



INTERIOR BOARD OF INDIAN APPEALS

Estate of Ernest Clark Bighorn, Sr.

61 IBIA 172 (08/13/2015)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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|------------------------|---|--------------------------------------|
| ESTATE OF ERNEST CLARK |) | Order Reversing in Part Modification |
| BIGHORN, SR. |) | Order to Include Omitted Property |
| |) | |
| |) | Docket No. IBIA 13-128 |
| |) | |
| |) | August 13, 2015 |

Fonda Crystal BigHorn (Appellant) appealed to the Board of Indian Appeals (Board) from a Modification Order to Include Omitted Property (Modification Order) entered on July 29, 2013, by Administrative Law Judge (ALJ) R. S. Chester in the estate of Appellant’s father, Ernest Clark Bighorn, Sr. (Decedent).¹ The Modification Order added to Decedent’s estate ownership interests in trust or restricted land on the Sisseton-Wahpeton Indian Reservation in South Dakota, and ordered that these interests be distributed to Decedent’s wife, Florence Mae Weinberger Bighorn (Florence). Appellant contends that the ALJ failed to apply the law that was in effect at the time of Decedent’s death, and that Decedent’s children are entitled to receive a 2/3 share of the interests.

We conclude that, although the ALJ cited the applicable intestacy law of the State of South Dakota in effect at the time of Decedent’s death, he misapplied the law. Under the law, a 1/3 share of the interests should have passed to Florence, and the remaining 2/3 share should have been distributed equally among Decedent’s children. Accordingly, we reverse the Modification Order in part.

Background

Decedent died intestate on August 12, 1972, and was survived by his wife and six children. Order Determining Heirs, Sept. 16, 1974, at 1 (unnumbered) (Administrative Record (AR) Tab 4). In the original probate proceedings held for Decedent’s estate, Decedent was determined to have died owning interests in trust or restricted property on

¹ Decedent, who was also known as Ernest C. Bighorn, was a Fort Peck Indian. The number assigned to the probate of Decedent’s estate in the Department of the Interior’s probate tracking system, ProTrac, is Probate No. P00014020IP. The original number assigned to the probate of Decedent’s estate was IP BI 445C 73.

the Fort Peck Indian Reservation in Montana, and the interests were distributed among his surviving wife and children in accordance with Montana law on intestate succession.² *Id.* at 1-2 (unnumbered).

On May 22, 2013, the Superintendent of BIA's Fort Peck Agency (Superintendent) submitted a petition for reopening on the basis that Decedent had inherited from his father, Maurice Bighorn, Sr., interests in trust or restricted property located on the Sisseton-Wahpeton Reservation in South Dakota, and that the interests should be added to Decedent's estate for distribution. Petition for Reopening to Distribute Trust Property, May 22, 2013 (Supplemental AR)³; *see also id.* at Attachment (Inventory of Decedents Report, May 15, 2013, at 1-2).

On July 29, 2013, ALJ Chester issued the Modification Order from which Appellant appeals. He prefaced the order by stating that, although he would ordinarily give interested parties an opportunity to respond to a proposed modification, and would ordinarily give the heirs time to disclaim the additional interests in favor of someone else, he did not do so in this case because the additional interests would pass entirely to Florence, and she had died in 1993. Modification Order at 1. ALJ Chester concluded that Florence was entitled to receive all of Decedent's interests in the Sisseton-Wahpeton property under the intestacy law of the State of South Dakota in effect at the time of Decedent's death, South Dakota Codified Laws (SDC) 1960 Supp. 56.0104 (copy added to appeal record). Modification Order at 1-2.

Appellant appealed to the Board and filed a notice of appeal, contending that Decedent's children are entitled to receive a 2/3 share of the additional interests. Notice of Appeal, Aug. 15, 2013. No other pleadings were filed in the appeal.

Discussion

Appellant's challenge to the determination regarding the descent of Decedent's interests in the Sisseton-Wahpeton property raises a question of law, which the Board reviews *de novo*. *Estate of Dickey Dee Jones, Jr.*, 61 IBIA 148, 151 (2015); *Estate of Sarah Stewart Sings Good*, 57 IBIA 65, 72 (2013).

² The Order Determining Heirs was modified by an October 8, 1974, Order Nunc Pro Tunc to correct an inventory error that is not at issue in this appeal.

³ Upon receiving the probate record from BIA, the Board determined that it was incomplete and ordered that BIA submit the remainder of the record. On February 10, 2014, the Board received a revised table of contents and the remainder of the record, which we refer to as the "Supplemental AR."

Inheritance is determined as of the date of a decedent's death. *Estate of Samuel R. Boyd*, 43 IBIA 11, 18 (2006). Prior to enactment of the Sisseton-Wahpeton Act, Pub. L. No. 98-513, 98 Stat. 2411 (Oct. 19, 1984), the inheritance of trust or restricted real property located on the Sisseton-Wahpeton Reservation was governed by the rules of intestate succession of the state in which the property was located. *See id.* at 16 (citing 25 U.S.C. § 348). Because Decedent died in 1972 and the property at issue is located in South Dakota, South Dakota law on intestate succession governs the descent of Decedent's interests in the tract. ALJ Chester correctly concluded that the framework for determining the distribution of Decedent's interests in the tract was provided by SDC 1960 Supp. 56.0104.

As we explained, Decedent was survived by his wife and six children. In pertinent part, § 56.0104 provided that if the decedent was survived by a "wife, and more than one child living," one-third of the estate descended "to the surviving . . . wife, and the remainder in equal shares to his children." SDC 1960 Supp. 56.0104(1). Although the ALJ cited the applicable law, he erroneously concluded that all of Decedent's interests in property should descend to Florence, contrary to the terms of the statute. Under the law, a 1/3 share of the interests should have passed to Florence, and the remaining 2/3 share should have been distributed equally among Decedent's children. *See id.* Accordingly, we reverse the Modification Order in part.

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 reverses the Modification Order in part, and remands for further proceedings consistent with this decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge