



INTERIOR BOARD OF INDIAN APPEALS

Estate of Joseph Baumann

38 IBIA 150 (10/24/2002)

Related Board case:
43 IBIA 127



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF JOSEPH BAUMANN : Order Affirming Decisions in
: Part, Vacating Decisions
: in Part, and Remanding
: Matter to Administrative
: Law Judge
:
: Docket No. IBIA 02-67
:
: October 24, 2002

Appellant Paul Selzler seeks review of a January 8, 2002, order denying petition for rehearing issued by Administrative Law Judge Marcel S. Greenia in the estate of Joseph Baumann (Decedent), Sisseton-Wahpeton Sioux. IP TC 167-R-97. Judge Greenia's order let stand an April 30, 2001, order in which Administrative Law Judge William S. Herbert approved Decedent's will. For the reasons discussed below, the Board affirms the April 30, 2001, and January 8, 2002, orders in part, vacates them in part, and remands this matter to Judge Greenia for further proceedings.

Decedent executed a will on August 7, 1995, in which he devised to his sister Peggy Johnson property he described as "SW 641 John Papiya Est. described as Lot 3 & 4 Sec. 11, T. 125N., R. 53W., all remaining acreage that are left after the conveyances that I have already given to my sisters."

Decedent died on November 2, 1996. In preparation for probate of his estate, the Bureau of Indian Affairs (BIA) submitted an inventory of Decedent's trust/restricted property to the Office of Hearings and Appeals. The inventory showed that Decedent owned 55.140 acres of such property at his death. That property was the subject of an August 29, 1994, gift deed from Theresa Selzler (Selzler), 1/ to Decedent and is described thus in the gift deed:

My entire 1/1 interest in and to: Lot 3 & 4 LESS 12.96 acres and Metes and Bounds, starting in the NE corner of Lot 4; Thence West 660 feet; thence South 660' to the true point of beginning, thence South 250'; thence northwesterly 700'; thence northeasterly 165'; along gravel road; thence southeasterly

1/ Selzler is Decedent's sister and Appellant's mother.

660' back to the true point of beginning, containing 4.00 acres more or less, Sec. 11, T. 125 N., R. 53 W., Fifth Principal Meridian, containing 55.14 acres, more or less. Subject to existing rights of way of record. [2/]

Judge Herbert held hearings to probate Decedent's estate on July 7, 1998, July 10, 1998, 3/ and September 28, 1998. Appellant attended all three hearings. At the September 28, 1998, hearing, he raised an issue concerning the land description in the August 29, 1994, gift deed. He contended that the description included approximately 7/10 of an acre more than Selzler intended to convey to Decedent. He also contended that the property had not been surveyed correctly. Selzler testified that the land description in the August 29, 1994, gift deed was inconsistent with her intent. After considerable discussion of the issue, and testimony from a Bureau of Indian Affairs (BIA) realty employee, Judge Herbert asked the parties and the BIA employee to attempt to resolve the matter.

On April 30, 2001, Judge Herbert issued an order approving Decedent's will. He found that the land description in the August 29, 1994, gift deed correctly described the trust land in Decedent's estate. He stated:

To the extent that the interested parties may have disputes as to where the property's boundary lines actually lie, such is a matter for determination by survey. The legal description [in the gift deed], plus the plats of record legally describing Lot 3 and Lot 4, is an adequate word reference for this to be accomplished.

Order Determining Heirs, Approving Will, and Decree of Distribution at 2 n.3.

Judge Herbert also stated:

Whereas there is evidence that Theresa Selzler began action to deed at first 5.00 acres, and then 4.00 acres, to [Appellant] in early 1994, while she owned 59.14 acres, there is no evidence that such transaction was ever concluded. After the August 29, 1994, gift deed back to [Decedent] of 55.14

2/ The 55.14 acres which Selzler conveyed to Decedent in her Aug. 29, 1994, gift deed was part of the 59.14 acres which Decedent had conveyed to Selzler in a gift deed dated Sept. 28, 1987.

3/ The July 10, 1998, hearing was a continuation of the July 7, 1998, hearing.

acres, Theresa Selzler conveyed her remaining 4.00 acres to [Appellant], and a fee patent was issued to [Appellant] to this 4.00 acres. [4/]

Id. at 2 n.2.

In the same order, Judge Herbert denied three claims filed against Decedent's estate, including Appellant's claim for \$160,000.

Appellant filed a petition for rehearing, objecting to, among other things, Judge Herbert's statement concerning the early 1994 actions taken by Selzler to gift deed four or five acres to Appellant. Appellant contended that Selzler's actions were effective to convey to Appellant some of the same land described in the August 29, 1994, gift deed to Decedent. He contended that the August 29, 1994, gift deed was invalid for that reason and because it was fraudulent.

Appellant's petition for rehearing was heard by Judge Greenia. On January 8, 2002, Judge Greenia denied rehearing, stating in part:

[T]he issue of [BIA's] approval of the gift deed to [Appellant] from Theresa Selzler is a collateral matter and not within the jurisdiction of this body. Where there is a question [as] to the title of real property it is not a question to be resolved by the Hearing Examiner (Administrative Law Judge) because approval of transfers or conveyances of trust lands is not subject to the jurisdiction of this body but lies within [BIA]. * * * Approval or denial of a gift deed would be appealed to the Board of Indian Appeals. * * *

[T]his matter is not one that triggers the Ducheneaux standard of review wherein the undersigned would order a hearing to determine the validity of the inventory in the estate. Estate of Leonard Douglas Ducheneaux, 13 IBIA 169 (1985). The gift deed from Theresa Selzler to [Appellant] was not approved by [BIA], whereas the gift deed of trust land to the decedent was approved by the Superintendent and therefore, the land was conveyed to decedent and he owned the land that he devised by Will.

Order Denying Petition for Rehearing at 1-2.

4/ A document submitted by Appellant in this appeal indicates that a deed from Selzler to Appellant for four acres, more or less, was approved on May 9, 1995, and corrected on Apr. 1, 1999. See Nov. 17, 2001, Letter from the Assistant Secretary - Indian Affairs to Representative John Thune.

On appeal to the Board, Appellant continues to challenge the August 29, 1994, gift deed to Decedent. ^{5/} Although his arguments are diffuse and often difficult to follow, it is clear that he is challenging the inventory of Decedent's estate.

As Judge Greenia recognized, issues concerning the validity of gift deeds are ordinarily issues which must be raised to BIA. However, where such an issue is raised as a challenge to an estate inventory, it is properly addressed by an Administrative Law Judge ^{6/} under the procedure established in Estate of Leonard Douglas Ducheneaux, *supra*. Under that procedure, the Administrative Law Judge is to notify the appropriate BIA officials (in this case, the Sisseton Agency Superintendent, the Great Plains Regional Director, and the Director, Office of Trust Responsibilities) that a challenge to the estate inventory has been raised. The Judge is to allow full participation by the BIA officials in the proceedings before him/her and is then to issue, in addition to the order setting out the distribution of the estate, a recommended decision on the inventory question. The recommended decision is final unless appealed to the Board. ^{7/}

Because this case involves a challenge to the estate inventory, the Board finds that Judge Greenia erred in stating that the case is not one that triggers the Ducheneaux procedure.

Judge Herbert did not follow the Ducheneaux procedure during the probate hearings, perhaps because the nature of Appellant's challenge was not entirely clear at that time. As noted above, however, the Judge found in his April 30, 2001, order that the August 29, 1994, gift deed properly described the trust land in Decedent's estate. That finding constitutes a decision on the inventory issue.

Judge Herbert's order included an extensive history of the allotment from which the land at issue here derived. The record presently before the Board includes copies of the September 28, 1987, gift deed from Decedent to Selzler and the August 29, 1994, gift deed from Selzler to Decedent. However, with the exception of these two deeds, none of the history recited by Judge Herbert is documented in the record.

^{5/} Appellant makes no argument concerning his claim for \$160,000 against Decedent's estate and thus appears to have abandoned that claim. To the extent he may have intended in this appeal to challenge the denial of his monetary claim, the Board finds that he has failed to show error in that denial.

