

IN THE SUPREME COURT OF THE STATE OF MONTANA

SUPREME COURT CAUSE NO: DA-0719

Glenn Robert Gopher, Estate of Thane Gopher,

Blair Gopher, Miranda Gopher, Melinda Gopher

And Mary Gopher Parenteau, APPELLANTS

APPELLANT'S BRIEF

v.

Mike Gopher, APPELLEE

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT,JUDGE THOMAS MCKITTRICK PRESIDING

Cause No: ADP-10-127 THE ESTATE OF DOROTHY MCGILLIS GOPHER

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the District Court's assumption of jurisdiction over the probate of a Blackfeet tribal member resident residing off the reservation at the time of her death and where the residual property of her estate is off reservation, and where the Blackfeet Tribe has asserted exclusive jurisdiction pursuant to the Blackfeet Law & Order code: the heirs seek a right to enforce a prior approved Family Settlement Agreement upon the sole opposing heir as s a matter of self government of the Blackfeet Tribe: does state jurisdiction unlawfully infringe on the Blackfeet Indian Tribe's right of tribal self- government?

STATEMENT OF THE CASE

This matter arises from an appeal from the Eighth Judicial District Court of Cascade County, denying the Motion of Glenn Robert Gopher, the Estate of Thane Gopher, Blair Gopher, Miranda Gopher, Melinda Gopher and Mary Gopher Parenteau (hereinafter referred to as, the Gopher heirs), to dismiss the District Court probate for lack of

subject matter jurisdiction, and invalidating Robert Gopher's Last Will & Testament, dated April 22, 1970, that had been prior approved and admitted to the probate by the Department of the Interior, of his Indian trust assets within the exterior boundaries of the Blackfeet Indian Reservation. Notably, the heirs point out Robert Gopher's will left Dorothy Gopher, the decedent, as his sole heir and beneficiary. Robert Gopher died on October 30, 1998, and Dorothy Gopher deceased, intestate, on October 2, 2008.

STATEMENT OF FACTS

Dorothy Gopher died intestate on October 2, 2008; her trust estate probate within the exterior boundaries of the Blackfeet Reservation: Interior approved family settlement agreement on June 22, 2010. Mike Gopher filed for PR status on remaining personal property on July 22, 2010 consisting of a rare 13 star peace flag bundle that passed in possession and ownership to Dorothy Gopher by way of her late husband Robert Gopher's Last Will & Testament, dated April 22, 1970 as sole beneficiary. Mike Gopher petitioned for and granted status as personal representative of the

estate. He then moved to disinherit all of his siblings inconsistent with MCA 72-2-113; the remaining heirs contested his appointment. Mike refused to cooperate in joint PR appointments per Montana law, and as a result, a Public Administrator was appointed by the Court on January 21, 2011. The Petitioners state Dorothy Gopher was a member of the Blackfeet Tribe, as we are. The Gophers moved to dismiss the proceedings in the Eighth Judicial District, Cascade County on November 17, 2011 by raising the *Big Spring* precedent on subject matter jurisdiction. The Gophers asked the court for an independent inquiry on proper jurisdiction. The court assured it would make this inquiry but left the matter unaddressed. Nine months elapsed.

The Gopher heirs on August 4, 2012, failing to get response and petitioned the Blackfeet Tribal Court to assert jurisdiction. Pursuant to the Blackfeet Tribal Law and Order Code, and notably, the tribe did not use its discretionary power to permit a state court to determine heirs Ch.3 § 4: the tribal court asserted exclusive

jurisdiction on October 30, 2012. The Court denied Motions to Intervene and Motions to dismiss filed by Phyllis Parker, et.al,. The court applied the American Indian Probate Reform Act (AIRPA), raising a federal preemption. On November 2, 2012, Cascade County issued its order, denying our motion to dismiss, granting Mike's contract claims of constructive trust based on unjust enrichment. The Gopher's filed a timely notice of appeal, and bring the matter to the court now in this opening brief.

STANDARD OF REVIEW

Review of a state district court's Order that is in-opposite to the prior precedent of the Montana Supreme Court ruling in *The Estate of William Big Spring, Jr.* 255 P.3d. 121 (MT 2011) is de novo. The heirs contest the Cascade County order as a conclusion of law to be incorrect and inconsistent with the newly articulated doctrine of this Court, and therefore lacks jurisdiction. The Montana Supreme Court re-articulated precedent reflective of upholding and enhancing tribal sovereignty, consistent with *Fisher v. District Court*, 424 U.S. 382 (1976), *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), *National Farmers*

Union Ins.. Cos. v. Crow Tribe, 471 U.S.C. 845 (1985),
Water Wheel Camp Recreational Area v. LaRance, 642 F. 3d
802 - Court of Appeals, 9th Circuit 2011 and several
others. These cases require exhaustion of tribal remedies.

LAW AND ARGUMENT

Pursuant to applicable Federal Indian law and Montana state law principles, the Blackfeet Tribe has inherent sovereignty over the probate of the estate of the deceased tribal member, Dorothy Gopher, who at the time of her death, although she was not a resident of the Blackfeet Reservation, was the owner of trust property within the exterior boundaries of the Blackfeet Indian Reservation, distributed by an Interior Department approved Settlement Agreement. Residual property owned by Dorothy Gopher includes oral/audio history of her late husband's Ojibway heritage and a thirteen star flag. Second, the Blackfeet Law & Order Code establishes exclusive jurisdiction of the probate proceedings of tribal members. The Federal government has long recognized the Tribe's retained sovereignty in the area of inheritance of its own members.

In addition BLOC Chapter 3, §§ 4, 5 affirm Blackfeet jurisdiction exclusively.

For the State District Court to assume jurisdiction over the probate of the estate of Dorothy Gopher on these facts, is an unlawful infringement on tribal self-government. Montana has never met the necessary federal requirements to assume jurisdiction over the reservation-based activities of Blackfeet Tribal members, and the Blackfeet Tribal Law and Order Code prevents state jurisdiction over the civil matters of its members unless specifically granted (BLOC Ch 3 §§4,5). The District Court's decision finding that it had jurisdiction is therefore wrong, and must be reversed. Further, the District Court ignores at least three central issues 1) the Blackfeet Tribe has retained exclusive jurisdiction of the civil matters of its tribal members, irrespective of whether the tribal member resides on or off the reservation pursuant to Ch. 3 of the Blackfeet Tribal Law & Order Code, and 2) the Tribe would have granted by order, the state court jurisdiction under its discretionary power, it did

not, and 3) the state court, and Cascade County appointed administrator erroneously argued for state court jurisdiction and deny a duty and obligation to first exhaust tribal remedies, as outlined above. Subject matter jurisdiction is a threshold issue which may be raised at any time, by any party. Procedural considerations are irrelevant in determining, whether the court had the power and authority to act in the first instance. Even so, the heirs waited for a full nine months from the time the issue was first raised in Cascade County court (Nov. 17, 2011 CasCo hearing), and the request for independent inquiry was made to the filing for tribal jurisdiction on August 4, 2012 by Blair and Melinda Gopher.

Our additional argument, citing the American Indian Religious Freedom Act 42 U.S.C., §1996 and Amend. I, U.S. Const., that a state court should not be exerting authority over an American Indian religious bundle or items of cultural patrimony, as this is in violation of federal laws.

Lastly, the state court cannot invalidate a will, as it has invalidated Robert Gopher's will, that had been prior to, admitted and approved by the Dept. of Interior in the 2002 probate of his Indian trust property.

