



INTERIOR BOARD OF INDIAN APPEALS

In the Matter of the Will of Leonard Morrell Maker

62 IBIA 33 (12/08/2015)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
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IN THE MATTER OF THE WILL OF	)	Order Reversing Decision in Part and
LEONARD MORRELL MAKER	)	Giving Effect to Decision in
	)	Remaining Part
	)	
	)	Docket No. IBIA 14-062
	)	
	)	December 8, 2015

Ronald Unap, Sr., Deborah Trujillo, Robert Unap, Jr., Andrew Unap, and Joseph Unap (collectively, Appellants) appealed to the Board of Indian Appeals (Board) from a February 4, 2014, Order Disapproving Will issued by the Acting Osage Agency Superintendent (Superintendent), Bureau of Indian Affairs (BIA), disapproving the Osage will executed on June 22, 1983, of Leonard Morrell Maker (Decedent), deceased unallotted Osage. Decedent’s will—which was executed before his marriage and the birth of his children—distributed his property to his cousins. The Superintendent disapproved the will because Decedent’s children were pretermitted (i.e., omitted) and, under his interpretation of Oklahoma law, Decedent’s spouse and children, or the children alone, would take Decedent’s entire estate as if Decedent had died intestate (i.e., without a will).

The Superintendent’s disapproval of the will is contrary to law. The existence of pretermitted heirs does not invalidate a will, regardless of the share of the estate to which the pretermitted heirs may be entitled. Therefore, we reverse the portion of the Superintendent’s decision disapproving Decedent’s will. We leave in place the Superintendent’s remaining conclusions that the will was validly executed, that Decedent possessed testamentary capacity, and that there was no evidence the will was the product of undue influence. Accordingly, giving effect to the Superintendent’s decision, we conclude that Decedent’s will is approved for probate in the appropriate Oklahoma state court, subject to the right of Decedent’s spouse and children to take their elective or intestate shares of Decedent’s estate as provided under Oklahoma law.

## Statutory and Regulatory Framework

All wills executed by Osage Indians that dispose of an Osage headright interest<sup>1</sup> or other trust or restricted property must be approved by BIA's Osage Agency Superintendent before the wills may be probated in state court. Act of Apr. 18, 1912 (1912 Act), ch. 83, § 8, 37 Stat. 86, 88, *as amended by* Act of Oct. 21, 1978 (1978 Act), Pub. L. No. 95-496, § 5(a), 92 Stat. 1660, 1661 *and* Act of Oct. 30, 1984 (1984 Act), Pub. L. No. 98-605, § 3(b), 98 Stat. 3163, 3166-67; *see also* 25 C.F.R. Part 17. Such wills must be "executed in accordance with the laws of the State of Oklahoma." 1912 Act, § 8, *as amended*. The Superintendent makes each approval or disapproval decision based on evidence adduced at a hearing on the will's validity. *Id.*; *see also* 25 C.F.R. § 17.12. The Superintendent's approval or disapproval decisions are then appealable to the Board. *See* 212 DM § 13.4(A)(3) (June 1, 2012) (delegating the Secretary of the Interior's review authority for Osage will determinations to the Board); *see also* 25 C.F.R. § 17.14 (Secretary of the Interior's review authority for Osage wills). Once the Superintendent's approval of an Osage will becomes final, it may be submitted for probate in the appropriate Oklahoma state court. 1912 Act, § 3, *as amended by* 1978 Act, § 5(b) *and* 1984 Act, § 3(a).

## Background

Decedent died testate on January 23, 2012. Order Disapproving Will, Feb. 4, 2014, at 1 (Administrative Record (AR) Tab 36). On June 22, 1983, Decedent executed a will in which he devised his entire estate to his cousins. *See* Will (AR Tab 6). Specifically, Decedent devised his Osage headright to Appellant Ronald Unap, Sr.; Appellant Deborah Unap (now known as Deborah Trujillo);<sup>2</sup> Robert Unap, Sr.; and David Unap.<sup>3</sup> *Id.* ¶ 3. Decedent devised all of his real property to those four cousins and to two other cousins, Amos Goodfox, Jr. and Terry Unap (collectively, Beneficiaries). *Id.* ¶ 4. Except for Decedent's automobile, which was devised to Deborah, the remainder of Decedent's property was devised to the first four cousins named above. *Id.* ¶¶ 5-6. The will names

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<sup>1</sup> An Osage headright is an "individual right to share in the income from an Osage tribal mineral estate and, sometimes, in other tribal income as well." *Pappin v. Eastern Oklahoma Regional Director*, 50 IBIA 238, 238 n.1 (2009); *see also* *Smith v. Muskogee Area Director*, 16 IBIA 153, 157-58 (1988) (providing a brief history of Osage headrights).

<sup>2</sup> Although the will contains a different spelling, we spell Deborah's first name as it is spelled in the notice of appeal.

<sup>3</sup> Robert Sr. and David are deceased. Appellants' Opening Brief (Br.), Apr. 1, 2014, at 2 n.1. Robert Sr.'s children (Robert Jr., Andrew, and Joseph) are Appellants in this appeal as his successors-in-interest. *Id.*

Ronald Sr. and Robert Sr. as co-executors of Decedent's estate. *Id.* ¶ 7. The will was dated and signed by Decedent and two attesting witnesses, and was approved as to form by the Solicitor's Office within the Department of the Interior. *Id.* at 1.

At the time of the will's execution, Decedent was not married and had no children. *Id.* ¶ 1. Subsequently, Decedent and Anita Maker married and had three children, George Maker, Juila Maker, and Alaina Maker. Special Attorney's Memorandum, Dec. 23, 2013, at 1 (AR Tab 37).

Following Decedent's death, his spouse Anita submitted the will to the Superintendent and petitioned for its disapproval. Petition for Submission of Will for Disapproval, Oct. 18, 2012 (AR Tab 1); Amended Petition, Feb. 13, 2013 (AR Tab 13). Anita requested disapproval of the will on the basis that Decedent did not intend to disinherit his spouse and children. Amended Petition at 1 (unnumbered). Anita also asserted in the alternative, if the will were approved, that she and the children would be entitled to take against the will, and take Decedent's entire estate. *Id.* at 3-4 (unnumbered).

In response, Appellant Ronald Unap, Sr. requested that BIA determine the will was valid, that distribution was to be made in accordance with the will, and that he was executor of the estate. Response of Ronald Unap, Sr. to Amended Petition, Feb. 21, 2013, at 4 (AR Tab 14).

The Superintendent, through a designated Special Attorney from the Office of the Solicitor, held several hearings regarding the will between December 2012 and June 2013. On July 12, 2013, the Special Attorney issued a Decision and Order in which he concluded that, contrary to prior indications and discussions, the parties would not be permitted to enter into a stipulation for the will to be approved by the Superintendent and for any disagreement regarding the distribution of assets in the estate to be addressed in Oklahoma state court. Decision and Order at 1 (AR Tab 26); *see also* Hearing Transcript (Tr.), June 25, 2013, at 13-16 (AR Tab 19) (discussing the possible stipulation). The Special Attorney reasoned that if the will were approved, under Oklahoma law, Decedent's spouse and children would take against the will as though Decedent had died intestate, and the estate would either be split one-half to the spouse and one-half to the children, or be taken entirely by the children. Decision and Order at 2-3. The Special Attorney further stated that "[w]hile the Beneficiaries appear to be willing to concede that the children . . . are pretermitted and therefore would take their intestate share," he did not believe there was "any basis to award the Beneficiaries anything under the will," and thus the Beneficiaries appeared to lack standing to oppose disapproval of the will or to petition for its approval. *Id.* Because the parties had not previously briefed these issues, the Special Attorney invited briefs in opposition and responses thereto. *Id.* at 3.

On behalf of the Beneficiaries, Ronald Sr. opposed the Decision and Order on the grounds that under Oklahoma law Anita was not entitled to take an intestate share of Decedent's estate, but that as Decedent's spouse she could take an elective share of half of any "joint industry" property. Beneficiaries' Objection to Decision and Order, Aug. 12, 2013, at 2-3 (AR Tab 27).<sup>4</sup> Ronald Sr. further argued that while it was undisputed that Decedent's children, as pretermitted heirs, could take their share of Decedent's estate as if he had died intestate, they were not entitled to take all of the property that Decedent's spouse was unable to take. *Id.* at 3-6. He requested that BIA approve the will and leave "all remaining issues" for a decision in Oklahoma state court. *Id.* at 6.

In response, Anita and the children argued that the Beneficiaries failed to timely prove the validity of Decedent's will by procuring the testimony of the attesting witnesses, and thus the will should be disapproved.<sup>5</sup> Response of the Heirs to Beneficiaries' Objection, Aug. 27, 2013, at 1-3 (AR Tab 29). They argued in the alternative that, even if the will were found valid, the Beneficiaries would take no property because, under Oklahoma law, "anything that does not pass to the spouse will be divided in equal shares to the surviving children." *Id.* at 4.

Ronald Sr. replied for the Beneficiaries that Anita and the children never argued the will was not properly attested, and that they instead indicated it was unnecessary to obtain testimony from an attesting witness regarding the validity of the will. Beneficiaries' Reply in Support of Objection, Sept. 11, 2013, at 2 (AR Tab 30).<sup>6</sup> Ronald Sr. also argued that

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<sup>4</sup> Ronald Sr. contended that the joint industry property did not include Decedent's headright or any property Decedent had inherited, and that the headright and any inherited property should pass under the will, "subject to the share to pretermitted heirs." Beneficiaries' Objection to Decision and Order at 3.

<sup>5</sup> The 1912 Act, as amended, provides that "[a]ll evidence relative to the validity of the will" must be submitted within 120 days after the date the petition for approval is filed, and that for good cause the time may be extended, but not beyond 6 months from the date of the first hearing. 1912 Act, § 8, *as amended* by 1978 Act, § 5(a) *and* 1984 Act, § 3(b).

<sup>6</sup> At the hearings, Ronald Sr.'s attorney asked, "I understand that you may object to the validity of the will based on lapse of time, the fact he got married, he had kids. . . . Do we need to bring [attesting witness Robert Kelly] in here to testify as to the validity of this will?" Hearing Tr., Mar. 26, 2013, at 15-16 (AR Tab 16). Counsel for Anita and the children responded, "No. . . . I know he's extremely thorough." *Id.* at 16. Counsel further explained that, "no matter what Robert Kelly would say, we have the burden of proof of establishing" undue influence or lack of testamentary capacity, and "I don't have evidence to that . . . . I would approach it from . . . does a will become stale?" *Id.*

(continued...)

the existence of pretermitted heirs does not invalidate a will, and that the Beneficiaries are entitled to take a portion of Decedent's estate under the will. *Id.* at 3-5. He reiterated the Beneficiaries' request for the Superintendent to approve the will and to allow the state court to determine "the portion of the estate which should be received by each of the parties involved." *Id.* at 6.

On December 23, 2013, the Special Attorney recommended to the Superintendent that Decedent's will be disapproved. Special Attorney's Memorandum at 3 (AR Tab 37). The Special Attorney expressly assumed that the will was valid, explaining that the parties had "largely proceeded on this basis." *Id.* He recommended that the will be disapproved because, in sum, Decedent's children were pretermitted, under Oklahoma law they would take any property not taken by the spouse, the Beneficiaries would take nothing, and the children had asked that the will be disapproved. *Id.* The Special Attorney also stated that it would not be "equitable to eliminate children and spouses because the decedent failed to update his will." *Id.*

On February 4, 2014, the Superintendent issued the Order Disapproving Will. The Superintendent concluded that the will met the requirements of Oklahoma law for a valid will in that it was in writing and was signed and dated by the testator and two witnesses. Order Disapproving Will at 2 (unnumbered) (AR Tab 36). The Superintendent also concluded that, at the time Decedent executed the will, he possessed testamentary capacity, and that there was "no evidence" the will was the product of fraud, duress, menace, coercion, or undue influence. *Id.* The Superintendent disapproved the will "for the reasons set forth" in the Special Attorney's memorandum. *Id.*

In this appeal to the Board, Appellants argue that: 1) Oklahoma statutes regarding pretermitted heirs do not render an otherwise valid will legally invalid; 2) the Special Attorney and Superintendent misinterpreted Oklahoma law as applicable to the distribution of Decedent's estate; and 3) the Order Disapproving Will substitutes BIA's view of the equities for Decedent's actual will. Opening Br., Apr. 1, 2014. Decedent's spouse and children filed a joint answer brief in which they stated that they would rely on their prior arguments and the record. Joint Answer Br., Apr. 30, 2014, at 2. In particular, they noted that they had urged the Superintendent to find that Appellants failed to provide testimony by the will witnesses to validate the will. *Id.* at 1-2. Appellants filed a reply brief, arguing that Decedent's spouse and children previously waived any objection to the validity of the

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There does not appear to have been any specific discussion of the second attesting witness, Penny Moore. Subsequently, counsel for Anita and the children withdrew, and Anita obtained another attorney while the children obtained their own attorney.

will for lack of testimony by the attesting witnesses and that the Superintendent agreed. Reply Br., May 15, 2014, at 1-2.

### Standard of Review

As relevant to this appeal, we review questions of law *de novo*. *In re the Will of Anna Pitts*, 55 IBIA 121, 124 (2012). Appellants bear the burden of showing error in the Order Disapproving Will. *See id.*

### Discussion

Pertinent to whether or not the will should be approved, the Superintendent concluded that Decedent's will met the requirements for a valid will under Oklahoma law, including that it was signed by the testator and two witnesses, that Decedent possessed testamentary capacity, and that there was no evidence the will was the product of undue influence. Order Disapproving Will at 2 (unnumbered); *see* 84 Okla. Stat. § 55 (requiring signatures on the will by two attesting witnesses). On appeal, Decedent's spouse and children stress that they requested—after the hearings—that the will be disapproved for lack of testimony from the will witnesses. Joint Answer Br. at 1-2 (citing Response of the Heirs to Beneficiaries' Objection at 1-3). But they do not respond to the specific findings by the Superintendent, which implicitly reject their argument. While the Superintendent's rationale is not further explained, for the reasons discussed below, we agree with Appellants that the argument was waived. *See* Reply Br. at 2.

As the Special Attorney noted in his recommendation to the Superintendent, the parties “largely proceeded” based on an assumption that the will was valid. Special Attorney's Memorandum at 3. For much of the hearings, it was the position of Decedent's spouse and children that because Decedent's will was made before his marriage and the birth of his children, it no longer reflected Decedent's testamentary intent, and thus should be set aside as “stale”—but not for lack of any witness testimony. *See, e.g., supra* note 6. After Decedent's spouse and children hired new attorneys, and the parties pivoted to discussions over a possible stipulation that the will was valid, the spouse and children were equivocal at best as to whether they would challenge the validity of the will. *See, e.g.,* Hearing Tr., June 25, 2013, at 12 (Anita's attorney stated, “There may not be any issue as to the validity of the will.”). Only after the hearings, in their joint filing of August 27, 2013, did Decedent's spouse and children complain about the lack of testimony from attesting witnesses. *See* Response of the Heirs to Beneficiaries' Objection at 1-3. By then, the time period for submitting evidence regarding the validity of the will, *see supra* note 5, had expired. We deem the argument to have been waived because Decedent's spouse and children explicitly declined Appellants' offer made during the hearings to call a will witness; they did not express their change of heart (e.g., by requesting that the Special Attorney

subpoena the witnesses) before the conclusion of the hearings or before the deadline for submitting evidence regarding the validity of the will; and they offered no argument or evidence as to how the testimony they now desire would support a finding that the will is invalid.

Turning now to the Superintendent's rationale for disapproving the will, it is based on the Special Attorney's interpretation of Oklahoma law that, as pretermitted heirs, Decedent's children would take any property not taken by Decedent's spouse. Order Disapproving Will at 2 (unnumbered); Special Attorney's Memorandum at 3. The Special Attorney recommended disapproval of the will because he believed that the Beneficiaries would receive nothing and lacked standing, and because Decedent's children had asked that the will be invalidated.<sup>7</sup> Special Attorney's Memorandum at 3.

