



INTERIOR BOARD OF INDIAN APPEALS

Estate of Paul Wilford Hail

13 IBIA 140 (03/28/1985)



United States Department of the Interior

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

ESTATE OF PAUL WILFORD HAIL

IBIA 84-52

Decided March 28, 1985

Appeal from an order denying rehearing issued by Administrative Law Judge Sam E. Taylor in IP TU 235 P 82, IP OK 208 P 84.

Affirmed.

1. Indian Probate: Wills: State Law: Applicability to Indian Probate

The authority of the Secretary of the Interior to approve an Indian will is controlled by 25 U.S.C. § 373 (1982) and regulations published in 43 CFR 4.260-.262, not by state law.

2. Indian Probate: Wills: Construction of

The principal criterion guiding an Administrative Law Judge in construing an Indian will is always the intention of the testator, if that intention can be reasonably ascertained and it is not contrary to an established rule of law or in violation of public policy.

3. Indian Probate: Appeal: Generally

The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was erroneous is on the person challenging the decision.

APPEARANCES: Daniel G. Webber, Esq., Watonga, Oklahoma, for appellants; Delbert Allen Hail, pro se. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On September 17, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Rosemary Hail Conner on behalf of her minor children, Dawn Standing Conner and Jennifer Conner (appellants). Appellants sought review of a July 18, 1984, order denying petition for rehearing entered in the estate of their uncle, Paul Wilford Hail (decedent), by Administrative Law Judge Sam E. Taylor. The order denied rehearing of a May 9, 1984, order

approving decedent's will and ordering distribution of his Indian trust property equally to nine individuals specified in the will. None of them has entered an appearance in this matter. For the reasons discussed below, the Board affirms the order denying rehearing.

Background

Decedent, a Cheyenne-Arapaho unallottee, was born on December 26, 1943, and died on April 8, 1982, in Oklahoma City, Oklahoma. He was unmarried and had no children. His mother was still living, but his father had predeceased him. Hearings to probate decedent's Indian trust estate were held on December 8, 1982, and on February 24, 1983. As a result of testimony introduced at the hearings, the Administrative Law Judge found that decedent's sole heir at law was his mother, Amanda Roman Nose, a Cheyenne-Arapaho unallottee.

On March 31, 1976, however, the decedent had executed a will with the following provisions:

FIRST.--I desire that all my legal debts be paid, including the expenses of my last illness funeral, and burial.

SECOND.--I give, devise, and bequeath to--Donnie Ray Seger, my nephew; Marlene Hadley, my cousin; Virgil Perry, my nephew; Marlene Roman Nose, my cousin; Vida Black Wolf, my niece; Kelly Sumo Black Wolf, my niece; Dawn Standing Conner, my niece; Jennifer Conner, my niece; Leroy Perry, Jr., my nephew, an undivided 1/9 interest each in and to all interest I now own or may die possessed of in and to Cheyenne-Arapaho Allotments No. 1470 (HAIL, Deceased); No. 1471 (CROSS KILLER, Deceased); and No. 1651 (LEONARD BOYNTON, Deceased): also in and to that Town Property in Colony, Oklahoma, in which I now own an interest.

I have never been married and have no children.

My mother is Amanda Roman Nose Hail, who is still living; my father was Elmo Ralph Hail, who is now deceased. I have no brothers. My only sister is Rosemary Hail Conner, who is the mother of my nieces above named. I do not wish any person other than my above named nieces to inherit any of my property.

I give, devise, and bequeath all of the rest and residue of my estate, real, personal, and mixed to: Donnie Ray Seger, Nephew; Marlene Hadley, my cousin; Virgil Perry, my nephew; Marlene Roman Nose, my Cousin; Vida Black Wolf, my niece; Kelly Sumo Black Wolf, my niece; Dawn Standing Conner, my niece; Jennifer Conner, my niece, and Leroy Perry, Jr., My nephew, each an undivided 1/9 interest.