^{6/} The challenge may also be addressed by another "OHA deciding official" as defined in 43 C.F.R. § 4.200 (2002).

^{7/} In addition to Ducheneaux, see Estate of Donna Gottschalk, 30 IBIA 82, 87-88 (1993), for a summary of the procedure and Estate of Mary Dorcas Gooday, 35 IBIA 79 (2000), for an example of a case in which the procedure was followed.

Appellant alleges that the Judge had post-hearing communications with BIA employees. Although no such contacts are noted in the record, it appears likely that such contacts occurred because BIA was almost certainly the source of the allotment history recited in Judge Herbert's order. 8/

Appellant also alleges that certain documents concerning the early 1994 gift deed proceedings were before Judge Herbert. Specifically, Appellant alleges that these documents included a January 9, 1994, gift deed from Selzler to Appellant; a May 10, 1994, letter to Appellant from someone in the Department of the Interior concerning the January 9, 1994, gift deed; a July 11, 1994, gift deed from Selzler to Decedent; and a letter from someone in the Department of the Interior, which Appellant does not identify by date or recipient. None of these documents are included in the record. Nor is there any other evidence concerning the early 1994 gift deed proceedings

As noted above, Judge Herbert's order stated that "there is evidence that Theresa Selzler began action to deed at first 5.00 acres, and then 4.00 acres, to [Appellant] in early 1994." The Judge did not further describe the evidence to which he referred. It is possible that that evidence included some or all of the documents which Appellant mentions in this appeal, but this cannot be determined on the present record.

It seems apparent that Judge Herbert had information before him that is now missing from the record. Thus, even if it were otherwise possible to decide the estate inventory issue in the absence of a Ducheneaux proceeding, the Board could not do so in the present circumstances because the necessary documentation is not included in the record. 9/

8/ Although Appellant contends that the contacts were improper ex parte communications, the Board does not reach such a conclusion. It is often necessary for an Administrative Law Judge to contact BIA in connection with Indian probate proceedings, and BIA is not ordinarily a party to such proceedings.

However, given the nature of the issue raised by Appellant in this case, and Appellant's objections to BIA actions concerning the gift deed, the Judge's contacts with BIA on the gift deed issue should at least have been documented in the record. The Board notes that, had a Ducheneaux proceeding been initiated, BIA would have become a party to the probate.

9/ Where is it clear from documents in the record that a challenge to an estate inventory is unfounded, both the Administrative Law Judge and the Board may decide the issue without the need for a Ducheneaux proceeding. This was the situation in Estate of Edward Q. Boyer, 38 IBIA 146 (2002), where the appellant's argument was, in part, a challenge to the estate inventory but where it was clear from the materials before the Board that there was no basis for such a challenge.

The Board concludes that this matter must be remanded to Judge Greenia so that he may conduct an additional hearing under the Ducheneaux procedure. The Board strongly urges, however, that Judge Greenia explore with the parties the possibility of resolving this dispute through alternative dispute resolution. While Appellant's arguments are not always clear, much of what he says suggests that he is most concerned with a relatively small amount of land which he believes should have been included in Selzler's gift deed to Appellant rather than Selzler's gift deed to Decedent. It thus appears conceivable that the matter might be resolved by agreement between the parties. 10/ If this turns out not to be possible, Judge Greenia shall conduct another hearing under the procedures described in Estate of Leonard Douglas Ducheneaux for the purpose of issuing a recommended decision concerning the estate inventory.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Herbert's April 30, 2001, order and Judge Greenia's January 8, 2002, order are affirmed except with respect to the estate inventory issue. Both orders are vacated as to the estate inventory issue, and the matter is remanded to Judge Greenia for further proceedings in accordance with this decision. 11/

//original signed

Anita Vogt
Administrative Judge

//original signed

Kathryn A. Lynn
Chief Administrative Judge

10/ The Assistant Secretary's letter cited in footnote 4 indicates that the property was surveyed by the Bureau of Land Management in August 2001. It is not clear whether this survey has resolved the survey complaints Appellant made at the Sept. 28, 1998, hearing.

11/ Arguments made by Appellant but not discussed in this decision have been considered and rejected.