of decedent. Thus, appellant is decedent's natural great-granddaughter. Appellant lived with Lois, her great-aunt, from childhood, and was formally adopted by Lois under Oklahoma law on May 18, 1970, at the age of 16.

Lois died on April 26, 1988. Judge Taylor determined Lois' heirs to be her subsequently deceased husband and appellant. Estate of Lois Tooahimpah Pahdopony, IP OK 322 P 88 (Feb. 1, 1990).

Decedent's estate was reopened for the limited purpose of determining the remainder interest after Lois' death. Judge Taylor's September 25, 1990, supplemental order states at pages 1-2:

[Appellant] claims that as the adopted daughter of Lois Tooahimpah Pahdopony, she is an heir of [Lois'] body. In support thereof she has submitted a brief asserting that the modern rule is that adopted children are included in the term "heirs of the body." This is premised on the fact that the adoption statutes of a great many states including Oklahoma (10 O.S. 60.16) specifically provide that an adopted child shall be entitled to inherit from and through the adoptive parents in accordance with the laws of intestate succession.

To accept the assertions of [appellant] is to equate the phrase "heirs of the body" to the simple term "issue" or perhaps even "children." The words "of the body" in effect become surplusage.

The phrase “heirs of the body” is a legal and technical phrase dating back prior to the founding of the United States. It has come to us from the common law of England. It is axiomatic that technical terms and phrases in a will must be given their technical meaning absent a clear showing that the testator intended a different meaning. The phrase “heirs of the body” as a technical and legal phrase in 1965 when decedent executed his Will and in 1966 when he died excluded adopted children and spouses. Moore v. McAlester, (OK 1967), 428 P.2d 266. \* \* \* There is nothing in decedent's Will nor the record herein including the record in the Estate of Lois Tooahimpah Pahdopony \* \* \* showing or indicating that the decedent intended to include adopted children or grandchildren. Furthermore, there were no adopted children in decedent's family at the time of his death.

Assuming arguendo that the phrase “heirs of the body” is not a technical and legal phrase, its literal meaning excludes adopted children. Although the term or word “heir” may by virtue of the adoption statutes include children by adoption, the words “of the body” limit it to those born of the person referred to.

Appellant appealed from this decision. Briefs have been filed on appeal by appellant, one of decedent's grandchildren, and other persons taking under Judge Taylor's order. 1/

#### Discussion and Conclusions

Appellant initially contends that decedent could not have intended the technical meaning of "heirs of her body" because he would have understood the phrase to exclude only spouses. This argument is based upon decedent's limited command of the English language, and a Bureau of Indian Affairs memorandum noting that there was reason to attempt to exclude non-Indian spouses from inheriting trust or restricted land. Appellant thus argues that the phrase must be given the meaning which decedent would have believed it to have; i.e., the exclusion of spouses.

[1] Appellant has the burden of proving the error in the Judge's decision. Estate of Jerry Elmer Coppock, 20 IBIA 212 (1991); Estate of Warren Lewis Lincoln, 19 IBIA 118 (1990). Her argument that decedent did not know the technical meaning of the phrase "heirs of the body" is based upon speculation. Appellant was not present when decedent discussed the will with the will scrivener, who was an attorney. She, therefore, has no knowledge of what the will scrivener explained to decedent and what decedent understood he was accomplishing by using the phrase "heirs of the body." In the absence of specific information to the contrary, the Board must assume that an attorney drafting a will for an Indian testator explained the meaning of technical words used in the will, especially when those words affected the dispositive scheme. Appellant has presented no evidence that the technical

---

1/ The brief filed by Mr. Sexton identifies the clients only as Ernest Tate, et al.

meaning of the phrase was not explained to decedent, and the record contains no such evidence.

Appellant cites a January 13, 1984, memorandum from the Anadarko Agency Superintendent to the Anadarko Area Director as proving that only spouses were considered to be excluded from the meaning of "heirs of the body." The memorandum requests that the Department reconsider questions dealing with the apportionment of income, rents, and royalties between life tenants and unknown contingent remaindermen. The memorandum suggests possible regulatory changes that would allow a life tenant to benefit from mineral development on the land, stating:

In our experience and after discussions with the probate technician and Realty Specialist, we believe that in this application of Oklahoma law to Indian devises of life estates with unknown contingent remaindermen, that the actual intention of Indian testators is overlooked. The three reasons life estates are created on Indian land are: to prevent non-family members (in-laws) from acquiring interest in a testator's estate, to prevent the devisees, especially young adults, from selling their interest as soon as the order approving the will is final, and to retain its trust status when the spouse is a non-Indian. These specific intentions are not clearly stated in wills because of an understandable reluctance to use blunt language that may cause bitterness in a testator's family and contribute to contesting the will.

The memorandum speaks only of life estates and unknown contingent remaindermen. It does not even contain the phrase "heirs of the body." No conclusion concerning what decedent understood that phrase to mean can be implied from this memorandum. Appellant has not carried her burden of proving that decedent did not know and/or intend the technical meaning of the phrase "heirs of the body."

Appellant next contends that the Department is barred by either collateral estoppel or res judicata from concluding that she cannot take as an "heir of the body" of Lois in this case. This contention is based upon the fact that in a December 20, 1984, order denying a petition to reopen decedent's estate, Judge Taylor did not list adopted children as a class of persons excluded from taking under a devise to the "heirs of the body." Judge Taylor's order was affirmed by the Board at 15 IBIA 258. Judge Taylor's order states: "The term 'heir of her body' or 'heirs of the body' is a term of art, ordinarily meaning the named person's lineal descendants who can take under the statutes, excluding a spouse."

The issue before both Judge Taylor and the Board in the prior proceeding was whether contingent remaindermen could be determined prior to the death of a life tenant. Judge Taylor held that they could not, and the Board affirmed. The identity of the individual remaindermen was not litigated. At most, Judge Taylor's statement is explanatory dicta. Therefore, neither collateral estoppel nor res judicata applies.

Appellant argues that the phrase "heirs of the body" no longer has the strict technical meaning that it previously had because of changes in the way society treats adopted children. This contention is supported by reference to several Federal and state court cases, and Departmental probate regulations.

Appellant contends that 25 U.S.C. § 373 (1988) makes Departmental regulations applicable in construing Indian wills, and that 43 CFR 4.201(k) and 4.261 make it clear that adopted children stand in the same relation to their adoptive parents as natural children. Appellant contends that based upon these regulations, "in all Indian probate matters relationships by adoption shall be equivalent to relationships by blood" (Appellant's Opening Brief at 14; emphasis in original).

Appellant reads too much into the regulations. Section 4.201 provides definitions for terms used in 43 CFR Part 4, Subpart D. It does not purport to define terms for any other purpose. Similarly, 43 CFR 4.261 applies only when a devise lapses because of the death of certain identified devisees. These two situations do not qualify as "all Indian probate matters."

Although appellant cites several Federal and state court cases in support of her argument that there is no longer a difference between the way adopted and natural children are treated for inheritance purposes, the cases she cites generally discuss phrases other than "heirs of the body." See, e.g., Lipscomb v. District National Bank of Washington, D.C., 203 U.S. App. D.C. 421, 631 F.2d 1003 (1980) ("child or children"); Johns v. Cobb, 131 U.S. App. D.C. 85, 402 F.2d 636 (1968) ("issue"); Hines v. First National Bank & Trust Company of Oklahoma City, 708 P.2d 1078 (Okla. 1985) ("issue"). Appellant concedes that state courts have irreconcilably split on the question of whether adopted children are to be included in class gifts, and urges the Board not to become trapped in an attempt to resolve the various state positions.

