IN THE COURT OF APPEALS

FOR THE

ROSEBUD SIOUX TRIBE

APPEAL # CA 88-05

IN THE MATTER OF THE)
ESTATE OF CHARLES BROKEN LEG,)
) ORDER
Deceased.)

This case having received complete appellate review, including oral argument, and the Court having issued opinion and being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED, that the judgment of the Tribal Court be, and the same is hereby, affirmed.

Dated this 27th day of July, 1989.

BY THE COURT:

ACTING CHIEF JUDGE

ATTEST:

(SEAL) CLERK

IN THE COURT OF APPEALS

FOR THE

ROSEBUD SIOUX TRIBE

APPEAL NUMBER CA 88-05

IN THE MATTER OF THE ESTATE OF

CHARLES BROKEN LEG,

Deceased.

APPEAL FROM THE ROSEBUD

SIOUX TRIBAL COURT OF THE

ROSEBUD SIOUX TRIBE

HONORABLE JANEL Y. SULLY
Presiding Judge

Robert A. Sambroak, Jr.
Attorney for Appellant
Box 1028
Mission, SD 57555

Krista Clark
Attorney for Appellee
Dakota Plains Legal Services
Box 727
Mission, SD 57555

OPINION FILED 7-27-89

CASE # CA 88-05

ROUBIDEAUX, ACTING CHIEF JUSTICE:

This case involves the Last Will and Testament of Charles Broken Leg, now deceased, executed in 1962. In 1973, the decedent purchased a so-called "Transitional House #107" and moved it onto his trust land, described as the Southwest Quarter (SW 1/4) of Section Four (4), Township Thirty-nine (39) North of Range Thirty-one (31) West of the 5th Principal Meridian and located on the Rosebud Indian Reservation in South Dakota.

This will was duly probated in 1978, by the Department of the Interior. Appellant, Grace Broken Leg, was awarded the North Half of the above quarter section. The rest and residue of decedent's property, both real and personal, was awarded one-half (1/2) each to Appellees, Emma Clarissa Broken Leg Yellow Hawk and Helen Broken Leg Shot With Two Arrows. This Department probate concerned only trust real property and no mention or disposition was made of Transitional House #107, which was located on the North Half of Section Four (4) above.

Subsequently, one of the Appellees applied for probate to the Rosebud Sioux Tribal Court involving said house claiming it was personal property and should be distributed to the above-named Appellees under the residuary clause of the Will.

Following a hearing on October 18, 1988, the Rosebud Sioux Tribal Court admitted the Last Will and Testament of Charles

Broken Leg to probate and entered an Order distributing this house under the residuary clause of the Last Will and Testament, holding that the house was personal property and not real property, and that as a result, the Appellees were entitled to the house.

The question for decision by this Court is whether Transitional House #107 aforesaid is real property or personal property. If it is real property, as claimed by Appellant, the Tribal Court's determination is incorrect. If it is personal property, the Tribal Court must be affirmed.

At the outset, the Court will note that the Rosebud Sioux Tribal Law and Order Code contains no statutory definition of real and personal property. Also, it does not appear that there is any precedent in this Court on this question.

Section 1-1-22 of the Tribal Probate Code provides as follows:

> "In any question arising under the provisions of this probate code, the Tribal Court shall apply the general principles of probate as enunciated in the statutory rules of the State of South Dakota except where such rules conflict with specific enactments of this code or other enactments of the Tribal Code."

Our Court has consistently looked also to the laws and principles enunciated by other jurisdictions and states in order to conform our decisions as much as possible to accepted and learned interpretations of the law in general throughout this country.

Black's Law Dictionary, Third Edition, on p. 789, discusses

the meaning of the term "fixture" which we hold is a term appropriately used to describe the house involved in this case.

