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INDIAN PROBATE: CAN AN ADOPTED INDIAN CHILD RECEIVE TRUST PROPERTY AS AN "HEIR OF THE BODY" UNDER AN INDIAN WILL?

S. Gail Gunning*

Indian probate is a colorful and complicated braid. The strands of tribal, state, federal, and concurrent jurisdiction interlace with ownership of restricted and unrestricted land, and again with tribal membership, status, testacy, and intestacy. Through it all run the variegated ribbons of ever-changing policy.¹

The very concept of probating one's estate — of transferring property to another — is a foreign concept superimposed on Indian life by non-Indian law.² Communal ownership of personal property and spiritual dominion over the land are widespread Indian traditions.³ The Indian is an inhabitant and steward of the land, which no person can "own." No wonder "[m]erely being involved in the research required prior to every Indian probate produces frustration. That frustration, however, cannot equate to the feeling of Indian clients bound by a conqueror's court and laws not their own, especially when those laws conflict with their traditions."⁴

Adoption, unlike probate, is deeply rooted in Indian tribal law and custom.⁵ In contrast, its origins in United States law date only from the middle of the nineteenth century.⁶ English common law provided no foundation for adoption law in the United States, since the first adoption statute in England was not passed until 1926.⁷ Indian traditions of adoption find little harmony with current state adoption laws.⁸

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1. Petroskey, *The Fundamentals of Federal Indian Law*, 65 MICH. B.J. 438, 438 (1986). The history of federal Indian policy can be divided into the following eras: Pre-Constitutional Precedents, 1532-1789; The Formative Years, 1789-1871; Allotments and Assimilation, 1871-1928; Indian Reorganization, 1928-1942; Termination, 1943-1961; Self-Determination, 1961-Present. *Id.* (citing F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47 (1982 ed.)).

2. Vaznelis, *Probating Indian Estates: Conqueror's Courts Versus Decedent Intent*, 10 AM. INDIAN L. REV. 287 (1982).

3. *Id.*

4. *Id.* at 308.

5. Hallbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 971-72 (1965).

6. *Id.*

7. *Id.* at 972.

8. *Id.*

Nowhere is the braid of Indian probate more intricate than around the modern-day adopted Indian child. The baffling combination of probate and adoption law, as applied to Indians, often erodes the comfort and security the adopted Indian child has found as an accepted member of a family and tribe. The child's life is tangled into a confusing web. A strand-by-strand unwinding of the elements of Indian probate and adoption law will help to clarify the Indian adoptee's position.

This note will examine how the elements of Indian probate and adoption law combine to answer the question of whether an adopted Indian child can receive trust property under an Indian will as an "heir of the body." This issue arose in the Department of the Interior case of *In re Estate of Frank (Tate) Nevquaya Toahimpah, Deceased Comanche Allottee 146*.⁹

Indian Probate Jurisdiction

The strands of tribal, state, and federal jurisdiction and law intertwine in the plait of Indian probate. A pattern can be drawn to delineate the conflict in Indian probate jurisdiction and choice of law. The decedent, his domicile, his tribal membership, and his property ownership all appear in the pattern.¹⁰

9. Indian Probate No. IP OK 1 P 85-1, I.B.I.A. 85-22, H-33-71, H-34-67 (Sept. 25, 1990).

10. G. GARDNER, INDIAN PROBATE LAW 20 (1986).

Indian Probate Jurisdiction

Decedent	Decedent's Domicile	Property	Jurisdiction
Indian ^a	Indian Country	Trust Property ^b	Federal (exclusive)
		Real Property Outside of Indian Country	State (exclusive)
		Real Property In Indian Country	Tribal (exclusive)
		Personal Property	Tribal (primary)
	Non-Indian Country	Trust Property ^b	Federal (exclusive)
		Real Property Outside of Indian Country	State (exclusive)
		Real Property In Indian Country	Tribal (primary)
			Possibly State (concurrent)

Tribal Sovereignty

The most basic principle of Indian law is that “*those powers which are lawfully vested in Indian tribes are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*”¹¹ Thus the powers of Indian tribes were born with the tribes long before the advent of the United States Constitution.

