



INTERIOR BOARD OF INDIAN APPEALS

Estate of Anna J. Prince Okitkun

50 IBIA 253 (10/15/2009)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF ANNA J. PRINCE)	Order Affirming Decision
OKITKUN)	
)	Docket No. IBIA 08-081
)	
)	October 15, 2009

Robert Okitkun (Robert or Appellant) appeals to the Board of Indian Appeals (Board) from a Decision on Reopening (Decision) entered March 13, 2008, by Administrative Law Judge Patricia McDonald Dan in the estate of Anna J. Prince Okitkun (Decedent), deceased Yup'ik Eskimo, Probate No. P000065038IP. The Decision amended an Order Approving Will and Decree of Distribution (Decree) entered on November 22, 1993, as modified by a Modification Order to Correct Distribution (Modification) entered October 30, 2002. The result of Judge Dan's correction was to order, as consistent with Decedent's Last Will and Testament (Will), the distribution of two lots of land held in trust for Decedent — one lot to Appellant, who is Decedent's son, and one lot to Decedent's grandson, Reynold Okitkun (Reynold). On the merits, Appellant contends that Judge Dan erred and should have distributed both tracts to himself, which he believes is consistent with the 1993 Decree and his mother's intent in executing her Will.

We affirm Judge Dan's Decision. Appellant's burden was to show that Judge Dan made an error of fact or law. Judge Dan ordered distribution of the estate under the terms of the Will, which expressly distributed one lot to Appellant, and the rest and residue of the estate to Reynold. Appellant has not met the burden of showing an error of fact or law on the part of Judge Dan in construing the Will, and does not contend that it was otherwise improper for Judge Dan to reopen the estate to correct the earlier orders.

Background

Decedent, an Alaska Yup'ik Eskimo, was born May 30, 1916, and died March 30, 1988, a resident of the Village of Kotlik, Alaska. At the time of her death, she possessed interests in three separate parcels of real estate held in trust by the United States — a Native allotment and two lots within U.S. Survey No. 4497, which is the surveyed Townsite of Kotlik, Alaska. The two lots are defined as follows: (1) the Tract B lot — Lot 5, Block 10, Tract "B," as shown on the official plat of U.S. Survey 4497 (1969), conveyed to Decedent

and her husband, Cyril N. Okitkun, by Native Restricted Trustee Deed dated May 14, 1973, Book 20, page 118; and (2) the Tract C lot — Lot 1, Block 3, Tract “C,” as shown on the official plat of U.S. Survey 4497 (1969), conveyed to Decedent and her husband by a different Native Restricted Trustee Deed dated May 14, 1973, Book 20, page 119. Decedent’s husband predeceased her and it is undisputed that Decedent thereafter held a 100 percent property interest in the two lots.

On April 18, 1984, Decedent executed her Will, in which she devised her Native allotment to her daughter Marian Pauline Okitkun. Will, Clause Second. The Will devised to Robert her “interest in Restricted Trustee Deed Lot 1, Block 3[,] Tract C[,] USS 4497.” *Id.*, Clause Third. She devised the rest and residue of her estate, including real property interests, to her “grandson Ronald Okitkun” *Id.*, Residuary Clause.

Administrative Law Judge William E. Hammett conducted a probate hearing and proceeding with respect to Decedent’s estate in 1993. On November 22, 1993, he issued the Decree. Judge Hammett properly ordered distribution of the Native allotment to Marian Okitkun; that distribution proceeded without alteration and is not at issue here. But Judge Hammett ordered distribution of “restricted Lot 5, Block 10, Tract, Kotlick,” as described in an “attached and incorporated deed” to Robert. Both deeds appear in the probate record, as does a probate inventory referring to both lots. The Decree failed altogether to mention the Tract C lot (Lot 1, Block 3, Tract C) which was devised to Robert in Clause Third.

On October 30, 2002, Administrative Law Judge Harvey C. Sweitzer issued a single-page Modification, to correct the name of Decedent’s grandson from “Ronald,” as named in the Will, to “Reynold.” It is unclear how the name correction issue arose for Judge Sweitzer. He recited that the 1993 Decree had incorrectly distributed Lot 5, Block 10 (identified by Judge Sweitzer as “Townsite B0042K1”) to Robert. Judge Sweitzer directed that “all references in this estate to Ronald Okitkun be corrected to **Reynold** Okitkun and that B00242K1 be distributed in accordance with the Residual Clause of the decedent’s [Will]” to Reynold.

On March 17, 2004, Judge Sweitzer issued a Notice to Reopen (Notice). He explained that Robert had objected to the Modification by letter dated November 4, 2002. Notice at 1. Judge Sweitzer stated that his office had responded to Robert in a December 11, 2002, letter, explaining “that the Modification was clerical in nature to correct the beneficiary’s misspelled name, and that it did not change the beneficiary’s interest in the estate.” *Id.* at 2. Judge Sweitzer stated that Robert telephoned on February 4, 2004; this call prompted the Judge’s comprehensive review and realization that the Modification “did, in

fact, change Robert Okitkun's interest in the estate." *Id.* Judge Sweitzer thus reopened the estate.¹

The case was subsequently assigned to Judge Dan, who conducted a hearing on August 16, 2004.² Both Robert and Reynold appeared. They discussed two houses, an older house and a newer HUD (Housing and Urban Development) house, both of which had been inhabited by Robert's parents and were located on the Tract B lot, and one of which Reynold lived in. Robert contended that Judge Hammett's Decree ordered distribution to himself of "all of the testatrix's restricted lot 5, block 10, tract -, more fully described in the attached incorporated deed"; that the deed "lists both of the lots"; and that Judge Hammett thus meant to distribute both lots to him. *See* Transcript of Hearing, Aug. 16, 2004 (Tr.) at 3. Robert stated that Judge Sweitzer had no authority to change the Decree because Judge Hammett's "final decision holds." *Id.* at 5. During the hearing, Judge Dan examined the attached deeds and inventory, and explained that each deed only related to one lot, while the probate inventory of Decedent's interests cited both lots. *Id.* at 3-5. She took evidence in the form of a copy of U.S. Survey 4497, which depicts both Tracts B and C, and their blocks and lots, across the Kotlik River from each other.

In her March 13, 2008, Decision, Judge Dan concluded that she had authority to reopen the estate pursuant to 43 C.F.R. § 4.242 because manifest error had been committed in the probate of Decedent's trust property.³ Decision at 3, 4. She asserted the following background facts: that Judge Hammett had ordered distribution to Robert of the Tract B lot, which was not devised to him in Clause Third of the Will; that Judge Hammett did not mention at all the Tract C lot that was devised to Robert in Clause Third; that the Tract C

¹ Judge Sweitzer construed Robert's November 4, 2002, letter as a petition for rehearing. Notice at 2. Neither letter referenced in the Notice appears in the record before us, nor is there any log of telephone calls.

² Judge Dan cited the hearing as having taken place on August 12. Decision at 2.

³ Judge Dan also cited authority to "correct this kind of error, that does not contain time limits, [in] 43 C.F.R. [§] 4.203 [(2007)]." Decision at 4. The cited rule addresses "nonexistent persons and other irregularities of allotments," and permits correction where an allotment was distributed to a non-existent person or where "more than one allotment was issued to the same person under different names and numbers or through errors in identification," presumably of the person. 43 C.F.R. § 4.203(a), (c). We do not find that this rule conferred authority to reopen an estate in order to correct errors made by a probate judge in construing the terms of a will.

lot could not have been distributed by Judge Hammett to Robert merely by virtue of the fact that it was mentioned in a probate inventory attached to the Decree, because it was not cited in the Decree itself; and that Judge Sweitzer had distributed the Tract B lot to Reynold under the Residuary Clause of the Will, while purporting to change only the spelling of Reynold's name, but had not mentioned the Tract C lot. Judge Dan thus concluded that both the Decree and the Modification made errors in distributing the estate.

She proceeded to address the provisions of the Will as it pertained to the two lots. She ordered distribution of the Tract C lot to Robert pursuant to Clause Third of the Will, and distribution of the Tract B lot to Reynold pursuant to the Residuary Clause. Decision at 4-5.

Appellant submitted a timely Notice of Appeal to this Board. He asserted that he did not object to permitting Reynold either to own or to inhabit the newer HUD house on the Tract B lot.⁴ Appellant did, however, object to Judge Dan's decision to distribute the Tract B lot to Reynold under the Residuary Clause. In his Opening Brief, Appellant briefly detailed the histories of the two houses and of his family. He asserted that his "mother's intention was to leave her townsite restricted lots to my son Cyril," Opening Brief at 2, because Robert and his wife had taken care of his aged parents; because his mother had insisted that his son be named Cyril, after Appellant's father; and because his mother had told him that the old house should "return to Cyril, our son and their grandson." *Id.* at 1.

No other briefs were submitted.

