ESTATE OF BERNITA ELIZABETH STAMP PAYTON

IBIA 81-28 Decided March 22, 1982

Appeal from order denying petition for reopening by Administrative Law Judge Sam E. Taylor.

Reversed.

1. Indian Lands: Patent in Fee: Jurisdiction

While the Federal trust responsibility over allotted land is extinguished when ownership of the land is acquired by a non-Indian, an erroneous heirship determination involving an interest in trust lands passing to a non-Indian does not prevent correction of Department records when a fee patent has not yet been issued. Departmental regulations enable the Department to correct its records to reflect the factual circumstances of the case and to correct discovery of legal error while the probate of a trust estate is still pending within the Department.

APPEARANCES: Benno G. Imbock, Esq., Anadarko Field Solicitor, United States Department of the Interior, for appellant Area Director.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On March 20, 1976, decedent Bernita Elizabeth Stamp Payton died intestate at the age of 39, the beneficial owner of Indian trust lands administered by the Department. An order dated December 1, 1978, divided her estate equally, in one-eleventh shares to each heir, among her non-Indian husband and nine Indian children. This apparent error was corrected by an order nunc pro tunc dated January 29, 1979, modifying the first order by correcting to a one-tenth interest the fractional share to be distributed to each heir. Subsequently, it was made to appear to the Department that two additional children of decedent were living and entitled to share in her estate. The Superintendent of the agency concerned petitioned to again reopen this estate to include the additional two, and to redistribute the assets of the estate accordingly. Following a hearing on reopening, where evidence concerning paternity of the two additional children was received which established their relationship to

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decedent, a third order issued on July 25, 1980, which ordered a one-tenth interest to be distributed to the non-Indian husband with the remaining nine-tenths interest in decedent's trust property to be divided equally among her 11 surviving children. It is from this order that the Anadarko Area Director, Bureau of Indian Affairs appeals, on behalf of the 11 Indian heirs, alleging that the order of distribution is erroneous in law.

Citing Chemah v. Fodder, 259 F. Supp. 910 (1966), appellant contends that the Department still retains sufficient jurisdiction over the trust property to correct the distribution ordered by the second order of distribution (itself, as he points out, a correction of an initial order distributing a different share to the non-Indian spouse).

In Estate of Knight, 9 IBIA 82 (1981), another decision arising from a probate in the Anadarko area, this Board considered the effect upon inheritance of Indian trust property when the heirs of a decedent include a non-Indian heir. In Knight, supra at 85, it is noted that under the holding in Chemah, cited above, (which applies the general principle laid down in Bailess v. Paukune, 344 U.S. 171 (1952), that allotted Indian lands take on a different status when held by a non-Indian), the Secretary, who has a duty to issue a fee patent to a non-Indian heir, could do so in more than one way. As the opinion in Chemah notes, the Secretary is charged with the administration of these trust estates under the Acts of Congress which establish the allotment system. He must not only decide which persons are to inherit, he must decide how he is to deliver the interest of persons who are entitled to a final patent in fee. In his administration of these trust estates he is guided by the statutes allotting the land and the regulations which provide for the implementation of the statutes. Thus, while it is true that the trust, so far as the non-Indian is concerned, terminates upon his acquisition of an interest in the trust property to the extent of his interest, the trust nonetheless continues in a "dry and passive" character to permit the Secretary to complete his administration of the estate. The proceedings before the Indian probate Administrative Law Judge are part of that administration and, under the probate regulations promulgated by the Secretary to permit the determination of inheritance, so long as the trust property remains in the hands of the Secretary, he is permitted to reopen to correct errors of administration. 43 CFR 4.241, 4.242. See Estate of Snipe, 9 IBIA 20 (1981); Estate of Marksman, 5 IBIA 56 (1976).

This described procedure for correction of agency records was in fact followed earlier in this case when the Administrative Law Judge reopened to correct his initial order distributing part of decedent's estate to her non-Indian and Indian heirs. He then correctly found that he could correct his initial error in this estate. He must now reopen this matter to correctly distribute, according to the applicable law, the shares to which each of the 11 Indian children and the surviving husband are entitled.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order denying petition for

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reopening is reversed. This matter is remanded for entry of an order of distribution in conformity to this opinion.

This decision is final for the Department.

Franklin D. Arness
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Jerry Muskrat
Administrative Judge

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