



INTERIOR BOARD OF INDIAN APPEALS

Estate of George Tsalote

7 IBIA 261 (10/30/1979)



United States Department of the Interior

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

ESTATE OF GEORGE TSALOTE

IBIA 79-24

Decided October 30, 1979

Appeal from order by Administrative Law Judge Sam E. Taylor denying petition for rehearing.

Affirmed.

1. Indian Probate: Wills: Generally

Where contested will contains devise which recites that devisee is "caring for me in my old age," the will is not, under the circumstances described at the hearing, conditioned upon continued residence by decedent with devisee of will.

2. Indian Probate: Rehearing: Generally

Petition to rehear (directed to order approving will) is deficient where supported by two affidavits of expected new testimony which do not tend to contradict any of the findings of fact upon which the disputed order is based. Where one of the affidavits is from a witness who previously testified and the other statement is not relevant to the execution of the contested will and merely repeats other testimony given at the hearing, there is no factual basis offered upon which a rehearing can be ordered.

3. Indian Probate: Attorneys at Law: Generally--Indian Probate: Hearing: Full and Complete

The Administrative Law Judge has an added responsibility to make a complete record when the parties appear without counsel. Appellant was not denied due process by

proceeding to conduct contest of decedent's will without assistance of legal counsel.

4. Indian Probate: Wills: Testamentary Capacity: Generally

Inability to read the English language alone does not prevent one from making a valid will, even though the will is written in English.

APPEARANCES: Amos E. Black III, for appellant Bessie Haungooah Ahaitty; Truman J. Ware, appellee, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

George Tsalote died testate at Lawton, Oklahoma, on August 13, 1976. Besides his will dated January 2, 1968, which was admitted into probate by the order approving will, two prior wills by decedent were found and appear of record, one made October 3, 1966, the other dated July 26, 1963. In the 1963 will, four nieces, Bessie (appellant), Mary Lou, Iris, and Phlyis Haungooah are named devisees of decedent's trust lands. The will of October 3, 1966, revokes the 1963 will specifically and declares that testator wishes his property to pass according to "the intestate laws of the State of Oklahoma." In the 1968 will, decedent devises all his trust property to appellee, whose father was decedent's nephew.

Decedent died a single man. He had never married and left no children. Born in 1901, decedent injured his legs when he was young, giving him a pronounced limp. In his last years he was obliged to use a cane to walk. He lived with relatives, moving back and forth between homes in the rural area near Anadarko. From 1966 until his death he divided his residence between the houses of appellant and appellee. In 1968 decedent lived with appellee, and had done so for a year or more. In 1969 or 1970, after appellee's marriage ended in divorce, decedent moved to appellant's house, and resided there shortly before he died.

Decedent was not able to read English. He could, however, sign his name and customarily handled his own business dealings involving his trust property, such as leasing arrangements. He preferred to speak Kiowa, and spoke to friends in that language. On occasions when he was confronted by strangers (such as when he submitted to examinations by Public Health Service nurses at the Lawton Hospital) he would appear to lack understanding. He generally tended to his own affairs, and was not dependent upon any single person, but he was in the habit of soliciting advice from friends on business and personal matters.

On the day he made the 1968 will, the decedent presented himself at the Anadarko Field Solicitor's Office alone, and told the secretary

he wanted to draw a will. He consulted a staff attorney, to whom he dictated the terms of the will, and executed the will before the secretary and the lawyer as witnesses. Both witnesses describe him to be quite unremarkable. They thought him to be a normal testator whose only remembered infirmity was that he was "nearly blind." There is no suggestion that appellee or anyone else attempted to influence him to make the will he did.

The will made recites that decedent's entire trust estate is to pass to appellee who "is caring for me in my old age." Both in the testimony given at the hearing and in her arguments advanced upon petition for rehearing and on this appeal appellant impliedly argues that the will in favor of appellee should not be admitted to probate because it was conditioned upon continued residence with appellee and failed when decedent moved to appellant's house in 1969 or 1970. More explicitly, appellant contends that another hearing is required because she appeared to contest the 1968 will without counsel, and was therefore denied the right to counsel's effective and necessary assistance. Further, she asserts she has new evidence to present at a rehearing, and furnishes affidavits outlining the expected new testimony. Last, she urges that the failure to provide decedent an interpreter to translate his will from English to Kiowa negates the necessary testamentary capacity to execute a will, since he could not read the English text which he signed.

