



INTERIOR BOARD OF INDIAN APPEALS

Estate of George Levi

26 IBIA 50 (06/17/1994)

Clarifying:

16 IBIA 192



# United States Department of the Interior

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

## ESTATE OF GEORGE LEVI

IBIA 93-8

Decided June 17, 1994

Appeal from an order after rehearing issued by Administrative Law Judge Sam E. Taylor in Indian Probate IP OK 111 P 89, and from the retroactive approval of warranty deeds by the Acting Anadarko Area Director.

Judge Taylor's order affirmed as modified; the Area Director's decision affirmed; 16 IBIA 192 clarified.

1. Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions--Indian Probate: Modification of Inventory: Generally--Indians: Lands: Alienation

It is ultimately a decision within the informed discretion of the Bureau of Indian Affairs as to whether any conveyance of trust property, including one presented after the death of the grantor, should be approved.

2. Administrative Procedure: Hearings--Indians: Lands: Alienation

Neither the statutes nor the regulations concerning approval of conveyances of trust property by the Bureau of Indian Affairs mandate a hearing in these matters.

3. Indian Probate: Wills: Contest

In Indian probate cases an anti-contest clause should not be enforced against an heir or beneficiary who had probable cause to believe that there was a legal deficiency in the will.

APPEARANCES: Richard T. Lewis, Esq., El Reno, Oklahoma, for Georgia Levi Henderson; E. Elaine Schuster, Esq., Oklahoma City, Oklahoma, for Tom J. Levi and Linda Lee Dyer; Curtis Levi, pro se.

### OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

This matter arose from an appeal filed by Georgia Levi Henderson from an August 20, 1992, order on rehearing issued by Administrative Law Judge Sam E. Taylor in the estate of George Levi (decendent). During initial consideration of Georgia's appeal, the Board of Indian Appeals (Board)

determined that four warranty deeds executed by decedent and his wife, Lillian Whitebird Levi, should be referred to the Bureau of Indian Affairs (BIA) for a determination as to whether the deeds should be retroactively approved. Curtis James Levi has objected to the March 24, 1994, decision of the Acting Anadarko Area Director (Area Director), BIA, retroactively approving the deeds. For the reasons discussed below, the Board affirms the Area Director's retroactive approval of the four warranty deeds, and affirms Judge Taylor's order on rehearing as modified by the removal from decedent's trust estate of the properties covered by the warranty deeds.

### Background

Decedent, an unallotted Arapaho, died on September 16, 1988, at the age of 88. Lillian predeceased decedent, leaving him survived by five children: Georgia, Tom J. Levi, Linda Lee Dyer, Curtis, and Jerry R. Levi.

Judge Taylor held hearings to probate decedent's trust or restricted estate on June 28, 1989; January 10, 1990; August 27, 1990; and March 28, 1991. A document dated October 1, 1985, and purported to be decedent's last will and testament was introduced at the June 28, 1989, hearing. Although not providing specific bequests, the document provided through a residuary clause that, in the event Lillian did not survive him, decedent's estate should pass in equal shares to four of his five children, excluding Jerry. Paragraph V of the will stated: "I am intentionally omitting my son, Jerry \* \* \*, from any bequest in this my Last will and Testament as he has already received his share of my estate." Paragraph IX provided that

[i]f any heir not named herein or any devisee, legatee, or beneficiary named in this my Last Will and Testament shall contest the validity of, object to the probate hereof, or seek to render this will ineffective in any manner, such person or persons shall receive the sum of One Dollar (\$1.00) each and shall thereby be deprived of all other beneficial interest or share of my estate. The balance of the share of such person or persons after payment of the One Dollar (\$1.00) shall become a part of my residuary estate, and the same shall be distributed among the remaining person or persons entitled to take under such residuary clause herein excluding those who may contest, object to, or seek to change the provisions of this will.

Judge Taylor noted that Jerry had objected to the will.

Following the initial hearings, by order dated February 20, 1992, the Judge approved decedent's will and ordered "that the Superintendent will cause to be made a distribution of the trust or restricted estate of the decedent in accordance with said Last Will and Testament dated October 1, 1985." The Judge did not discuss what, if any, application Paragraph IX of the will might have.

Tom filed a petition for rehearing, alleging that Georgia, Jerry, and Curtis had objected to probate of the will and therefore Paragraph IX should

be applied against them so that Georgia and Curtis would each receive \$1 and Jerry would receive nothing as he was specifically excluded from taking by Paragraph V of the will. Judge Taylor held another hearing on May 6, 1992. By order dated August 20, 1992, he concluded that Georgia had objected to the will, but Curtis had not. Accordingly, he further held that Georgia was to take only \$1, and the remainder of decedent's estate was to be divided among Tom, Curtis, and Linda.