> "A fixture is an article of personal or chattel nature affixed to the freehold by a tenant and removable by him if it can be taken away without material injury to the realty. Boise Ass'n of Credit Men v. Ellis, 26 Idaho, 438, 144 P. 6,9, L.R.A. 1915E, 917.
>
> A "fixture" formerly meant any chattel which on becoming affixed to the soil became a part of the realty. It now means those things which formed an exception to that rule and can be removed by the person who affixed them to the soil. L.R. 4 Ex. 328.
>
> "Fixtures" does not necessarily import things affixed to the freehold. The word is a modern one, and is generally understood to comprehend any article which a tenant has the power to remove. Sheen v. Rickle, 5 Mees. & W. 174; Rogers v. Gilinger, 30 Pa. 185, 189, 72 Am. Dec. 694.
>
> Chattels which, by being physically annexed or affixed to real estate, become a part of and accessory to the freehold, and ordinarily the property of the owner of the land. Hill.; Atlantic Refining Co. v. Feinberg, 1 W. W. Harr. (Del.) 183, 112 A. 685, 687; Red Diamond Clothing Co. v. Steidemann, 169 Mo. App. 306, 152 S.W. 609, 617.
>
> Things fixed or affixed to other things. The rule of law regarding them is that which is expressed in the maxim, "accessio cedit principali," "the accessory goes with, and as part of, the principal subject-matter." Brown.
>
> "Fixtures" are chattels annexed to realty so as to become part thereof. Holy Ghost Catholic Church of Two Harbors v. Clinton, 169 Minn. 253, 211 N.W. 13, 15; Earle v. Kelly, 21 Cal. App. 480, 132 P. 262, 263; Inhabitants of Whiting v. Inhabitants of Lubec, 121 Me. 121, 115 A. 896, 899; Ochs v. Tilton, 181 Ind. 81, 103 N.E. 837, 838; Hurst v. J.D. Craig Furniture Co., 95 S.C. 221, 78 S.E. 960, 962; Kent Storage Co. v. Grand Rapids Lumber Co., 239 Mich. 161, 214 N.W. 111, 112.
>
> Personal property is not so attached to realty as to become a fixture if it can be removed without material injury to the property or to the freehold. Maxson v. Ashland Iron Works, 85 Or. 345, 166 P. 37, 39.
>
> A thing is deemed to be affixed to land when

> it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanent, as by means of cement, plaster, nails, bolts, or screws. Civ. Code Cal. §660; Big Sespe Oil Co. v. Cochran (C.C.A.) 276 F. 216, 225. Also see SDCL 43-33-1 (added).
>
> Personal property, in order to lose its character as a chattel and become a fixture, must be annexed to the realty, either actually or constructively, must be appropriated to the use of that part of the realty with which it is connected, and must be intended as a permanent accession to the freehold. Boise Payette Lumber Co. v. McCormick, 32 Idaho, 462, 186 P. 252; Hatton v. Kansas City, C. & S.R. Co., 253 Mo. 660, 162 S.W. 227, 233; De Charette's Guardian v. Bank of Shelbyville, 218 Ky. 691, 291 S.W. 1054, 1057; Patterson v. Chaney, 24 N.M. 156, 173 P. 859, 860, 6 A.L.R. 90; Snuffer v. Spangler, 79 W. Va. 628, 92 S.E. 106, 109, L.R.A. 1918E, 149; Binkley v. Forkner, 117 Ind. 176, 19 N.E. 753, 3 L.R.A. 33; Atchison, T. & S.F.R. Co. v. Morgan, 42 Kan. 23. 21 P. 809, 4 L.R.A. 284, 16 Am. St. Rep. 471.
>
> The general result seems to be that three views have been taken. One is that "fixture" means something which has been affixed to the realty, so as to become a part of it; it is fixed, irremovable. An opposite view is that "fixture" means something which appears to be a part of the realty, but is not fully so; it is only a chattel fixed to it, but removable. An intermediate view is that "fixture" means a chattel annexed, affixed, to the realty, but imports nothing as to whether it is removable; that is to be determined by considering its circumstances and the relation of the parties. Abbot; New Castle Theater Co. v. Ward, 57 Ind. App. 473, 104 N.E. 526, 527. See, also, Review Printing Co. v. Hartford Fire Ins. Co., 133 Minn. 213, 158 N.W. 39, 40."

