



INTERIOR BOARD OF INDIAN APPEALS

In the Matter of the Will of Phyllis J. Campbell

63 IBIA 68 (05/20/2016)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

IN THE MATTER OF THE WILL OF)	Order Affirming in Part and Vacating
PHYLLIS J. CAMPBELL)	in Part the Order Approving Will
)	
)	
)	Docket No. IBIA 15-011
)	
)	
)	May 20, 2016

Henry Gene Kohlmeyer (Appellant) seeks review of a September 24, 2014, Order Approving Will issued by the Acting Osage Agency Superintendent (Superintendent), Bureau of Indian Affairs (BIA), approving the Osage will of Phyllis J. Campbell (Decedent), deceased unallotted Osage. The will devised Decedent’s Osage headright¹ interest outright and free of trust to her non-Osage friend, Martha A. Barnes. Federal statutes governing Osage wills preclude a non-Osage beneficiary from receiving more than a life estate in a headright interest. The Superintendent interpreted the devise to Barnes as limited to a life estate interest in the headright, with the remainder to vest in two of Decedent’s children, William E. Kohlmeyer and Dawnette R. Kohlmeyer, in equal shares, as contingent devisees.

Appellant argues that the Superintendent erred in approving the will because Federal law prohibits non-Osage individuals from inheriting any interest in Osage headrights or personalty. Thus Appellant contends that Federal law requires that the will be disapproved in its entirety, and that Decedent’s estate descend to her three children in equal shares by intestate succession. Appellant also maintains that a disclaimer executed by Barnes, which under the terms of the will would result in Decedent’s estate passing directly to William and Dawnette, was invalid under Oklahoma law.

The Board finds that Appellant has not proved error in the Superintendent’s Order Approving Will, although we modify the order to clarify that the Superintendent’s approval and interpretation of the will shall not be construed to preclude the Oklahoma probate

¹ A headright is the right to share in the per capita distribution of income, such as royalties and bonuses, generated from the Osage tribe’s mineral estate. *See Estate of Vivian M. Rogers*, 14 IBIA 217, 218 (1986).

court from giving effect to the disclaimer. Federal caselaw establishes BIA's authority to convert a fee interest devise to a life estate when an Osage will bequeaths more than a life estate in an Osage headright to a non-Osage beneficiary. And we reject Appellant's argument that an Osage will may not devise *any* interest in a headright to a non-Osage who is not an heir of the testator. Thus the Superintendent did not err in approving the will and interpreting it to devise a life estate to Barnes. But we vacate the order to the extent that it directs the remainder interest in the estate to vest in William and Dawnette, because such a modification is beyond the Superintendent's authority.

Statutory and Regulatory Framework

All wills executed by Osage Indians that dispose of Osage trust property, including headright interests, must be approved by BIA's Osage Agency Superintendent before they may be probated in Oklahoma state court. Act of Apr. 18, 1912 (1912 Act), Pub. L. No. 62-125, § 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; *In re Will of Leonard Morrell Maker*, 62 IBIA 33, 34 (2015). Such wills must be "executed in accordance with the laws of the State of Oklahoma." 1912 Act, § 8, *as amended*. The Superintendent decides whether to approve each will based on evidence adduced at a hearing on the will's validity. *Id.*

Appeals from action on wills of Osage Indians are governed by 25 C.F.R. § 17.14. The Secretary of the Interior's authority to consider and decide appeals from an action by the Superintendent approving or disapproving an Osage will, *see id.* § 17.14(a), has been delegated to the Board. *See* 212 Departmental Manual 13.4 (2012). Once approval of an Osage will becomes final, the will may be submitted to the appropriate Oklahoma state court for probate. 1912 Act, § 3, *as amended by* 1978 Act, § 5(a) *and* 1984 Act, § 3(a).

Background

Decedent died testate on November 28, 2010. Order Approving Will, Sept. 24, 2014, at 1 (unnumbered) (Administrative Record (AR) 17). Decedent was survived by her three children, William Kohlmeyer, Dawnette Kohlmeyer, and Appellant. *Id.*; *see also* Hearing Transcript (Tr.), July 29, 2014, at 16 (AR 16) (Decedent's husband predeceased her). At the time of her death, Decedent owned a 0.05556 Osage headright interest. Order Approving Will at 1 (unnumbered).

On July 22, 2010, Decedent executed a will devising her entire residuary estate² to Martha Ann Barnes, “outright and free of trust.” Last Will and Testament of Phyllis J. Campbell, July 22, 2010, at 1 (Will) (AR 12). Barnes, a non-Osage individual, was a close friend of Decedent and her late husband. *See* Hearing Tr. at 16. The will also directed that should Barnes predecease Decedent or disclaim her interest in the estate, the estate would pass to “only two of [Decedent’s] children, Willie Kohlmeyer and Dawnette Kohlmeyer, outright and free of trust, in equal shares,” or to their “survivor(s) . . . in equal shares.” Will at 1. The will made no provision for Appellant to inherit any interest in Decedent’s estate. *See id.* Decedent’s will was prepared by attorney Julie McKain, and witnessed by Nona Friske and Allen Hartless, in Aransas County, Texas, where Decedent was domiciled and resided at the time of her death. *Id.* at 1-2; *see also* Hearing Tr. at 22-23.

On October 30, 2013, Barnes executed a disclaimer of “all interest in the Osage head rights [sic] of Phyllis Jean Campbell (deceased 11/28/10).” Disclaimer, Oct. 30, 2013 (AR 15). The disclaimer did not include or refer to any other real or personal property interest in Decedent’s residuary estate. *Id.* As provided for in 25 C.F.R. Part 17, a hearing was called to take testimony concerning Decedent’s will; the will witnesses and will attorney were subpoenaed to provide testimony; and notice was provided to Appellant, William, Dawnette, Barnes, and legal counsel. *See* Notice of Hearing, Apr. 7, 2014 (AR 3); *see also* Subpoenas (AR 9, 10, 11). The disclaimer was admitted into evidence during the hearing held July 29, 2014. Hearing Tr. at 70.

At the hearing, Appellant argued that Barnes’s disclaimer was invalid under Oklahoma law, and objected to the will as invalid because of the devise of Decedent’s headright interest to Barnes, a non-Osage. *Id.* at 68-69. Following review of the transcript of the hearing, the record, and the recommendation of the Special Attorney,³ the Superintendent issued his Order Approving Will. The Superintendent found, and Appellant does not dispute, that the will was properly executed in accordance with the laws of Oklahoma and that Decedent had testamentary capacity and was acting under her own free will at the time the will was executed. Order Approving Will at 2 (unnumbered). Having noted that Decedent’s estate included a 0.05556 Osage headright interest, *id.* at 1 (unnumbered), the Superintendent approved the will “subject to the interpretation” that Barnes receives a life estate in Decedent’s headright interest, with the remainder to vest in

² The residuary estate is defined as “the part of a decedent’s estate remaining after payment of all debts, expenses, statutory claims, taxes, and testamentary gifts (special, general, and demonstrative) have been made.” Black’s Law Dictionary 666 (10th ed. 2014).

³ Hearings concerning approval of Osage wills are conducted by the Special Attorney, *see* 25 C.F.R. §§ 17.1 and 17.3, who is also charged with preparing the record and providing a recommendation to the Superintendent, *id.* § 17.10.

William and Dawnette, *id.* at 2 (unnumbered). In approving the will, the Superintendent did not rule on the validity of the disclaimer. *See id.* at 1 (unnumbered).

Appellant appealed the Order Approving Will to the Board and filed an opening brief. William Kohlmeyer answered, and Appellant filed a reply.

Discussion

I. Standard of Review

The Board reviews questions of law *de novo*, and Appellant bears the burden of showing error in the Superintendent's decision. *In re Will of Maker*, 62 IBIA at 38; *see also In re Will of Anna Pitts*, 55 IBIA 121, 124 (2012).

II. The Board Affirms the Superintendent's Approval of the Will

Appellant raises two issues of law on appeal: (1) whether the disclaimer executed by Barnes is valid under Oklahoma state law; and (2) whether the will is valid under the Osage will statutes. Appellant first argues that the disclaimer was invalid because, he contends, it was not timely filed and was not in the form required by Oklahoma law. Opening Brief (Br.), Dec. 1, 2014, at 3-4. The Superintendent approved the will without ruling on the disclaimer, and the Board similarly refrains from doing so on appeal because that determination is more properly left to the appropriate Oklahoma court during the probate of Decedent's estate. *See Estate of Jesse Earl Jones*, IA-881 (January 5, 1959) (concluding that the Secretary should avoid interpreting Oklahoma law when approving a will and leave questions of Oklahoma law for resolution by the Oklahoma courts).

However, assuming, without deciding, that Barnes's disclaimer is invalid, as argued by Appellant, the disclaimer's invalidity would not render the will invalid as well. First, the will devised not just the headright interest that was the subject of the disclaimer, but "all of the rest and residue of [Decedent's] estate, of every kind and character, real, personal and mixed." Will at 1. The residuary estate also included, therefore, Decedent's IIM account and any other real or personal property in Decedent's estate. The alleged invalidity of the disclaimer, which was limited to the headright interest, would not otherwise affect the devise of Decedent's estate according to the terms of the will. If, on the other hand, the Oklahoma court determines that the disclaimer is valid, it would presumably trigger the contingent gift clause and the residuary estate would pass to William and Dawnette as contingent devisees.

Second, despite Appellant's arguments to the contrary, Decedent's attempt to convey her headright interest to Barnes was not, itself, impermissible, and the Superintendent did

not err in modifying the fee devise to a life estate to give effect to Decedent's clear testamentary intent. The Superintendent found, and Appellant does not dispute, that the will meets the requirements for a valid will under Oklahoma law, that Decedent possessed testamentary capacity at the time the will was executed, and that she understood the nature and extent of her testamentary act. Order Approving Will at 2 (unnumbered). Thus the Board affirms the Superintendent's approval of the will.

A. Federal Law Does Not Prohibit an Osage Indian From Devising a Headright Interest to a Non-Osage Who Is Not an Heir

Appellant argues that § 5(c) of the 1978 Act prohibits Osage Indians from devising headright interests to anyone but their "heir[s] of Indian blood." Opening Br. at 5. Section 5(c) states that "none but heirs of Indian blood and children legally adopted . . . and parents, Indian or non-Indian, shall inherit from Osage Indians any right, title, or interest to any restricted land, moneys, or Osage headright or mineral interest." 1978 Act, § 5(c), *as amended by* 1984 Act, § 2(b) (correcting typographical error by replacing (7) with (c)). Section 5(c) is subject to § 7, which provides that "[n]o person who is not an Osage Indian may . . . receive any interest in any headright, other than a life estate." *Id.* § 7, *as amended by* 1984 Act, § 2(e). Appellant believes that § 7 serves to clarify that if a decedent's heir is not also Osage Indian, the heir would only receive a life estate in the property interest. Opening Br. at 5; *see also Akers v. Hodel*, 871 F.2d 924 (10th Cir. 1989) (explaining distinction between having Osage blood and being Osage Indian).

According to Appellant, Decedent's will is therefore "in direct violation of the 1978 and 1984 Acts by her attempt to convey her Osage headright interests to a non-Osage, who is not an heir of her Indian blood . . ." Opening Br. at 5. The Board rejects Appellant's interpretation of the pertinent Osage statutes to so limit Osage testators from devising their property. Rather than controlling the testator's right to *devise* property, Section 5(c) instead restricts who may *inherit* property by intestate succession. *See* 1978 Act, § 5(c) (amending § 7 of the Act of February 27, 1925 (43 Stat. 1008, 1011) (1925 Act)). And it is clear that Congress knew how to distinguish between the acts of "devising" and "inheriting" when regulating the distribution of Osage property. *Compare* 1925 Act, § 3 (referring to "[l]ands devised to members of the Osage Tribe" and "lands inherited by such Indians") *with id.* § 7 ("none but heirs . . . shall inherit"). Moreover, § 7(b) explains that "an individual who is not an Osage Indian may receive a life estate in any headright." 1978 Act, § 7, *as amended*. Section 7 focuses on who may *receive* property, rather than prohibiting any type of devise, and does not require that the individual receiving the headright interest also be an heir of the testator, despite Congress's clear ability to distinguish between heirs and non-heir devisees. *Compare id. with* 1978 Act, § 5(c). Thus nothing in the applicable Osage statutes prohibits an Osage testator from devising a headright interest to a non-Osage devisee, and Decedent's devise of her headright interest to Barnes is not unlawful.