Georgia appealed from this decision. Briefs were filed by Georgia and by Tom and Linda.

The Board began consideration of this case in August 1993. The probate record contained four warranty deeds executed by decedent and Lillian during their lifetimes, and purporting to convey property to Tom (two deeds), Linda, and Georgia. The deeds were not presented to BIA for approval prior to decedent's death, but were recorded in the office of the County clerk for Canadian County, Oklahoma. 2/ The deeds purported to convey property that was listed on the inventory of decedent's trust estate.

The hearing transcripts and documents filed by the parties showed that at least Tom had requested retroactive approval of the two deeds which purported to convey property to him. The transcripts further showed that testimony was taken concerning the preparation and execution of the deeds. Although Judge Taylor stated that the deeds were before him at least for the purpose of taking evidence concerning whether or not BIA should approve the deeds retroactively (see Aug. 27, 1990, transcript at 40), he did not address the deeds in any way in his orders, or otherwise refer the question of retroactive approval to BIA.

In an August 25, 1993, order the Board held that the request for retroactive approval of the deeds constituted a challenge to the estate inventory which should have been handled under the procedures in the Board's standing order in Estate of Douglas Leonard Ducheneaux, 13 IBIA 169, 92 I.D. 247 (1985). 3/ Although the decision whether or not to approve a conveyance of trust property is ultimately discretionary with BIA (see, e.g., Estate of Aaron Francis Walter, 16 IBIA 192, 199 n.9, 95 I.D. 138, 142 n.9 (1988)),

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1/ Judge Taylor did not respond to contentions concerning Jerry.

2/ The record indicates that decedent and Lillian had previously conveyed trust property to Curtis, but there were problems with BIA's implementation of the conveyance which were not straightened out for 3-4 years. The attorney who prepared both the will and the four warranty deeds testified that decedent and Lillian were aware of the requirements for BIA approval of the deeds.

3/ Ducheneaux was appealed to Federal court on another issue. The Board's standing order, considered in the present case, was not addressed in that appeal. See Ducheneaux v. Secretary of the Interior, rev'd on other grounds, 645 F. Supp. 930 (D.S.D. 1986); rev'd, No. 87-5024 (8th Cir. Jan. 26, 1988), cert. denied, 486 U.S. 1055 (1988).

in an attempt to expedite resolution of challenges to an estate inventory, the Board's standing order in Ducheneaux requires that when such a challenge is raised during the probate proceeding, the Administrative Law Judge is to inform the appropriate BIA Superintendent and Area Director, and the Director, Office of Trust Responsibilities, of the challenge. Based upon any evidence taken concerning the deeds and BIA's input, the Administrative Law Judge is to include in the probate order a recommended decision concerning whether the deeds should be approved. The recommended decision is final unless appealed to the Board. 4/

Here, Judge Taylor acknowledged the existence of the deeds and took evidence concerning them, but failed to inform any BIA official that he was considering a challenge to the estate inventory, and failed to include a recommended decision concerning approval or disapproval of the deeds. In order to resolve this matter as expeditiously as possible, the Board did not remand the matter to the Administrative Law Judge, 5/ but informed BIA of the challenge and requested that it consider whether the deeds should be retroactively approved in accordance with the Board's ruling in Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21, 32, 89 I.D. 655, 661 (1982). 6/

On November 29, 1993, the Superintendent concluded that the deeds should be approved retroactively even though there were technical problems with the conveyances, specifically concerning access, which would ordinarily result in a decision not to approve them. 7/ Pursuant to instructions issued by the Board, Tom appealed this decision to the Area

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4/ Although not specified in Ducheneaux, in addition to the parties, the Superintendent, Area Director, or Director, Office of Trust Responsibilities, would be a proper person to appeal from the recommended decision.

5/ Judge Taylor retired before this matter was considered by the Board. Accordingly, if the Board had remanded the appeal, a different Administrative Law Judge would have had to consider the question.

6/ Tom has argued that the question of retroactive approval of the deeds was raised by the Area Director, and was not an attempt to challenge the estate inventory. In support of this argument, he has submitted a copy of an Oct. 18, 1989, memorandum from the Area Director to the Superintendent, Concho Agency, BIA (Superintendent), concerning retroactive approval of the deeds. This memorandum was not part of the probate record when the Board referred this matter to BIA.