Discussion

In order to consider the appeal, we must take it as one from a decision on reopening. 43 C.F.R. § 4.242 (2007). We note that, under that rule, neither Judge Sweitzer nor Judge Dan had authority *sua sponte* to reopen the estate after 9 and 11 years, respectively, to reconsider the 1993 Decree with respect to Tract B. *Compare id.* § 4.242(e) (administrative law judge may reopen case within 3 years of final decision, on his or her own motion, to correct manifest error), with *id.* § 4.242(i). On the other hand, because Tract C remained undistributed under Judge Hammett's Decree, Judges Sweitzer and Dan undoubtedly had authority to amend the original Decree to distribute that tract, or else the estate could not be fully distributed and closed. Any procedural question regarding the propriety of also addressing Tract B need not be now unraveled because the Department's probate rules have

⁴ Judge Dan stated that the houses were not trust property and thus did not purport to distribute them. Decision at 3, 4-5.

been amended since the decisions were issued by Judges Sweitzer and Dan. The new rules expressly permit a probate judge to reopen an estate after 3 years to correct manifest injustice without additional constraints included in the prior rule. As we explained in *Estate of Phillip Loring*, 50 IBIA 178, 185 (2009):

The current regulations . . . provide probate judges with greater authority than they previously possessed to reopen a closed estate. *See* 73 Fed. Reg. 67,256, 67,302 (Nov. 13, 2008), *to be codified at* 43 C.F.R. § 30.242. Because the Board has jurisdiction over this timely appeal from [the probate judge's decision], which effectively was an order on reopening, and because no purpose would be served by vacating and remanding for the sole purpose of requiring [the probate judge] to explain her jurisdictional reasoning (or to issue a new order on reopening under authority contained in the current regulations, but with the same substantive result), the Board proceeds to consider and decide the merits of the case.

Appellant bears the burden of establishing that an order issued on the basis of a decision to reopen a probate, whether deriving from an Appellant's motion or a motion of the probate judge, is erroneous. *Estate of Darryl Edwin Rice*, 49 IBIA 16, 18 (2009) (citing *Estate of Martha Marie Vielle Gallineaux*, 44 IBIA 230, 234 (2007)). Appellant has not met this burden.

The same logic applies here. Appellant has not shown that Judge Dan misconstrued the Will. Appellant does not demonstrate any error in Judge Dan's decision to order distribution of the Tract B lot to Reynold. While Robert argues that Judge Dan misconstrued Decedent's intent and that Decedent had told him during her life that she wanted the old house to go to the grandchild (Appellant's son) named after her husband (Appellant's father), he does not suggest that Decedent either expressed such a desire in her Will or mentioned in it a grandson other than Reynold. To the extent Appellant believes that Clause Third left both lots to himself, it does not mention anything except the Tract C lot. We conclude that Judge Dan (and Judge Sweitzer) properly construed the Residuary Clause to cover the Tract B lot as property not otherwise mentioned in the Will.

Moreover, Judge Dan was correct to conclude that reopening the estate was necessary in order to ensure distribution of the Tract C lot to Robert. To the extent Appellant believes that the Decree ordered distribution of both lots to himself, such a construction of the Will would not have been justified in the Decree. But such a construction of the Decree is also mistaken. Judge Hammett ordered distribution to Robert only of the Tract B lot, a distribution which was in error because the Tract B lot was not mentioned in Clause Third.

Judge Dan was correct to reject Appellant’s belief that, by incorporating the restricted deed which identified the Tract B lot into his Decree, Judge Hammett meant to incorporate both townsite lots because a single deed covered both. Appellant is incorrect. Two different deeds in the record address the two different lots. There was no restricted deed covering both lots that Judge Hammett could have incorporated.⁵ Accordingly, Judge Hammett did not in his Decree ever order distribution to Robert of the Tract C lot, as directed by Clause Third of the Will, and thus Judge Dan properly ordered distribution of that lot to Appellant.

Appellant has not argued, much less shown, that Judge Dan erred in construing the plain language in the Will. As she stated in the Decision, the “will controls distribution of the property, not verbal statements made on a different occasion.” Decision at 3. Appellant has not shown that Judge Dan did anything but effectuate the terms of his mother’s Will.⁶

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision on Reopening is affirmed.

I concur:

// original signed
Lisa Hemmer
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.

⁵ We agree with Judge Dan that Appellant likely confused the deeds with the inventory prepared for purposes of probate. The inventory mentions both lots.

⁶ Appellant does not argue, even assuming Judge Dan correctly interpreted Decedent’s Will, that it was nevertheless error for Judge Sweitzer to reopen the estate because the “manifest injustice” standard was not satisfied.