



INTERIOR BOARD OF INDIAN APPEALS

Estate of Vincent Duane Ducheneaux

48 IBIA 167 (12/17/2008)

Background

A. *Appellant's Challenge to the Distribution of Decedent's Interest in Allotment No. 340-6303.*

Karen argues that she has a right of first purchase of a 1/13 interest in allotment no. 340-6303, inherited by Vincent from their father, Frank Ducheneaux (Frank), an allottee of the Cheyenne River Indian Reservation of South Dakota. We disagree because no "right of first purchase" was imposed upon Vincent when he received the distribution of his 1/13 interest in the allotment from Frank's estate.

1. *The Distribution of the Estate of Frank Ducheneaux.*

Karen and Vincent are two of Frank's 13 children. Frank died on March 13, 1976, and Frank's last will and testament was subject to probate. The Order Approving Will and Decree of Distribution was entered in Frank's estate on December 19, 1980 (1980 Decree). In Paragraph Second of the 1976 Last Will and Testament of Frank D. Ducheneaux, (Frank's Will), Frank set forth his desire for the establishment of a cemetery, museum, and non-denominational church (collectively, the Complex) on part of his allotment no. 340-6303.² In Paragraph Third, Frank stated his intent to "give, devise, and bequeath" to each of his 13 children all of his property in equal shares, subject to certain exceptions not relevant here. In Paragraphs Third and Fourth, Frank described a meeting that he convened on January 18, 1976, attended by eight of his children, to discuss his wishes for the Complex. Paragraph Fourth also discussed an agreement among those "children present at this meeting held on January 18, 1976," to establish a "Cooperation" that would manage and maintain the museum. Paragraph Fourth specified that, subject to certain exceptions, Frank's real and personal property would be inherited in equal shares by his children and held "undivided" until determined otherwise by a majority of the heirs. If any of his children "want their share of the estate," such heirs are "hereby ordered to sell their share back to the Cooperation at the appraised value" Frank's Will, at Paragraph Fourth.

By the time of the 1980 Decree, 10 of Frank's 13 children had agreed to reconvey by quitclaim deeds their 1/13 interests in allotment no. 340-6303 to Karen, so that she could generally accomplish their father's wishes for the Complex. These ten offspring had entered into an "Agreement for Establishing and Maintenance of the Frank Ducheneaux Family Cemetery, Chapel and Museum" (Agreement). Vincent had neither joined in the

² This allotment contains 20 acres, more or less, in section 34, T. 13 N., R. 31 E., Black Hills Meridian, on the Cheyenne River Reservation in South Dakota.

agreement nor quitclaimed his 1/13 interest to Karen. Accordingly, the 1980 Decree contained the following provision with respect to allotment no. 340-6303:

TO: (This distribution is pursuant to the bequest in Paragraph Third of the will as modified by quit claim deeds appearing in Attachment D.)

Karen Rae Ducheneaux Nitzschke, . . .	10/13
Vincent Ducheneaux, . . .	1/13
Louella Ducheneaux Nickerson, . . .	1/13
Candice Idita Ducheneaux, . . .	1/13

1980 Decree at 5 (tribal enrollment numbers and birthdates omitted). The 1980 Decree did not grant a right of purchase in favor of Karen in the event the remaining three heirs chose to devise or otherwise divest themselves of their 1/13 interests in allotment no. 340-6303. The quitclaim deeds were attached as Attachment D to the Decree, and the Agreement signed by ten of Frank's children was attached as Attachment E. Vincent received his 1/13 share of the 20-acre allotment.

2. *The Distribution of the Estate of Vincent Ducheneaux.*

Vincent died in 1999 as a resident of San Diego, California, with a Last Will and Testament dated 1989. His Will devised all of his property to his non-Indian wife, Marie, and, should she predecease him, to his daughter Ann Marie Ducheneaux English, an enrolled member of the Cheyenne River Reservation. On March 10, 2003, Administrative Law Judge William E. Hammett (ALJ) issued an Order Approving Will and Decree of Distribution in Decedent's estate (2003 Order Approving Will) and distributed Vincent's 1/13 interest in allotment no. 340-6303 to Marie. The 1/13 interest was valued at \$20.

On March 8, 2006, Karen submitted a Petition for Rehearing and for Reopening, taking the position that, with respect to Vincent's 1/13 share of the 20-acre allotment 340-6303 on the Cheyenne River Reservation, she was "co-owner of the estate." Petition at 4. She averred that she received no actual Notice of Hearing related to Vincent's estate. *Id.* Citing the Agreement (Attachment E to the 1980 Decree), Karen claimed that, in order to effectuate the intent of Frank's Will and the Agreement, she "should have had the first right of refusal to purchase this 1/13 interest . . ." *Id.* She claimed to have purchased the interest of her sister Candice, thus leaving as owners only herself and two siblings, including Vincent. She claimed to have communicated with Marie, offering to purchase Marie's 1/13 interest in allotment no. 340-6303, but without success. *Id.*

The IPJ denied the petition on November 17, 2006.³ He reached the merits of Karen's petition because he concluded that she did not receive notice of the probate of Vincent's estate. But he disagreed that anything in the 1980 Decree suggested that conveyance to Vincent of the 1/13 interest in allotment no. 340-6303 was conditional. The IPJ explained that the distribution of the 1/13 interest to Vincent in the 1980 Decree had been unequivocal and contained no language subjecting the distribution to a purchase option. Order on Petition at 4. Moreover, the IPJ considered Karen's argument that the 2003 Order Approving Will failed to account for the intent of Frank's Will. The IPJ pointed out that the operative provision of Frank's Will was Paragraph Third, which devised his property to his children without qualification. Order on Petition at 4.

Karen appealed to the Board and submitted her Opening Brief on March 26, 2008. Repeating her assertion that she received "the first right to purchase the 1/13th interest," Karen argues that the ALJ erred because he did not have the complete land records before him, including Frank's probate record, and that the IPJ failed to conduct a "four corner" reading of Frank's will and supporting documentation. Her argument, in its entirety, is set forth as follows:

The real value in [Frank's] estate was not the dollar value of his undivided trust land including his interest in his 20 acre retirement homestead. The main value was not in the small home/antique shop he had established on the land. Rather, it was his plan to have established on the remaining land a cemetery and a chapel/museum to serve the needs of the people in the area. His commitment was set forth in his last will and testament. Any persons benefitting from [Frank's] estate are subject to any limiting terms set forth in his will.

[Vincent] was a son and beneficiary in [Frank's] estate. By his last will and testament, Vincent left his entire estate to his non-Indian wife. It is respectfully submitted that such bequest is inconsistent with the limited terms set forth in [Frank's] will. A non-Indian spouse cannot hold an undivided interest in trust property.

Opening Brief at 1. No other briefs were submitted.

³ By the time the petition was filed, Judge Hammett had also passed away. Thus, the matter was assigned to Judge Stancampiano.

B. Distribution of Decedent's Interests in Allotments on the Lake Traverse Reservation.

At the time of Decedent's death in 1999, Decedent also owned the following interests in three allotments on the Lake Traverse Reservation located in South Dakota and home of the Sisseton-Wahpeton Oyate Tribe:

1. 1/324 undivided interest in allotment no. 1284, valued in January 2000 at \$160.49, consisting of a total of 160 acres, located in Sections 33 and 34, T. 125 N., R. 50 W., 5th Principal Meridian, Roberts County;
2. 1/729 undivided interest in allotment no. 1361, valued in January 2000 at \$40.80, consisting of a total of 116.63 acres, located in Sections 3, 4, and 17, T. 128 N., R. 54 W., 5th Principal Meridian, Marshall County; and
3. 1/729 undivided interest in allotment no. 1361-A, valued in January 2000 at \$13.99, consisting of a total of 40 acres, located in Section 17, T. 128 N., R. 53 W., 5th Principal Meridian, Marshall County.