[1] The suggestion the will of decedent may have been conditioned upon continued residence with appellee is without basis in the record. The recital in the will that appellee "is caring for me in my old age" is a phrase descriptive of a present fact concerning which there is no dispute, since from about 1967 until 1969 or 1970 decedent lived regularly with appellee. During the time he lived in appellee's house he often went to town with appellee. Decedent would then spend the day as he liked and return home with appellee after work. On one such day he executed the questioned will without telling appellee (or anyone else, apparently) that he had done so. There was no agreement to make such a will, or any will. Appellee had not asked for a gift of any of decedent's lands, nor was there a discussion of such a gift in exchange for future support or a continued stay at appellee's home. Indeed, since appellee continued to take decedent on outings with him and his family to such events as car races and pow-wows, it seems appellee may have continued "caring for me in my old age" even after decedent no longer stayed at appellee's house. Under the circumstances, the will was not conditioned upon decedent's continued residence at appellee's home. ^{1/}

[2] Appellant contends the offered testimony of two witnesses as set out by affidavits attached to her petition for rehearing requires

^{1/} See Estate of Annie Bear, 5 IBIA 149 (1976).

a rehearing into the matter of decedent's will. The statements produced by her fail to support the proposition advanced, however. One affidavit is from a witness who testified at the hearing held, and merely repeats in abbreviated form, his reported testimony. The second affidavit is repetitious of testimony of others who testified at the hearing. It is not relevant to the execution of the will, but states the author's personal opinion of decedent. The statements made do not tend in any way to rebut the evidence of the attesting witnesses to the will that the decedent was capable in all material respects when he made his will on January 2, 1968. Both affiants apparently knew the decedent, but know nothing specific about circumstances surrounding the making of his 1968 will.

[3] Similarly, appellant's complaint she was denied the effective assistance of counsel in a manner affecting her substantial rights is unpersuasive. 2/ She does not indicate how her initial appearance without counsel hampered her or affected her case. Certainly it does not arise from the failure of the Administrative Law Judge to consider the testimony outlined in the two affidavits offered in these proceedings on appeal. 3/ To justify a rehearing she must show that lack of counsel resulted in damage or injustice. 4/ Beyond the assertion that appellant was damaged in some way, there is no showing of any such injury. On the contrary, it appears the Administrative Law Judge adequately protected the parties and made a complete record in the hearing process which leads logically and correctly to the findings made and conclusions drawn from them. 5/ There is no showing of error in the orders made by him, nor any indication by counsel of where such error occurred. 6/

[4] On appeal appellant is represented by counsel, who has briefed the single contention that the absence of a translator at the will signing invalidated the will because decedent could not read English. 7/ The record simply does not support the assertions made that appellant could not speak English. It is clear he both spoke and

2/ She apparently chose to appear without counsel although notified by the Notice of Hearing (on probate of will) that she could retain a lawyer if she wished.

3/ See 43 CFR 4. 241(a)

4/ Estate of Peaher Mabel Mahseet, 5 IBIA 27 (1976).

5/ Estate of Harold Humpy, 5 IBIA 132 (1976).

6/ See Estate of Simpson Nokusille, 5 IBIA 178 (1976). The opportunity to be represented by counsel and to be present and to cross-examine witnesses satisfies required standards of due process at administrative hearings. See Freight Consolidator's Co-op v. U.S.D.C., 230 F. Supp. 692 (S.D.N.Y. 1964).

7/ A near total reliance upon the provisions of 43 CFR 4.234 is misplaced, as shown by a review of the decisions cited in footnotes 4, 5, 6, above.

understood English, that he used English to handle his own affairs when dealing with his trust property, that he had made two prior wills and knew how to make a will and where to go to do it. His failing eyesight, advancing age, and old leg injury did not affect his understanding. 8/ The attesting witnesses agree no interpreter was furnished because none was needed: their observations are supported by the record as a whole.

The will made by decedent on January 2, 1968, was properly admitted to probate pursuant to statute and implementing regulations governing probate of Indian wills. 9/

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from is affirmed.

This decision is final for the Department.

//original signed
Franklin Arness
Administrative Judge

We concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge

//original signed
Mitchell J. Sabagh
Administrative Judge

8/ Nor, apparently, did it affect his enjoyment of life--he liked to play games with appellee's children, enjoyed singing at celebrations, and apparently had his own social life in the town. The record reveals he knew what was happening about him and did as he pleased despite the advice (or opinions) of others. He was, in short, competent. (See Estate of Fannie Newrobe Choate, 7 IBIA 171 (1979) for a discussion of the effect of age, blindness, and illiteracy upon competence to make a will.)

9/ Act of June 25, 1910, 36 Stat. 856, as amended (25 U.S.C. § 373 (1976)); 43 CFR 4.233.