South Dakota has, early on, decided that the intention of the party to make an article a permanent accession to the realty is the controlling criterion. This intention is determined and deduced from the relation of the parties and the circumstances of the particular case. Metropolitan Life Ins. Co. v. Jensen, 9 N.W.2d 140 (SD 1943).

Most of the principles cited in Black's Law Dictionary, supra, are discussed and adopted by Killian v. Hubbard, 9 N.W.2d 700 (SD 1943). This case discusses the circumstances under which a building may be considered removable personalty and not a part of the land. There the Court held that the evidence, even though weak, supported the inference that there was an implied agreement as to the temporary nature and location of certain buildings, and they were to be considered personal property upon all the facts and circumstances. The evidence was held sufficient to rebut any presumption that the buildings were part of the realty.

The South Dakota Supreme Court has held that where a party does not have the right to remove a house from the land, it must be considered as realty. Milison v. Mutual Cash Guarantee Fire Ins. Co. (1909) 24 SD 285, 123 N.W. 839, 140 Am St. Rep. 188.

In 35 Am Jur2d, Fixtures, §1,79, it is stated:

> "There appears to be no single statement defining fixtures which is capable of application in all situations, and the efforts of the courts through the years to formulate a comprehensive and universal definition of the term have been attended by considerable difficulty and have not resulted satisfactorily. Most modern authorities recognize the practical difficulties in formulating a comprehensive principle for determining what are fixtures and hold that the determination can only be made from a consideration of all the individual facts and circumstances attending the particular case.
>
> On the other hand, whether a building is a fixture depends on all the circumstances of the case and it is clear that the parties may agree or may so place a structure on land that it retains

> its character as personalty. Thus a structure designed to be moved from one location to another, such as a refreshment stand or a house trailer, does not become a fixture by mere reason of its introduction upon the realty, nor will such structures as platforms, flooring, walks, and the like, although as to these latter structures, there is some difference of opinion."

In this case, we are dealing with a so-called "transitional" house which was constructed elsewhere, purchased by the decedent and moved onto the property in question. Although the evidence is not clear as to the nature of the annexation, if any, to the realty, its very nature as a "transitional" house would seem to rebut any presumption it was a part of this realty. Sioux Indians historically have been known to be nomadic and have moved from place to place, rarely ever acquiring a permanent home in any one location. Since the advent of the white man, the Indian has been schooled in the white civilization to regard land in individual ownership. The allotment period led to construction of homes on individual allotments, some of which were permanent in nature, some were small shacks moved thereon, a great many were mobile trailer homes and in general construction of substantial permanent homes was minimal due to meager economic status.

It is significant that the Department of the Interior in probating Indian estates has treated Indian homes as personalty, the disposition of which in probate was left to local tribal courts.

Appellee has cited In re Hoisington's Estate, 291 N.W.

921 (SD 1940) where the testatrix specifically included with a description of the land a statement including everthing else, thus depriving the residuary beneficiary of any interest in the land or fixtures thereon. As homes are important to any family, it would seem that if decedent intended improvements to go with the land he would have stated so, in view of his specificity in other parts of the Will. Clearly, decedent could not have intended improvements or fixtures were to go with the land, as the house was not moved onto the land until eleven (11) years later.

The Code of Federal Regulations, 43 CFR 4.201(m), defines trust property to include; ". . . real and personal property title to which is in the United States for the benefit of an Indian. . .". The duty of administrative law judges who probate Indians' trust estates is, among other things, to ". . . approve or disapprove wills of deceased Indians disposing of trust property; . . ." 43 CFR 4.202. Clearly, the BIA does not consider structures such as house #107 to be part of the trust realty, and that is why no mention was made of it by the administrative law judge when the decedent's will was probated.

This so-called "Transitional" home under all the facts and circumstances of this case must be considered to be personal property, particularly due to its transitional status, similar to a mobile home. The very word transitional means changing and moving from place to place. Evidently this particular type of home was regarded as personal property, by the Rosebud

Sioux Tribe, the Department of the Interior and tribal members. We so hold.

The decision of the Rosebud Sioux Tribal Court is therefore affirmed.

POMMERSHEIM, JUSTICE: AMIOTTE, JUSTICE, CONCUR

July 25, 1989.