



INTERIOR BOARD OF INDIAN APPEALS

Estate of Lorna Kay Harris

61 IBIA 303 (09/29/2015)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF LORNA KAY HARRIS)	Order Affirming Order Denying
)	Reopening
)	
)	Docket No. IBIA 14-021
)	
)	September 29, 2015

On October 28, 2013, the Board of Indian Appeals (Board) received a notice of appeal from Dana M. Hall (Appellant), pro se. Appellant seeks review of an Order Affirming and Clarifying Decision After Hearing on Reopening (Order Denying Reopening)¹ entered on September 26, 2013, by Indian Probate Judge (IPJ) Albert C. Jones in the estate of Appellant’s mother, Lorna Kay Harris, also known as Lorna Kay Loans Arrow (Decedent).² IPJ Jones held a hearing on reopening, which provided the parties an opportunity to advance their arguments and to review the basis for the underlying probate decision, prior to issuing his order denying reopening and affirming and clarifying IPJ P. Diane Johnson’s February 28, 2006, Order Determining Heirs, Approval of Compromise Settlement Agreement, and Decree of Distribution (Decision). The Decision accepted a Compromise Settlement Agreement executed by Decedent’s spouse, Lynn Harris (Harris), providing that all interests to be inherited by Harris pass instead to Decedent’s youngest child, David Mares.

On appeal to the Board, Appellant contends that the Compromise Settlement Agreement (Agreement) constituted a directional disclaimer, which was impermissible under the applicable laws at the time it was executed. Appellant argues that she and Decedent’s other children were entitled to receive equal shares in Decedent’s estate. We

¹ Although styled an “Order Affirming and Clarifying Decision,” the order denies Appellant’s petition to reopen, while at the same time clarifying aspects of the underlying probate order. Appellant has appealed the denial of her petition. For that reason, we label the IPJ’s decision an Order Denying Reopening in this opinion.

² Decedent was a member of the Three Affiliated Tribes of the Fort Berthold Reservation. Her probate case is assigned Probate No. P000029127IP in the Department of the Interior’s probate tracking system, ProTrac.

affirm the Order Denying Reopening. Though the Agreement may have had the same effect as a directional disclaimer, it was a valid settlement agreement under the regulations then in effect. IPJ Jones did not err in affirming the Decision approving the Agreement and ordering that the trust property that would have been distributed to Harris, passed instead to Decedent's minor child, David Mares. Even if we were to conclude that the Agreement was invalid, as urged by Appellant, the part of Decedent's estate that descended to Harris would then pass to Harris's heirs, rather than to Appellant and her siblings. Because Harris is non-Indian and none of Decedent's descendants are also descendants of Harris, much of Decedent's trust property would then leave trust status.

Background

At the time of her death on October 18, 2004, *see* Certificate of Death, Oct. 21, 2004 (Administrative Record (AR) Tab 76), Decedent had a positive balance in her Individual Indian Money (IIM) account and held interests in various properties on the Fort Berthold, Fort Totten, and Standing Rock Reservations, all located in North Dakota, and on the Fort Peck Reservation in Montana, *see* OHA-7 Form, Dec. 27, 2005, at 5 (AR Tab 43). The total estimated value of Decedent's trust personalty, i.e. the IIM account, and trust property, was less than \$50,000. *See* OHA-7 Form at 5.

Decedent married and divorced twice before marrying her third and final husband, Harris, on October 22, 2000. OHA-7 Form at 1. Decedent had seven children, all living at the time of her death. *Id.* Harris was non-Indian and he did not father any of Decedent's children. *Id.*

Despite a concerted effort to locate Decedent's children, BIA was apparently unable to provide written notice of the probate hearing to six of Decedent's seven children. *See, e.g.,* Affidavit Verifying the Search for Heirs/Beneficiaries, Barbara A. Youngbird, Deponent, Nov. 28, 2015 (AR Tab 46) (listing dates and efforts made to contact heirs); Probate Case File Notes (AR Tab 47) (same); Memo to File, Nov. 9, 2005 (AR Tab 48) (efforts to locate Decedent's son, Anthony Loans Arrow). Only Decedent's brother, his wife (Decedent's sister-in-law), and Decedent's youngest son, David Mares, were present at a February 13, 2006 probate hearing regarding Decedent's estate.³ Sign-In Sheet 1 (AR Tab 35). David Mares was 10 years old at the time of his mother's death. *See* OHA-7 Form at 1.

On February 28, 2006, IPJ Johnson issued her Decision. Decision (AR Tab 31). The Decision explained that under applicable law, Decedent's surviving spouse, Harris, was

³ There is no recording or transcript of the original hearing.

the sole heir to Decedent's trust property interests located on the Fort Berthold, Fort Peck, and Fort Totten Reservations, including any income accrued after Decedent's death, and trust personalty in Decedent's IIM account. *Id.* at 2-3. Harris would also be entitled to a life estate with respect to one-half of trust property interests located on the Standing Rock Reservation. *Id.* at 3.

However, pursuant to the Agreement, Harris gave "all of [D]ecedent's trust property interests, both real, personal and mixed, located on the Fort Berthold, Fort Peck, [and] Fort Totten [Reservations]; and, [his] entitlement to receive a one-half (1/2) life estate interest from the Standing Rock Reservation, . . . [to] David Juan Mares." Agreement, Feb. 27, 2006, at 1 (AR Tab 32). Harris signed the Agreement on February 27, 2006, *id.* at 3, and the Decision indicated that David Mares, represented by his guardian ad litem, Decedent's brother Thomas Loans Arrow, consented to the Agreement, *see* Decision at 2. The remaining one-half of Decedent's trust real property located on the Standing Rock Reservation, trust personalty derived from those Standing Rock interests, and related income accruing after Decedent's death, were divided equally among Decedent's seven children. Decision at 3.

Harris died on October 29, 2006. Order Denying Reopening, Sept. 26, 2013, at 3 (AR Tab 10). On March 6, 2012, Decedent's sister—LaVonne Swift Eagle Snyder—and Decedent's daughter—Appellant—separately filed petitions to reopen Decedent's estate. *See* Snyder Petition at 1 (AR Tab 21); Hall Petition at 1 (AR Tab 20). Snyder argued that Decedent's estate should have been distributed equally between Decedent's seven children, *see* Snyder's Petition at 1, and Appellant stated that she and her siblings had not been properly notified of Decedent's probate hearing and thus the Decision was "unfair," *see* Hall Petition at 1. IPJ Jones held a hearing on the petitions for reopening on December 7, 2012. Transcript (AR Tab 14). IPJ Jones stated that he scheduled the hearing to explain "what had transpired in distributing . . . Decedent's estate, to determine the competency of David Mares . . . , and to further allow the parties to settle the matter" because he had "concluded that proper notice had not been given to all of . . . Decedent's children and because it was probable that those children had never received a copy of the Decision." Order Denying Reopening at 4. All seven of Decedent's children were present at this hearing. Sign-In Sheet 2 (AR Tab 13).

Following the hearing, IPJ Jones issued his order affirming IPJ Johnson's Decision and denying the reopening petitions filed by Snyder and Appellant. Order Denying Reopening. He first stated that because Snyder was not an actual or potential heir, she lacked standing to petition for reopening pursuant to 43 C.F.R. § 30.101. *Id.* at 2-3. He also determined that Appellant, as an actual heir, had standing. *Id.* at 3. He found that Harris, the legal heir of the majority of Decedent's property, executed and submitted a valid Compromise Settlement Agreement, renouncing his interest in the estate in favor of David

Mares. *Id.* He explained that, even were Harris still alive, he could not alter the Agreement because it became irrevocable when IPJ Johnson issued the final order. *Id.* at 4. IPJ Jones determined that, despite the fact that some of Decedent's children did not receive notice of the probate hearing, "the ultimate Decision issued in this estate properly applied the law." *Id.* He also found that "David Mares [was] competent and able to make decisions for himself" and that Mares indicated at the hearing that he was not interested in settling the matter with his siblings and was not required to do so. *Id.* IPJ Jones denied Appellant's petition for reopening because she was unable to identify any error of fact or law in the Decision, and he denied Snyder's petition for lack of standing.⁴ *Id.* at 3-4.

Appellant timely appealed the Order Denying Reopening. Appellant submitted an opening brief and no other briefs were filed in this case.

Standard of Review

An appellant bears the burden of showing error in the Order Denying Reopening. *Estate of George Umtuch, Jr.*, 58 IBIA 205, 207 (2014). The Board reviews factual determinations by the probate judge to determine whether they are supported by substantial evidence. *Estate of Samuel Johnson Aimsback*, 45 IBIA 298, 303 (2007). We review legal determinations and the sufficiency of the evidence *de novo*. *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62 (2012).

Discussion

In her opening brief to the Board, Appellant contends that the decisions of IPJs Jones and Johnson denied her and her siblings their rights to their inheritance. Opening Brief (Br.), May 6, 2014, at 1 (unnumbered). Appellant argues that if the Agreement by which Harris renounced his interests in Decedent's estate in favor of David Mares is a directional disclaimer, as IPJ Jones implied, it is invalid under applicable North Dakota and Montana law. *Id.* at 2 (unnumbered). She contends that because directional disclaimers were not recognized under North Dakota or Montana law at that time, and state law in both states mandated that the disclaimed interests pass as if Harris had predeceased Decedent, Decedent's property would have been distributed equally among all seven of her children. *Id.* Appellant also argues that pursuant to North Dakota and Montana laws of intestate succession, Harris was not entitled to receive the entirety of Decedent's estate, as IPJ Johnson concluded in the Decision. *Id.*

⁴ IPJ Jones noted that the Decision failed to specify how the Standing Rock life estate was to be distributed upon the death of Harris, and clarified that the property should now be divided equally among Decedent's children. Order Denying Reopening at 4.

When Decedent died intestate in 2004, state law was applied to direct the distribution of trust assets, except where there was relevant Federal law controlling the devise or descent of trust property on a given reservation. Therefore, as IPJ Johnson determined in the Decision, North Dakota law applied to Decedent's interests in property located on the Fort Berthold and Fort Totten⁵ Reservations, Montana law applied to her interests in property on the Fort Peck Reservation, and Federal law specific to the Standing Rock Reservation⁶ applied to her interests on the Standing Rock Reservation. *See* Decision at 2-3. Appellant does not dispute the distribution of Decedent's property interests on the Standing Rock Reservation. The Montana and North Dakota laws governing intestate succession at the time of Decedent's death each provided that, where one or more of the decedent's surviving descendants were not descendants of the surviving spouse, the surviving spouse's intestate share was the first \$100,000, plus one-half of any balance of the intestate estate. *See* N.D. Cent. Code § 30.1-04-02(4) (1995); Mont. Code Ann. § 72-2-112(4) (2003). Decedent's trust estate, including both real and personal property, was valued at less than \$100,000. Therefore, Harris, as Decedent's surviving spouse, was entitled to the entirety of Decedent's property interests on the Fort Berthold, Fort Totten, and Fort Peck Reservations, as stated in the Decision and the Order Denying Rehearing.

Appellant is correct that neither the laws of Montana and North Dakota, nor Federal regulations, provided for a directional disclaimer at the time of Decedent's death. The laws governing disclaimer provided that when an individual disclaims a property interest descending through intestate succession, the disclaimed property passes as if the disclaimant had predeceased the decedent. *See* N.D. Cent. Code § 30.1-10.1-03(4) (2003); Mont. Code Ann. § 72-2-811(4)(a) (2003); 43 C.F.R. § 4.208 (2005) (terming the disclaimer a "renunciation of interest" that is treated as if the person renouncing the interest had predeceased the decedent); *see also Estate of Donna Gottschalk*, 30 IBIA 82, 85-86 (1996) ("43 C.F.R. 4.208 does not permit an heir to renounce an interest in trust or restricted property in favor of a particular person or persons."). However, and notwithstanding IPJ

⁵ As stated in the Decision, the Act of January 12, 1983, Pub. L. No. 97-459, 96 Stat. 2515, which governs the devise and descent of trust and restricted land on the Spirit Lake (Fort Totten) Reservation, provides that interests in land on the Spirit Lake Nation inherited by or devised to a person who is not a member of the Spirit Lake Sioux Tribe may be subject to divestiture through purchase by the Tribe within two years of the decedent's death. However, there is no record of the Spirit Lake Nation having purchased the interests at issue here.

⁶ *See* The Standing Rock Heirship Act, Pub. L. No. 96-274, sec. 4(a), 94 Stat. 537, 538 (1980) (providing that the non-Indian surviving spouse of an Indian decedent is entitled to a no-more-than one-half undivided interest in the estate as a life estate).

Jones's comment that the Agreement was essentially a directional disclaimer, *see* Order Denying Reopening at 3, we agree with IPJ Johnson and IPJ Jones that the Agreement signed by Harris and approved by IPJ Johnson constituted a valid settlement agreement under our regulations at the time.