Federal Indian law regulates the relationship between Indian tribes and the United States.¹² Included are separate titles of the United States Code, the Code of Federal Regulations, some 380 treaties, hundreds of opinions of the Solicitor of the Department of the Interior, thousands of cases, and scores of law review articles.¹³

Federal Preemption

The federal policy of preemption underlies the jurisdiction of tribal, state, and federal governments.¹⁴ This policy grew out of *Worcester v. Georgia*,¹⁵ wherein Chief Justice John Marshall wrote that state law was preempted by federal power over Indians, in conjunction with the tribes’ inherent sovereignty.¹⁶ Myriad policy changes have led to the modern trend away from the concept of inherent Indian sovereignty and toward federal preemption of tribal law as well as state law. In *McClanahan v. Arizona State Tax Commission*,¹⁷ Indian tribal sovereignty was relegated to the status of a “backdrop” for treaty and statute analysis.

	Personal Property	State (primary) Possibly Tribal (concurrent)
Non-Indian Anywhere	All Property	State (primary)

^a Note that this does not include members of the Five Civilized Tribes or the Osage Tribe.

^b The term trust property includes all trust or restricted property.

11. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1971 ed.) (emphasis in original).

12. D. GETCHES & C. WILKINSON, *FEDERAL INDIAN LAW* xxiii (2d ed. 1986).

13. *Id.*

14. Petroskey, *supra* note 1, at 441.

15. 31 U.S. (6 Pet.) 515 (1832).

16. Petroskey, *supra* note 1, at 441.

17. 411 U.S. 164 (1973).

However, the limited sovereignty concept first stated by Marshall was reaffirmed in *United States v. Wheeler*.¹⁸ "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."¹⁹ The Indian probate process clearly and unfortunately illustrates that "possessing attributes of sovereignty" is a far cry from having sovereign control over tribal members and property located within tribal territory.²⁰

Indian Country

Federal Indian law determines jurisdiction in "Indian Country," which includes reservations, dependent Indian communities, and Indian trust allotments.²¹ Jurisdiction over land in Indian Country is determined by the land's status as trust (restricted) or nontrust (nonrestricted) property. Choice of law is also affected by trust and nontrust status of the property. The basic rule is that federal law controls the descent of trust property (which includes allotted lands), while state or tribal law controls the descent of nonrestricted property.²²

"Trust property" is held in trust by the United States for the benefit of an Indian.²³ Title is in the United States, as trustee.²⁴

18. 435 U.S. 313 (1978).

19. *Id.* (citing F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945 ed.)).

20. Vaznelis, *supra* note 2, at 289.

21. 18 U.S.C. § 1151 (1988); *see also* Petroskey, *supra* note 1, at 441.

22. G. GARDNER, *supra* note 10, at 5. The notion of "discovery" provides the foundation for the operative scheme, whereby the European "discoverers" gained the power to define title to land and limit power — all without compensation to the Indians.

The General Allotment Act of 1887, ch. 119, 24 Stat. 388, assigned individual Indians to parcels of land, on the theory that they would stop hunting and become farmers. The balance of the land became public domain, open to homesteading. The notion of assimilation was solidified by the regulation of the Bureau of Indian Affairs. The enforced trust relationship took one hundred million acres out of Indian ownership between 1887 and 1932.

Less than one hundred years ago, not one non-Indian owned any land in what is now Oklahoma. Land was not the only loss. The Indian population has decreased from twenty-three million to two million since the 1920s. Lecture by F. Browning Pipestem, Attorney, University of Oklahoma College of Law (Sept. 13, 1989).

23. 43 C.F.R. § 4.201(m) (1988). *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) was dismissed when Chief Justice Marshall ruled that the Court did not have original jurisdiction, because the Cherokees were not a "foreign nation." Marshall set forth important principles regarding the federal-tribal relationship. The Court described the Indian tribes as "domestic dependent nations" in a state of pupillage. The relation of a tribe to the federal government was said to resemble that of a ward to his guardian. From this statement arose the concept of federal trust protection. Petroskey, *supra* note

Under the Non-Intercourse Act of 1790,²⁵ a conveyance of trust property from an Indian must be approved by the United States. The Indian owner may not alienate trust property without the consent of the Secretary of the Interior or the Secretary's authorized representative.²⁶ Treatment of "trust property" and "restricted property" is the same.²⁷

The original twenty-five-year trust term of the Non-Intercourse Act was extended indefinitely by the Indian Reorganization (Wheeler-Howard) Act of 1934.²⁸ However, one avenue which remains open to the assertion of tribal self-government is the establishment of tribal court jurisdiction over the nontrust assets in an Indian estate.²⁹

In the estate of an Indian whose domicile is Indian Country, tribal jurisdiction could include nontrust real property in Indian Country as well as personal property.³⁰ Where an Indian's domicile is outside Indian Country, tribal jurisdiction would depend on whether agreements between the tribe and the state had granted the state concurrent or primary jurisdiction.³¹ Current federal policy seems supportive of such a division of jurisdiction among federal, state, and tribal courts.³² The law and order regulations for Indian reservations set forth the procedure for determination of heirship and approval of wills in Courts of Indian Offenses.³³ Thus a tribal court, or a combination of tribal court and state court, could exercise jurisdiction over the

1, at 440-41.

"Congress' overriding purposes in enacting the General Allotment Act of 1887 were to protect the Indians' interests in restricted land and to provide Indian allottees and their families with permanent homes." *Akers v. Morton*, 499 F.2d 44, 47 (9th Cir. 1974) (citing General Allotment Act of 1887, ch. 119, §§ 1-11, 24 Stat. 388, 389-91 (current version at 25 U.S.C. § 331 (1988)) (citation omitted). The act authorizes the President to cause allotment of tribal reservation land "to each Indian located thereon to be made in such areas as in his opinion may be for their best interest. . . ." 25 U.S.C. § 331 (1988).

24. 25 U.S.C. § 331 (1988).

25. *Id.* § 177.

26. 43 C.F.R. § 4.201(m) (1990).

27. *Id.*

28. 25 U.S.C. § 461 (1988); see Vaznelis, *supra* note 2, at 291.

29. See Vaznelis, *supra* note 2, at 290.

30. See G. GARDNER, *supra* note 10.

31. *Id.*

32. See Vaznelis, *supra* note 2, at 290.

33. 25 C.F.R. §§ 11.31-32C (1989).

nontrust assets contemporaneously with federal jurisdiction over the trust assets in an Indian estate.

Testacy/Intestacy

The Indian Probate Act³⁴ provides the legal authority for the descent of land, the ascertainment of heirs, and the disposal by will of trust property. When an Indian dies owning trust property, jurisdiction lies with the Secretary of the Interior to determine the legal heirs of the decedent.³⁵ The determination of the sufficiency of an Indian will is also under the jurisdiction of the Secretary.³⁶ The Secretary's jurisdiction over trust property

34. 25 U.S.C. §§ 371-373 (1988).

35. *Id.* § 372; G. GARDNER, *supra* note 10, at 7; *see also* *Blanset v. Cardin*, 256 U.S. 319-20, 326-27 (1921) (upholding a Quapaw Indian decedent's devise of her allotted land to her children and grandchildren instead of her husband; Congress intended Indians to have the right to dispose of property by will free of restrictions of state law); *see also* *Hanson v. Hoffman*, 113 F.2d 780, 789 (10th Cir. 1940) (plaintiff claiming a share of deceased allottee's estate as his blood daughter had no remedy under state law; Secretary of the Interior had jurisdiction; decedent could will his property free of state law).

36. 25 U.S.C. § 373 (1988); 43 C.F.R. §§ 4.200-.340 (1990). Hearing formalities are provided in 43 C.F.R. §§ 4.230-36 (1990).

In *Akers v. Morton*, 499 F.2d 44, 47 (9th Cir. 1974) (citing *Tooahnippah v. Hickel*, 397 U.S. 598, 610 (1970)), an Indian widow challenged the determination of the Secretary of the Interior that her Indian husband's will disinheriting her was valid. Although the court expressed its dissatisfaction with the state of the law, it found that the Secretary was not free to disapprove the will merely on notions of fairness or equity. *Id.* The sole limit on an Indian testator's freedom to devise restricted lands is the power of the Secretary of the Interior to disapprove a will which is (1) technically deficient or (2) irrational. *Id.* "[A]n Indian's devise of restricted lands is less restricted than an Indian's (or a non-Indian's) devise of any other realty. He or she can will that property free from any state law designed to protect a surviving spouse and there is no federal law that fills the state law gap." *Id.* at 48.

In *Atewooflakewa v. Udall*, 277 F. Supp. 464, 466 (W.D. Okla. 1967), *aff'd sub nom.* *Tooahnippah v. Hickel*, 397 U.S. 598 (1970), the Secretary disapproved the will of a Comanche Indian devising his allotted property. The Secretary's basis was the failure to provide for an adult daughter born out of wedlock. *Id.* Examples given by the court of rational bases upon which approval may be denied under 25 U.S.C. § 373 are lack of testamentary capacity, fraud, duress, coercion, undue influence, overreaching, substantially changed conditions as to the decedent's heirs or estate occurring subsequent to the making of the will, and improvident disposition. *Id.* at 468. The court pointed out that it is incumbent upon the Secretary that he not lose sight of the fact that the right to make a will has been conferred upon the Indian and not upon the Secretary. *Id.*

The Supreme Court discussed the scope of the Secretary's power, as balanced against the testamentary capacity of the Indian Testator. The Court stated that, in this case, because the testator had testamentary capacity, was not unduly influenced in the execution of the will, and complied with prescribed formalities, all questions were

grants the additional discretionary power to cause trust lands to be sold and the proceeds used for the benefit of the heirs or beneficiaries.³⁷ The Secretary may also remove restrictions, issue a patent in fee (thus eliminating the trust status of the property), or pay estate proceeds to the heirs or beneficiaries in whole or in part from time to time as he deems advisable.³⁸ Under the Indian Probate Act, if the Secretary determines that the Indian holder of trust or restricted land died intestate without heirs, the land will escheat to the tribe to which it belonged at the time of allotment.³⁹

Choice of law is also affected by the testacy or intestacy of the Indian decedent. If an Indian dies intestate owning trust property, or if the federal administrative law judge disapproves an Indian decedent's will, the judge will look to state law of intestate succession in determining the heirs.⁴⁰ If an Indian dies with a will which the judge approves, beneficiaries are determined under the will and federal law.⁴¹ In *Tooahnippah v. Hickel*,⁴² the U.S. Supreme Court held that the Secretary's authority and discretion do not allow disapproval of a will "simply because of a subjective feeling that the disposition of the estate was not 'just and equitable.'"⁴³

removed except the scope of the Secretary's power to approve or disapprove the will under 25 U.S.C. § 373. *Tooahnippah v. Hickel*, 397 U.S. 598, 607 (1970).

It cannot be assumed that Congress, in giving testamentary power to Indians respecting their allotted property with the one hand, was taking that power away by vesting in the Secretary the same degree of authority to disapprove such a disposition. *Id.* at 608-09. However, the Court also pointed out that the right to dispose of trust property is not absolute, because the allottee is only the beneficial owner, while the Government is the trustee under 25 U.S.C. § 348. *Tooahnippah*, 397 U.S. at 609.

37. 25 U.S.C. § 373 (1988). "The Secretary may use his discretion to have the trust restricted lands of a testator sold and the proceeds to be held or used for the benefits of the entitled heirs, when to do so would be in their best interest, according to the Secretary's judgment. . . .

However, this provision has never been used by the B.I.A. Northern Idaho Agency. The Agency holds that the title passes immediately upon the death of the testator; therefore, the consent and/or application of the heirs is required before a sale of the Indian land can be made." NEZ PERCE JUDICIAL SERVICES, *YOUR INDIAN WILL: A WAY TO KEEP RESERVATION LAND INDIAN* (undated).

38. 25 U.S.C. § 373a (1988); 43 C.F.R. § 4.205(a) (1990).

39. 25 U.S.C. § 373a (1988); 43 C.F.R. § 4.205(a) (1990).

40. Estate of Victor Blackeagle, 16 I.B.I.A. 100, 102 (1988).

41. *Hanson v. Hoffman*, 113 F.2d 780, 789 (10th Cir. 1940).

42. 397 U.S. 598 (1970).

43. *Id.* at 610; see also W. Nutten, III, *Probate Problems of the American Indian*, 7 REAL PROP. PROB. & TR. J. 495, 497 (1972).

Tribal Membership

Tribal membership is vitally relevant in Indian probate. Without tribal membership, one cannot hold the legal and political status of "Indian." Tribal membership affects jurisdiction, in that federal Indian probate statutes are not applicable for decedents who are members of the Five Civilized Tribes or the Osage tribe.⁴⁴ Primary jurisdiction over probate for those six tribes is in the state courts of the State of Oklahoma.⁴⁵

Status

Several types of status are relevant in Indian probate. The status of the decedent as an "Indian" is a legal and political status, determined through recognition by the tribe and acknowledgment by the federal government.⁴⁶ Status in regard to marriage, divorce, and adoption is determined by the state law, tribal code or tribal custom effective in each individual case.⁴⁷ The validity of status is then subject to recognition or nonrecognition by the administrative law judge representing the Secretary of the Interior in a probate matter.⁴⁸

The status of an Indian child as "adopted" is determined by the jurisdiction granting the adoption.⁴⁹ However, the child's inheritance rights are determined under the laws of intestate succession of the situs of the land, while her right to disposition of trust property by will is under the jurisdiction of the Secretary of the Interior.⁵⁰

44. 25 U.S.C. § 375 (1988); see also G. GARDNER, *supra* note 10, at 18-20.

45. See *supra* note 44.

46. One may be an Indian by race and culture and yet fall outside the legal and political classification. Most tribes have adoption procedures whereby one can be admitted to tribal membership. However, the federal government bars one from taking on the legal and political status of being Indian. The legal and political status of the Indian tribes themselves is also subject to recognition by the federal government. Lecture by F. Browning Pipestem, Attorney, University of Oklahoma College of Law (Sept. 13, 1989).

47. *Fisher v. District Court*, 424 U.S. 382, 388-89 (1976) ("25 U.S.C. § 372a manifests no congressional intent to "confer jurisdiction upon state courts over adoptions by Indians. The statute is concerned solely with the documentation necessary to prove adoption by an Indian in proceedings before the Secretary of the Interior.").

48. G. GARDNER, *supra* note 10, at 7.

49. *Estate of Richard Doyle Two Bulls*, 11 I.B.I.A. 77, 82 (1983) (cited with approval in *Estate of Victor Blackeagle*, 16 I.B.I.A. 100, 102 (1988)).

50. *Two Bulls*, 11 I.B.I.A. at 82.

Statement of In re Tooahimpah

In *In re Tooahimpah*, the decedent was an Indian allottee whose will was approved by the Secretary of the Interior through the administrative law judge. Had the decedent died intestate, the recent Internal Board of Indian Appeals (IBIA) decision in *Estate of Irene Theresa Shoots Another Butterfly*,⁵¹ would have been applicable. As an adopted child, the court would have ruled the claimant was an heir under federal law.⁵²

The decedent devised to each of his seven children a life estate in a separate portion of his trust property. The will directed that each remainder interest would vest in the "heirs of the body" of each life tenant. The claimant was the natural-born daughter of decedent's granddaughter. Her great aunt, one of the decedent's daughters, adopted her.⁵³ Thus the claimant's present relationship to the decedent was that of adopted granddaughter.

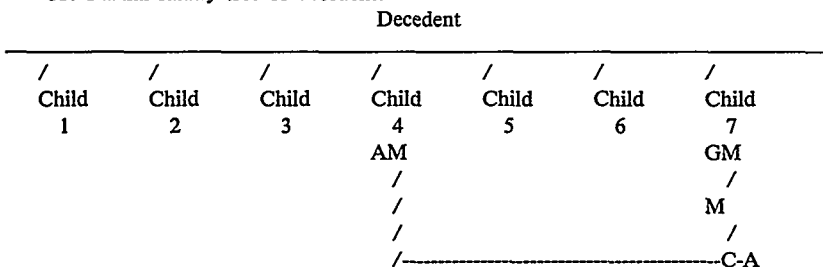
Projected Decision in In re Tooahimpah

Can the adopted Indian child in *In re Tooahimpah* receive trust property under the decedent Indian's will as an "heir of the body"? Jurisdiction is the first determining factor in the decision. The Secretary of the Interior clearly has jurisdiction over *In re Tooahimpah*, because the Indian Probate Act provides for exclusive federal jurisdiction over trust property, which includes Indian allotments.⁵⁴ The death of an allottee does not affect the trust status of the land, and trust property is not

51. 16 I.B.I.A. 214 (1988).

52. 25 U.S.C. § 372a (1988).

53. Partial family tree of decedent:



GM: Claimant's Grandmother (Decedent's Daughter)

M: Claimant's Natural Mother (Decedent's Granddaughter)

C-A: Claimant-Adoptee

AM: Adoptive Mother (Decedent's Daughter)

54. 25 U.S.C. §§ 371-373 (1988).

subject to tribal or state jurisdiction.⁵⁵ A division of federal jurisdiction over trust property and tribal or state jurisdiction over nontrust property in this estate might have been possible, but it was not asserted. Therefore, sole jurisdiction lies with the Secretary of the Interior.

