



INTERIOR BOARD OF INDIAN APPEALS

Darrell Chissoe v. Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs

59 IBIA 304 (01/09/2015)

Judicial review of this case:

Affirmed, Chissoe v. Jewell, No. 15-CV-0166-CVE-TLW (N.D. Okla. Sept. 27, 2016)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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DARRELL CHISSOE,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 12-081
ACTING EASTERN OKLAHOMA)	
REGIONAL DIRECTOR, BUREAU)	
OF INDIAN AFFAIRS,)	
Appellee.)	January 9, 2015

Darrell Chisoe (Appellant), on behalf of Paul Chisoe, deceased (Chisoe or Decedent), appealed to the Board of Indian Appeals (Board) from a January 31, 2012, decision (Decision) of the Acting Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director affirmed a decision by BIA’s Okmulgee Agency Superintendent (Superintendent) rejecting a request from Appellant to reinstate a fee-to-trust application submitted by Appellant as guardian and on behalf of Chisoe during Chisoe’s lifetime. The Regional Director affirmed the Superintendent on several grounds, one of which we find sufficient for purposes of deciding this appeal: We agree with the Regional Director that BIA’s fee-to-trust acquisition regulations do not authorize BIA to acquire Chisoe’s fee title in trust for him now that he is deceased, or in trust for his estate. Therefore, BIA properly terminated the fee-to-trust process upon Chisoe’s death.

Background

The property at issue (Property) consists of approximately 8.21 acres located in Tulsa County, Oklahoma, and was originally allotted in 1904 to Decedent’s mother, a citizen of the Muskogee (Creek) Nation (Creek Nation). *See* Allotment Deed, Jan. 28, 1904 (Administrative Record (AR) Tab 2). The Property was owned by her in fee subject to restrictions against alienation in accordance with the Act of August 4, 1947, 61 Stat. 731 (1947 Act), which governs restrictions for lands in Oklahoma belonging to members of the Five Civilized Tribes.¹ Restricted fee property under the 1947 Act retains its restricted

¹ The term “Five Civilized Tribes” refers to the Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations.

status if inherited by or devised to an individual who possesses one-half or more blood of the Five Civilized Tribes, but otherwise the restrictions are removed upon the death of the owner. 1947 Act, § 1, 61 Stat. 731. The Property passed to Decedent, who possessed the requisite blood quantum for it to remain in restricted status under the 1947 Act. *See* Order Allowing Final Account, May 11, 1976 (AR Tab 3); Letter from Appellant, Jan. 12, 2011, (Appellant's Letter) at 2 (AR Tab 25).

Decedent apparently desired that the Property retain its protected status following his death, and thus decided to submit a fee-to-trust application to BIA. *See* Order Appointing Special Guardian, Oct. 1, 2010, at 1-2 (unnumbered) (AR Tab 14).² Before he submitted an application, however, Decedent suffered a stroke which left him with limited abilities. Email from Mitch O'Donnell to Sonya Lytch, Sept. 27, 2010 (AR Tab 11); Order Appointing Special Guardian at 1 (unnumbered).

On October 1, 2010, by order of the District Court in and for Tulsa County, State of Oklahoma, Appellant was appointed Special Guardian for Chissoc, and authorized to execute a fee-to-trust application on behalf of Chissoc. Order Appointing Special Guardian at 2 (unnumbered).³ The state court also appointed Appellant "Guardian of the person and property of Paul Eugene Chissoc." Order Appointing Guardian, Oct. 26, 2010, at 3 (unnumbered) (AR Tab 16).

Appellant subsequently sent a letter to the Creek Nation Realty Office,⁴ which that office and the Superintendent construed as an application on behalf of Chissoc, to place the Property in trust for Chissoc. Appellant's Letter; *see also* Letter from Muscogee (Creek) Nation to Superintendent, Jan. 13, 2011 (AR Tab 26); Superintendent's Certificate of Inspection and Possession, Jan. 20, 2011 (AR Tab 27); Memorandum from Superintendent to Acting Regional Director, Jan. 27, 2011, at 1 (unnumbered) (AR Tab 28). The Superintendent advised the Solicitor's Office that a preliminary decision had been made to acquire the Property in trust. Memorandum from Superintendent to Office of the Field Solicitor, Tulsa, Jan. 27, 2011 (AR Tab 29).

² The record does not contain evidence of the blood quantum of Appellant or of Decedent's other children, but it appears that Decedent's heirs or devisees may lack the Indian blood quantum required for the Property's restricted status to remain following Decedent's death.

³ Under the 1947 Act, the State courts of Oklahoma have exclusive jurisdiction over guardianship matters affecting Indians of the Five Civilized Tribes and over proceedings to administer estates or to probate the wills and determine heirs of such Indians. 1947 Act, § 3, 61 Stat. at 732.

⁴ The Creek Nation Realty Office apparently contracts certain realty functions from BIA.

Decedent died on April 5, 2011. Memorandum from Superintendent to Acting Regional Director, Apr. 7, 2011 (AR Tab 49). On April 6, 2011, the Creek Nation Realty Officer sent a letter to the Superintendent stating that “[d]ue to the recent death of our client, Paul Chissoe, I am requesting that his file be closed.” Letter from Creek Nation to Superintendent, Apr. 6, 2011 (AR Tab 48). The Superintendent then sent a letter to Appellant stating that BIA could not “process a [f]ee-to-[t]rust request if the person is deceased; therefore, the acquisition has been withdrawn upon [Chissoe’s] death.” Letter from Superintendent to Appellant, Apr. 15, 2011 (AR Tab 52).

Counsel, on behalf of Decedent’s estate, and who now represents Appellant, responded by asking BIA to “immediately reinstate Mr. Paul Chissoe’s application and proceed with the approval process.” Letter from Mitchell D. O’Donnell, Esq. to Superintendent, May 27, 2011 (AR Tab 54). Counsel stated that there was no need to withdraw the application because “[a] deed conveying Mr. Chissoe’s property in trust certainly can be given by Mr. Chissoe’s personal representative and approved by the Tulsa County District Court.” *Id.*⁵

On June 17, 2011, the Superintendent issued a formal decision, addressed to Appellant, denying Chissoe’s application. Letter from Superintendent to Appellant, June 17, 2011, (Superintendent’s Decision) at 2 (unnumbered) (AR Tab 55). The Superintendent first concluded that BIA could not process the application because, with the death of Chissoe, title had vested in his heirs or devisees, and until the probate process was completed by the state court, there was no individual who could convey marketable title to the United States, as required by BIA’s trust acquisition regulations. *Id.* at 1 (unnumbered) (citing 25 C.F.R. § 151.14). Next, the Superintendent concluded that BIA’s fee-to-trust regulations do not permit BIA to acquire fee land in trust for a deceased individual or an estate. *Id.* at 2 (unnumbered). Finally, the Superintendent stated that even if BIA’s regulations legally permitted the acquisition of title in trust for a deceased individual or estate, she was choosing to exercise her discretion not to do so. *Id.*

Appellant appealed the Superintendent’s Decision to the Regional Director, and the Regional Director affirmed. Decision, Jan. 31, 2012 (AR Tab 60). The Regional Director first concluded, as a procedural matter, that Appellant’s submission did not constitute a fee-to-trust application on behalf of Chissoe, and thus BIA had never received an application from Decedent, or on Decedent’s behalf, as required by 25 C.F.R. § 151.9. *Id.* at 2

⁵ Under the 1947 Act, restricted fee inherited lands of members of the Five Civilized Tribes are restricted against alienation without the approval of the Oklahoma state courts. 1947 Act, § 1.

(unnumbered).⁶ The Regional Director then concluded that even if Appellant's letter could be construed as an application for Decedent, the Superintendent had correctly concluded that BIA's regulations do not allow BIA to accept land in trust for a deceased individual or an estate, and BIA cannot complete a fee-to-trust acquisition where the applicant no longer has title to the property and it is unclear if anyone has the authority to convey the property into trust on behalf of the applicant. *Id.* at 2-3 (unnumbered).

Appellant appealed to the Board. Appellant argues that the Regional Director erred in concluding: (1) that BIA did not receive an application; (2) that BIA's regulations do not allow BIA to take land into trust for deceased individuals or estates; and (3) that it is unclear who can convey marketable title to the Property to the United States. Darrell Chissoe's Opening Brief, May 24, 2012, (Opening Brief) at 5-15. As relevant to Appellant's second argument, Appellant contends that even though BIA's fee-to-trust regulations require BIA to consider the needs of the individual applicant, *see* 25 C.F.R. § 151.10, they do not prevent BIA from considering these factors retroactively and retroactively approving an application that was initiated during an applicant's lifetime and accepting the fee title in trust. *Id.* at 7-8. Appellant also argues that marketable title can be conveyed to the United States by an administrator of Decedent's estate appointed by the Oklahoma state court. *Id.* at 10-11.

The Regional Director filed an answering brief, and Appellant filed a reply brief.

Discussion

As relevant to our disposition of the appeal, we review the Regional Director's legal conclusions de novo. *See Preservation of Los Olivos v. Pacific Regional Director*, 58 IBIA 278, 307 (2014). We affirm the Decision on the ground that BIA's fee-to-trust acquisition regulations do not authorize BIA to accept fee title to land in trust for a deceased individual or the individual's estate.⁷

⁶ The Regional Director relied on language in Appellant's submission suggesting that the application was being made on Appellant's own behalf for property owned by Appellant, although the submission also contained a legal description of the Property and enclosed copies of identification cards for Chissoe.

⁷ We do not affirm the portion of the Decision in which the Regional Director concluded that Appellant's submission did not constitute a fee-to-trust application for the Property on behalf of Chissoe. There are no strict guidelines regarding the form of fee-to-trust applications, *see* 25 C.F.R. § 151.9, and both the Creek Nation Realty Department and the Superintendent clearly and reasonably construed Appellant's submission as a fee-to-trust application for the Property made on behalf of Chissoe.

The regulations specifically provide for “the acquisition of land by the United States in trust status for *individual Indians* and tribes.” 25 C.F.R. § 151.1 (emphasis added). The regulations define “individual Indian” in terms of a “person” who “is” a member of a tribe or a descendant of such a member, or a person “possessing” a requisite degree of Indian blood. *Id.* § 151.2.⁸ The definition’s use of the present tense strongly suggests, if not compels, a conclusion that the term “individual Indian,” in BIA’s trust acquisition regulations, was intended to be limited to living persons. The definition does not include a “decendent” or an “estate.”

The factors that BIA must consider in evaluating a fee-to-trust application from an individual Indian reinforces our construction of the meaning of “individual Indian” in Part 151 as limited to living persons. In deciding whether to accept fee title in trust for an individual Indian, BIA must consider “[t]he need of the individual Indian . . . for additional land” and “the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs.” 25 C.F.R. § 151.10(b), (d). Neither of these factors is relevant to an individual who is no longer living.

Appellant contends that the Board has, on multiple occasions, upheld BIA decisions approving the conveyance of restricted or trust property from an Indian grantor after the grantor’s death. Appellant argues that BIA’s acceptance of title in trust should be treated no differently. Opening Brief at 8 (citing *Kent v. Acting Northwest Regional Director*, 45 IBIA 168 (2007); *Willis v. Northwest Regional Director*, 45 IBIA 152 (2007); *Wishkeno v. Deputy Assistant Secretary*, 11 IBIA 21 (1982)). Appellant’s reliance on our decisions in *Kent*, *Willis*, and *Wishkeno* is misplaced. Those cases involved a different regulation, 25 C.F.R. Part 152, and in each of those cases, BIA already held legal title to the property, and the

⁸ 25 C.F.R. § 151.2(c) states:

Individual Indian means:

- (1) Any person who is an enrolled member of a tribe;
- (2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation;
- (3) Any other person possessing a total of one-half or more degree Indian blood of a tribe;
- (4) For purposes of acquisitions outside of the State of Alaska, *Individual Indian* also means a person who meets the qualifications of paragraph (c)(1), (2), or (3) of this section where “Tribe” includes any Alaska Native Village or Alaska Native Group which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.

issue was whether BIA, as trustee, could or should retroactively approve a deed executed by the Indian grantor to effectuate an attempted conveyance of beneficial title during the grantor's lifetime. See *Kent*, 45 IBIA at 174; *Willis*, 45 IBIA at 161; *Wishkeno*, 11 IBIA at 27.

In contrast, BIA's trust acquisition regulations, as relevant to a fee-to-trust acquisition, involve the authority of BIA to accept legal title to property and to assume trusteeship over that property for an Indian beneficiary. The regulatory authority for BIA to create a trust, by accepting title, involves different underlying considerations and we are not convinced that the concepts of "retroactive approval" involved in the *Wishkeno* line of cases can be extended to fee-to-trust *acquisitions*. Thus, based on the definitions in Part 151, and the purposes and factors contained in those regulations, we conclude that BIA's trust acquisition regulations do not authorize BIA to accept fee title, and create a trust, for someone who is deceased, or for his or her estate.⁹

Conclusion

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 Board affirms the Regional Director's January 31, 2012, decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Robert E. Hall
Administrative Judge

⁹ To the extent that Appellant may be suggesting that BIA should consider accepting title in trust for the beneficiary, or beneficiaries, of Decedent's will, rather than for Decedent or his estate, we agree with BIA that any such consideration by BIA would be premature. Appellant concedes that Decedent's estate and his will have yet to be probated in state court. As the Superintendent correctly noted, if, following completion of the probate process in state court, the Property passes to one or more beneficiaries who are "individual Indians" within the meaning of Part 151, those beneficiaries may apply to BIA to have their interest accepted in trust.