



INTERIOR BOARD OF INDIAN APPEALS

Joseph La-Fauss Pappin III and Deborah L. Wyatt v. Eastern Oklahoma Regional Director,
Bureau of Indian Affairs

50 IBIA 238 (09/29/2009)

Petition for Reconsideration dismissed:

50 IBIA 353



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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JOSEPH LA-FAUSS PAPPIN III and) Order Affirming Decision
DEBORAH L. WYATT,)
Appellants,)
)
v.) Docket No. IBIA 09-35-A
)
EASTERN OKLAHOMA REGIONAL)
DIRECTOR, BUREAU OF)
INDIAN AFFAIRS,)
Appellee.) September 29, 2009

Joseph La-Fauss Pappin III (Joseph) and his sister, Deborah L. Wyatt (collectively, Appellants), appeal from a November 18, 2008, decision of the Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which she authorized a life estate for Gladdie Ann Hawkins in the Osage headright¹ of Appellants' deceased father, Joseph La-Fauss Pappin, Jr. (Decedent), pursuant to the terms of a revocable *inter vivos* trust executed by Decedent. Appellants argue that Decedent revoked the terms of the trust and that it, therefore, is no longer valid. We affirm the Regional Director's decision because the terms of the trust require any revocation or amendment to be in writing, and parol evidence of desired changes and a subsequent will that mentions neither the trust nor the trust corpus do not constitute the requisite written revocation or amendment, and thus do not revoke the *inter vivos* trust.

¹ The term "Osage headright" means an individual right to share in the income from an Osage tribal mineral estate and, sometimes, in other tribal income as well. *See, e.g.*, Act of Oct. 21, 1978, 92 Stat. 1660, 1663, 25 U.S.C. § 331 note (1978 Act), § 8(a); *Redleaf v. Muskogee Area Director*, 18 IBIA 268 n.1 (1990); *Estate of Vivian M. Rogers v. Acting Muskogee Area Director*, 14 IBIA 217 (1986). At the time of his death, Decedent owned a .33589 interest in an Osage headright along with an undisclosed sum of money on deposit with BIA.

Facts

On November 17, 2004, Decedent executed a Revocable Trust Agreement (Trust), covering his Osage headright interest and funds on deposit at the Osage Agency, BIA. He named the Secretary of the Interior as trustee, and provided that, upon his death, his entire estate would vest in equal shares in his two children, Appellants herein. Article I of the Trust provided for the payment of Decedent's debts, if any, from the Trust's assets and Article II provided that the Trust "may be revoked, amended, altered or modified at any time in any manner in writing by the Settlor." The Trust was approved by BIA.

Decedent revised the Trust at least twice, on March 11, 2005, and on November 4, 2005, and both revisions were approved by BIA.² In both revisions, Decedent provided that his friend, Gladdie Ann Hawkins, would receive a life estate in the trust assets. The only apparent changes between the two revisions appears to be a change in Hawkins's name and address from "Gladdie Ann (Hawkins) Pappin" with Decedent's home address in Oklahoma (March 2005 Trust) to "Gladdie Ann Hawkins" with an address in Florida (November 2005 Trust).³ Upon Hawkins's death, the trust assets would then vest in equal shares in Appellants.⁴

Decedent died on May 11, 2006. By notice dated May 18, 2006, the Superintendent notified interested parties of their right to contest the November 2005 Trust, and advised that, absent a contest, the trust assets would be distributed in accordance with the terms of the trust document. By letter dated June 11, 2006, Appellants contested the November 2005 Trust. Appellants claimed that, prior to his death, Decedent specifically requested that the Trust be revoked insofar as it gave a life estate to Hawkins. Appellants stated:

² We will refer herein to these revisions as the March 2005 Trust and the November 2005 Trust.

³ Appellants represent that Hawkins never married their father or, to their knowledge, used the name "Pappin."

⁴ Appellants contend that Decedent also executed a revision on June 2, 2005, in which he removed Hawkins from any share in his trust estate and provided for its distribution instead in equal shares to Appellants. The administrative record does not contain a copy of this particular revision. Our decision would remain the same regardless of whether this revision were part of the record because the November 2005 Trust postdates and thus supersedes any revision that Decedent may have executed in June 2005.

While in his final days in St. Francis Hospital, [Decedent] asked [Joseph] to contact the Osage Agency . . . and have the agency fax the proper forms to the hospital so he could change the Headright to be vested in [Appellants], his sole son and daughter, equal share and share alike. [F]ather expressed his regret for having changed the beneficiary of the headright to be Mrs. Hawkins. He expressed this desire to several other family members who were also present in his hospital room on May 6 and May 7, 2006. It seemed very important to him to change his Revocable Trust Agreement before his death, which was imminent.

Administrative Record (AR) at Tab 5. Although BIA did provide a new trust agreement pursuant to Appellants' request, Appellants contend that, at such time as a notary became available, Decedent no longer was capable of signing it.⁵ In their letter to the Superintendent, Appellants argued that, as members of the Osage Nation and the only direct descendents of Decedent, they should immediately inherit Decedent's entire estate. Finally, Appellants also submitted a copy of Decedent's "Last Will and Testament," which was executed on May 6, 2006, while Decedent was hospitalized and argued that the will should control the distribution of Decedent's trust assets rather than the November 2005 Trust. The will named Appellants as co-beneficiaries of Decedent's estate but the will made no mention of Decedent's trust or trust assets, although it did devise Decedent's "entire estate of whatsoever nature, whether it be real estate, personal property, or mixed" to Appellants in equal shares.

The Superintendent subsequently held an evidentiary hearing in this matter on August 31, 2006, to address Appellants' contentions. Joseph and his wife, Gay Pappin, appeared at the hearing and testified.⁶ Appellants represent that they offered notes, written by Gay Pappin contemporaneously with Decedent's instructions to revoke or alter his trust,

⁵ Nothing in the terms of the Trust requires the services of a notary.

⁶ No transcript of the hearing appears in the record, and we cannot determine if, in fact, the hearing was recorded. A summary of the testimony (Summary) received at the hearing is part of the record. *See* AR at Tab 8 (Memorandum from Field Solicitor to Superintendent, Mar. 12, 2007). The Summary also discusses four exhibits but these exhibits are not attached to the copy of the Summary that appears in the record.

as evidence of Decedent's intent and wishes.⁷ On April 12, 2007, the Superintendent rejected Appellants' contest, finding that Appellants did not argue that Decedent was not competent to execute the trust, nor that there was any defect in the trust itself. The Superintendent further dismissed Appellants' argument that Hawkins, as a non-Osage Indian, was an improper beneficiary. The Superintendent stated that "Ms. Hawkins'[s] interest is limited to a life estate which is permitted under the [1978 Act]." AR at Tab 8. The Superintendent did not address the effect of the will or the effect of Decedent's verbal assertions.

Appellants then appealed to the Regional Director, again contending that Decedent's will effectively altered the terms of the November 2005 Trust and that Decedent told Appellants and others days before his death that he wanted Appellants to receive the trust assets rather than Hawkins. Appellants also stated that Decedent had died with significant debts. In her November 18, 2008, decision, the Regional Director affirmed the Superintendent's decision on the grounds that there was "no evidence of a challenge to the Trust," Decision at 1, no showing that Decedent was incompetent at the time he executed the November 2005 Trust, *id.* at 2, and notwithstanding that Hawkins is not an Osage tribal member, while Appellants are, Hawkins nevertheless is eligible to take a life estate in the assets of Decedent's trust, *id.* The Regional Director did not address the effect of Decedent's will or the effect of Decedent's verbal assertions.

Appellants have now appealed the Regional Director's decision to the Board. Appellants and the Regional Director have filed briefs; Hawkins sent a letter to the Board in July 2009 seeking the status of the appeal, informing the Board that she is 83 years old, and requesting a decision due to her age. Given Hawkins's age, the Board agreed to expedite its decision in this matter.

Discussion

Simply stated, neither parol evidence⁸ nor a will that makes no mention of the revocable trust or its corpus is sufficient to revoke or amend Decedent's trust where the terms of the trust itself explicitly require that any revocation or amendment must be in writing. *See* November 2005 Trust, Art. II. We thus affirm the Regional Director's decision.

⁷ These notes are not part of the record received by the Board. Even if they were, they would not alter our decision because the notes were not authored or signed by Decedent.

⁸ "Parol evidence" is verbal evidence.

1. Standard of Review

Decisions of the Regional Director are reviewed by the Board to determine whether they comport with the law, are supported by substantial evidence, or are otherwise arbitrary or capricious. *Estes v. Acting Great Plains Regional Director*, 50 IBIA 110, 115 (2009). Legal determinations are reviewed de novo. *Id.* Where the Regional Director's decision complies with these standards, we will not substitute our judgment for hers. *See Kent v. Acting Northwest Regional Director*, 45 IBIA 168, 174 (2007). At all times, it remains Appellants' burden to show error in the Regional Director's decision. *Id.*

2. Decedent Did Not Revoke or Amend his November 2005 Trust

Because Decedent expressly provided in his trust that any revocation or amendment must be in writing, we affirm the Regional Director's decision. Decedent did not, through his will or through his verbal statements, revoke or amend his November 2005 Trust.

The legal right to place Osage Indian trust assets into an *inter vivos* trust is of fairly recent creation. In 1978, Congress enacted legislation — the 1978 Act — which, among other things, authorized the establishment of *inter vivos* trusts by persons of Osage Indian blood. Section 6 of the 1978 Act, 92 Stat. at 1662, provides in relevant part:

(a) With the approval of the Secretary of the Interior, any person of Osage Indian blood, eighteen years of age or older, may establish an *inter vivos* trust covering his headright or mineral interest except as provided in section 8 hereof;⁹ surplus funds; invested surplus funds[;] segregated trust funds; and allotted or inherited land, naming the Secretary of the Interior as trustee. . . . Said trust shall be revocable and shall make provision for the payment of funeral expenses, expenses of last illness, debts, and an allowance to members of the family dependent on the settler.

Appellants argue on appeal that Decedent's will, which leaves his entire estate to Appellants, "should take precedence in determining the disposition of . . . [F]ather's Headright Trust." Notice of Appeal at unpaginated 1. They argue that the will devises to them Decedent's "entire estate of whatsoever nature," which Appellants contend is language sufficient to revoke the life estate left to Hawkins in the November 2005 Trust. Appellants also argue that Decedent's verbal communications concerning his desire to remove Hawkins

⁹ Section 8 of the 1978 Act, 92 Stat. at 1663, which addresses the sale of headright interests shared by persons not of Indian blood, is not relevant here.

as a beneficiary of the November 2005 Trust and to substitute Appellants in her place should be accepted by BIA as a legally sufficient means of amending or revoking the trust. Appellants explain that the funds in the Trust are needed to pay down debt accrued by Decedent during his lifetime. Although Appellants raised these arguments before the Regional Director, we note that she did not address them in her decision. Ordinarily, we would remand such a decision for further consideration by the Regional Director. We do not do so in this instance because we accept Appellants' assertions as true, and decide only the legal questions arising from those assertions, questions which we would review de novo in any event.

Our analysis begins and ends with the language of the trust instrument. Article II of each version of Decedent's Revocable Trust Agreement states that

[t]his trust is declared to be revocable at any time by the Settlor, *and may be revoked, amended, altered or modified in any manner at any time in writing by the Settlor*. Settlor may withdraw from time to time any assets transferred to this Trust, and to the extent that the same is withdrawn, this agreement is hereby deemed to have been amended.

(Emphasis added). This language is unambiguous. Any revocation, amendment, alteration, or modification of Decedent's trust must be set forth *in writing*. As the Restatement of Trusts recognizes, "[i]f the terms of the trust reserve to the settlor a power to revoke or amend the trust *exclusively* by a particular procedure, the settlor can exercise the power only by substantial compliance with the method prescribed." Restatement (Third) of Trusts, § 63, comment (i) (2003); *see also* Uniform Trust Code, § 602(c)(1) (same); 76 Am. Jur. 2d *Trusts* § 76 (2005) ("[I]f the settlor reserves a power to revoke the trust only in a particular manner or under particular circumstances, he can revoke the trust only in that manner or under those circumstances."); *id.* § 68 (same, with respect to amending a trust).¹⁰

¹⁰ In her brief before the Board, the Regional Director assumes without discussion that Oklahoma law applies to issues affecting a revocable trust under the 1978 Act. The Board has rejected the application of Oklahoma law to trusts created under the 1978 Act. *Jech v. Eastern Oklahoma Regional Director*, 41 IBIA 63, 67 (2005). Moreover, the November 2005 Trust itself expressly states that the Trustee's powers and "[a]ll questions pertaining to the construction and administration of this Trust shall be determined in accordance with the applicable [F]ederal statutes." November 2005 Trust, Art. III. Thus, we conclude that it is appropriate to apply Federal law to determine whether Decedent effected a revocation or

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Appellants argue that Decedent’s will is a writing and that the will, by devising Decedent’s “entire estate of whatsoever nature,” effected a revocation of the November 2005 Trust. Leaving aside the question of whether a revocable *inter vivos* trust, which exists during the life of the settlor, may ever be revoked or amended by the terms of a will that becomes effective upon the death of the settlor¹¹ and assuming for purposes of this decision that it may, Decedent’s will expressly revokes only prior wills and makes no mention of any trust. To the extent that the will devises to Appellants Decedent’s “entire estate of whatsoever nature, whether it be real estate, personal property, or mixed,” this language also is insufficient to revoke the trust. The will does not mention the trust nor does the will identify the specific assets in the trust. *See* Uniform Trust Code § 602 (2006 Comment) (“A residuary clause in a will disposing of the estate differently than the trust is alone insufficient to revoke or amend a trust. The provision in the will must either be express or the will must dispose of specific assets contrary to the terms of the trust.”); *see also Estate of Sanders*, 261 Kan. 176, 182-84, 929 P.2d 153, 158-59 (1996).

Appellants also argue that Decedent *verbally* expressed a desire to alter the terms of the November 2005 Trust. Because Decedent’s trust unambiguously requires any revocation or amendment to be in writing, parol evidence of a change desired by the settlor may not be considered. *See, e.g., Estate of Sanders*, 261 Kan. at 187-88, 929 P.2d at 160-61 (“A . . . rule established by the majority of the jurisdictions around the country is that the revocation of a trust requires an express statement and cannot be accomplished through implication, especially by allowing oral testimony from outside the four corners of the document to determine intent.”).

Accordingly, we must affirm the Regional Director’s November 18, 2008, decision.¹²

¹⁰(...continued)

amendment of his trust. Where, as here, there is no Federal law on point, the Board relies on state law and treatises to determine the applicable general law in this area. *See United States v. Humboldt Fir, Inc.*, 426 F. Supp. 292, 296-97 (N. D. Calif. 1977) (citing *Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947)), *aff’d*, 625 F.2d 330 (9th Cir. 1980).

¹¹ *See* 76 Am. Jur. 2d *Trusts* § 77 for a discussion of whether an *inter vivos* trust may be amended or revoked by a subsequent will.

¹² Appellants also mention that Hawkins failed to return an engagement ring that she removed from a safe deposit box that she shared with Decedent. To the extent Appellants
(continued...)

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 the Regional Director's November 18, 2008, decision.¹³

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Sara B. Greenberg
Acting Administrative Judge*

* Interior Board of Land Appeals, sitting by designation

¹²(...continued)

contend that BIA should take action to recover the ring from Hawkins and distribute the ring according to Decedent's will, the Regional Director correctly observed that the ring is not an asset identified in Decedent's Trust, and thus, is outside the jurisdiction of the Department of the Interior.

¹³ Both the 1978 Act and each version of Decedent's Trust provide for the payment of Decedent's debts. Appellants contend that, at his death, Decedent had amassed \$60,000 in debt. Therefore and upon presentation of appropriate proof of any debts that remain outstanding at this time, BIA should determine what funds may be available for the payment of such debts. Once all such debts have been paid, then any remaining funds and any future income shall be distributed to Hawkins for the duration of her life. At Hawkins's death, Decedent's trust estate shall vest in Appellants in equal shares.