Having established federal jurisdiction under the Secretary, choice of law is the next factor to be determined. Where a will exists, the allotment is disposed of under its terms, irrespective of state law limitations.⁵⁶ Where intestacy exists, the allotment is disposed of under the state laws of descent and distribution.⁵⁷ Thus the choice of law factor for trust property is determined by the existence or nonexistence of a will. Authority for the choice of law is provided in federal statutes, federal regulations, and federal case law.⁵⁸

The Secretary will look first to federal statutes, which provide the threshold test for an adoptee to qualify as an heir of a deceased Indian.⁵⁹ The two basic requirements are that (1) the adoption is valid under a state court decree, Indian court decree, written approval and recordation by the appropriate agency superintendent, or recognized tribal procedure; and (2) the adoption must be recognized by the Department of the Interior.⁶⁰ In *Tooahimpah*, the claimant's status as an adopted child was determined in an Oklahoma state court and is thus eligible for recognition by the Secretary.

Disposal by will of Indian allotments is authorized by federal statute.⁶¹ The validity of such disposal is decided under two requirements: (1) the will must be approved by the Secretary of the Interior, either before or after the date of death, and (2) the will must comply with regulations prescribed by the Secretary of the Interior.⁶² In *Tooahimpah*, the decedent's will was approved by the Secretary after the date of death. Reference to

55. *Blanset v. Cardin*, 256 U.S. 319, 325 (1921).

56. *Id.* at 326.

57. *Id.*

58. *Hanson v. Hoffman*, 113 F.2d 780, 789 (10th Cir. 1940).

59. 25 U.S.C. § 372a (1988).

60. *Id.* A problem also arises for the life tenant/parents. In *Estate of Frank Tooahnippah*, 15 I.B.I.A. 258 (1987), the court held that where an Indian will creates life estates in the decedent's children, with remainders to the life tenants' "heirs of the body," no life tenant can receive oil and gas royalties from the property during life. Such distribution requires the consent of all remaindermen, and the remaindermen cannot be determined until after the life tenant's death.

61. 25 U.S.C. § 373 (1988).

62. *Id.*; see also *Blanset v. Cardin*, 256 U.S. 319, 323 (1921).

the Code of Federal Regulations resolves the issue of whether the will complies with federal regulations.

After looking to federal statutes to determine the validity of an Indian will, the administrative law judge next turns to federal regulations as the second source of authority.⁶³ In deciding the issues of fact and law in a testate case, the judge shall (1) approve or disapprove the will with construction of its provisions, and (2) decide the name and relationship of the testator to each of the beneficiaries and describe the property each is to receive.⁶⁴ The will in *Tooahimpah* had been approved. Thus, the administrative law judge clearly has authority to construe the will, based upon federal regulations.

The word "child" or "children" includes an adopted child or children.⁶⁵ More specifically, there is an anti-lapse provision for trust property devised to "lineal descendants or their issue" — in *Tooahimpah*, the testator's children and their "heirs of the body."⁶⁶ When a lineal descendant is to take under a will, the "[r]elationship by adoption shall be equivalent to relationship by blood."⁶⁷ The key terms which emerge in this analysis are "lineal descendants," "issue," and "heirs of the body."⁶⁸

Definition of the key terms requires reference to federal case law, the third determining authority in the judge's decision. The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of federal law—not state law—and is governed by decisions of the Interior Board of Indian Appeals and appropriate decisions of federal courts.⁶⁹ The testator's intent is primary in the construction of his will.⁷⁰ In *Lipscomb v. District National Bank of Washington, D.C.*, the court based its decision on "internal evidence supplied by the will taken as a whole."⁷¹ It found an affirmative intent to include adopted children in the terms "child," "issue," and "descendant."⁷² The court also considered the public policy

63. 43 C.F.R. § 4.240 (1990).

64. *Id.* § 4.240(a)(2).

65. *Id.* § 4.201(k).

66. *Id.* § 4.261.

67. *Id.*

68. *Id.*

69. Estate of Reuben Mesteth, 16 I.B.I.A. 148, 150-51 (1988); see also Estate of Winona June Little Hawk Garcia, 14 I.B.I.A. 106, 106-07 (1986).

70. *Lipscomb v. District Nat'l Bank*, 631 F.2d 1003, 1005 (D.C. Cir. 1980).

71. *Id.*

72. In *Lipscomb*, the beneficiaries included a home for unwed mothers and a home for aged and orphans. The court interpreted these bequests as evidence of the testator's generosity to persons outside the blood line whose situation was similar to that of his granddaughter before her adoption. *Id.* at 1005-06.

implications of the District of Columbia statutes passed by Congress, whereby adopted children are accorded all the rights of natural offspring.⁷³

Where the will itself fails to supply a reasonable intent, either explicitly or impliedly, the court may be guided by public policy, on the assumption that the testator would wish such an interpretation.⁷⁴ Public policy can be determined partially from the "unmistakable trend" in a number of jurisdictions to include adoptees in testamentary gifts to "issue."⁷⁵

It is unlikely that the decedent in *In re Tooahimpah* would have wished to discriminate against his daughter's adopted child. The adoptee was the natural-born child of the decedent's granddaughter and was, therefore, a blood relative. Had the claimant not been adopted by her great-aunt, she would have remained the great-granddaughter and lineal descendant of the decedent through another child.⁷⁶

In addition to the probable intent of the testator, public policy leans heavily on the side of according an adopted child all the rights of a natural-born child.⁷⁷ The Supreme Court of Oklahoma has not yet expressly included an adopted child as an "heir of the body."⁷⁸ However, since the passage of the Uniform

73. *Id.* at 1005.

74. *Johns v. Cobb*, 402 F.2d 636, 638 (D.C. Cir. 1968).

75. *Id.*

76. *See supra* note 53.

77. Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 738, 744 (1984) ("Until quite recently the prevailing presumption was that when a person not a party to the adoption made a gift to someone else's 'children,' 'issue,' 'grandchildren,' or other class of relatives, he did not intend to include anyone not biologically born into the class." This is sometimes referred to as the "stranger-to-the-adoption" doctrine." The new presumption is pro-inclusion.); *Wheeling Dollar Savs. & Trust Co. v. Hanes*, 237 S.E.2d 499, 504 (W. Va. 1977) (term "issue of their body" does not show plain intent to exclude adoptee in view of statutory presumption that "an adopted child is deemed a natural child unless a contrary intent is plainly shown"); W. MCGOVERN, S. KURTZ & J. REIN, *WILLS, TRUSTS AND ESTATES* 50-51 (1988) (citing *In re Estate of Ogden*, 353 Pa. Super. 273, 509 A.2d 1271 (1986)). Anna Ogden's will created a trust for grandnieces and grandnephews; the share of any who died was to pass to the "children of his body." This was held to include two adopted children of a grandniece. The court said if the decedent wanted to exclude adopted children she should have used clearer language. *Ogden* is more typical of recent decisions.); *Estate of Nicolaus*, 366 N.W.2d 562 (Iowa 1985) (adoptee was issue of decedent's deceased son in absence of limiting language in decedent's will).

78. *See Moore v. McAlester*, 428 P.2d 266, 270 (Okla. 1967) ("issue of her body" excludes adopted children). *But see Estate of Ware v. Rector*, 348 P.2d 176, 179 (Okla. 1958) ("heirs of my body" does not include adopted children; Oklahoma state law was applicable because the decedent was an Osage Indian).

Adoption Act,⁷⁹ the Oklahoma Supreme Court held in *Hines v. First National Bank & Trust Co.*⁸⁰ that unless the adopted lineal descendants are specifically excluded by testamentary disposition, they qualify as beneficiaries and devisees under a will leaving the estate to the ancestor's "issue."⁸¹ In *Estate of George Green*,⁸² the IBIA overruled at least one Oklahoma case which restricted full family status in interpreting the meaning of the term "heirs of my body" in a will.⁸³

Although Oklahoma law may be an indicator of public policy, it is not controlling. Not only are state laws of intestate succession non-authoritative, but state laws governing the construction of wills also lack authority in Indian probate.⁸⁴ State law is immaterial where there is an Indian will.⁸⁵

While states are still split, more have ruled in favor of the adoptees.⁸⁶ Equal inclusion of adoptees with natural-born children has been called "typical of recent decisions."⁸⁷

Certainly the strongest relevant indicator of public policy for *Tooahimpah* is the Indian Child Welfare Act of 1978.⁸⁸ Public policy, as stated in the Act, is "to protect the best interests of Indian children and to promote stability in tribes and families"⁸⁹ Clearly this purpose is served by treating adopted beneficiaries the same as natural-born beneficiaries, rather than excluding accepted members of the family from class gifts.

The claimant in *Tooahimpah* is entitled to judicial review of the Secretary's forthcoming decision, by virtue of her status as an Indian with a claim to an allotment under an Indian will.⁹⁰ Had the decedent died intestate, the Secretary's determination

79. 10 OKLA. STAT. § 60.16 (1981).

80. 708 P.2d 1078, 1081 (Okla. 1985).

81. *Id.* at 1080.