No objections were raised concerning the execution of decedent's will. Both during the hearings and on appeal, however, appellants contended that the first paragraph of the second bequest was inconsistent with the third paragraph of the bequest; that the third paragraph should govern since

it evidences a later intention than that of the first paragraph; and that, therefore, only appellants should receive any of decedent's property. Judge Taylor rejected appellants' contention in his May 9, 1984, order approving the will:

The cardinal rule in the construction of a will to which all other rules are subordinate is that the intention of the testator must be ascertained, if possible, and must be given effect if it is not contrary to an established rule of positive law or in violation of public policies. A clear and distinct devise or bequest is not affected by reasons, inference or argument from other parts of [the] will. Accordingly, in the instant situation, the decedent clearly and distinctly named 9 persons in paragraph Second of his will and he specifically devised to each a 1/9 interest in his share of specified allotments. He did the same in the residuary clause. Therefore, it is very clear what his intention was, i.e., that each of the 9 persons named in paragraph Second and as named in the residuary clause of his said will, receive a 1/9 share of his estate.

Appellants appealed this determination by a notice of appeal dated September 14, 1984. On October 10, 1984, the Board received a letter from Delbert Allen Hail, decedent's half brother, who sought to preserve whatever rights he might have to participate in decedent's estate. Appellants' opening brief was received on November 5, 1984.

Discussion and Conclusion

Essentially, this case involves only the issue of whether the Administrative Law Judge was correct in deciding that it was the decedent's intention for the nine persons named in the first paragraph of the second bequest and in the residual bequest, rather than his two nieces alone, to receive his property. However, since appellants' attorney has devoted much of his brief to arguing the proper construction of the will under Oklahoma law, it is first necessary to put to rest the notion that Oklahoma law is in any way relevant to the construction of decedent's will.

[1] As the Board pointed out in one of its early cases, Estate of Lucy Feathers, 1 IBIA 336, 343, 79 I.D. 693, 696 (1972), the authority of the Secretary to approve Indian wills which dispose of trust or allotted lands is

1/ Except as noted below, because of the disposition we make of the case, we do not reach the issue whether this intervention, filed after the time for appeal had expired, was proper.

Board member Lewis notes that if we characterize Delbert Allen Hail as an intervenor, his motion to intervene was timely as the appeal was then pending before the Board and 43 CFR 4.313 places no time restriction on intervention. In any event, Delbert Allen Hail's effort to share in the estate fails because he was not named in the will to receive any bequest, and our decision upholds the will.

set out in 25 U.S.C. § 373 (1982), and “[s]ince 1910, the Secretary, or his delegate--currently the Administrative Law Judge and this Board--has exercised this authority with the approval of the courts. Bond v. U.S., 181 F. 613 (9th Cir. 1910); Tooahnippah v. Hickel, 397 U.S. 598 (1970).”

Shortly after Bond the U.S. Supreme Court also sustained this statutory construction--for example, in Lane v. Mickadiet, 241 U.S. 201 (1916). Moreover, the Court specifically stated in reviewing an early Oklahoma case, Blanset v. Cardin, 256 U.S. 319, 326-27 (1921), that:

Our conclusion is the same as that of the Court of Appeals, "that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under this act of Congress, free from restrictions on the part of the State as to the portions to be conveyed or as to the objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior." The court added that the conclusion was in accord with the views of the Supreme Court of the State, referring to Brock v. Keifer, 59 Oklahoma, 5.

For two other leading Oklahoma cases, see Hanson v. Hoffman, 113 F.2d 780 (10th Cir. 1940), and Attocknie v. Udall, 390 F.2d 636 (10th Cir. 1968), cert. denied, 393 U.S. 833 (1968). Cf. Akers v. Morton, 499 F.2d 44 (9th Cir. 1974), cert. denied, 423 U.S. 831 (1975).

