



INTERIOR BOARD OF INDIAN APPEALS

Estate of Anthony Bitseedy

5 IBIA 270 (12/17/1976)

Judicial review of this case:

Affirmed, *Dawson v. Kleppe*, No. CIV-77-0237 (W.D. Okla. Oct. 27, 1977)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF ANTHONY BITSEEDY

IBIA 76-36

Decided December 17, 1976

Appeal from decision on petition for rehearing.

Reversed.

1. Indian Probate: Wills: Approval of Will

A copy of a will can be admitted to probate only if proper execution of the original can be proved.

2. Indian Probate: Wills: Proof of Will--Indian Probate: Wills: Witnesses, Approving

Departmental regulations require that an Indian will be executed in writing and attested by two disinterested adult witnesses.

3. Indian Probate: Wills: Dependent Relative Revocation--Indian Probate: Wills: Revocation

For a revocation clause of an Indian will to be effective the will itself must be admitted to probate.

4. Indian Probate: Wills: Approval of Will--Indian Probate: Children, Disinheritance of--Indian Probate: Wills: Unnatural Will

For the Secretary to withhold approval of testator's will in this case, which omits his illegitimate child and sole heir at law, would be tantamount to applying a "just and equitable" standard in passing

on an Indian's will, which is the precise error in Departmental judgment previously condemned by the Supreme Court.

APPEARANCES: Robert T. Keel for appellee; F. Browning Pipestem for appellants.

OPINION BY ADMINISTRATIVE JUDGE HORTON

This is an appeal from a decision by Administrative Law Judge Jack M. Short, dated January 30, 1976, which denied appellants the relief they requested in a petition for rehearing. Appellants are three nephews of the decedent, Anthony Bitseedy, unallotted Apache, who died February 11, 1972. On appeal they claim Judge Short erred in refusing to admit for probate a purported last will and testament of the decedent dated May 12, 1962, which devises decedent's estate to them in equal one-third (1/3) shares. Alternatively, appellants allege it was legal error for Judge Short to fail to give effect to a last will and testament of the decedent dated September 10, 1959, which satisfies technical requirements of a self-proved will but which Judge Short disapproved for being irrational and unnatural. Two of the three nephews named in decedent's 1962 will are beneficiaries under the 1959 will.

Probate of decedent's estate commenced September 19, 1973, under the direction of former Administrative Law Judge John F. Curran. On February 21, 1975, Judge Curran entered an order determining heirs which found that Anthony Bitseedy died intestate and that Anthony Bitseedy Jr., decedent's son, was his sole heir at law.

Subsequent to a hearing which considered appellants' petition for rehearing, Judge Short modified some of Judge Curran's legal holdings, which will be briefly discussed, but he reaffirmed the two principal conclusions reached by his predecessor that 1) the decedent did not die possessed of a valid will; and 2) Anthony Bitseedy, Jr., should inherit all of decedent's property as his sole heir at law. For reasons set forth below, we must disagree by holding that decedent's last will and testament dated September 10, 1959, is a validly executed will which was never revoked and the terms of which are both rational and natural.

For approval to be given to the September 10, 1959 will, it is necessary that no subsequent will exists which revokes it. The record contains two subsequent wills of the decedent, one dated May 12, 1962, and the other, although undated, apparently prepared in March 1964. 1/

1/ Tr. of March 27, 1974 hearing, p. 38.

The 1964 instrument is an undated carbon copy of a purported will of the decedent, which although bearing his probable signature, contains neither the name nor signature of any witnesses. It is not claimed by anyone that the evidence establishes the 1964 instrument to be a validly executed will.

[1] The instrument dated May 12, 1962, is not an original either. Appellants contend, however, that because this copy of a will contains the signature of witnesses and has been in the custody of the Anadarko Agency since May 1962, it should be admitted to probate. Appellants interpret Departmental regulations as specifically authorizing probate of a copy of a will which has been maintained in agency files. 2/ We know of no cases in which the Department has allowed probate of a carbon copy of an alleged will of a deceased Indian, where, as here, the record is silent as to execution of the original. 3/ In this regard we also find nothing in our regulations, including the regulation cited by appellants, which sanctions the admission of a carbon copy of a will to probate when execution of the original is open to question. Nor is state law on this subject applicable. 4/

We hold, therefore, that a copy of a will can be admitted to probate only if proper execution of the original can be proved. No such evidence was presented in this case.

[2] Testimony was obtained from the sole, surviving, subscribing witness to the 1962 will at the hearing of July 24, 1974. He does not know whether he signed an original instrument in addition to the copy which was entered into evidence (Tr. p. 43).

2/ Appeal Brief, p. 4. The regulation cited by appellants is 43 CFR 4.260(b) which reads in pertinent part:

"The will or codicil or any replacement or copy thereof may be retained by the Superintendent at the request of the testator or testatrix for safekeeping."

3/ Cf. Estate of Weasel, P.R. No. 1260 (31416-14) in which a carbon copy of a will was approved where the attesting witnesses could not account for the loss of the original but did establish due execution.

4/ The Secretary is not bound by state requirements respecting the validity of wills of Indians disposing of trust property. Hansen v. Hoffman, 113 F.2d 780 (10 Cir. 1940); Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971). See also 43 CFR 4.260(c). Even if state law were applicable, Judge Curran's Order Determining Heirs correctly points out that the 1962 will in this case could not be probated in Oklahoma.

Moreover, he states that he did not see the testator sign the will and that the testator did not acknowledge his signature to him (Tr. p. 42). It is obvious, therefore, that the execution requirements of 43 CFR 4.260(a) are not satisfied by the 1962 instrument. This regulation requires that an Indian will be “executed in writing and attested by two disinterested adult witnesses.”

[3] One of the main issues considered by Judge Short in his January 30, 1976 Decision on Petition for Rehearing was whether the revocation clauses of the 1962 and 1964 wills of the decedent, which recite that all prior wills are revoked, could be given effect even though the wills were not approved for probate. Former Administrative Law Judge Curran ruled the revocation clauses effective and thereby concluded that decedent died intestate, possessed of no valid will. ^{5/} Judge Short, on the other hand, concluded that for a revocation clause to be effective, the will containing the clause must be admitted to probate. We agree with Judge Short on this point and incorporate the authorities cited by him. ^{6/}

We come to the final question on appeal which is whether the September 10, 1959 last will and testament of decedent, which has not been revoked, should be approved. Judge Short finds this will to be technically valid and the parties do not dispute such finding. ^{7/} His ultimate conclusion, however, is that the terms of the 1959 will are irrational and unnatural and that the will should therefore be disapproved.

^{5/} Order Determining Heirs dated February 21, 1975, p. 1.

^{6/} As set forth at page 2 of his order these authorities are: Leard v. Askew, 28 Okla. 300, 114 P. 251 (1911); Chesnut v. Capey, 45 Okla. 754, 146 P. 589, 590 (1915); Estate of Kenneth Strikeaxe, IA-248, 65 I.D. 157 (1958); Estate of John J. Akers, IA-D-18, decided February 26, 1968. See also 43 CFR 4.260(c) which provides that an Indian testator may “revoke his will by a subsequent will or other writing executed with the same formalities as are required in the case of the execution of a will * * *.”

^{7/} Counsel for appellee acknowledged the will’s proper execution and the testamentary capacity of the testator at the June 17, 1975, hearing. Tr. p. 22. Appellants urge approval of the September 10, 1959 will as an alternative to their primary claim. Appeal Brief, p. 9.

The primary reason given by Judge Short for declaring decedent's 1959 will to be irrational and unnatural is that it makes no provision for his only child, Anthony Bitseedy, Jr., a minor, "whose paternity testator first denied then later acknowledged." (Order Denying Petition for Rehearing, p. 3).

The evidence shows that Anthony Bitseedy, Jr., was born February 4, 1960. His mother is Sarah Ann Mingus with whom decedent lived from approximately 1958-1961. 8/ In his 1959 will, the testator stated:

To the unborn child of Sarah Ann Mingus, whose birth is expected in December of 1959 or January of 1960, whose paternity I categorically deny, I leave nothing.

On February 11, 1969, however, the decedent signed a sworn acknowledgment of paternity which states that he is the father of the child born to Sarah Ann Mingus on February 4, 1960, and that the child's correct name should be Anthony Bitseedy, Jr. 9/

In addition to the above affidavit of paternity, the record shows that the decedent regarded Anthony Bitseedy, Jr., as his son by his conduct (Tr. 9, 11, 15, 16, 25, 26, 29, 30). In light of such facts, Judge Short determined that the 1959 will "disposes of decedent's property in a manner inconsistent with decedent's later attitude toward that son." Judge Short refers to the following language of Tooahnippah v. Hickel, 397 U.S. 598 (1970) as legal authority for disapproval of the 1959 will:

It is not difficult to conceive of dispositions so lacking in rational basis that the Secretary's approval could reasonably be withheld under § 373 [of 25 U.S.C.] * * * (at p. 610).