7/ The Superintendent stated that there were questions concerning whether the property conveyed would pass in trust or in fee. This concern was also expressed in the Area Director's Oct. 18, 1989, memorandum. It appears that these questions resulted from the fact that the conveyances in Wishkeno were in fee. Whether a conveyance of trust property from one Indian to another should be in fee or in trust is within the discretion of BIA. Wishkeno does not require that all property conveyed through a deed which is approved retroactively must be taken in fee.

Director. <sup>8/</sup> Tom sought reversal only of the decision to approve the deed which conveyed property to Georgia.

The Area Director affirmed the Superintendent's decision on March 24, 1994. Upon receipt of the Area Director's decision, the Board gave all interested parties an opportunity to submit comments or objections. Curtis filed an objection to the Area Director's decision. Curtis' objection to the Area Director's approval of the deeds, and Georgia's appeal from the Judge's order excluding her from participating in decedent's estate are both considered in this decision.

#### Discussion and Conclusions

The Board first addresses the retroactive approval of the deeds. In Wishkeno the Board held

that the Secretary or his delegate has the authority to approve a conveyance of Indian trust lands after the death of the Indian grantor if the Secretary is satisfied that the consideration for conveyance was adequate; the grantor received the full consideration bargained for; and there is no evidence of fraud, overreaching, or other illegality in the procurement of the conveyance.

Here, the Area Director specifically considered each of these factors, in the context of Tom's appeal, in determining that the deeds should be retroactively approved.

Curtis does not challenge the Area Director's decision on any of the Wishkeno factors. Instead, he objects to the decision on procedural grounds.

[1] Curtis first argues that the Board did not precisely follow the procedures established in Ducheneaux, contending that no opportunity was given to present evidence specific to the preparation and execution of the deeds. As the Board noted in Walter, 16 IBIA at 197, “[t]he procedure contemplated in Ducheneaux is, admittedly, a hybrid, allowing consideration of a BIA administrative action within the context of a probate case. Consideration of BIA administrative actions would normally follow the procedure set out in 25 CFR Part 2 and 43 CFR 4.330-4.340.” As further stated in footnote 7, at pages 197-98, the procedure is an attempt to avoid the type of protracted proceeding that arose in Wishkeno (and now in this case), and to allow more expeditious resolution of challenges to an estate inventory. None of these cases, however, alters the fact that it is ultimately a decision within BIA's informed discretion as to whether any conveyance of trust

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<sup>8/</sup> Curtis also attempted to appeal the decision. The Area Director concluded, however, that Curtis' appeal was not timely, and did not consider it.

property, including one presented after the death of the grantor, should be approved.

The Board agrees that its orders in this case did not exactly follow Ducheneaux. By the time the matter was before the Board, it was already too late to follow those procedures. In actuality, the Board's order more closely followed the procedures established in 25 CFR Part 2 and 43 CFR 4.330-4.340.

Initially, the Board disagrees with Curtis' suggestion that there was no opportunity to present evidence concerning the preparation and execution of the deed. In addition to other testimony, the attorney who prepared these documents testified at great length about their preparation and about decedent's statements of his intent. See, e.g., Jan. 10, 1990, transcript at pages 3-29.

[2] The Ducheneaux procedures were established for the specific situation under which a question about the estate inventory is raised during the probate proceeding, when a hearing is already being conducted. Under this circumstance, taking evidence from the family members and other witnesses during the probate hearing allows both the preservation of this evidence for BIA's consideration and a more efficient use of everyone's time. However, nothing in the statutes and regulations governing approval of conveyances of trust property mandates a hearing. In fact, BIA decided Wishkeno without a hearing. The Board concludes that BIA is not precluded from determining that a conveyance should be retroactively approved by the fact that a hearing is not held.

Curtis next objects to the Area Director's decision because it does not fall within the confines of the Board's decision in Walter, which he argues allows retroactive approval only when BIA did something it should not have done or failed to do something it should have done, and that error or omission was responsible for the deeds not being approved.

The specific question raised in Walter was whether BIA had erred by failing, during the grantor's lifetime, to finalize action on an inter vivos conveyance and transfer the property to the grantee. The failure to finalize the approval process resulted in the inclusion of the property covered by the deeds in the grantor's trust estate upon his death. The situation in Walter is not, however, the only situation under which a challenge may be raised to an estate inventory. To the extent Walter can be read as holding that it presents the only situation under which BIA may approve deeds retroactively, it is clarified to show that it is only one possible scenario concerning retroactive approval. The Board holds that Walter does not preclude BIA from considering deeds not presented to BIA during the grantor's lifetime.

Curtis also contends that the Board's order referring this matter to BIA was based on suppositions from the probate record. The Board's referral

order has been superseded by the Area Director's decision. Curtis does not object to the manner in which the Area Director considered this question.