A.SUBJECT MATTER JURISDICTION - TIMING

The issue of subject matter jurisdiction may be invoked at any time in the course of a proceeding, and that once the court determines that it lacks subject matter jurisdiction, it can take no further action in the case other than to dismiss it." *Wippert v. The Blackfeet Tribe*, 260 Mont. 92, 103, 859 P.2d 420, 425 (1993), (jurisdiction successfully raised after 17 years of litigation and two prior appeals). The Gopher family notes that 1) the issue was first raised in November 17, 2012 and the court failed to act, 2) the Gopher's filed a Motion to Dismiss for lack of subject matter jurisdiction, the Court denied this motion on October 2, 2012, and Appellants now appeal. Further, Jurisdiction involves the fundamental power and authority of a court to determine and hear an issue." *Stanley v. Leniire* , 2006 MT 304, 130, 334 Mont. 489, ¶ 30, 148 P.3d 643, ¶ 30. For this reason, jurisdictional issues

"transcend procedural considerations." *id.*, quoting *Thompson v. Crow Tribe of Indians*, 1998 Mt 161, 112, 289 Mont. 358, 112, 962 P.2d 577, ¶ 12. Importantly, subject matter jurisdiction cannot be conferred by the consent of a party. *Indian Health Board of Billing, Inc. v. Montana Department of Labor and industry, et al.*, (2008), 2008 MT 48, 120, _Mont., 120, P.3d ,¶; *Thompson v. State*, 2007 MT 185, 128, 38 Mont. 511, 128, 167 R3d 867, ¶ 28; *In re Marriage of Miller*, 259 Mont. 424, 427, 856 P.2d 1378, 1389 (1993). In short, "lack of jurisdiction over the subject matter can be raised at any time and a court which in fact lacks such jurisdiction cannot acquire it even by consent of the parties." *Corban v. Corban*, 161 Mont. 93, 96, 504 P.2d985, 987 (1972).

If the District Court in this instance lacked subject matter jurisdiction, the Cascade County court has proceeded as if Mike Gopher's consent and participation is all that is needed. This is clearly in error, and now has enacted an illegal order in direct affront to the prior *Big Spring*

rule. This misapplication cannot overrule controlling jurisdictional rule, simply, jurisdiction is non-existent.

B. TRIBAL SOVEREIGNTY AND TRIBAL COURT JURISDICTION

1. Tribe Retains Exclusive Jurisdiction over the

Inheritance and Probate of Members Subject to the Blackfeet

Law & Order Code

Inherent tribal sovereignty contains exclusive authority to regulate through rules of inheritance the estates of tribal members, and to enforce these rules in tribal court. Longheld federal case law and policy support retained tribal sovereignty in this area as the exclusive domain of the tribe. The Blackfeet Tribe has asserted its sovereignty pursuant to its Blackfeet Law and Order Code, this has been a sentiment expressed by this Court and will not be restated for purposes of brevity. Tribal inheritance rules are governed by the BLOC CH 3 does not exclude non-resident tribal members, nor does it exclude off - reservation property, nor would such exclusions be consistent with the stated social policy of this court, to backdoor an attempt of PL 280 that only the U.S. Congress can authorize. Short of Congressional act the District

Court does not have jurisdiction, this Court expressed clearly in *Big Spring*, of the need to honor tribal jurisdiction even if there is a "colorable" argument in support of it.

2. Exclusive Tribal Inheritance and Probate Jurisdiction

The Blackfeet Law & Order Code, Chapter 3, specifically sets forth rules of inheritance and the procedural guidelines. It also provides for whether the tribal court will, in its discretion, authorize and relinquish heir determinations to a state court. In this matter, the Blackfeet Tribal Court asserted exclusive jurisdiction (October 30, 2012 Order, In the Matter of the Estates of Robert & Dorothy Gopher, 2012-P-27).

C. STATE COURT JURISDICTION

1. The State District Court General Lack of Subject Matter Jurisdiction

a. The State has not complied with the requirements of Federal law, this controversy is replete with federal preemptions that bar state jurisdiction.

