UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

ESTATE OF RAYMOND P. SAUSER, and JAMES RAYMOND SAUSER, **Plaintiffs,**	)	
v.	)	
UNITED STATES OF AMERICA; SALLY JEWELL AS SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR; and KEVIN WASHBURN AS ASSISTANT SECRETARY OF INTERIOR BUREAU OF INDIAN AFFAIRS; **Defendants.**	)	CIV 14-5051-JLV

PLAINTIFFS' REPLY BRIEF

The issues before this Court are straightforward and can be summarized as:

1) That Defendants acted arbitrarily and capriciously when they refused to give effect to the terms of Raymond P. Sauser ("Decedent")'s Last Will and Testament and his clear testamentary intent.

2) That Defendants acted arbitrarily and capriciously when they refused to consider and apply the Renunciation and Disclaimer, which was filed as an alternative means to effect Decedent's testamentary intent only after response to Defendants' continued refusal to give effect to the terms of the Will.

ARGUMENT

1. The Application of Issue Exhaustion to This Case is Inappropriate.

As discussed in Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings, Plaintiffs have fully exhausted their administrative remedies. This is plainly admitted by Defendants in argument 1 of their Brief in Opposition.

Having made this critical admission, Defendants now resort to the unsupportable assertion that "issue exhaustion" precludes this Court's consideration of the Renunciation and Disclaimer. This plainly ignores the fact that the Renunciation and Disclaimer was timely filed (as discussed in Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings). Further, "issue exhaustion" is not applicable because the underlying administrative proceedings are non-adversarial. *Sims v. Apfel*, 530 U.S. 103, 109, 120 S.Ct. 2080, 147 L.Ed.2d 80 (2000).

As the Renunciation and Disclaimer was timely filed, it should have been considered and given effect by Defendants. However, the timing of the filing of the Renunciation and Disclaimer is nothing more than a red herring as issue exhaustion has no relevance to this non-adversarial proceeding. *Sims*, 530 U.S. at 109. The United States Supreme Court has held that "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* The Supreme Court further held that "[w]here... an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker." *Id.* at 110.

Application of the doctrine of exhaustion of administrative remedies "requires an understanding of its purposes and of the particular administrative scheme involved." *McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969). If administrative proceedings are adversarial, the parties are expected to develop the issues whereas in non-adversarial, the parties do not have adequate opportunity to develop the record or frame the issues. *Sims*, 530 U.S. at 109.

The BIA probate of Decedent's will was wholly non-adversarial and issue exhaustion is therefore inapplicable. This is primarily because the probate process itself is non-adversarial.

Estate of Wesley Emmett Anton, 12 IBIA 139, 142 n.3; Will Contests § 12:1 (2d ed.); see also *Heussner v. Hayes*, 289 Conn. 795, 805, 961 A.2d 365, 371 Conn. (2008) (holding that probates, unlike civil actions, are not adversarial actions between parties); see also *Estate of Dahlke ex rel. Jubie v. Dahlke*, 2014 WY 29 ¶ 79, 319 P.3d 116, 134 (Wyo. 2014) (holding that probate administration is often not adversarial, and the probate court has a significant role in assuring that the decedent's intended distribution be carried out efficiently and honestly); see also *In re La Mar's Will*, 146 N.E.2d 472, 474 (Ohio Prob. 1957) (acknowledging that a proceeding to admit a will to probate and record is not an adversary one).

Specifically, in this case, there were absolutely no adversarial proceedings held. Agency proceedings are non-adversarial when they lack cross-examination, counter-arguments, or any type of discussion that could be defined as "adversarial," none of which occurred in this present case. *Coal. For Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 465-66. In fact, Jon and James, the only two beneficiaries, have never disagreed as to the manner in which their father intended to devise the Indian Trust Land between them. It has only been the Defendants that have resisted the clear testamentary intent of Decedent as they substituted their own will for his. This, however, does not make the proceedings adversarial because the government's role in Indian probates is itself purely non-adversarial. Estate of Charles Daniels, 1 IBIA 177, 185.

For these reasons, the application of administrative issue exhaustion is wholly inappropriate to this present action.

2. The IBIA's Decision Refusal to Consider the Renunciation and Disclaimer was Erroneous

Plaintiffs rely upon their Brief in Support of Motion for Judgment on the Pleadings with regard to the timely filing of the Renunciation and Disclaimer. However, it is important to note

that the Renunciation and Disclaimer was only filed as an alternative method to ensure that Decedent's final wishes were carried out in light of Defendants' repeated refusal to comply with their responsibility to do so. The Court need not reach this issue if it determines that Defendants' acted arbitrarily and capriciously with regard to ordered distribution of Decedent's Indian trust land.

Defendants have asserted that ambiguities exist in the Code of Federal Regulations and that the agency's interpretation of those regulations are binding. However, no ambiguities exist in the statutes for the agency to interpret. As described in Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings, the Code of Federal Regulations specifies precisely and unequivocally when an agency action is "final." 43 CFR § 4.314. 43 CFR § 4.314 states in relevant part: "No decision of an administrative law judge, Indian probate judge, or BIA official… will be considered final so as to constitute agency action… unless it has been made effective pending a decision on appeal by order of the Board." *Id.* When no ambiguity exists, there is no room for agency interpretation and deference to the agency should not be afforded. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984).

Defendants attempt to manufacture an ambiguity by parsing terms and arguing that since the hyper-specific job title of "Administrative Judge, Interior Board of Indian Appeals" does not appear in the regulation definition, that person is not a "Judge." It is important to note that 43 CFR § 30.101, cited by Defendants, makes absolutely no distinction between "Administrative Judge" and "Administrative Law Judge." 43 CFR 30.101. In fact, an Administrative Law Judge is defined simply as "an administrative law judge with OHA appointed under the Administrative Procedure Act, 5 U.S.C. 3105." *Id.* An ALJ is merely a person appointed under the APA that

"are necessary for proceedings required to be conducted in accordance with [5 U.S.C. §§ 556-57]," which includes agency review. 5 U.S.C. § 3105; 5 U.S.C. § 557. An Administrative Judge is therefore an Administrative Law Judge and no ambiguity exists.

The Renunciation and Disclaimer was timely filed "before the issuance of the final order in the probate case." (AR 31-35), 43 C.F.R. § 30.18. Therefore, the Renunciation and Disclaimer should have been considered and made effective so that Decedent's last wishes can be carried out.

3. Defendants Arbitrarily and Capriciously Refused to Enforce the Testamentary Intentions of Raymond P. Sauser.

As discussed more fully in Appellant's Brief in Support of Motion for Judgment on the Pleadings, the Agency acted arbitrarily and capriciously in its flagrant disregard for the last wishes of decedent. "An agency's decision is arbitrary and capricious if it represents its will and not its judgment." *Hiawatha Aviation of Rochester, Inc. v. Minn. Dept. of* Health, 375 N.W.2d 496, 501 (Minn.App. 1985) (citation omitted), aff'd, 389 N.W.2d 507 (Minn. 1986). The Supreme Court clarified that an agency's decision will be deemed arbitrary and capricious if it appears that the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983). The Department of the Interior may not revoke or rewrite an otherwise valid will disposing of Indian trust or restricted property that reflects a rational testamentary scheme simply because the disposition does not comport with the deciding official's conception of equity and fairness. *Tooahnippah v. Hickel*, 397 U.S. 598 (1970).

Decedent clearly wished to avoid any uncertainty or risk related to the ultimate distribution of his trust lands and he wishes to treat his sons as equally as possible. Last Will and Testament, Article VI (AR 284-302 at page 4 of 19). This proved problematic as his son Jon was an enrolled Indian but his son James was not.

Defendant's arbitrary and capricious decision to thrust the interests in Indian land upon James will create incalculable uncertainties, risks, and difficulties for not only James, but Jon as well. It is uncertain whether James' income from the trust lands would be taxed if he is forced to inherit the trust lands. By treaty, the income from Indian trust lands is exempt from taxation for Indians, however, James is not an enrolled Indian. The possibility that James income would be taxed and Jon's would not is antithetical to the testamentary intent of Decedent. Decedent stated in his Will that:

> when this [Will] refers to treating my children equally, such equality is to be determined after taking into account the unique tax consequences to my son Jim, as a result of his not being an enrolled member of a federally recognized tribe.

Id. In fact, this directive was Decedent's "overriding and primary intent." *Id.* The Defendants, however, have wholly failed to account for any disparity created between James and Jon due to taxation. This was unequivocally admitted by the ALJ when he ordered distribution of "the estate without regard to any tax consequences…" Decision, p. 3. This is clearly antithetical the testamentary intent of Decedent. In failing to give effect to the clear terms of the will, the agency has acted arbitrarily and capriciously.

Plaintiffs acknowledge that normally the tax consequences may not be considered in a probate. However, Decedent was exceptionally successful during his life and acquired numerous assets including Indian Trust Land as well as innumerable assets that passed via state court

probate. Decedent clearly and unequivocally expressed his overriding and primary intent of treating his children equally in light of the unique tax consequences they face.

It is important to note that Decedent's overriding and primary intent to treat his children equally will only be further trampled if Defendants are not compelled to comply with the final wishes of Decedent or give effect to the renunciation and disclaimer. The only way that Plaintiffs can ensure that Decedent's last wishes are carried out is to execute a gift deed from James to John. This will cause a further disparity between the two as James will undeniably incur gift tax liability from this transfer. Defendants have unabashedly refused to consider any tax ramifications at all and have thus acted arbitrarily and capriciously.

For these reasons, as well as those stated in Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings, Defendants' actions are arbitrary and capricious.

CONCLUSION

Defendants have acted arbitrarily and capriciously with regard to the distribution of Decedent's Will and their refusal to consider and apply the Renunciation and Disclaimer. Therefore, Plaintiffs respectfully request that this Court grant Plaintiffs the relief requested in the Complaint but particularly:

1) That this Court order enter an Order compelling Defendants to approve the Last Will and Testament of Decedent and Order that all of Decedent's Indian transferrable Trust Land interests, except for the "Home Place", be transferred solely to Jonathan Sauser;

2) Alternatively that this Court remand the case to the BIA so that it can enter an order consistent with this Court's determination that Defendants shall approve the Last Will and Testament of Decedent and Order that all of Decedent's Indian transferrable Trust Land interests, except for the "Home Place", be transferred solely to Jonathan Sauser; and

3) Alternatively that this Court find that the Renunciation and Disclaimer executed by James Raymond Sauser is valid and timely filed and require the BIA to change its records so that Jonathan is the sole recipient of Decedent's Indian trust land except the "Home Place."

Dated this 9th day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2015, a true and correct copy of the foregoing **PLAINTIFFS' REPLY BRIEF** as served upon the following counsel of record, as follows:

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