Finally, Curtis argues that approval of the deeds violates a duty to carry out the decedent's intention as set forth in his will, and a duty to protect the interests of the landowner in approving or disapproving a conveyance of trust property.

As noted throughout this proceeding, the deeds were prepared at the same time as decedent's will and were given to decedent when he executed the will. The deeds, which each retained a life estate for decedent and his wife, were executed approximately 2 weeks after the will was executed, and were recorded in the office of the County Clerk of Canadian County, although not presented to BIA for approval. The attorney who prepared both the will and the deeds testified that they were all part of decedent and Lillian's testamentary scheme. Furthermore, Curtis does not dispute that he had previously been the beneficiary of an inter vivos conveyance of trust property from decedent and Lillian. Even assuming that Curtis were correct in his statement of the responsibility owed to decedent, an issue which the Board does not decide, it is reasonable under these circumstances to conclude that the deeds were in fact part of decedent's plan for the distribution of his trust estate, and that in approving those deeds retroactively, BIA was carrying out decedent's testamentary intent. Curtis has not provided any evidence to the contrary. The Board holds that approval of the deeds did not violate any duty imposed on BIA.

The Board finds no reason either to reverse the Area Director's decision to approve the deeds retroactively, or to refer the matter to BIA for additional consideration. The Area Director's retroactive approval of the four warranty deeds is, therefore, affirmed.

The question remains as to what effect retroactive approval of the deeds has on the probate of decedent's estate. The deeds cover portions of parts A and C of Allotment No. 1288, Good Killer, and include 100 acres, more or less. Based on the inventory of decedent's trust estate, it appears that he held interests in addition to those conveyed under the four warranty deeds. Therefore, it is necessary to address the issues raised in Georgia's appeal.

Under decedent's will, that property which was in his estate now, excluding the property conveyed through the deeds, was to be divided equally among Tom, Georgia, Linda, and Curtis, unless Paragraph IX, the anti-contest, clause, was found to apply. Judge Taylor found that Georgia objected to the will and was therefore entitled to only \$1 from the estate; but that Curtis had not objected and was entitled to a full share of the residue of the estate. Judge Taylor's order therefore held that Tom, Linda, and Curtis were each to receive 1/3 of the residue of decedent's trust estate.

Lengthy legal arguments, relying primarily upon Oklahoma State law, were presented on this issue. <sup>9/</sup> Georgia cites In re Estate of Westfahl, 674 P.2d 21 (Okla. 1983), to support her argument that Oklahoma law provides that anti-contest clauses are to be strictly construed to avoid forfeitures. Tom and Linda contend that Oklahoma law is not binding in this Federal administrative proceeding, and that, even if it were, Westfahl does not support Georgia's position.

Tom and Linda are correct that this proceeding is governed by Federal, not state, law. See, e.g., 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, in the absence of Federal law on point, i.e., Federal statutes, regulations, or decisions of this Board, the Department can look to state law for non-binding guidance. Looking to state law may be particularly appropriate where, as here, the testator specifically sought an attorney from outside the Department to prepare his will, and where that attorney would be presumed to have explained to the testator the specifics of Oklahoma law applied in the will.

Westfahl states at pages 23-25:

A forfeiture clause is an executory limitation which is employed to effect testamentary intention, and its use is within the province of the testator if it does not contravene public policy or a rule of law. The validity of no contest clauses has been explicitly and implicitly acknowledged by this Court. Because no contest clauses protect estates from costly, time consuming and vexatious litigation; and serve to minimize family bickering concerning the competence and capacity of the testator, as well as the amounts bequeathed, they are favored by public policy. \* \* \* Forfeiture provisions in a will are to be strictly construed, and forfeiture avoided if possible. \* \* \* It is only where the acts of the parties fall strictly within the express terms of the punitive clause of the will that a breach may be declared.

The word, contest, as it pertains to a no contest clause is defined as any legal proceeding designed to result in the thwarting of the testator's wishes as expressed in the will. Whether

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<sup>9/</sup> Tom and Linda also contend that the Board must show deference to Judge Taylor's decision because he was present and had the opportunity to observe the demeanor of the witnesses as they testified. The Board shows deference to an Administrative Law Judge's credibility determinations when such determinations are an element of the decision. Here, however, there is nothing in Judge Taylor's decision indicating that he in any way based his decision on witness demeanor or credibility. Therefore, the rule concerning demeanor evidence has no application in this case.

there has been a contest within the meaning of the language used in the clause is decided according to the circumstances in each case. However, a clear and unequivocal attack must be made on the will before the penalty contained in the no contest clause will be invoked. \* \* \* Each will must be construed by examining the peculiar surrounding circumstances, the language employed, and the intention of the testator gathered from the general situation. Attendant circumstances may be contemplated to perceive the testator's true intent and the testator's feelings toward the beneficiary named in the will.