1) FEDERAL PREEMPTION CONSISTENT WITH BIG SPRING BARS

STATE JURISDICTION. The Gopher heirs raise substantial

claims, and assert the following, the Montana Supreme Court articulated its underlying doctrine in the reinterpretation to enact new precedent in *The Estate of William Big Spring, Jr.* 255 P.3d. 121 (MT 2011) based upon ruling precedents of both the 9th Circuit and the United States Supreme Court. The Heirs claim the underlying doctrine of honoring and upholding tribal sovereignty prohibits state court jurisdiction. The Gophers state both federal preemption claims, prior existing probates of their parents on the Blackfeet Reservation provide for "consistency in the law." State court meddling has been an extreme burden on the family. Second, the Gopher's claim Mike Gopher has used the state forum to avoid being held to the Family Settlement Agreement of June 22, 2010, the state court has infringed on self government of the tribe to regulate the contract affairs of its members, including the Family Settlement Agreement. Other general defects include:

- 2) The state is attempting to impose an order for claims of unjust enrichment and to impose a constructive charitable trust, this order is in violation of the federal "Indian Commerce Clause," Art.1, Sec. 8, Cl. 3. A state court lacks such jurisdiction, as only Congress can regulate the commerce of Indian tribes.
- 3) The state is in violation of Amendment 1, U.S.Const., that bars infringing on the religious rights and practices of the heirs with respect to the 13 star flag medicine bundle.
- 4) The state order is defective and in violation of the American Indian Religious Freedom Act, 42 U.S.C., §1996 and impermissibly attempts jurisdiction where a federal preemption exists.
- 5) The state order is defective and in violation of the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3007, perhaps causing the violation of civil and criminal penalty provisions of the Act by court appointed Public Administrator, Gerald Boland.

- 6) The state order attempts to overturn *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998), that upholds sovereign immunity, the Gopher's Ojibway side are reorganized as a tribal clan, the Listening Thunder & Rattle Woman Clan, and the state order attempts to impose contract conditions and obligations where none exist, nor does it have authority to impose these conditions, nor does it have authority to hear tribal claims or determine tribal trust property.
- 7) The state court egregiously created a government entanglement, in violation of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) in the private religious life of the Gopher family. The state court caused a high profile, defamatory media spectacle, and unwanted attention into the private religious life and beliefs of the Gopher family with respect to the 13 star flag bundle.
- 8) The state court is attempting re-write over 200 years of federal Indian policy in one order. The state court impermissibly invalidates the Last Will & Testament of Robert Gopher, and violates the doctrines of

established policy and precedent in its zeal to confiscate an item that is held as a religious item of cultural patrimony by the Gopher family, members of a federally recognized tribe, for the sake of its value, and illegally appraise and impose taxes.

9) The state court order violates the principles of charitable trust establishment, and does not meet the requirements that a charitable goal be stated by the giver/settlor, in this case Robert Gopher, and attempts to create a class of beneficiaries on the whims of Mike Gopher: nothing in the order has been supported by written instructions of Robert Gopher for such a trust establishment. Courts will generally not recognize the existence of a trust unless the settlor's intent to create a trust was "clear and unequivocal" or "definite and particular"

- in other words, that the language used in the documents or conveyance that create the trust (known as the trust instrument) must indicate the settlor's intent to create the relationship to some reasonable

level of certainty. *C.F. De Mello v. Home Escrow, Inc.*, 659 P.2d 759 (Haw. 1983). *Hoyle v. Dickinson*, 746 P.2d 18 (Ariz. App. 1987); *McGhee v. Bank of America* (1st Dist) 60 Cal. App. 3d 442, 131 Cal. Rptr. 482 (1976).

10) In fact, the court overreaches to apply a *cy pres doctrine*, this is impermissible in the laws on trusts, certainly it is not done with respect to charitable trusts. This point is largely moot for the lack of jurisdiction, but is mentioned to illustrate the exhaustive effort the court made to divest the Gopher family of their property.

11) The non-estate parties, namely Phyllis Parker's claims to Ahontoays Tribal affiliation are untrue, her claims are at rest, *Bear Claw Tribe v. United States*, 36 Fed. Cl. 181, 192 (1996) Phyllis Parker was the registered agent of the Bear Claw Tribe, (1992 Sec. of State Business Records, Bear Claw Tribe). Further, Phyllis is not entitled to state court relief, the state must respect the federal process in place for

membership/leadership disputes of petitioning tribes,
FR 73-30146, May 28, 2008 (fed. rule). State court is
the improper forum for membership disputes this is a
detailed and regulatory federal process.

- 12) The Gopher heirs are entitled to the sole useage
and return, protection, of the audio cassette tape in
the custody of PR Gerald Boland pursuant to *Hickman v.*
Taylor, 329 U.S. 495(1947). The Gopher heirs have been
deprived of the use of the audio evidence that
disproves the claims made in the state order, namely
that Ahontoays was the receiver of the 13 star flag,
this is a fabrication, and not consistent with the oral
traditions of the Gopher family.

b. The District Court's assumption of jurisdiction
impermissibly infringes on the Blackfeet Tribe's right of
self-government.

The Blackfeet Law & Order code states a policy: the
tribal court is the sole authority to determine heirs and
to approve and admit wills. The Blackfeet Tribe, and the
Department of the Interior had prior acknowledged, approved

and admitted Robert Gopher's Last Will & Testament to the record under auspices of federal law can presenting yet another preemption (Distribution Decree, Estate of Robert Gopher, No: 001-201-234N, DoI, BIA, January 25, 2002). Mike Gopher is not satisfied with the outcome and has attempted to use a state court to invalidate his late father's will that left Dorothy Gopher as a sole beneficiary / trustee of his property, and in doing so, has violated the Family Settlement Agreement that was approved under the authority of the Interior Department, creating another preemption. The Blackfeet Tribe has regulatory authority to enforce agreements, by nature of its sovereign status, to regulate the affairs of trust situated property within the exterior boundaries of its reservation. In setting aside the Family Settlement Agreement, and invalidating Robert Gopher's Will, the state has impermissibly infringed on Blackfeet tribal sovereignty.

CONCLUSION

The opposing heir, Mike Gopher and Cascade County, its appointed representative in the Estate of Dorothy Gopher,

have gone to great lengths to set aside well-established precedents, cited *Id.*, and in doing so, have deprived and stripped the Gopher family heirs of their property for a substantial period. The state court by every source law stated here, lacks jurisdiction and the November 2, 2012 order must be dismissed and the matter allowed to conclude pursuant to Blackfeet Tribal jurisdiction. The heirs pray for the Court to reverse the state order, and remand this matter for dismissal for lack of subject matter jurisdiction.

Dated this 6th day of February 2013.

Glenn R. Gopher

Glenn Robert Gopher
(Current PR, Thane Gopher Estate)

BLAIR GOPHER

Blair Gopher

Melinda Gopher

Melinda Gopher

Miranda Gopher

Miranda Gopher

Mary Gopher

Mary Gopher

CERTIFICATE OF SERVICE

I hereby certify that I have filed this Appeal with the Clerk of the Montana Supreme Court and that I have mailed and hand delivered a copy to each attorney of record and any party not represented by counsel as follows:

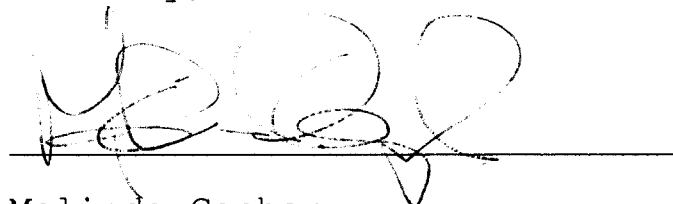
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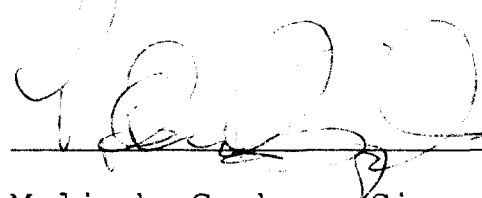
Dated this 6th Day of February, 2013.



Melinda Gopher

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 13(4)(b) of the Montana Rules of Appellate procedure, I certify that this brief is printed in mono-spaced Courier text typeface, 14 points, is double spaced, Microsoft Word 2010, is not more than 30 pages, excluding certificate of service and certificate of compliance. Dated this 6th Day of February, 2013.

A handwritten signature in dark ink, appearing to read 'Melinda Gopher', is written over a horizontal line.

Melinda Gopher, Signed For All Appellants