82. 1 I.B.I.A. 148 (1971) (court applied Oklahoma law in holding that the term "heirs at law" in an agreement approved by the Examiner did not bar an adoptee from pressing his claim for his proper share of the estate).

83. *Estate of Ware v. Rector*, 348 P.2d 176, 180 (Okla. 1958).

84. *Estate of Reuben Mesteth*, 16 I.B.I.A. 148, 150-51 (1986) (board applies federal law concerning will construction when Indian executes will; therefore, neither state law of intestate succession nor state law of will construction applies).

85. *Blanset v. Cardin*, 256 U.S. 319, 325 (1921).

86. See Rein, *supra* note 77, at 711, 738, 744; see also *Wheeling Dollar Savs. & Trust Co. v. Hanes*, 237 S.E.2d 499, 504 (W. Va. 1977).

87. W. MCGOVERN, S. KURTZ & J. REIN, *supra* note 77, at 50-51.

88. 25 U.S.C. §§ 1901-1963 (1988).

89. *Id.* § 1902; see also B. Levine, *The Indian Child Welfare Act: Federal Indian Law in State Probate Court Proceedings*, 65 MICH. B.J. 453 (1986).

90. *Tooahnippah v. Hickel*, 397 U.S. 598, 611 (1970).

of legal heirs would not be subject to judicial review, due to the "final and conclusive" language in the statute.⁹¹

In summary, the Secretary of the Interior clearly has exclusive jurisdiction to render a decision in *In re Tooahimpah*, because the real property is trust property and no other jurisdiction has been asserted over the nontrust property of the estate. The will was approved by the examiner. The will is to be construed under federal statutes, under which the status of the claimant has been satisfied by her adoption in a state court. Federal regulations require that the adoptee/claimant be treated the same as a child of the blood. In addition, the testator quite likely intended to treat the claimant as an "heir of the body" of his daughter, the life tenant. Public policy further supports the claimant's position. For these reasons, the claimant should receive the trust property under the Indian allottee's will as an "heir of the body" of her adoptive mother.

Conclusion

The inconsistencies in Indian probate constrict the process. The inconsistencies further raise the question of whether Indian probate may be a dispensation of injustice. Why should a person write a "will" and yet find its terms subject to disapproval by those who are unfamiliar with the testator, his ways, and the objects of his bounty? Why should a tribe, which takes responsibility for Indian land during a tribe member's life, see that jurisdiction dissolve with the sale of the land or with the tribe member's demise? Why should the Indian landowner, whether an individual or a tribe, be "protected" out of the full rights accorded other citizens of the United States? Why should the original inhabitants and lovers of the land be forced to participate in the determination of its future "ownership" and yet be limited in doing so?

Federal law has determined that Indians are competent to write wills and that Indian tribes are competent to administer the probate process for non-trust property. Why should a trust relationship be found necessary for people of such acknowledged competence?

91. *Johnson v. Kleppe*, 596 F.2d 950, 950-51 (10th Cir. 1979); see also *Hayes v. Seaton*, 270 F.2d 319, 321 (D.C. Cir. 1959); *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808, 815 (E.D. Wash. 1965), *aff'd*, 384 U.S. 209 (1966); *Tooisgah v. Kleppe*, 418 F. Supp. 913, 915 (W.D. Okla. 1976); *Crawford v. Andrus*, 472 F. Supp. 853, 854 (D. Mont. 1979).

The Indian adoptee is bounced about from a number of possible determiners of adoptive status to a "secure" home in a family and tribe to another tug-of-war over her right to receive property under a family will. That right is complicated by many factors, including varying circumstances of property status, personal status, testacy, public policy, and, ultimately, the will of government officials.

In spite of the complicated braiding of procedure and authority, the adoptee in *In re Tooahimpah* will probably receive the property which is rightfully hers under the will of her grandfather. But what of the next case and the next? Indian testators and beneficiaries have a right to a less convoluted process. In addition, the will of Indian testators, the rights of Indian adoptees, and jurisdiction over Indian country rightfully belong to Indian tribes. Indian probate is one braid which should be unbound.

Addendum

A Department of Interior law administrative judge issued a decision in *In re Tooahimpah* on September 25, 1990. The claim of Debra Sue Pahdopony, nee Debra Sue Otipoby, was denied. The judge stated that the words "of the body" are limited to those born of the parent. He would have required a showing of clear intent not to exclude either adopted children or spouses. The author views the decision as a manifest injustice to the claimant. The claimant has a right to appeal this decision to the Bureau of Indian Appeals.

