INTERIOR BOARD OF INDIAN APPEALS

Estate of Sandra Lee Morrison

54 IBIA 67 (09/26/2011)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF SANDRA LEE MORRISON	)	Order Affirming Decision
	)	
	)	Docket No. IBIA 09-065
	)	
	)	September 26, 2011

In this appeal to the Board of Indian Appeals (Board), Christina Tenas (Appellant) objects to an administrative law judge (ALJ) giving effect to the 1999 Inheritance Code (1999 Code) of the Confederated Tribes of the Umatilla Indian Reservation (Tribe) in distributing an interest in Umatilla Allotment 143-WW-28 (Allotment) from the estate of Appellant's mother, Sandra Lee Morrison (Decedent). Decedent died intestate (i.e., without a will), and under the 1999 Code, Appellant and her brother, Corbett Adrian Ellenwood (Corbett), inherit only life estate interests in the Allotment. Because neither of them is a member of the Tribe (both are members of the Yakama Nation), the 1999 Code provides that the remainder interest passes to the Tribe without any requirement that the Tribe pay compensation.

Appellant concedes that the 1999 Code, as enacted by the Tribe and approved in 1999 by the Bureau of Indian Affairs (BIA), is consistent with the Federal authorizing statute, § 206 of the Indian Land Consolidation Act (ILCA), as amended in 1984.[1] But Appellant believes that applying the 1999 Code would result in an unconstitutional taking of property without compensation. In the proceedings below, she asked ALJ Steven Lynch not to apply the 1999 Code to the Allotment. The ALJ denied Appellant's request and Appellant appealed the ALJ's Order Denying Petition for Rehearing to the Board.[2] On appeal, Appellant makes three arguments, none of which convinces us that the ALJ erred or that the Board may decline to give effect to the 1999 Code in distributing the Allotment.

---

[1] Pub. L. No. 98-608, 98 Stat. 3171, 3172 (Oct. 30, 1984), formerly codified at 25 U.S.C. § 2205 (1988). Unless otherwise specified, all references in this decision to § 206 are to the 1984 version.

[2] *See Estate of Sandra Lee Morrison*, Probate No. P000029459IP, Order Denying Petition for Rehearing, Mar. 2, 2009 (denying Appellant's petition for rehearing from Order Determining Heirs, Nov. 26, 2008).

First, Appellant reiterates her constitutional objection to applying the 1999 Code, and argues that to achieve a constitutionally sound result, the Board should instead apply a revised inheritance code adopted by the Tribe in 2008, under which the Tribe could only receive the remainder interest in the Allotment if it paid fair market value. We reject this argument because the 2008 Code is prospective only and does not apply to the estate of Decedent, who died in 2004.

Second, Appellant argues that as a result of an amendment made to § 206 in 2000, the 1999 Code became invalid because under the amended version of § 206 it could not have been approved by BIA. The 2000 amendment to § 206 prohibited BIA from approving a tribal probate code if it prevented an Indian person from inheriting an interest in an allotment that was originally allotted to his or her lineal ancestor. Amended § 206 did not purport to invalidate existing approved tribal codes, and Appellant does not offer evidence that she and Corbett are, in fact, lineal descendants of the original allottee of the Allotment. But Appellant argues that giving effect to the 1999 Code, in light of the 2000 amendment, would be improper unless and until the Department of the Interior (Department) determines, after further hearing, that they are *not* such lineal descendants. We disagree. Whether or not the 1999 Code could have been approved by BIA had it been presented for approval in 2000, we reject Appellant's argument that the 2000 amendment to § 206 implicitly repealed the already approved 1999 Code, either in whole or in part. Thus, we find no basis to remand for a hearing.

Third, Appellant argues that the intestacy provisions of the 1999 Code are inconsistent with the heirship rules enacted in the American Indian Probate Reform Act of 2004 (AIPRA), which became effective in 2006. Appellant concedes that AIPRA affirmed the right of Indian tribes to enact tribal probate codes, but suggests that it is "unknown" whether the 1999 Code would merit approval under AIPRA, and she relies on the "inconsistency" between AIPRA's rules of intestate succession and the 1999 Code's rules of intestate succession as grounds for us to decline to apply the 1999 Code. We reject this argument. The fact that Congress enacted certain "default" rules of intestate succession do not render invalid a tribe's choice to enact different rules of intestate succession. But even assuming that AIPRA could be deemed relevant to the application of the 1999 Code to Decedent's estate, AIPRA's provisions governing tribal probate codes would appear to cut against Appellant. AIPRA expressly disallows tribal codes that prohibit a *devise* of trust or restricted property to lineal descendants of an original allottee or members of another tribe, unless the code provides for payment of compensation. But that restriction does not apply to tribal codes governing *intestate* succession, such as the provisions in the 1999 Code that are at issue in the present case.

Background

Decedent died intestate on December 29, 2004. Decedent was a member of the Yakama Nation, and her children, Appellant and Corbett, are also members of the Yakama Nation. Included in Decedent's estate is a 44.44% interest in the Allotment, which Decedent inherited from her mother, Christine Beavert, and her grandfather, Henry Beavert.[3] In 2006, BIA estimated the value of Decedent's interest in the Allotment at $53,333.33, and the record indicates that the Allotment generates lease income.

In the absence of the 1999 Code, Appellant and Corbett each would have inherited one-half of Decedent's interest in the Allotment, without limitation. *See* Order Determining Heirs at 1 n.2; Pub. L. No. 95-264, § 2, 92 Stat. 202 (Apr. 18, 1978) (Umatilla Inheritance Act), *reprinted at* 25 U.S.C. § 463d note. But as explained below, under the 1999 Code, each of their inherited interests is limited to a life estate, with the remainder interest passing to the Tribe, without any requirement that the Tribe pay compensation for the value of the remainder interest.

The 1999 Code provides, in relevant part, that if a decedent dies intestate owning interests in trust land located within the Tribe's reservation, nonmember[4] heirs at law are not entitled to inherit those interests, except that a nonmember spouse or child may elect to receive a life estate under certain circumstances. 1999 Code §§ 4.E.1, 4.E.3, 4.E.8; *see generally Estate of Celestine White*, 47 IBIA 73, 76-77 (2008). Tribal members who would

---

[3] Henry's wife, and Christine's mother, was Mary Pims Bob Beavert, a Yakama Indian. Mary apparently acquired a full interest in the Allotment through a devise in the 1945 will of Yakama allottee Teypum Popkiawwahnee. According to a probate order in Popkiawwahnee's estate, Mary was a collateral relative of Popkiawwahnee (a niece or a second cousin). Popkiawwahnee was married to Charley Tokaekin, a Umatilla Indian who was the original allottee of the Allotment. Popkiawwahnee and Tokaekin did not have any children, and Popkiawwahnee was Tokaekin's sole heir. *See Estate of Mary Pims Bob Beavert*, Probate No. E-23-68 RJM (Certificate of Appraisement for Allotment No. WW-28, Charley Tokaekin); *Estate of Teypum Popkiawwahnee*, Probate No. 35257-47 (Petition of Mrs. Tom Joe for rehearing denied; Data for Heirship Finding; Transcript of interview, May 13, 1938; Correspondence from Umatilla Agency Superintendent to Yakima Agency Superintendent, June 14, 1943) (copies from Office of Hearings and Appeals electronic files added to appeal record).

[4] As used in the 1999 Code, "nonmember" means an individual who is not a member of the Umatilla Tribe.

be next in line as heirs after the life estate heirs may inherit the remainder interest, but when there are no such tribal member-heirs, the remainder interest escheats, i.e., passes, to the Tribe. 1999 Code § 4.E.3. The Tribe is not required to pay compensation for the remainder interest that it receives when a decedent has died without a will.[5] In contrast, if a decedent died with a will and devised an interest in Umatilla property to a nonmember, the Tribe could only defeat the devise by paying fair market value, minus the value of any life estate interest retained by the nonmember devisee. *See id*. §§ 4.E.5., 4.E.8.

In the proceedings before the ALJ, Appellant asked the ALJ to disregard the 1999 Code, arguing that its application would result in an unconstitutional taking of private property without compensation, in violation of the Fifth Amendment to the U.S. Constitution and the Indian Civil Rights Act (ICRA),[6] and would be inconsistent with Supreme Court decisions that declared another provision in ILCA, former § 207, to be unconstitutional.[7] The ALJ concluded, as Appellant acknowledged, that he lacked authority to declare § 206 — the Federal law under which the 1999 Code was adopted by the Tribe and approved by BIA — unconstitutional. The ALJ also rejected Appellant's request to find the 1999 Code as violating ICRA and to disregard the 1999 Code on that ground.

---

[5] "If no such tribal member[-heirs] exist[], the remainder will escheat to the [Tribe], in which case the [Tribe is] under no obligation to make any payment for the interest it acquires." *Id*. § 4.E.3.

In her opening brief, Appellant suggests that there may be an internal inconsistency in the 1999 Code because elsewhere it provides that in the event a life estate is retained, "the fair market value paid by the [Tribe] shall be reduced by the value of the life estate." Appellant's Amended Opening Brief at 4, quoting 1999 Code § 4.E.8. Appellant does not pursue this as grounds not to give effect to the express language in § 4.E.3., and in any event we do not find any internal inconsistency. The focus of § 4.E.8. is to give life estate rights to certain nonmember spouses and children, whether in testate or intestate cases. The language quoted by Appellant does not create an affirmative obligation for the Tribe to pay fair market value; it simply provides that the amount paid shall be reduced by the value of the life estate. Under the 1999 Code, only land interests *devised* to a nonmember are subject to a right of compensation from the Tribe. 1999 Code § 4.E.5.

[6] 25 U.S.C. § 1302(5).

[7] *See Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987); *see also* 25 U.S.C. § 2206 (1988 & 1994) (invalidated versions of § 207). Former § 207 was repealed and replaced by AIPRA.

Discussion

I. Introduction

The Department's application of the 1999 Code was the subject of a previous appeal to the Board. *See Estate of White*, 47 IBIA 73. In *Estate of White*, as in the present case, the appellant did not contend that the 1999 Code is inconsistent with the version of § 206 that was in effect when BIA approved the 1999 Code. Instead the appellant argued that the Supreme Court decisions striking down earlier versions of the escheat provision in former § 207 mandated a finding that the authorization in § 206 of tribal codes containing an escheat rule was also unconstitutional. In *Estate of White*, we held that

> our determination . . . that the [1999 Code] was passed pursuant to authority granted by Congress through [§] 206 begins and ends our inquiry regarding the validity of the [1999 Code].
>
> . . . .
>
> . . . Section 206 authorizes tribes to enact probate codes defining the class of individuals who are eligible to inherit (or receive a devise of) trust property that is subject to the tribe's jurisdiction.
>
> . . . Section 206 has not been reviewed by any Federal court and has not been determined to be unconstitutional. The Board, of course, cannot declare an act of Congress unconstitutional. [Citations omitted.] Thus, unless the [1999 Code] is outside the scope of what Congress authorized under [§] 206, we have no basis to determine that it was impermissible to apply it to Decedent's estate in this case.

47 IBIA at 74, 81. In the present case, we reaffirm our conclusion in *Estate of White* that the Supreme Court decisions striking down former § 207 as unconstitutional do not provide us with a basis to disregard the approved 1999 Code, which Appellant does not dispute was enacted pursuant to and is consistent with § 206. As Appellant concedes, we lack authority to declare § 206 unconstitutional, and it follows that we may not impliedly find that it is by simply refusing to apply the 1999 Code.

Appellant makes three arguments, however, that were not raised or decided in *Estate of White*. First, she argues that we can avoid the constitutional issue altogether by applying the Tribe's revised 2008 Code, under which the Tribe could only receive the remainder interest if it paid fair market value. Second, Appellant argues that an amendment to § 206 made in 2000 is inconsistent with the 1999 Code, thus providing at least a potential basis for us to decline to give effect to the 1999 Code in this case. Third, Appellant argues that AIPRA is inconsistent with the 1999 Code, and thus AIPRA also provides a basis for us

not to apply the 1999 Code. The Tribe filed an answer in opposition to Appellant. We address each of Appellant's arguments in turn, finding none to be convincing.

II. 2008 Tribal Code

In 2008, the Tribe enacted a revised Inheritance Code that now includes a provision that would require payment of compensation by the Tribe before it may preclude an ineligible heir from inheriting an interest in trust or restricted lands on the Tribe's reservation. *See* 2008 Code § 1.05.C.3. The 2008 Code states that it shall become effective 180 days after approval by BIA and that it shall apply "to all estates of decedents whose deaths occur on or after the effective date of this Code." *Id.* § 1.03; *see also* 25 U.S.C. §§ 2205(b)(4)(A) (a tribal probate code "shall apply only to the estate of a decedent who dies on or after the effective date of the tribal probate code"), 2205(b)(4)(B) (same rule for amendments to tribal probate codes).[8] The 2008 Code was approved by the Assistant Secretary - Indian Affairs. *See* Memorandum from Assistant Secretary to BIA Northwest Regional Director, May 16, 2008.[9] But Decedent died in 2004, and the 2008 Code is prospective only, and cannot apply to Decedent's estate. Therefore, even if applying the 2008 Code would avoid the constitutional issues raised by Appellant, we lack authority to do so.

III. ILCA § 206, as Amended in 2000

In 2000, Congress amended § 206 and placed a limitation on BIA's authority to approve certain tribal probate codes. As amended in 2000, § 206 provided that "[t]he Secretary shall not approve a tribal probate code if such code prevents an Indian person from inheriting an interest in an allotment that was originally allotted to his or her lineal ancestor." 25 U.S.C. § 2205(a)(3) (2000); *see* Pub. L. No. 106-462, § 103(3), 114 Stat. 1993 (Nov. 7, 2000) (amending § 2205). Appellant contends that if she and Corbett are lineal descendants of the original allottee of the Allotment, then § 206, as amended in 2000, renders the 1999 Code invalid as applied in this case. We disagree.

---

[8] Similarly, 25 U.S.C. § 2205(b)(5)(B) provides that the repeal of a tribal probate code shall apply only to the estate of a decedent who dies on or after the effective date of the repeal.

[9] *See* 2008 Code, App. B (copy at www.umatilla.nsn.us/InheritanceCode.pdf) (copy added to appeal record).

Nothing in the 2000 amendment to § 206 addresses already approved tribal probate codes. The language stating that the Secretary "shall not approve" certain tribal codes is prospective in nature. Had Congress intended to repeal, or render invalid, existing tribal probate codes that were inconsistent with the amendment, it could have done so. The fact that Congress in 2000 decided to place limitations on the Secretary's authority to approve tribal probate codes that were subsequently enacted does not, in our view, necessarily imply an intent by Congress to nullify approved existing codes to the extent they were inconsistent with the 2000 amendment. Our conclusion on this issue is reinforced by the fact that subsequent to 2000, Congress again amended § 206, and as discussed below, present-day § 206 only contains restrictive language governing tribal probate codes that prohibit *devises* to lineal descendants (and to members of other tribes). Thus, the 2000 amendment cannot be construed as a definitive and final determination by Congress on the permissible terms of a tribal probate code.[10]

IV. The Effect of AIPRA on Application of the 1999 Code

In 2004, Congress enacted AIPRA, which substantially revised or replaced entirely certain provisions in ILCA, including § 207, the section that had once contained the escheat provisions that the Supreme Court struck down in *Youpee* and *Irving*, *see supra* note 7. Section 207, as amended and replaced by AIPRA, now includes extensive rules governing the descent and distribution of trust property, including default Federal rules of intestate succession and rules governing devises of trust property. *See* 25 U.S.C. § 2206 (2006). If AIPRA's rules of intestate succession applied to Decedent's estate, it appears that Appellant and Corbett would be eligible heirs who would share the inheritance of Decedent's entire interest in the Allotment, and the Tribe would receive nothing. *See* 25 U.S.C. § 2206(a)(2)(B)(i); *see also id*. § 2201(9) (definition of "eligible heirs").

Appellant acknowledges that Decedent died before AIPRA's rules of intestate succession became effective in 2006, and that AIPRA does not apply to this case. *See* Appellant's Amended Opening Brief at 4 n.2. But Appellant argues that there is an inconsistency between AIPRA and the 1999 Code that provides us with grounds not to apply the 1999 Code. We disagree. The fact that Congress chose certain Federal default rules of intestate succession, whether under AIPRA or under the Umatilla Inheritance Act,

---

[10] The probate documents discussed earlier, *supra* note 3, do not indicate that Appellant and Corbett are, in fact, lineal descendants of the original Umatilla allottee, Charley Tokaekin, but we need not make any such finding to decide this appeal. Based on our resolution of this issue, we find it unnecessary to remand this case for further proceedings to determine whether or not Appellant and Corbett are lineal descendants of Tokaekin.

which apply in the absence of an approved tribal probate code, does not render invalid the Tribe's choice as authorized by § 206 to adopt different and more limiting rules of intestate succession.

Moreover, as Appellant concedes, AIPRA reaffirmed the authority of tribes to adopt tribal probate codes to govern the descent and distribution of trust or restricted lands. *See* 25 U.S.C. § 2205 (2006). Although Appellant contends that it is "unknown" whether the 1999 Code, if enacted by the Tribe today, would be consistent with § 206, as amended by AIPRA, she identifies no provisions in present-day § 206 that are inconsistent with the 1999 Code. Thus, even if the tribal probate code provisions in AIPRA were relevant to our decision in this case, Appellant does not argue that an inconsistency exists between the 1999 Code and AIPRA's provisions governing tribal probate codes.

If anything, our examination of § 206, as amended by AIPRA, would appear to undercut Appellant's position. In AIPRA, Congress explicitly placed restrictions on tribal probate codes that prohibit certain *devises* of trust or restricted property without payment of compensation, but Congress did not place the same restrictions on tribal codes governing *intestate* succession. In the present case, if Decedent had died with a will and had devised her interest in the Allotment to Appellant and Corbett, the 1999 Code — consistent with AIPRA — would have required the Tribe to pay compensation before it could prevent the devise. But Decedent died without a will, and nothing in § 206, as amended by AIPRA, appears to prevent a tribe from enacting the rule of intestate succession that is embodied in the 1999 Code and which applies in this case. *See* 25 U.S.C. § 2205(a)(3). Thus, we find no basis in AIPRA to find that the ALJ erred in applying the 1999 Code to the Allotment, or to conclude that the Board may disregard the 1999 Code.

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, the Board affirms the Order Denying Rehearing.

I concur:

// original signed	// original signed
Steven K. Linscheid	Debora G. Luther
Chief Administrative Judge	Administrative Judge