As pertinent here, at the time of Decedent's death, our regulations provided:

(a) If during the course of the probate of an estate it develops that an issue between contending parties is of such nature as to be substantial, and it further appears that such issue may be settled by agreement preferably in writing by the parties in interest to their advantage and to the advantage of the United States, such an agreement may be approved by the [IPJ] upon findings that:

- (1) All parties to the compromise are fully advised as to all material facts;
- (2) All parties to the compromise are fully cognizant of the effect of the compromise upon their rights; and
- (3) It is in the best interest of the parties to settle rather than to continue litigation.

43 C.F.R. § 4.207(a) (2004). Here, Harris was the sole heir to the property interests on the Fort Berthold, Fort Totten, and Fort Peck Reservations and had right to claim a one-half interest life estate on that part of the estate located on the Standing Rock Reservation. According to IPJ Johnson, and as stated in the signed Agreement, Harris voluntarily agreed to transfer his interests in Decedent's trust estate to David Mares. Decision at 2; Agreement at 1-2. IPJ Johnson also states in the Decision that "[t]he decedent's minor child is represented by a guardian ad litem, namely, Thomas Loan[s] Arrow, who consents on behalf of the minor child." Decision at 2. As to Harris's interests, he and David Mares, through his guardian ad litem, constituted "the parties in interest" for this settlement agreement. The Agreement specifying the terms of the settlement, attached notice, *see* Notice of Compromise Settlement Agreement (AR Tab 33), and the parties' informed consent satisfied the legal requirements contained in 43 C.F.R. § 4.207(a), and the result was not inconsistent with Federal law.

In explaining the purpose of the Agreement, IPJ Johnson noted that Harris decided to "maintain [Decedent's] trust property in 'trust status' and that said trust property interests should be inherited by [Decedent's] youngest child." Decision at 2. She also found that it was "in the best interest of the parties to settle rather than to accomplish their

land transactional goals in another manner.”⁷ *Id.* In approving the Agreement, IPJ Johnson concluded that “the outcome . . . is to the advantage of all parties to the Agreement, and to the United States.” *Id.* That the Agreement had the same effect as a directional disclaimer, does not invalidate the otherwise valid settlement agreement.

Even if we were to determine that the Agreement constituted an impermissible directional disclaimer, this would not result in our treating the Agreement as a general disclaimer and redistributing Decedent’s trust property as if Harris had predeceased Decedent. We have previously held that where a decedent’s heir attempted to execute an impermissible directional disclaimer, and did not understand the actual consequences of the disclaimer, the disclaimant must be allowed to withdraw the invalid disclaimer. *Estate of Gottschalk*, 30 IBIA at 86. We will not interpret a document to be a general disclaimer where, as here, it is clear that the result would be contrary to the disclaimant’s intent. *C.f. Estate of Clifford Barney Tullee, Sr.*, 37 IBIA 235 (2002) (holding that a probate judge erred in rejecting a directional disclaimer—rather than accepting it as a general disclaimer—where a general disclaimer would have the same effect as the impermissible directional disclaimer). As IPJ Johnson stated and as the terms of the Agreement make clear, Harris desired that Decedent’s trust estate that would otherwise go to him, as surviving spouse, went instead to Decedent’s minor son.

Because Harris himself died in 2006, we cannot now provide him with an opportunity to withdraw or clarify the Agreement. The Agreement clearly indicates that Harris intended to transfer his interests to David Mares, rather than to all of Decedent’s children, and therefore it would be contrary to Harris’s intent to treat the agreement as a general disclaimer. Were we to conclude that the Agreement was invalid, the result would be to distribute Decedent’s estate under the applicable laws of intestate succession. Under such laws, Decedent’s property interests in the Fort Berthold, Fort Totten, and Fort Peck Reservations would have passed to Harris and his heirs, not to Decedent’s children. We agree with IPJ Jones that the Agreement is a valid settlement agreement and that IPJ Johnson did not err in distributing Decedent’s estate in keeping with its terms. Appellant

⁷ Although IPJ Johnson does not elucidate on this point, one option for Harris would have been to receive his inheritance and then gift it back to his intended beneficiary. Because Harris was non-Indian, however, the land and trust personalty would lose its trust character, along with any federal responsibility to oversee the disposition of same for the benefit of the minor Indian child. While it would be legally possible for David Mares to then petition for the land to be taken into trust on his behalf, *see* 25 C.F.R. § 151.4, the process itself is not simple and the decision to take the land into trust is discretionary, *see id.* § 151.3. While in fee status, the land and any income generated from it would be subject to taxation.

has therefore failed to meet her burden to show error in the IPJ's decision to deny reopening.

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 ALJ's September 26, 2013, Order Denying Reopening.

I concur:

// original signed
Robert E. Hall
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge