



INTERIOR BOARD OF INDIAN APPEALS

Estate of Ellen Phillips

7 IBIA 100 (12/06/1978)

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# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

## ESTATE OF ELLEN PHILLIPS

IBIA 78-14

Decided December 6, 1978

Appeal from an order denying petition for rehearing.

Affirmed.

1. Indian Probate: State Law: Applicability to Indian Probate, Intestate Estates: Generally

Under sec. 5 of the General Allotment Act, 25 U.S.C. § 348 (1976), the Department is required to apply the law of the State in which the allotment is located in determining the heirs of the deceased allottee.

2. Indian Probate: Homestead Right: Generally

The Department of the Interior has recognized homestead rights in those cases where such rights have been found necessary and purposeful in the distribution of intestate estates under State law.

APPEARANCES: Michael I. Jeffery, Esq., Alaska Legal Services Corporation, for appellant Shirley Phillips.

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON

Ellen Phillips, hereinafter referred to as decedent, an Alaskan Native, died, intestate on October 2, 1978, possessed of an undivided one-half interest in restricted property described as Lot 11, Block 42, Barrow Townsite, United States Survey 4615.

A hearing was duly held and concluded at Barrow, Alaska, on September 29, 1977. From the evidence adduced therein Administrative Law Judge William E. Hammett on November 23, 1977, issued an order determining heirs wherein he found the decedent's heirs to be Shirley Phillips, husband, and Samuel Ekosik, adopted son, each entitled to one-half of decedent's interest in the above-described property pursuant to the laws of intestate succession of the State of Alaska (§§13.11.010(4) and 13.11.015(1), Alaska Stat. 1972).

The judge also found that the property involved herein was on July 26, 1965, through a Native restricted townsite deed, conveyed to the decedent and appellant as tenants in common rather than tenants by the entirety.

A petition for rehearing, dated January 22, 1978, was filed by the appellant on January 27, 1978. In support of the petition appellant alleged that the judge in his order of November 23, 1977, misstated Alaska law in the following respects: (1) In finding that

the decedent's interest in the property in question was that of a tenant in common, and (2) In failing to find that homestead and other statutory rights were applicable.

The judge on February 28, 1978, denied the petition for the following reasons:

(1) That a tenancy in common was created in the property by the trustee's deed of July 26, 1965, pursuant to Alaska law (AS 34.15.110) in effect at that date which provided as follows:

A conveyance or devise of land or an interest in land made to two or more persons, other than executors and trustees, as such, shall be construed to create a tenancy in common in the estate, unless it is expressly declared in a conveyance or devise that the grantees or devisees take the lands as joint tenants.

He further found petitioner's argument that a tenancy by the entirety was created by a 1970 amendment 1/ was without merit in view of the fact that the amendment had no retroactive effect, thus, leaving unchanged the quality of the tenancy created by the deed of July 26, 1965, i.e., a tenancy in common.

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1/ Section 34.15.110 was amended in 1970 and now reads as follows:

"(a) A conveyance or devise of land or an interest in land made to two or more persons, other than to executors and trustees, as such, shall be construed to create a tenancy in common in the estate, except as provided in (b) of this section.

"(b) A husband and wife who acquire title in real property hold the estate as tenants by the entirety, unless it is expressly declared otherwise in a conveyance or devise. The conveyance shall recite the marital status of the parties acquiring title to the real property."

(2) That the Departmental decisions in the Estates of Titus Jug (Jugg), 36846-33, and Alex Horned Eagle, 36360-35, were controlling in not recognizing homestead rights on trust lands.

Having determined that the appellant and the adopted son inherited equally as tenants in common the judge followed the precedents set forth in Jug (Jugg), and Horned Eagle, supra. Accordingly, he gave no recognition to the homestead allowance and other special rights.

[1] There appears to be no argument that the Alaska laws of intestate succession are applicable in this case. Under section 5 of the General Allotment Act, 25 U.S.C. § 348 (1976), the Department is required to apply the law of the State in which the allotment is located in determining the heirs of the deceased allottee. 2/

However, while obligated to apply State laws of descent or inheritance, the determination and settlement of all other questions or controversies concerning the heirship to allotted and other restricted Indian lands is vested solely in the Secretary, uncontrolled by the laws of a State or court decisions construing State law. Estate of

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2/ 25 U.S.C. § 348 in pertinent part provides: “The United States does and will hold the land thus allotted, \* \* \* in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in the case of his decease, of his heirs according to the laws of the State or Territory where such land is located,\* \* \*.”

Lucy Thompson, 60 I.D. 125, 127 (1948); Bertrand v. Doyle, 36 F.2d 351 (10th Cir. 1929); First Moon v. White Tail and United States, 270 U.S. 243 (1926); Hallowell v. Commons, 239 U.S. 506 (1916); Lane v. Mickadiet, 241 U.S. 201 (1916).

Clearly, the issue of whether homestead and other similar rights are to be recognized on trust or restricted lands falls within the jurisdiction of the Secretary. In order to resolve such issue one must look to Federal statutes and Departmental regulations and decisions. We find no Federal statute which mandates recognition of homestead rights or allowances in restricted allotments. Neither do the regulations, 43 CFR 4.200 et seq., make such allowances or rights mandatory. Under 43 CFR 4.240(a)(5) an administrative law judge is required to make a determination of any rights of dower, curtesy or homestead which may constitute a burden upon the interest of the heirs.

In the instant case, the judge in the absence of specific statutes and regulations mandating homestead and other special rights, looked to past decisions of the Department on the subject. In so doing he found and concluded the decisions of Jug (Jugg), and Horned Eagle, supra, to be controlling and determinative of the issue insofar as this estate is concerned.

Homestead rights and similar rights are generally accepted and recognized in the majority of the States for the specific purpose of

protecting the surviving spouse and dependent children from creditors and from levy and forced sales. 40 Am. Jur. 2d, Homestead § 53. Homestead rights generally are not intended to operate to the prejudice of cotenants or deprive them of their enjoyment of the property. Cole v. Coons, 178 P.2d 997 (Kan. 1947); Cooley v. Shepherd, 225 P.2d 75 (Kan. 1950); Sayers v. Ryland, 161 SW.2d 769 (Tex. 1942), 140 ALR 1164; 4A Thompson, Real Property, Estates in Freehold, sec. 1937.

[2] The Department of the Interior has recognized homestead rights whenever such rights have been found necessary and purposeful in the distribution of intestate estates under State law.

Considering the present case along the foregoing recognized concepts concerning homestead rights or allowances, we fail to see the necessity of invoking the Alaskan laws of homestead allowances. In a first instance there are no creditors seeking satisfaction of any indebtedness. Assuming arguendo that there were creditors they could not in any event levy and force a sale of the trust or restricted lands in satisfaction of claims unless with the approval of the Secretary of the Interior. 25 U.S.C.A. § 412(a) and 48 U.S.C.A. § 355(a). Accordingly, insofar as this estate is concerned, recognizing homestead allowances and other special rights would serve no useful purpose as the surviving husband's tenure in the property involved is already amply protected and assured.

Appellant further contends that section 13.11.125 of the Alaska statutes creates a right to a homestead allowance in the amount of \$12,000 in the surviving spouse. Accordingly, the appellant contends that he is entitled to the entire estate to the exclusion of the other heir, Samuel Ekosik, since the amount of the homestead allowance exceeds the value of the estate. We disagree. To do so would disregard completely the Alaska laws of intestate succession. We do not believe the Alaskan legislature intended the homestead allowance provision to serve as a means of disinheritance where the amount of the homestead allowance exceeds the value of the estate. The appellant cites no authority to substantiate his contention.

Appellant's final argument is that the rationale underlying the decisions in the Estate of Jug (Jugg), and Horned Eagle, *supra*, is inapposite in the context of this case. Specifically, appellant contends that because the decedent had no cotenants other than the appellant, there is no possibility of cotenants being deprived of their rights if the homestead allowance is recognized. This argument, like the other contention is likewise unacceptable as being without foundation or merit.

As previously indicated, the judge found the decedent and the appellant held the property in question as tenants in common and not as tenants by the entirety. Accordingly, the decedent's interest in the property passed to the surviving spouse and the adopted son as tenants in common in accordance with Alaska law, sections 13.11.010(4)

and 13.11.015(l). Under such circumstances we find the rationale of the Horned Eagle case, supra, regarding cotenants to be applicable and dispositive of this case.

In view of the reasons set forth above we find no reason to disturb the judge's decision of February 28, 1978, and it should be affirmed.

NOW, THEREFORE, by virtue of the authority of the Secretary of the Interior, 43 CFR 4.1, the Order Denying Petition for Rehearing of January 22, 1978, is affirmed and the appeal is dismissed.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed

Alexander H. Wilson  
Chief Administrative Judge

I concur:

//original signed

Mitchell J. Sabagh  
Administrative Judge