[2] The construction of Indian wills is a question of Federal, not state, law. Estate of Paul Widow, 17 IBIA 107 (1989); Estate of William Mason Cultee, 9 IBIA 43 (1981), aff'd sub nom. Cultee v. United States of America, 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). However, intestate heirs are determined with reference to state law. 25 U.S.C. §§ 348 (1988), 372 (Supp. 11 1990); Estate of Reuben Mesteth, 16 IBIA 148 (1988), and cases cited therein. 2/ Under a will such as the present

---

2/ Section 348 states: "Provided, That the law of descent and partition in the State or Territory where such lands are situated shall apply thereto after [trust] patents have been executed and delivered."

Section 372 provides:

"When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon

one, the construction of the will is a question of Federal law, but the determination of the remaindermen requires the Judge to examine state law to determine the legal meaning of the phrase "heirs of the body." 3/

Judge Taylor relied upon Moore v. McAlester, 428 P.2d 266 (Okla. 1967), in finding that under Oklahoma law adopted children were not covered by the phrase "heirs of the body." Moore states at page 270:

The phrase "issue of her body" has a clear and well defined meaning. It is not ambiguous or doubtful. It is such a phrase as is customarily used (as distinguished from the word "issue") for one purpose and one purpose only--to exclude adopted children from the class described. It is not suggested that the other parts of the will require a different meaning, or that the testator was not aware of the true meaning of the phrase.

Appellant relies upon Hines v. First National Bank & Trust of Oklahoma City, *supra*, in arguing, essentially, that Moore has been overruled. Appellant quotes several passages from Hines to the effect that the adoption of the Uniform Adoption Act by the State of Oklahoma placed adopted children in the same position as natural children.

The term under consideration by the Oklahoma Supreme Court in Hines was "issue." The court stated:

Apparently, the trial court concluded that the term issue was synonymous with heirs of or issue of the body. Historically, that may have been correct, but because of the adoption of the [Uniform Adoption] Act and societal changes, the contemporary definition of issue has taken on a wider meaning. The majority of jurisdictions interpreting the Uniform Act have held that adopted children and adoptive parents possess the same duties and legal responsibilities to one another as if the adoptee were the natural child, and that exclusion from inheritance by adopted children must be done with precision. \* \* \*

\* \* \* \* \*

We find that unless adopted children specifically are excluded by testamentary disposition, the Uniform Adoption Act places adopted children in the same class as natural children. \* \* \* [T]he use of the word, issue, standing alone does not bar adopted children [from inheriting].

---

fn. 2 (continued)

notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent."

3/ Under a will with different wording, the Judge might not have been required to examine state law. For example, if the remainder interest was left to named individuals, there would be no necessity to examine state law.

(708 P.2d at 1081-82). In Hines, the Oklahoma Supreme Court specifically overruled Mealy v. First National Bank & Trust Company of Tulsa, 445 P.2d 795 (Okla. 1968), to the extent it was inconsistent with Hines. Mealy had held that the term "issue" did not include a child adopted by a testator's deceased son after the testator's death.

[3] In Hines the Oklahoma Supreme Court specifically distinguished the term "issue" from the phrase "heirs of" or "issue of the body." The court is presumed to be aware of its own prior decision in Moore, which held that the phrase "issue of her body" had a clearly defined meaning which excluded adopted children from taking under a class gift. In Hines the court specifically overruled Mealy, which had reached a different conclusion than Hines as to the inclusion of adopted children under the term "issue." By not overruling Moore, the court must be presumed to have intended to maintain the legal distinction between "issue" and "issue of the body." No other Oklahoma cases have been cited, and the Board has discovered none in its independent research, which would indicate that the Oklahoma Supreme Court has altered this interpretation. Therefore, the Board concludes that, under Oklahoma law, the use of the phrase "issue of" or "heirs of the body" evidences an intent to exclude adopted children from a class gift.

Appellant attempts to distinguish Moore on its facts because the testator in Moore was found to be a worldly individual who gave every indication he fully understood the technical meaning of the phrase. Based upon the Board's prior discussion, although appellant raised a question concerning whether or not decedent understood this technical meaning, she has not sustained her burden of proving that he did not understand it. 4/

Appellant's final argument is that even if she is found not to take the remainder after Lois' life estate, she is entitled to share in the remainder interest under the residuary clause of decedent's will. The residuary clause states: "I give, devise, and bequeath all of the rest

---

4/ The Board is aware that this decision may appear harsh. It has been argued that even if decedent intended to prevent non-blood relatives from receiving an interest in his property, appellant should be allowed to take the remainder interest because she is a blood relative.

At the time of decedent's death, appellant was being raised by Lois, but had not been adopted. It would presumably have been decedent's expectation that appellant would be provided for through the devise he made to her natural mother. This devise conveyed the full interest in certain property, without creating a life estate and future interest. Decedent's intent, as evidenced from the dispositive provisions of his will, was to provide for his children during their lifetimes, while vesting title in his grandchildren. This dispositive scheme is shown in the fact that he devised only life estates to his children, but devised the entire interest to each grandchild given a specific devise. Although appellant is a blood relative, and decedent's "granddaughter" by virtue of her adoption by Lois, she is a great-granddaughter by birth. Decedent did not evidence an intent to provide directly for great-grandchildren, even though he had at least one great-grandchild, appellant, living at the time he executed his will.

and residue of my estate, real, personal, and mixed to: The devisees listed in this Will in equal shares." The devisees listed in the will include Lois. Judge Taylor found that the remainder interest in the life estate devised to Lois failed and vested in accordance with the residuary clause. The individuals listed as taking a portion of the interest included both individuals named in the will and the children of two individuals named in the will who were deceased. Appellant argues that the Judge must have applied the Department's anti-lapse regulation, 43 CFR 4.261, in determining that the interest of deceased named individuals should pass to their children, and that he erred in not also applying the regulation to find that she should take an interest in the same fashion.

43 CFR 4.261 provides:

When an Indian testator devises or bequeaths trust property to any of his grandparents or to the lineal descendant of a grandparent, and the devisee or legatee dies before the testator leaving lineal descendants, such descendants shall take the right, title, or interest so given by the will per stirpes. Relationship by adoption shall be equivalent to relationship by blood.

When Lois died without heirs to her body, the remainder interest lapsed. The interest reverted to decedent's estate and passed under the residuary clause, which devised all property covered by it to those persons named in the will. Although Lois was named in the will, she was not alive at the time the remainder interest was being determined. Judge Taylor found that "the remainder interest in that portion of decedent's allotment devised to Lois Tooahimpah Pahdopony for her life, passes under the residuary clause of decedent's Will to the other devisees listed in said Will in equal shares" (Sept. 25, 1990, Supplemental Order at 2). Judge Taylor found that the remainder interest should pass to eight surviving named devisees and the seven children of two deceased named devisees. <sup>5/</sup>

Appellant argues that this finding is legally inconsistent. Citing 80 Am. Jur.2d, Wills § 1695, appellant contends that, under general rules concerning lapse in a residuary devise to named devisees, the remainder interest should have passed either (1) to only the surviving named devisees, or (2) by intestacy. Because the distribution ordered by Judge Taylor does not follow either of these dispositive schemes, appellant assumes that the

---

<sup>5/</sup> One of the surviving named devisees is identified as "Estate of." The Board interprets this to mean that the named devisee survived Lois, but subsequently died.

The probate numbers given for the two deceased named devisees suggest that they survived decedent, but predeceased Lois.

This order was amended on Oct. 19, 1990, because one person identified as a surviving named devisee was found to have predeceased Lois without issue. The interest originally found to pass to this individual was redistributed among the remaining seven surviving named devisees and the seven children of deceased named devisees.