[2] The proper construction of an Indian testator's will is, therefore, primarily a matter for the Administrative Law Judge to determine. Estate of Herman Coando, 5 IBIA 140, 83 I.D. 229 (1976). As Judge Taylor noted, the principal criterion in construing an Indian will is the intention of the testator, if that intention can be reasonably ascertained and it is not contrary to an established rule of law or in violation of public policy. Estate of Dorothy Sheldon, 7 IBIA 11, 85 I.D. 31 (1978).

We therefore turn our attention to the intention of the testator. According to appellants, in their opening brief at page 2:

The record is uncontroverted that the Decedant [sic] did in fact have only one sister, as recited in said Will, that being Rosemary Hail Conner, and he did in fact have one brother or half-brother, Delbert Hail. It is further uncontroverted that ROSMARY HAIL CONNER is the mother of the two named devisees, DAWN STANDING CONNER and JENNIFER CONNER, and that none of the other parties named in the granting clause or in the residuary clause is a niece or nephew of decedent. All said other devisees are relatives of more or lesser degree (cousins of some degree) to decedent, except for "Marlene Hadley" who is an unknown person. There has been no testimony as to the existence of "Marlene Hadley" and no identification thereof and that "person" is not named on any notice within the file of this estate.

However, the relevant issue is not why decedent should or should not have done what he did in disposing of his estate; it is, rather, whether it

is possible to tell what testamentary scheme he had in mind at the time he executed the will. After reviewing the record and rereading the will, the Administrative Law Judge, in his order denying the petition for rehearing, concluded that:

In Paragraph SECOND of the decedent's will, he makes a specific devise to 9 individuals, including Dawn Standing Conner and Jennifer Conner. He devises the residue of his estate to the same 9 individuals. It is thus abundantly clear that he intended these 9 individuals to receive his estate.

The weight of the evidence in this case is in accord with that conclusion. Appellants' principal substantive argument appears to be that the last sentence of the third paragraph of the second bequest, which is unclear, renders the entire will ambiguous. Therefore, according to appellants, the third paragraph, which was obviously written after the first paragraph, must control, and it can only mean that appellants are intended to take the estate. However, it is not the first paragraph of the second bequest that is ambiguous; it is, rather, the third paragraph itself. Moreover, appellants' argument that the third paragraph must control because it is later in time is destroyed by the fact that the residuary clause, which is the final paragraph of the will, repeats the same testamentary intention as the first paragraph of the second bequest. Thus, as the Administrative Law Judge concluded, the intention of the will is clear, regardless of the ambiguous paragraph.

It is likely that the second and third paragraphs of the second bequest were included by the decedent simply to show that he knew that there were other, and perhaps closer, objects of his bounty than those to whom he had devised his property; and he may have wanted to ensure that those persons were expressly excluded in order that his intentions would be given effect.

Thus, the persons the decedent wanted to make sure would not inherit (for whatever reason) were not those in the first paragraph of the bequest, but rather those in the third paragraph; namely, any alleged father or brother, and his mother and sister. However, the decedent also carefully stated in the same paragraph that two of the nine beneficiaries named in the first paragraph were indeed his nieces (his sister's children), and that he did want them to inherit. What decedent may have meant to say was, "I do not wish any person [named in this paragraph] other than my above named nieces to inherit any of my property." This is consistent with the construction of the Administrative Law Judge which distributed the estate to the nine persons first mentioned. We also note that the arguments to the contrary by appellants' counsel failed to persuade the scrivener, when he was on the witness stand, as to what the words he wrote must really have meant (II Tr. 9-11).

[3] Finally, the burden of proving that the initial decision in the probate of a deceased Indian's trust estate was erroneous is on the person challenging the decision. Estate of Pearl Asepermy Werqueyah, 13 IBIA 49 (1984); Estate of Fred Redstone, Sr., 13 IBIA 44 (1984). Nothing that appellants have submitted is sufficient to sustain that burden.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 18, 1984, order denying rehearing is affirmed.

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Bernard V. Parrette
Chief Administrative Judge

We concur:

//original signed

Jerry Muskrat
Administrative Judge

//original signed

Anne Poindexter Lewis
Administrative Judge