The ALJ observed in his final probate order, however, that the above "Sisseton interests" on the Lake Traverse Reservation were subject to Section 5 of the Sisseton-Wahpeton Sioux Act, Pub. L. 98-513 (Oct. 19, 1984) (Section 5; Act), which directs all interests of less than 2.5 acres, or the equivalent, in trust land on the Reservation to escheat to the Sisseton-Wahpeton Oyate Tribe. The ALJ further noted that the constitutionality of Section 5 was, at the time of his decision, the subject of litigation in a Federal district court. Therefore, with respect to Decedent's interests on the Lake Traverse Reservation, the ALJ decreed:

Until such time as the Federal court system has given a final answer concerning the constitutionality of [Section 5], no distribution of the decedent's Sisseton interests listed on the BIA inventory will be made by this Order. At some future date, either the [ALJ] or the Land Titles and Records Office, Bureau of Indian Affairs, will make distribution of decedent's Sisseton interests and will designate whether they shall pass to the decedent's heirs as determined herein, or to the designated tribe pursuant to [Section 5].

2003 Order Approving Will, at 2-3.

Subsequent to the 2003 Probate Order, the United States District Court for the District of South Dakota held Section 5 of the Sisseton-Wahpeton Sioux Act to be

unconstitutional. *DuMarce v. Norton*, 277 F. Supp. 2d 1046 (D.S.D. 2003), *rev'd in part on other grounds sub nom. DuMarce v. Scarlett*, 446 F.3d 1294 (Fed.Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1335 (2007).⁴ Under the terms of the 2003 Order Approving Will, either the ALJ or BIA was to then “make distribution of decedent’s Sisseton interests,” either to Marie or to the Sisseton-Wahpeton Tribe.

Title Status Reports supplied to the Board show that either prior to or subsequent to the resolution of *DuMarce*, BIA distributed Decedent’s interests in the three allotments to the Sisseton-Wahpeton Oyate Tribe, subject to a life estate in Marie Ducheneaux. The probate record does not contain any order authorizing BIA’s distribution; more importantly, it appears that no notice of the distribution was served on any interested parties. BIA apparently construed the 2003 Order Approving Will as permitting it to distribute Vincent’s Sisseton interests without such notice.

On October 17, 2008, the Board issued an order to show cause why BIA’s distribution of Decedent’s interests on the Lake Traverse Reservation should not be affirmed.⁵ The order specified responses to be filed with the Board on or before December 1, 2008, and if no responses were received, BIA’s distribution would be affirmed by this Board. The Board observed in its order that while Section 5 of the Act had been held to be unconstitutional, the validity of the remaining sections of the Act have not been adjudicated.

No responses were received from any party.

⁴ The United States appealed to the Federal Circuit the narrow issue of the timeliness of claims made by two of the several plaintiffs. It was only as to these two plaintiffs that the Federal Circuit reversed and only on the issue of timeliness; no appeal was taken from the District Court’s ruling on the unconstitutionality claim brought by the remaining plaintiffs. Thus, the District Court’s order “permanently enjoining and restraining defendants from any further use of Section 5 of Public Law 98-513” remains in effect. *See* Final Judgment entered Nov. 1, 2007, in *DuMarce v. Kempthorne*, No. CIV 02-1026 (D.S.D.).

⁵ The order to show cause was issued to Marie Ducheneaux or, alternatively, to her estate; to Decedent’s child, Anne Ducheneaux English; and to the Tribe.

Discussion

A. Karen's Appeal.

Appellant bears the burden of establishing that the Order Denying Petition was erroneous. *Estate of Martha Marie Vielle Gallineaux*, 44 IBIA 230, 234 (2007). We do not find that Karen has met this burden by arguing that Judge Hammet erred in implementing Frank's Will. This was not the will before him.