Although there is a split in authority concerning whether a forfeiture clause will be enforced if good cause is shown, the consensus rule is that the forfeiture clause should not be invoked if the contestant has probable cause to challenge the will based on forgery or subsequent revocation by a later will or codicil. [10/]  
[Footnotes omitted.]

In Westfahl, a later will was presented for probate, and was found to have been procured through the undue influence of the beneficiary, who had presented it for probate. Regardless of that fact, the Court held that the presentation of the later will was required by statute and did not constitute a prohibited attack on the earlier will. Consequently, the beneficiary was found entitled to take his share under the earlier will.

The Board agrees with Georgia that Oklahoma law holds that anti-contest clauses are to be strictly construed to avoid forfeiture. However, the Board cannot tell from the cases cited, or from its independent research, how much further the Oklahoma Supreme Court would be inclined to extend its strict construction of such clauses.

[3] The Board concludes, however, that Oklahoma law does envision a case-by-case factual determination as to whether or not there was probable cause to contest the will. Although the extent of the meaning of "probable cause" under Oklahoma law appears not to have been totally explored, the basic tenet that an anti-contest clause will not be enforced against a person who had probable cause to contest the will appears eminently reasonable. The Board concludes that in Indian probate cases an anti-contest clause should not be enforced against an heir or beneficiary who had probable cause to believe that there was a legal deficiency in the will. 11/

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10/ The Uniform Probate Code, in section 3-905, provides that “[a] provision in a will purporting to penalize any interested person for contesting the will or instituting proceedings related to the estate is unenforceable if probable cause exists for instituting proceedings.” To the best of the Board's knowledge, the Uniform Probate Code has not been adopted in Oklahoma.

11/ This holding does not preclude the possibility that there may also be other grounds for declining to enforce an anti-contest clause.

Here, Georgia contends that she did not contest the will, but merely testified truthfully when asked if she believed the will represented decedent's wishes. Tom and Linda disagree, and further argue that Georgia attempted to get decedent to change his will at a time when he was subject to influence. In support of this argument they cite the testimony of an attorney who was contacted to prepare a new will, but who indicated his belief that decedent was susceptible to influence at that time. 12/

Judge Taylor did not explain his reasons for holding that Georgia had contested the will, merely citing pages 41 and 47 of the August 27, 1990, hearing transcript. The absence of an explanation of the Judge's reasoning makes the Board's review more difficult. However, the Board has carefully considered Georgia's testimony as well as its context, and her explanations for her actions. Although there is no evidence that Georgia personally initiated a contest of the will, and although she may have been confused about the implications of her testimony and of the various outcomes possible in this matter, especially considering the rather aggressive questioning style of opposing counsel, Georgia clearly objected to approval of the will on the grounds that it did not represent decedent's true intentions. The Board concludes that Georgia's actions constitute a contest of the will. The relevant question, therefore, is whether that contest was based on probable cause to believe that there was a legal deficiency in the will.

The record indicates that Georgia's objections were based on her perception that decedent would no longer have wanted his property to pass in the manner set out in his 1985 will because the situation between various family members had changed. The Board cannot conclude that this belief, no matter how strongly held, constitutes probable cause to believe that there was a legal deficiency in the will. Accordingly, under the circumstances of this case, the Board is constrained to conclude that Georgia falls under Paragraph IX of the will.

Therefore, the Board affirms Judge Taylor's order that Georgia should take only \$1 under decedent's will. The rest and residue of decedent's estate, after removing the properties covered by the four warranty deeds, should be divided equally among Tom, Linda, and Curtis.

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12/ The attorney's testimony appears at pages 2-15 of the Aug. 27, 1990, hearing transcript. The attorney initially did not prepare a new will for decedent because he wanted to obtain a copy of decedent's previous will to determine whether a new will was actually needed to carry out decedent's testamentary scheme. When asked whether his belief that decedent was susceptible to influence had any effect on his failure to prepare a new will, the attorney testified "that was one thing, a bridge I was going to cross after I looked at this original will is to get with him again by himself and see if that truly was his desire" (Aug. 17, 1990, transcript at 14). The attorney further testified that he believed decedent was susceptible to influence even though no family members were actually present in the room while they discussed the preparation of a new will.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's March 24, 1994, decision retroactively approving the four warranty deeds is affirmed, and Judge Taylor's August 20, 1992, order on rehearing is affirmed as modified by the removal of the properties covered by the warranty deeds.

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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//original signed  
Anita Vogt  
Administrative Judge