



INTERIOR TULSA REGIONAL SOLICITOR

Estate of Lillie Morrell Burkhart

3 IBIA 284 (01/02/74)

ESTATE OF LILLIE MORRELL BURKHART

Decided January 2, 1974

IA-T-27

Indian Probate: Appeal: Reconsideration--Indian Probate: Appeal: Waiver of Late Filing--Indian Probate: Reconsideration: Generally--Indian Probate: Secretary's Authority: Generally

The Secretary of the Interior has by express terms reserved to himself the power to waive and make exceptions to his regulations affecting Indian matters and, further, has the inherent power, notwithstanding the absence of specific regulations so providing, to reopen and review administrative determinations purporting to be final.



# United States Department of the Interior

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IA-T-27

January 2, 1974

Estate of Lillie Morrell Burkhart,  
deceased Osage Allottee No.2185

: Appeal from action of the  
: Superintendent of the Osage  
: Agency approving last will  
: and testament and denying  
: Motion For Reconsideration  
:  
: Appeal Denied

On April 11, 1973, the appellant, William Wabaunsee, filed with the Superintendent of the Osage Agency, Pawhuska, a Motion For Reconsideration seeking a rehearing on the decision of the Superintendent, Osage Agency, Bureau of Indian Affairs, dated February 7, 1968, approving the Last Will and Testament of Lillie Morrell Burkhart, Osage Allottee No. 2185, deceased, dated April 5, 1966. By a Notice dated August 14, 1973, the Superintendent, Osage Agency, denied the said Motion For Reconsideration, and the appellant, William Wabaunsee, joined by the appellant Mrs. Lillie DesCygne Morrell Robedeaux, a niece and devisee of the decedent, filed with the Superintendent a Notice Of Intention To Appeal dated August 27, 1973, pursuant to which they appeal from the denial of the appellant's Motion For Reconsideration.

Through counsel, Mrs. Robedeaux filed with the Superintendent an Appeal To Secretary Of The Interior And Brief dated September 11, 1973, alleging that the Superintendent had approved the will of the decedent dated April 5, 1966, in spite of evidence of undue influence and lack of

testamentary capacity, and that said will devised real property in contravention of the Act of February 27, 1925, ch. 359, 43 Stat. 1008, as amended by the Act of September 1, 1950, ch. 832, 64 Stat. 572.

William Wabaunsee, on September 25, 1973, filed with the Superintendent an Appeal To The Secretary Of The Interior And Brief alleging that the Superintendent's decision dated August 14, 1973, denying said Motion For Reconsideration was based on "mistakes of fact, law and discretion committed by the Superintendent". On October 5, 1973, the Oklahoma Historical Society, a devisee under the will of the decedent dated April 5, 1966, filed an Answer To Appeals To Secretary Of The Interior.

The decision of the Superintendent of the Osage Indian Agency dated February 7, 1968, was the decision of the Secretary, made for him pursuant to the provisions of the Act of April 18, 1912, ch. 83, 39 Stat. 86, and the delegation of authority set forth in 25 CFR 17.12. The decision became final when no interested parties gave written notice of intention to appeal within fifteen days after notice of said decision was mailed. 1/

The Secretary has by express terms reserved to himself the power to waive and make exceptions to his regulations affecting Indian matters, 2/ but such power will be exercised only in cases where the most compelling

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1/ 25 CFR 17.14(b).

2/ 25 CFR 1.2.

reasons are present. 3/ Furthermore, the Secretary has the power, notwithstanding the absence of specific regulations so providing, to reopen and review administrative determinations purporting to be final. 4/

The “Motion For Reconsideration” and “Notice Of Intention To Appeal”, together with the “Appeal To Secretary Of The Interior And Brief” filed by appellant William Wabaunsee and by appellant Lillie DesCygne Morrell Robedeaux, therefore, will be considered here as a request to the Secretary that he make an exception to the regulations governing actions on wills of Osage Indians, 5/ and that he reopen the administrative proceedings for approval of the decedent’s will. Disposition of such request for reopening will be made herein pursuant to the delegation of authority by the Secretary to the Solicitor, 6/ and the redelegation of authority by the Solicitor to the Regional Solicitor. 7/

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3/ Estate of Sophie Iron Beaver Fisherman, IBIA 73-11 (October 16, 1973); Estate of William Bigheart, Jr., IA-T-21 (Supp.) (September 4, 1969).

4/ Lane v. Mickadiet, 36 S. Ct. 599 (1916); Peoria Tribe v. Wea Townsite Co., 117 F.2d 940 (10th Cir. 1941); Hanson v. Hoffman, 113 F.2d 780 (10th Cir. 1940); Nimrod v. Jandron,

24 F.2d 613 (D.C. Cir. 1928); Dixon v. Cox, 268 F. 284 (8th Cir. 1920) ; Estate of Joseph Cannon, IA-T-19 (Supp.) (March 7, 1969); Estate of Edward Leon Petsemoie, IA-T-10 (Supp.) (May 29, 1968); Estate of Inez (Agnes) Gayton King, IA-D-1 (Supp.) (February 3, 1967); Estate of Ute, IA-143 (August 25, 1955); Estate of Meshach (Mace) Tipton, IA-41 (January 19, 1951); Estate of Sara Chahse-nah, IA-2 (June 29, 1950).

5/ 25 CFR 17.1-17.14.

6/ 210 DM 2.2A(3)(a), 38 F.R. 29623.

7/ Solicitor’s Regulation 23, 31 F.R. 4631.

As was noted in Estate of William Bigheart, Jr., *supra*, and in Estate of Ellen Fitzpatrick, IA-T-5 (Supp.) (November 5, 1968), the few instances in which the Secretary has granted the extraordinary relief of reopening Indian probate proceedings involved either fraud, 8/ or failure to conduct the proceedings in the manner required by statute and regulations. 9/ It was further noted in these cases that, even when the Secretary has recognized the probable validity of a petitioner's claim, the Secretary has declined to reopen Indian probate proceedings because the "public interest requires that proceedings relating to Indian estates be brought to a final conclusion sometime in order that the property rights of the heirs or devisees may be stabilized." 10/

The record before me discloses that the decedent, Lillie Morrell Burkhart, Osage Allottee No. 2185, died on September 2, 1967. Her Last Will and

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8/ Lane v. Mickadiet, 36 S. Ct. 599 (1916); Mickadiet v. Payne, 269 F. 194 (D.C. Cir. 1920), aff'd mem., 42 S. Ct. 381 (1922) (decree of adoption secured by fraud).

9/ Entry of order based on inadequate record: Nimrod v. Jandron, 24 F.2d 613 (D.C. Cir. 1928); Estate of Sarah Malewind, 53 I.D. 519 (1931); Entry of two contradictory orders for estate of one decedent: Estate of Gi we bi nes i kew, IA-D-19 (March 1, 1968); Entry of order for estate of living person: Estate of Es sun sey, IA-D-16 (December 21, 1967); Entry of order without notice to minor or incompetent not represented at hearing: Estate of Sam Shawagon, IA-D-10 (August 4, 1967); Estate of Betty May Black Garcia, IA-P-3 (July 21, 1967); Estate of Es Sun E Cly, IA-1278 (June 29, 1966); Entry of order without notice: Estate of George Squawlie, IA-1231 (April 5, 1966); Entry of order without notice or hearing: Estate of Kneale Blackbird, IA-62 (February 19, 1952).

10/ Estate of Abel Gravelle, IA-75 (April 11, 1952); accord, Estates of Jose Sandoval et al., IA-1337 (May 17, 1966).

Testament, dated April 5, 1966, was approved by the Superintendent of the Osage Agency on February 7, 1968, pursuant to the Act of April 18, 1912, supra, and 25 CFR 17.12. On April 10, 1968, the said will was admitted to probate by the County Court of Osage County, Oklahoma. The Order admitting the said will to probate was appealed through the District Court of Osage County to the Supreme Court of Oklahoma, which referred the matter back to the Court of Appeals where said Order was affirmed. The record further discloses that the appellants were present and represented by counsel at all stages of the administrative proceedings. It appears from the record that at the hearing conducted prior to the approval of the decedent's will, appellant William Wabaunsee testified that he was a distant relative of the deceased, and that he claimed no interest in the estate. It was not until after the District Court admitted the decedent's will to probate that the appellant William Wabaunsee claimed to be a surviving spouse.

The foregoing circumstances do not justify granting an exception to the regulations governing action on wills of Osage Indians and to reopen the administrative proceedings for approval of the decedent's will. Furthermore, it should be noted that the authority delegated to the Superintendent pursuant to the Act of April 18, 1912, supra, is limited to this approval or disapproval of wills, and that the remaining probate function, including the admission of any approved will to probate, is the responsibility of a state court. The appellants, in that forum, had ample opportunity to object to and offer evidence in opposition to