Appellants are correct that the existence of pretermitted heirs does not provide a basis to disapprove a will. *See* Opening Br. at 5-7. Oklahoma law is unambiguous that a child born after the will's execution and omitted from it may receive "the same portion of the testator's real and personal property that he *would have* succeeded to *if the testator had died intestate*." 84 Okla. Stat. § 131 (emphases added); *see id.* § 132 (children who are unintentionally omitted from the will may receive "the same share in the estate of the testator, *as if he had died intestate*") (emphasis added). These statutes expressly do not invalidate the testator's will and leave him actually intestate. *See also* 46 Am. Jur. 2d *Wills* § 1518 (2015) ("Pursuant to a pretermitted heir statute, the testator is deemed to have died intestate with regard only to a specific child born or adopted after execution of a will, and the will itself is otherwise valid."). Accordingly, we have affirmed a superintendent's approval of an Osage will subject to the right of pretermitted heirs to take their intestate shares. *In re the Will of Mural W. Barnes*, 30 IBIA 7, 11-12 (1996). Nor does it matter, for purposes of the validity of Decedent's will, to what share of the estate the pretermitted heirs would be entitled.<sup>8</sup>

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<sup>7</sup> Contrary to the Special Attorney's conclusion about his authority to approve a possible stipulation for the will to be approved, "[i]n the case of any action in probate contesting the will of any Osage Indian, the Secretary of the Interior may approve any settlement relating to such action with respect to any property under the jurisdiction of the Secretary." 1912 Act, § 8, *as amended* by 1978 Act, § 5(a) *and* 1984 Act, § 3(b)(4). This authority does not evaporate because, in the Special Attorney's view, certain settling parties may allegedly lack standing.

<sup>8</sup> On appeal, the parties continue to dispute the amount of property to which Decedent's spouse, his children, and the Beneficiaries are entitled. *See, e.g.*, Opening Br. at 10 ("Decedent's [c]hildren are entitled to one-half of the estate."); Joint Answer Br. at 1 ("The primary issue [before the Superintendent] was whether the spouse and children would take (continued...)

Because the Superintendent's decision to disapprove Decedent's will is based on the existence of pretermitted heirs, and thus is contrary to law, we reverse that portion of the Order Disapproving Will.<sup>9</sup> In remaining part, we give effect to the Order Disapproving Will, specifically, the Superintendent's conclusions that the will was validly executed under Oklahoma law, that Decedent had testamentary capacity, and that the will was not the product of fraud, duress, menace, coercion, or undue influence. *See Estate of Clayton Donald Mountain Pocket*, 54 IBIA 236, 245 (2012) (reversing erroneous portions of decision and leaving intact parts showing that the requirements of a valid will were satisfied); *Estate of Blackowl*, 29 IBIA at 199-200 (same). Accordingly, we conclude that Decedent's will is approved for probate in the appropriate Oklahoma state court, subject to the right of Decedent's surviving spouse and pretermitted children to take their elective or intestate shares of Decedent's estate under Oklahoma law.

### 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 Superintendent's Order

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all of the estate against the legatees and devisees.”). The parties agree, however, that the distribution of the property is governed by Oklahoma law. Joint Answer Br. at 2; Reply Br. at 2-3. While we question the Special Attorney's interpretation of Oklahoma law that, after the will is approved, Decedent's spouse and children are entitled to take Decedent's entire estate, we leave the parties' disputes over the proper distribution of Decedent's estate assets under the will and Oklahoma law to be decided in Oklahoma state court.

<sup>9</sup> To the extent that the Superintendent also may have relied on the Special Attorney's opinion that Decedent would have wanted to include in any will his after-married spouse and after-born children, *see* Special Attorney's Memorandum at 3, that reliance was erroneous. Whether or not the Special Attorney was correct in his opinion of Decedent's wishes regarding pretermitted heirs, it was legally irrelevant as to whether the will should be approved. *See Tooahmippah v. Hickel*, 397 U.S. 598, 609-10 (1970) (holding that, in approving and disapproving Indian wills under 25 U.S.C. § 373, the Departmental official considering the will does not have authority to “revoke or rewrite a will that reflects a rational testamentary scheme . . . simply because of a subjective feeling that the disposition of the estate was not ‘just and equitable’”); *Estate of Archie Blackowl, Sr.*, 29 IBIA 195, 198-99 (1996) (holding that the probate judge lacked authority to disapprove an Indian will under § 373 on the basis of changed circumstances and the will's failure to provide for pretermitted heirs); *see also Estate of Edith Walker Brown*, 43 IBIA 221, 227 (2006) (“It is immaterial whether [the d]ecedent desired to execute a new will—intent alone is not sufficient to create, alter, or revoke an Indian will.”).

Disapproving Will in part, as provided in this order, and gives effect to the Superintendent's decision in remaining part.

I concur:

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// original signed  
Thomas A. Blaser  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge