

Thomas Lazore/Glenn Lazore,
Petitioner(s)

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Case No.: 17-CIV-00015
Estate of Katie Herne Swamp

DECISION AND ORDER
On the Conditions Contained in the
Last Will and Testament of
Anna Waheson Tarbell

Status conferences were held on October 31, 2017, December 4, 2017, January 2, 2018, January 23, 2018, and March 13, 2018. A hearing on the interested parties was held on March 27, 2018.

At the status conference on March 13, 2018, several of the individuals whom filed Notices of Appearances, including Peter J. Herne, Norman Tarbell, Vicki Herne, and Beulah Terrance, indicated that they would not be calling any witnesses at the hearing on March 27th. Mr. Peter J. Herne indicated that he was only interested as to what the Estate of Katie Herne claimed and stated he was not a direct heir of Katie Herne.¹ He expressed an interest in a possible separate action regarding this issue.² The other interested parties followed suit. The Court left the hearing on interested parties on the calendar for March 27, 2018, given that not all of the individuals who filed a notice to be included as an interested party were present.

At the scheduled hearing for interested parties on March 27, 2018, no interested parties called witnesses. Those present, Beulah Bigtree and Norman Tarbell, indicated they just wished to observe. No finding was made as to the issue of the status of the individuals who filed Notices of Appearance. The Court then turned to the writing purported to be the Last Will and Testament of Anna Waheson Tarbell, which had been submitted to the Court with Andrew Glenn Lazore's Petition. Thomas Lazore, the Executor of the Katie Herne Estate, informed the Court he wanted the Court to consider the writing purported to be the Last Will and Testament of Anna Waheson Tarbell in its determination as to what property was contained in the Katie Herne Swamp Estate, as it was included in the documents submitted to the Court in the probate petition. Given that the writing purported to be the Last Will and Testament of Anna Waheson Tarbell's was executed in 1900, the Court set a hearing to determine whether it was an ancient document and, therefore, may be considered as evidence of Katie Herne Swamp's ownership of land. The Court sent notice of the hearing to all the parties, including those who had filed Notices of Appearance. The notice stated a hearing would be held on the writing purported to be the Last Will and Testament of Anna Waheson Tarbell.

Subsequently, a hearing was conducted on April 16, 2018 for the writing purported to be the Last Will and Testament of Anna Waheson Tarbell, in which the Court found that the writing was an ancient document and, thus, may be considered as evidence of Katie Herne Swamp's ownership of land.

The Court convened again on May 7, 2018 for a hearing on the condition contained in the writing purported to be the Last Will and Testament of Anna Waheson Tarbell. Notice was sent to all parties, included the individuals who filed Notices of Appearance. The notice stated a hearing would be held regarding the conditions contained in the writing purported to be the Last Will and Testament of Anna Waheson Tarbell.

On May 22, 2018, a continuation of the May 7th hearing was held to determine whether or not the condition contained within the Last Will and Testament of Anna Waheson Tarbell was met.

¹ Audio Status Conference March 13, 2018.

² Audio Status Conference March 13, 2018.

Jurisdiction

Pursuant to the Saint Regis Mohawk Tribe Probate Law, the Court “shall have personal jurisdiction to probate an estate when, at the time of death, (1) the deceased was either a Tribal Member or a person eligible for enrollment as a Tribal Member and the deceased resided or owned real or personal property located within the reservation.”³ Furthermore, “[t]he Tribal Court shall have exclusive jurisdiction to probate real property located within the reservation.”⁴

In the instant matter, the Petitioner Andrew Glenn Lazore and Executor Thomas Lazore, contend that the decedent, Katie Herne Swamp, has an interest in real property owned by her mother, Anna Waheson Tarbell, as well as land referenced in the Last Will and Testament of Katie Herne Swamp. The documents provided by the Petitioners and the Saint Regis Mohawk Tribe Tribal Clerk’s Office demonstrate that the real property is located within the borders of the Saint Regis Mohawk Indian Reservation. Thus, the Court possesses exclusive jurisdiction over the real property based on the aforementioned reasoning.

Applicable Law

The present action is governed by the Saint Regis Mohawk Tribe Probate Law (SRMT Probate Law).⁵

Findings of Fact

Based on its finding in this decision, the Court notes the following relevant facts that are related to the evidence submitted to the Court for purposes of this decision.

1. Anna Waheson Tarbell is the mother of Katie Herne Swamp.
2. Anna Waheson Tarbell owned a farm and acreage (“homestead”) prior to being married.
3. Anna Waheson Tarbell was married to John Herne.
4. Anna Waheson Tarbell and John Herne had seven (7) children; Catherine ‘Katie’ Herne, Joseph Herne, Thomas Herne, Arthur Herne, Marie Herne, Pierre Herne, and Michel Herne.
5. John Herne was listed as a Saint Regis Mohawk Indian in an 1876 Annuity Role document.
6. The Petitioner, Andrew Glenn Lazore, and the Executor, Thomas Lazore, are the grandsons of Katie Herne Swamp and the great-grandsons of John Herne and Anna Waheson Tarbell.
7. Thomas Lazore and Andrew Glenn Lazore, are enrolled members of the Saint Regis Mohawk Tribe.

³ SRMT Probate Law § 1.3 (a).

⁴ SRMT Probate Law § 1.3. (b) (1).

⁵ SRMT Probate Law (enacted August 16, 2017).

8. Anna Waheson Tarbell executed a writing purported to be her Last Will and Testament in the Mohawk language on September 20, 1900.
9. The writing purported to be the Last Will and Testament of Anna Waheson Tarbell, dated September 20, 1900, was transcribed into an English handwritten and typewritten version.
10. The writing purported to be the Last Will and Testament of Anna Waheson Tarbell includes several conditions.
11. Anna Waheson Tarbell died on September 23, 1900.
12. The writing purported to be the Last Will and Testament of Anna Waheson Tarbell has not been probated by a Court of competent jurisdiction or the Saint Regis Mohawk Tribal Council.
13. There is no pending action before this Court to probate the writing purported to be the Last Will and Testament of Anna Waheson Tarbell.
14. The Decedent, Katie Herne Swamp, executed a writing purported to be her Last Will and Testament on January 18, 1983.
15. Katie Herne Swamp passed away on May 29, 1983.

DISCUSSION

Before the Court is a proceeding in which the Petitioner, Andrew Glenn Lazore, and Executor, Thomas Lazore, contend that a condition contained within Anna Waheson Tarbell's, their great grandmother, Last Will and Testament was not satisfied by their great grandfather, John Herne. Thus, they contend that Katie Herne Swamp, their grandmother/daughter of John Herne and Anna Waheson Tarbell, has an interest in the real property owned by Anna Waheson Tarbell.

Before the Court addresses the arguments raised by the Petitioner, Andrew Glenn Lazore, and Executor, Thomas Lazore, the Court will first address whether the writing purported to be the Last Will and Testament of Anna Waheson Tarbell may be considered as evidence to demonstrate Katie Herne Swamp has an interest in property owned by Anna Waheson Tarbell.

The writing, dated September 20, 1900, was submitted by the Lazores and claimed to be the Last Will and Testament of Anna Waheson Tarbell. As noted above, Anna Waheson Tarbell is the mother of the decedent, Katie Herne Swamp. Therefore, Katie Herne Swamp is an heir/beneficiary to Anna Waheson Tarbell's Estate. Thus, the Last Will and Testament of Anna

Waheson Tarbell is relevant evidence.⁶ The issue before the Court then becomes is the writing admissible as evidence.⁷

In general, for evidence to be admissible the proponent must demonstrate the authentication or identification of the evidence to support the Court finding that the matter in question is what its proponent claims.⁸ The foundation for identification or authentication can be accomplished by providing the Court with witness testimony or other related evidence. However, in regards to the instant case, the writing was signed by the decedent, Anna Waheson Tarbell on September 20, 1900. Thus, the subscribing witnesses present during the signing of the writing or any individual that has prior knowledge of the writing is deceased.

As previously noted, the writing submitted to the Court was signed on September 20, 1900. There is no section within the Saint Regis Mohawk Tribe Rules of Evidence (SRMT Rules of Evidence) with respect to evidence that is ancient. However, the SRMT Rules of Evidence allows for the Tribal Court to look to the Federal Rules of Evidence for guidance on any matter not covered by these rules.⁹ The Federal Rules of Evidence state that ancient documents are admissible as an exception to the hearsay rule.¹⁰ Under Rule 901 (8) for evidence to be admitted under the ancient document exception it must be demonstrated to the Court by the proponent that the evidence is in a condition that creates no suspicion about its authenticity, was in a place where, if authentic, it would likely be, and is at least twenty (20) years old when offered.¹¹ Pursuant to the SRMT Rules of Evidence, the Court will utilize this analysis in reaching a decision on the admission of the writing, dated September 20, 1900, purported to be the Last Will and Testament of Anna Waheson Tarbell.

In the instant case, Derrick King, Lands and Estate Officer for the SRMT Tribal Clerk,¹² testified that the English handwritten and typed version and the Mohawk version are documents that were contained in the Tribal Clerk's records.¹³ He further testified that the records were kept together in proximity and that there is no reason to doubt that the document written in English is not the translation of what was written in Mohawk.¹⁴ He testified that someone also took it upon themselves to make an English typewritten version of the handwritten version.¹⁵ He testified that nothing about the document appeared suspicious in any manner in the Tribal Clerk's records.¹⁶

⁶ SRMT Rules of Evidence § VIII. [Rule 5] A.

⁷ The Court notes the writing purported to be the Last Will and Testament of Anna Waheson Tarbell was admitted on the record at the hearing scheduled on April 16, 2018. For purposes of this decision, the Court is providing its written reasoning for allowing its admission.

⁸ SRMT Rules of Evidence § XLIX. [Rule 46]. A.

⁹ SRMT Rules of Evidence § IV. [Rule 1] D.

¹⁰ Fed. R. Evid. 901 (8).

¹¹ Fed. R. Evid. 901 (8) (A) – (C).

¹² "The clerk's office is in charge of membership and related databases such as enrollment, land ownership, voters lists, record keeping and research among other aspects SRMT Tribal Clerk," *available at*, https://www.srmt-nsn.gov/tribal_clerk.

¹³ Transcript in the Matter of the Estate of Katie Herne Swamp, 7 (Derrick King testimony) (April 16, 2018).

¹⁴ Transcript in the Matter of the Estate of Katie Herne Swamp, 7 – 8 (Derrick King testimony) (April 16, 2018).

¹⁵ Transcript in the Matter of the Estate of Katie Herne Swamp, 10 (Derrick King testimony) (April 16, 2018).

¹⁶ Transcript in the Matter of the Estate of Katie Herne Swamp, 8 (Derrick King testimony) (April 16, 2018).

In regards to the instant case, the writing purported to be the Last Will and Testament of Anna Waheson Tarbell is dated September 20, 1900. Thus, the document is clearly more than twenty (20) years old. Derrick King, Lands and Estate Officer for the SRMT Tribal Clerk, provided testimony that indicates that the writing and the attached translations were found in the Tribal Clerk's records and close in proximity. Mr. King further testified that nothing about the document appeared suspicious in any manner. The Court does not have evidence before it rebutting Mr. King's testimony. Moreover, in its review of the writing purported to be the Last Will and Testament of Anna Waheson Tarbell and the attached translations the Court does not find anything that raises suspicion. Therefore, the Court finds that the writing purported to be the Last Will and Testament of Anna Waheson Tarbell and the English handwritten and typed versions are admitted under the Ancient Document Rule.

As previously indicated, the Lazores contend that Katie Herne Swamp, their grandmother/daughter of John Herne and Anna Waheson Tarbell, has an interest in the real property owned by Anna Waheson Tarbell. To substantiate their claim, the Lazores point to the condition imposed in the writing purported to be the Last Will and Testament of Anna Waheson Tarbell and allege that their grandfather, John Herne, failed to satisfy the obligations imposed. The Lazores have provided to the Court oral testimony to prove their claim. It is alleged that by the fact that John Herne, their grandfather, failed to satisfy the conditions found within the writing purported to be the Last Will and Testament of Anna Waheson Tarbell, the property interest held by their great grandmother, Anna Waheson Tarbell, was transferred to their grandmother, Katie Herne Swamp. However, at this time, the record before the Court indicates that the writing purported to be the Last Will and Testament of Anna Waheson Tarbell has not been probated by a Court of competent jurisdiction or the Saint Regis Mohawk Tribal Council.

This Court has noted in other decisions the importance of the role of the probate process in regards to the transfer of property.¹⁷ Probate means the Court process regarding the distribution of a decedent's estate.¹⁸ It is important to understand, that the transfer of property by and through a writing purported to be a decedent's Last Will and Testament is not automatic upon the decedent's death. Rather, the writing must be admitted to probate. Otherwise, the interest remains in the decedent's Estate. As noted, the writing purported to be the Last Will and Testament of Anna Waheson Tarbell has not been probated. This means that any real property interest held by Anna Waheson Tarbell was and is owned by her Estate. This principle remains true even in cases where a decedent has been gone for a substantial amount of time.¹⁹ Thus, the Court cannot procedurally, at this time, assess the condition imposed and the evidence put forth by the Lazores without the writing purported to be the Last Will and Testament of Anna Waheson Tarbell being admitted to probate in a separate action. Furthermore, only within the context of the matter of the Estate of Anna Waheson Tarbell, is it proper for the Court to address whether John Herne satisfied the terms of the condition. Once determined, the Court will apply any applicable finding related to the interest held by Katie Herne Swamp to this case. Thus, the question regarding the property interest held by Katie Herne Swamp in any property owned by her mother, Anna Waheson Tarbell, is held in abeyance, or in other words placed on hold, until a probate action is commenced by an heir and/or beneficiary and the Court makes a determination within that probate action based on the

¹⁷ See *Lazore v. Martin*, 17-LND-00004, 2 (June 26, 2017).

¹⁸ SRMT Probate Law § Chapter 1. 1.1.

¹⁹ *Lazore v. Martin*, 17-LND-00004, 2 (June 26, 2017).

aforementioned reasoning. The Court takes judicial notice of all testimony provided by the Lazores and their witness in the instant case.

The testimony and evidence before the Court demonstrates that there remains a separate issue regarding the tribal membership of Katie Herne Swamp. Specifically, the question before the Court is whether Katie Herne Swamp was a tribal member or eligible for membership in the Saint Regis Mohawk Tribe.²⁰ This issue is critical because only tribal members or those eligible for membership in the Saint Regis Mohawk Tribe may own or devise property on the Saint Regis Mohawk Indian Reservation. The SRMT Tribal Clerk's Office, who is responsible for the Tribe's records, is requested to attend the next hearing and provide testimony to determine whether Katie Herne Swamp was a member or eligible for membership, as the Tribal Clerk has the responsibility to "administrate and record Eligibility, Enrollment, and Membership determinations of the Tribal Council."²¹ The SRMT Tribal Clerk's Office may also submit a written brief or documents prior to the hearing, if they wish. Given that the SRMT Tribal Council possesses the authority and responsibility to determine eligibility, enrollment, and membership,²² the SRMT Tribal Council may submit a brief and/or appear on the issue regarding the membership or eligibility of membership of Katie Herne Swamp in the Saint Regis Mohawk Tribe.

²⁰ SRMT Land Laws and Land Dispute Ordinance § IV. 4.

²¹ SRMT Tribal Eligibility, Enrollment and Membership Determinations, TCR 2007-63 (July 19, 2007).

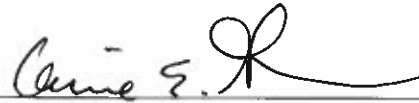
²² SRMT Tribal Eligibility, Enrollment and Membership Determinations, TCR 2007-63 (July 19, 2007).

ACCORDINGLY, IT IS HEREBY ADJUDGED AND DECREED:

Based upon the foregoing, the question regarding the property interest held by Katie Herne Swamp in any property owned by her mother, Anna Waheson Tarbell, is held in abeyance, or in other words placed on hold, until a probate action is commenced by an heir and/or beneficiary. Any property owned by Anna Waheson Tarbell is owned by the Estate of Anna Waheson Tarbell.

This case is set for a hearing on the membership status of Katie Herne Swamp on September 18, 2018 at 10:00 a.m. The parties, if they wish, may submit briefs/documents related to the membership issue on September 11, 2018. If the parties, SRMT Tribal Clerk and SRMT Tribal Council submit briefs or documents, they do not need to be served upon the individuals who filed Notices of Appearance.

Signed by my hand this 9th day of August 2018.



Carrie E. Garrow,
Chief Judge
Saint Regis Mohawk Tribal Court

Pursuant to the Saint Regis Mohawk Tribe's Rules of Appellate Procedure this Order may be appealed within thirty (30) days after the entry of judgment.