B. The Superintendent Did Not Err in Modifying the Headright Devise to Barnes to a Life Estate

When an Osage testator devises more than a life estate in a headright interest to a non-Osage individual, as Decedent does here, the proper result is not disapproval of the will, but modification of the devise to a life estate. The Court of Appeals for the 10th Circuit approved of this practice in *Crawley v. United States*, 977 F.2d 1409 (10th Cir. 1992), and its holding is dispositive to the facts of this case. In *Crawley*, the decedent devised her entire estate, including an Osage headright interest, to her husband who was not an Osage Indian. *Crawley*, 977 F.2d at 1410. The superintendent disapproved the headright devise to the decedent's husband, and ordered that the headright vest instead in the decedent's children. *Id.* On appeal to the regional solicitor,⁴ the will was modified to distribute to the husband a life estate in the headright, with the remainder in the decedent's children. *Id.* The children then appealed to federal court. *Id.*

The 10th Circuit held that the Osage statutes gave the superintendent the authority to modify an Osage will to convert a fee interest to a life estate devise where more than a life estate in a headright interest was devised to a non-Osage individual in an Osage will. *Id.* at 1411. The Court read the applicable Osage statutes "to permit the Secretary to modify wills so that they do not violate the statutes' restraint on alienation," while fulfilling "the intent of Osage testators to the fullest extent possible under federal law." *Id.* at 1411-12. In doing so, the Court relied on the express wording of § 7 of the 1978 Act, which "forbids not the *granting* of more than a life estate, but the *receipt* of more than a life estate." *Id.* at 1411.

Decisions of the Board are final for the Department of the Interior, and are subject to judicial review. See 43 C.F.R. § 4.21(d); 5 U.S.C. §§ 701-706. Appeals to the Federal courts of the Board's Osage will decisions are within the jurisdiction of the 10th Circuit. Thus the *Crawley* decision is controlling authority for the Board in this matter, and we find that the Superintendent did not err in approving the will subject to modification of the fee devise to a life estate interest in the headright.

⁴ At the time of the superintendent's decision, authority to decide appeals of a decision concerning an Osage will was vested in the Office of the Solicitor. Responsibility for disposition of appeals from action on Osage wills was transferred to the Board on March 16, 1992. See *In re Will of Emanuel Mal Revard*, 37 IBIA 52, 54 n.2 (2001) (discussing Departmental Manual (DM) Release 2937).

C. This Decision Shall Not Affect the Oklahoma Court's Ability to Give Effect to the Disclaimer

For reasons previously discussed, the Board refrains from deciding whether Barnes's disclaimer is valid. However, nothing in this decision shall be construed as precluding the Oklahoma court from giving effect to the disclaimer. If the disclaimer is found to be valid, the modification of the will would be moot, and the residuary estate would presumably pass to William and Dawnette under the contingent gift clause.

III. The Superintendent's Designation of the Remainder Interest in Decedent's Headright is Vacated

The Superintendent approved Decedent's will, "subject to the interpretation that after the life estate inherited by [Decedent's] non-Osage friend, Martha A. Barnes, the remainder will vest in Testatrix's two children, [William and Dawnette]." Order Approving Will at 2 (unnumbered). The Superintendent thereby made two modifications to the will, first in converting Barnes's headright interest to a life estate, and second in vesting the remainder interest in William and Dawnette. As we have discussed, the first modification was permissible under *Crawley*. But the modification designating the remainder interest was beyond the Superintendent's authority granted by the Osage statutes.

The will's contingent gift clause, which names William and Dawnette as contingent devisees, only becomes effective if Barnes died before Decedent, or disclaims her interest in the residuary estate. Will at 1 (unnumbered). Whether, under Decedent's will, Barnes's disclaimer was sufficient to trigger the contingent gift clause devising the residuary estate to William and Dawnette, has yet to be determined. Moreover, the will did not clearly designate remaindermen to a life estate. How the property is ultimately distributed is left to the purview of the Oklahoma court, and the Board therefore vacates that part of the Order Approving Will that determines that the remainder interest to Barnes's life estate vests in William and Dawnette.

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 in part and vacates in part the September 24, 2014, Order Approving Will.

I concur:

// original signed
Robert E. Hall
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge