UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

IN REPLY REFER TO:
IA-1275

MAY 10 1963

Int
Indians

Hon. A. S. Mike Monroney
United States Senate
Washington 25, D. C.

Dear Senator Monroney:

There is enclosed a copy of the Deputy Solicitor's decision, dated May 2, 1963, on the appeal filed in the matter of the Estate of Harris Eugene Russell, deceased unallotted Osage Indian. We had advised you in an earlier letter, dated September 27, 1962, that a copy would be furnished when a decision was made on the appeal.

Sincerely yours,

Duard R. Barnes

Duard R. Barnes
Assistant Solicitor
Appeals & Litigation

Enclosure

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WASHINGTON 25, D. C.

May 2, 1963

IA-1275

In the matter of the wills of Harris Eugene Russell, deceased unallotted Osage Indian	:	Appeal from action of the Superintendent of the Osage Indian Agency disapproving eight wills of decedent
	:	Reversed in part

APPEAL FROM THE SUPERINTENDENT, OSAGE AGENCY

The decision of the Superintendent of the Osage Indian Agency, dated October 30, 1961, disapproving eight wills of Harris Eugene Russell, a deceased unallotted Osage Indian, has been appealed to the Commissioner of Indian Affairs by Mrs. Genevieve Jewell Ray, insofar as it disapproves the will of June 8, 1960; by Cleo Bascus Russell and Ronald Gene Russell, insofar as it disapproves the will of October 7, 1959; and by Carol Jean Logan, Jacquelyn Logan, and Leroy Elrod Logan, Jr., insofar as it disapproves the will of March 27, 1958. 1/ The appellants are represented by T. F. Dukes, McCoy and Kelly, and P. D. Lindsey, respectively.

1/ Under Section 8 of the Act of April 18, 1912 (37 Stat. 86), adult members of the Osage Tribe of Indians, not mentally incompetent, may dispose of their restricted estates by will in accordance with the laws of the State of Oklahoma, and subject to the approval of the Secretary of the Interior. The function of approval or disapproval in this respect was delegated to the Superintendent of the Osage Indian Agency under regulations of the Department (25 CFR 17.12). At the time this appeal was instituted Section 17.14 of those regulations (subsequently amended to provide for a direct appeal to the Secretary of the Interior) provided for an appeal from the Superintendent's action to the Commissioner of Indian Affairs, and for a further appeal to the Secretary. For administrative reasons, the Commissioner of Indian Affairs referred the present appeal directly to the Secretary for action.

ESTATE OF HARRIS EUGENE RUSSELL
UNALLOTTED OSAGE INDIAN

Decided MAY 2 1963

IA-1275

Indian Lands: Descent and Distribution: Wills

Testimony of lay witnesses not present at the execution of the will, establishing that testator was in poor health, that he was unable to manage his property, that he customarily used intoxicants to excess, and that he appeared to be intoxicated at different times on the day the will was executed, does not meet the burden of proving testamentary incapacity placed upon contestants where testimony of scrivener and attesting witnesses, and the rationality of the will support a contrary finding.

Indian Lands: Descent and Distribution: Wills

Where a decedent, in the six-month period following a divorce, during which Oklahoma law prevented remarriage to any party other than the divorced spouse, executed a will devising property to "my wife"; his divorced spouse, in attempting to establish that an alleged subsequent marriage between herself and the decedent, during said period, revoked the will by

operation of law, cannot, where circumstances rule out the possibility that any other former spouse was the intended devisee, successfully maintain the position that because she was not the decedent's wife at the time he executed the will, she was not provided for in the will.

The decedent, Harris Eugene Russell, died December 31, 1960, a resident of Hominy, Oklahoma. Under the terms of his purported last will, dated June 8, 1960, the decedent devised and bequeathed to his son, Ronald Gene Russell, $1,000 and 160 acres of land; and a life estate in his Osage headright and in 360 acres of land to his "wife" (without further identification), with remainder interest to his first cousin of the half blood, Genevieve Jewell Ray, to whom he also left two improved lots in Hominy and the residue of his estate.

The will of October 7, 1959, for which Cleo Bascus Russell (decedent's wife at that time) and Ronald Gene Russell are the proponents, left decedent's entire estate to them. In the will of March 28, 1958, for which the Logans are the proponents, decedent left everything, except a bequest to his son of $100, to Carol Jean, Jacquelyn, and Leroy Elrod Logan.

A petition for approval of the last will and testament (June 8, 1960) of Harris Eugene Russell was filed with the Superintendent of the Osage Indian Agency by T. F. Dukes, named executor in the will, and Genevieve Jewell Ray. Objections to the approval of the will were filed by Cleo Bascus Russell, Ronald Gene Russell, and the Logans. The allegations included undue influence, lack of testamentary capacity, improper execution, and revocation by operation of law. A hearing on the approval or disapproval of the eight wills was

held before a Field Solicitor to whom hearing authority had been delegated.

Between 1936 and his death in 1960 at the age of 43, the decedent entered into five or six marriages with three women. Four were terminated by divorce and one was annulled. He executed eight wills during the last 15 years of his life, and, because of excessive use of intoxicants and inability to manage his property, he was under guardianship during the last six years of his life. The decedent was afflicted with sugar diabetes which, aggravated by his use of intoxicants, necessitated amputation of his legs. He was hospitalized from time to time for both diabetes and alcoholism. The decedent's marriages were to Cleo Bascus, 1936-1937; Lena Boyiddle, 1938-1944; Pearl DeRoin, 1947-1952; Pearl DeRoin, 1952-1954; and Cleo Bascus, 1954-1960. A sixth marriage was alleged to have been consummated between decedent and Cleo Bascus in June 1960. Ronald Gene Russell, the decedent's only offspring, was born of the first marriage. Circumstances surrounding the marriage and the boy's physical features apparently raised doubt in decedent's mind that Ronald was his issue. A decree of divorce from Cleo Bascus Russell was entered March 4, 1960, and sometime in June 1960, after executing his last will on June 8, 1960, decedent took up residence with her and their son at Mrs. Russell's home in Oklahoma City. The decedent stayed with Mrs. Russell about three months before returning to Hominy to live with relatives. A petition for divorce was filed in his behalf November 4, and this

action was pending when he died the following month. The foregoing facts adduced at the hearing were, except the sixth marriage, uncontroverted.

The Superintendent of the Osage Indian Agency based his decision on the number of wills executed, the numerous changes in beneficiaries, and on findings that the decedent was a chronic alcoholic and that he lacked testamentary capacity because of mental immaturity.

Genevieve Jewell Ray and the Logans based their appeal on allegations that the Superintendent's action was an abuse of discretion in that the evidence adduced at the hearing required approval of the wills they proposed. Ronald Gene Russell and Cleo Bascus Russell, satisfied with the Superintendent's disapproval of all the wills because of their standing as heirs, appealed only to protect their interest in the 1959 will in the event of reversal.

The allegations of undue influence and improper execution, not having been supported by evidence during the hearing, are not now in issue. The issues remaining to be resolved are whether the evidence adduced at the hearing supports a finding that decedent had the requisite testamentary capacity in executing any of the last three wills, and, if he had such capacity, whether a revocation by operation of law resulted from having thereafter married a woman who had not been provided for in the will.

The Supreme Court of Oklahoma has defined testamentary capacity as a state of mental capacity which would enable a person to understand in a general way the nature of the business then ensuing, to bear in mind in a general way the nature and situation of his property, to remember the objects of his bounty, and to plan or understand the scheme of distribution.[2] It has held that while inability to transact business,[3] adjudication of mental incompetence and appointment of a guardian,[4] sickness or bodily weakness,[5] and habitual intoxication[6] may be considered in determining testamentary capacity, they are not conclusive. The Oklahoma courts have also held that in order to invalidate a will for lack of testamentary capacity, evidence must show that the condition existed at the time the will was executed, and that such condition precluded an understanding of the nature and consequences of the act.[7] Prior and subsequent acts may have bearing only to the extent that they assist in determining the mental status at the time of execution.[8] Oklahoma law accords a testator a presumption of sanity, and places upon the contestants the burden of proving a lack of testamentary capacity.[9]

2/ In re Nitey's Estate, 75 Okl. 389, 53 P.2d 215 (1935)
3/ In re Tayrien's Estate, 117 Okl. 216, 246 Pac. 400 (1926)
4/ In re Shipman's Estate, 184 Okl. 56, 85 P.2d 317 (1938)
5/ Ibid.
6/ In re DeVine's Estate, 188 Okl. 423, 109 P.2d 1078 (1941)
7/ In re Shipman's Estate, 184 Okl. 56, 85 P.2d 317 (1938)
8/ In re Mason's Estate, 185 Okl. 278, 91 P.2d 657 (1939)
9/ In re Blackfeather's Estate, 54 Okl. 1, 153 Pac. 839 (1915)

The appellants have not met this burden. The hearing produced conflicting testimony on the question of decedent's sobriety, health, and mental capacity during the period in which the last three wills were executed, and on June 8, 1960, the day the last will was executed, in particular. The only testimony on the decedent's condition at the time of the execution of the last will was that of the scrivener and the attesting witnesses. These witnesses concurred in the position that decedent's mind and memory were clear, that he was not intoxicated, that he appeared to appreciate the significance of the transaction, and that the act of executing the will was of his own volition. The only witnesses who offered contradicting testimony were the lawyer of one of the contestants and that lawyer's secretary. These witnesses testified that they had seen the testator in an intoxicated condition on April 8, 1960 both before and after the time the will was executed, but they were not present at the execution of the will. It is the testator's condition when he executed the will which is decisive. Testimony establishing the testator's reputation as a drunkard and his intoxication at times other than that when the will was executed cannot constitute a proper basis for a Superintendent's determination of the issue of testamentary capacity. The testimony of the scrivener and attesting witnesses, which was not overcome by the testimony of contestant's counsel and counsel's secretary, is supported by the rationality of the will itself. Having made provision for decedent's son and recently divorced wife, and having made no gifts to persons other than those related by blood or marriage, the last will cannot be

said to be unnatural, and in view of decedent's marital history and his doubt about his son's paternity, the will could not be characterized as unfair to his heirs.

Appellants Cleo Bascus Russell and Ronald Gene Russell have argued that decedent and Cleo Bascus Russell entered into a common law marriage after the execution of the last will, and that the will was revoked by operation of law pursuant to 84 OSA 107 because the "wife" provided for in the will was not identified; that Cleo Bascus Russell was not decedent's wife at that time; and that, therefore, she was not provided for in the will as required by said statute. The pertinent text of statute states, "If, after making a will, the testator marries, and the wife survives the testator, the will is revoked * * * unless she is provided for in the will."

A marriage to Cleo Bascus Russell having been terminated four months before the will was executed, it appears that decedent had no wife at the time of executing the will because the six-month period following a divorce decree, during which remarriage to anyone other than the divorced spouse was prohibited by 12 OSA 1280, had not expired.[10/] Thus, the gift to "my wife" created an uncertainty. However, an uncertainty arising upon the face of a will may be resolved pursuant to 84 OSA 152 by ascertaining the testator's intention from the words of the will and the circumstances under which the will was made. From 1954 until his death, the decedent had no wife other than Cleo Bascus,

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10/ Yeats v. State, 30 Okl. Cr. 320, 236 Pac. 62 (1925)

and within a few days of executing the last will he began living with her once more. At that time he was prohibited by 12 OSA 1280 from marrying anyone else. Establishing that a common law marriage was consummated at that time could only serve to support further a finding that Cleo Bascus Russell was the person referred to in the will as "my wife"; thus, in this case, establishing one of the conditions required by the statute - - a subsequent marriage, would tend to negate the existence of the other required condition - - failure to provide for the after-married spouse in the will.

It is determined, in the light of the whole record, that on June 8, 1960, Harris Eugene Russell possessed the requisite testamentary capacity for executing a valid will; that he was not subjected to undue influence, fraud or coercion; that the execution of said will complied with the laws of the State of Oklahoma; and that said will revoked all prior wills, and was not itself revoked by operation of law. Therefore, pursuant to authority delegated to the Solicitor by the Secretary of the Interior [sec. 210 2.A (3) (a), Departmental Manual, 24 F. R. 1348], the action of the Superintendent of the Osage Indian Agency, dated October 30, 1961, disapproving the last will and testament of the decedent, dated June 8, 1960, is hereby reversed, said will is approved, and the Superintendent is directed to enter an order certifying such approval.

Edward Weinberg

DEPUTY Solicitor