



INTERIOR BOARD OF INDIAN APPEALS

Estate of Walter A. Abraham

24 IBIA 86 (07/08/1993)



United States Department of the Interior

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

ESTATE OF WALTER A. ABRAHAM

IBIA 93-10

Decided July 8, 1993

Appeal from an order denying reopening issued by Administrative Law Judge Elmer T. Nitzschke in Indian Probate IP RC 372Z 91.

Affirmed.

1. Indian Probate: Appeals: Standing to Appeal--Indian Probate: Reopening: Standing to Petition for Reopening

An Agency Superintendent has standing to seek reopening of an estate, the decision in which conflicts with the decision in another estate. A Superintendent also has standing to appeal from a decision of an Administrative Law Judge which creates a conflict in the law by being contrary to a decision issued in another estate.

2. Indian Probate: Inheriting: Generally

Under 25 U.S.C. § 348 (1988), those persons who may inherit trust property from a deceased Indian are determined in accordance with the appropriate state law. Whether a person may inherit is not affected by whether the property will remain in trust in the hands of the heir.

APPEARANCES: Nolan J. Solomon, Acting Superintendent, Winnebago Agency, Bureau of Indian Affairs, Winnebago, Nebraska, pro se; Anne R. Lises, Derby, England, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

The Superintendent, Winnebago Agency, Bureau of Indian Affairs (Superintendent; BIA), seeks review of a September 30, 1992, order denying reopening issued by Administrative Law Judge Elmer T. Nitzschke in the estate of William A. Abraham (decendent). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that order.

Background

Decendent, Santee Sioux 382-U001078, was born on April 28, 1917, and died intestate on January 31, 1986. Judge Nitzschke held a hearing to probate decendent's trust estate on February 25, 1992. The Judge found that the only trust property decendent owned at the time of his death was money in an Individual Indian Money account at the Winnebago Agency. The Judge further

found that decedent was survived by a daughter, Anne R. Lises, who was his sole heir under the laws of the State of Nebraska. Lises, a citizen and resident of England, is a foreign national.

The Superintendent sought reopening on the grounds that the decision that Lises could inherit decedent's trust property conflicted with an earlier decision in the Estate of George Thomas, Jr., IP TC 289S 75, June 29, 1976. In Thomas, a different Administrative Law Judge had held that a foreign national could not inherit Thomas' trust property. The decision states:

These guardianship powers [of the United States over Indians] obviously do not extend to the subjects of a foreign nation. The national guardianship extends only to dependent Indian communities within the borders of the United States, United States v. Sandoval, 231 U.S. 28, 46 [(1913)]. The theater for the exercise of the guardianship powers is "within the geographical limits of the United States." United States v. Kagama, 118 U.S. 375, 384 [(1886)]. The fact that the son of the decedent may be a descendant of an Omaha Indian is not important. His status is controlled, not by the nationality of his father, George Thomas, Jr., but by his own nationality. As the subject of a foreign nation, he is without the scope of the statutes enacted for the protection of Indians of the United States. Such statutes subject him to no disability. See [Solicitor's Opinion M-30146 Supp., I Op. Sol. Indian Affairs 906,] 57 I.D. 24, 26 [June 1, 1939]. Therefore, the son of George Thomas, Jr., is not within the class whom Congress sought to protect by the enactment of legislation relating to guardianship powers of Indians of this nation, nor is he in the class that Congress sought to protect in the Act of February 28, 1891 [General Allotment Act Amendments, 26 Stat. 794]. He is not found to be an heir of the decedent herein.

[1] Judge Nitzschke's decision, which is directly contrary to Thomas, created a conflict in the law. In the proper exercise of his trust responsibility toward those Indians under his jurisdiction, the Superintendent first sought reopening and then review by this Board in order to resolve the conflict.

Discussion and Conclusions

[2] The issue before the Board is solely a question of law: can a foreign national inherit trust property from a Native American? The Board agrees with Judge Nitzschke's analysis in his September 1992 order denying reopening. Under 25 U.S.C. § 348 (1988), the inheritance rights of a foreign national, like those of any other individual, are determined by the law of descent and distribution of the appropriate state. Here, decedent resided in the State of Nebraska and his trust personal property was also located in the state of Nebraska. Therefore, Judge Nitzschke properly looked to the laws of the State of Nebraska to determine decedent's heirs.

The Board hereby adopts the discussion of State and Federal law set forth in Judge Nitzschke's order. A copy of that order is attached to this decision and incorporated by this reference.