8/ Order Determining Heirs, p. 2. Evidence required to establish an Indian-custom or common-law marriage is conflicting in the record. Neither Judge Curran nor Judge Short found such a marriage. The testimony of decedent's surviving sister given at the hearing of March 27, 1974 (Tr. p. 32-33), and decedent's sworn statement denying marriage to Sarah Ann Mingus found in the 1959 will, seem to preclude any possible finding of an Indian-custom or common-law marriage.

9/ The original of this document is on file at the Oklahoma State Department of Health in Oklahoma City, Oklahoma.

[4] In the Tooahnippah case the Supreme Court ruled that it was arbitrary and capricious for the Department of the Interior to fail to give effect to the terms of a will merely because an Indian testator left his estate to a niece and her children with no provision for a surviving illegitimate child. ^{10/} The chief difference between the facts in the preceding case and here is that our testator cultivated a father-son relationship of sorts with his illegitimate child subsequent to the making of his will, whereas in Tooahnippah the testator was evidently not close to his illegitimate daughter and sole heir at law at any time. Nevertheless, we believe that for the Secretary to withhold approval of the testator's will on the facts before us would be tantamount to applying a "just and equitable" standard in passing on an Indian's will, which is the precise error in Departmental judgment condemned by the Court in Tooahnippah. ^{11/}

The Board also takes note of the following in concluding that the 1959 will of the decedent should be approved. First, the beneficiaries identified in the 1959 will are close nephews of the decedent and the daughter of Sarah Ann Mingus, Shondra Lynne Bitseedy, who lived with decedent for approximately 3 years. Sarah Ann Mingus testified that the decedent treated Shondra as his own child (Tr. p. 16) and bought her clothes (Tr. p. 18). ^{12/} Second, it is obvious that the decedent knew he could alter his will if he harbored a desire to devise part of his estate to Anthony Bitseedy, Jr. ^{13/} Third, there is no federal requirement that an Indian's devise of trust property include testator's children, legitimate or otherwise, Tooahnippah v. Hickel, *supra*; Estate of Jacob Snideup, A-23878 (August 8, 1944); Estate of Jennie Sears

^{10/} By statute, an illegitimate Indian child is deemed to be the legitimate issue of his or her father for purposes of inheritance of trust land from him. 25 U.S.C. 371.

^{11/} See 397 U.S. 598, 608, 609, 610.

^{12/} Judge Short's order refers to the decedent's denomination of Shondra in his will as "my step daughter, Shondra Lynne Bitseedy" as odd since he professed in his will not to be married to Shondra's mother (p. 3, Decision on Petition for Rehearing). We perceive the denomination of Shondra to be consistent with testator's fatherly attitude toward her and therefore not as evidence of irrationality.

^{13/} Evidence of unsuccessful subsequent wills in this case does not lead to a conclusion that the decedent did not know how to execute a new will; the 1959 instrument shows he knew how to have the Bureau write one for him. Nor does it benefit appellee for consideration to be given to any provisions of the unsuccessful wills prepared after 1959, if such consideration could be made, since Anthony Bitseedy Jr., is not included in the later will as a beneficiary.

IA-23 (March 23, 1950); in fact, the primary purpose of a will is to alter the normal course of the descent of property. Estate of Kaun-dy (Joanna), IA-1008 (November 23, 1959). Fourth, decedent's filing of a paternity affidavit on behalf of Anthony Bitseedy, Jr., with state officials could not have been connected in any way with decedent's plan for the disposition of his trust estate upon death which, as decedent knew, is a function supervised by the Department. The record suggests that the apparent purpose of the affidavit was to qualify Anthony Bitseedy, Jr., for VA and social security benefits which are now being received.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Decision on Petition for Rehearing entered by Administrative Law Judge Jack M. Short on January 30, 1976, disapproving decedent's last will and testament dated September 10, 1959, is hereby REVERSED.

IT IS THEREFORE ORDERED that at the expiration of 60 days following the date of this decision, the Superintendent of the Anadarko Agency of the Bureau of Indian Affairs undertake to distribute decedent's trust estate in accordance with the terms of his September 10, 1959, last will and testament as follows: To Eugene Tsoodle, Wallace Bitseedy and Shondra Lynne Mingus (Bitseedy), one-third (1/3) each of all trust property of the decedent in equal shares.

IT IS FURTHER ORDERED that the award of \$1,500 in attorney's fees to Mr. Robert T. Keel, counsel for Anthony Bitseedy, Jr., ordered to be paid from funds credited to decedent's estate by Judge Short's January 30, 1976, order, be, and the same is, hereby VACATED.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Wm. Philip Horton
Administrative Judge

I concur:

//original signed
Alexander H. Wilson
Administrative Judge