In effect, Karen petitions to reopen her father's estate to modify the 1980 Decree by subjecting Vincent's interest in allotment no. 340-6303 to a right of purchase prior to its descent to Vincent's heir. As the IPJ correctly observes, no such limitation or restriction was imposed on Vincent in the 1980 Decree. Karen cannot, in the guise of a challenge to the distribution of Vincent's estate, obtain a modification of 1980 Decree that would impose restrictions on Vincent's inheritance. The time passed decades ago for Karen to challenge the 1980 Decree. *See* 43 C.F.R. § 4.241. Karen cannot meet the requirements of this rule and does not claim to. Accordingly, we will not revisit the 1980 Decree now.⁶

B. Distribution of Decedent's Interests in Trust Lands on the Lake Traverse Reservation.

Because there is no probate order in the record that authorizes the distribution made by BIA of Vincent's Sisseton interests, we exercise our plenary authority under 43 C.F.R. § 4.318 to ratify BIA's distribution of these interests to the Sisseton-Wahpeton Oyate Tribe subject to a life estate in Marie. The Act contains the following pertinent provisions:

⁶ We agree with the IPJ that Paragraph Third of Frank's will devised Frank's property equally among his 13 children. While Paragraph Fourth addressed Frank's hope that his offspring would create a Cooperation to establish the Complex, and his desire that any of them who wished to convey an interest in allotment no. 340-6303 would sell it to the Cooperation, Frank was aware that not all of his children had joined together to effectuate his intentions regarding the Complex. Paragraph Third explained that several of the children, including Vincent, had chosen not to attend the meeting Frank had convened, "for reasons of their own." Their absences had no impact on Frank's equal distribution of his interests to all children in that paragraph. Moreover, while the Agreement was attached (Attachment E) to the 1980 Decree, it was not an agreement entered into by Vincent and he was never bound by it.

Sec. 2(a) Except as provided in section 4 of this Act, only the Sisseton-Wahpeton Sioux Tribe of North Dakota and South Dakota (hereinafter the “tribe”) or persons who are enrolled members of the tribe shall be entitled to receive by devise or descent any interest in trust or restricted land within the reservation.

Sec. 4(a) Notwithstanding the provisions of section 2 . . . , the nonmember of the tribe surviving spouse, nonmember surviving children and the non-member surviving issue of any children of any person who dies possessed of any interest in trust or restricted land within the reservation, shall be entitled to take only a life estate in any interest in such trust or restricted land devised by a will approved by the Secretary of the Interior

Sec. 6 If a decedent has devised an interest in trust or restricted land within the reservation to a person prohibited under section 2 of this Act from acquiring an interest in such trust or restricted land, the interest in such land shall escheat to the tribe and title to such escheated interest shall be taken in the name of the United States in trust for the tribe: *Provided*, That any interest escheated to the tribe shall be subject to a life estate in the devisee as provided for under section 4(a) of this Act.

Decedent’s widow Marie is a non-Indian and, thus, a “nonmember of the tribe surviving spouse.” Therefore, pursuant to Section 2 of the Act, she is ineligible to inherit outright any interests in trust lands on the Lake Traverse Reservation. However, because Decedent left a Will that was approved by the IPJ and because Decedent devised all of his property to his widow, BIA correctly concluded that she falls within the exception to Section 2(a) and is eligible for a life estate in Decedent’s interests on the Lake Traverse Reservation pursuant to Sections 4(a) and 6 of the Act. The remainder interests are properly held in trust for the Tribe by the United States pursuant to Section 6. For these reasons, we ratify BIA’s distribution of Decedent’s interests in allotment nos. 1284, 1361, and 1361-A on the Lake Traverse Reservation to the Sisseton-Wahpeton Oyate Tribe subject to a life estate in Marie.⁷

⁷ Property tax records for Marie’s address of record in San Diego County, California, show that her property is owned by the “Est. of Marie J. Ducheneaux.” If and when BIA obtains confirmation that Marie is deceased, the remainder interests vest in the Sisseton-Wahpeton Tribe as of the date of her death.

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, we affirm the Order Denying Petition and ratify BIA's distribution of Decedent's interests in three allotments on the Lake Traverse Reservation.

I concur:

// original signed
Lisa Hemmer
Administrative Judge*

// original signed
Debora G. Luther
Administrative Judge

*Interior Board of Land Appeals, sitting by designation.