As did Judge Nitzschke, the Board notes that there is a difference between whether an individual may inherit trust property and whether that trust property may continue to be held in trust for the heir. Whether the property can continue to be held in trust does not determine whether the individual may inherit it.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Nitzschke's September 30, 1992, order denying reopening is affirmed. 1/

//original signed

Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed

Anita Vogt
Administrative Judge

1/ This decision necessarily involves a conclusion that the legal analysis in Thomas was incorrect. The record in Thomas, however, is not before the Board. It is possible that the application of the legal analysis set forth in this decision would have ultimately resulted in the same finding as that reached under Thomas' faulty analysis.



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IP RC 372Z 91

IN THE MATTER OF THE ESTATE OF:)	
)	
WALTER ABRAHAM)	ORDER
)	DENYING PETITION
)	TO
DECEASED 382-UO01078)	REOPEN
OF THE SANTEE SIOUX TRIBE)	
IN THE STATE OF NEBRASKA)	

An Order Determining Heirs to this estate was entered on May 12, 1992. In that order it was found that the decedent was survived by one child, Anne Lisles.

A petition for reopening was filed by the Superintendent, Winnebago Agency on July 20, 1990. The Superintendent, on behalf of decedent's brothers and sisters states that the original order was in error in that Anne Lisles, although the natural child of the decedent is a foreign national, being a citizen and resident of Derby, England and therefore not eligible to inherit in this estate.

There are no matters of fact at issue. In support of his petition the Superintendent refers to a decision in a previous estate, that being the **Estate of George Thomas Jr. Omaha U-07786** IP TC 289S 75. In this estate a natural child of the decedent was not allowed to inherit on the basis that he was a foreign national residing in Germany.

“ ... As the subject of a foreign nation, he is without the scope of the statutes enacted for the protection of Indians of the United States. Such status subjects him to no disability. See 57 ID 24, 26. Therefor, the son of George Thomas Jr., is not within the class whom Congress sought to protect by the enactment of legislation relating to guardianship powers of Indians of this nation, nor is he in the class that Congress sought to protect in the Act of February 28, 1891. He is not found to be an heir of the decedent herein.”

It is quite clear that a natural child of an Indian person, if that child is not a U.S. citizen, is not an “Indian” entitled to the trust protection referred to above. However, it does not necessarily follow that such child is not an “heir at law” for purposes of inheriting interests that will not be subject to trust protection - anymore than a non-Indian spouse. Where the decedent

dies intestate, his heirs are determined in accordance with the descent and distribution laws of the state in which the trust property is located. 25 USC 348.

Decedent's trust estate consisted of trust funds on deposit in his individual Indian money account at the Winnebago Agency, Winnebago, Nebraska.

As set forth in the original order under the descent and distribution laws of the State of Nebraska decedent's daughter is his sole heir at law. Neb. Rev. Stats. Sec. 30-2303(1). As to the matter of the sole heir being a foreign national Sec. 30-2312 provides "no person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien except as provided in section 4-107 and Chapter 76, article 4." This exception is as follows:

4-107. Nonresident alien; property by succession or testamentary disposition; taking of property in this state; conditions; escheat; disposition of escheated property. (1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant;

(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

* * * * *

The Treaty of March 2, 1899 between Great Britain and the United States, grants the subjects of each party certain rights of inheritance respecting property within the territories of each other. Article II provides:

"ARTICLE II.*

"The citizens or subjects of each of the Contracting Parties shall have full power to dispose of their personal property within the territories of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases.

* * * * *

31 Stat 1939. Also see **Zschernig v. Miller** 389 US 429, 19 Led 2d 683 88 S.Ct. 664; **Sullivan v. Kedd** 254 US 433 (1921); 6 Led 2d 1345.

Accordingly decedent's daughter, a non-resident foreign national is eligible to take in this estate as an heir at law.

ORDER

NOW THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior under Sec. 1 of the Act of June 25, 1910, as amended, 25 USC 372, and other applicable statutes, as delegated to Administrative law Judges by 43 CFR part 4.1 IT IS **HEREBY ORDERED** that the Petition to Reopen this estate be and is hereby **denied**.

This Order Denying Petition to Reopen is subject to the right of appeal to the Board of Indian Appeals under 43 CFR Secs. 4.320 through 4.323, pursuant to the notice attached hereto.

Done at Rapid City, South Dakota September 30, 1992.

//original signed
Elmer T. Nitzschke
Administrative Law Judge