Judge must have applied 43 CFR 4.261 to allow the children of the two deceased named devisees to share in the remainder interest. 6/

Appellant proposes a third alternative; i.e., applying 43 CFR 4.261 uniformly to find that she, as a lineal descendant of Lois, was entitled to share in the remainder interest, just as were the lineal descendants of other deceased named devisees. Appellant argues:

If the anti-lapse provision of the Regulations does not apply in this case then Appellees can point to no law that would entitle the heirs of [deceased named devisees] to share in the lapsed remainder interest unless Appellant is allowed to share as well. Judge Taylor's order should be legally consistent. If Appellant is not entitled to share, then neither are the heirs of [other deceased named devisees], and the entire remainder interest should be apportioned equally among the living residuary devisees.

(Reply Brief at 10).

[4] It is apparent that both the rule providing that a lapsed residuary devise passes to the other residuary devisees and the one providing that the lapsed devise passes by intestacy are under criticism and reevaluation in state courts and legislatures. In any case, as previously discussed, the construction of Indian wills is a question of Federal, not state, law. The Board holds that, in order to give full effect to the presumption that a person who executes a will does not intend to die intestate as to any part of his/her estate, to implement more fully the policy established by the Department of the Interior in promulgating 43 CFR 4.261, and in view of the fact that section 4.261 does not require a contrary result, section 4.261 should be applied to the lapse of a devise in the residuary clause when the devisee is an individual covered by the regulation.

In ordinary cases, section 4.261 should be relatively easy to apply to the lapse of a residuary devise. However, in the present case, the factual situation is complicated by the fact that the life tenant is also a residuary devisee. Because the will, including the residuary clause, must be construed as of the date of death of the life tenant in order to determine who takes the lapsed remainder interest, this will is, in essence, being construed as of the date of death of a residuary devisee.

---

6/ The Board agrees that the Judge's reasoning is not clear from the order. Because the Board does not have the probate records in the estates of the two deceased individuals before it, it does not know if either of them were survived by heirs other than the lineal descendants named to share in the remainder interest. The Board also agrees, however, that from his use of the phrase "children of" it appears that Judge Taylor applied 43 CFR 4.261 to determine who took the shares of the lapsed remainder interest that would have passed to the two deceased devisees.

On its face, section 4.261 applies when the devisee predeceases the testator. The regulation would, therefore, appear not to apply here, because the devisee was the life tenant/residuary devisee, who died in 1988, thus obviously surviving the testator who died in 1966.

However, as previously mentioned, in order to determine who takes a remainder interest after the death of a life tenant, the will is construed at the time of the life tenant's death. For purposes of applying section 4.261, the Board holds that the testator should be deemed to have died at the time the will is being construed; *i.e.*, at the time of the life tenant's death. In this case, this interpretation means that the testator is also deemed to have died at the same time as the residuary devisee. If the testator and the residuary devisee are deemed to have died at the same time, section 1 of the Uniform Simultaneous Death Act <sup>Z/</sup> suggests that the property should pass as if the devisee predeceased the testator. Under this analysis, section 4.261 would apply, and the interest which would have passed to Lois as a residuary devisee should pass to appellant as her lineal descendant within the meaning of that regulation. Furthermore, the children of the two other deceased named devisees, found by Judge Taylor to take under the residuary clause, would continue to share in the remainder interest.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 25, 1990, decision of Judge Sam E. Taylor is affirmed in part and reversed in part. This matter is remanded to him for a redetermination, in accordance with this opinion, of the shares taken by each individual in the lapsed remainder interest.

\_\_\_\_\_  
//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

\_\_\_\_\_  
//original signed  
Anita Vogt  
Administrative Judge

<sup>Z/</sup> Section 1 of the Uniform Simultaneous Death Act (1953 Revision) provides:

“Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this act.”

The Uniform Simultaneous Death Act has been adopted in at least 46 states, the District of Columbia, and the Virgin Islands, sometimes with modifications. The Board accepts this Uniform Act as evidence of the modern interpretation of the matters covered by it, but not as dispositive of any issue actually raised in this appeal.