



INTERIOR BOARD OF INDIAN APPEALS

Estate of Grace Dion Antelope Horse Ring

12 IBIA 232 (04/30/1984)

Judicial review of this case:

Appeal withdrawn, *Drapeaux v. U.S. Department of the Interior*, No. CIV 84-1781  
(8th Cir. Nov. 15, 1984)



# United States Department of the Interior

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

## ESTATE OF GRACE DION ANTELOPE HORSE RING

IBIA 83-54

Decided April 30, 1984

Appeal from an order denying rehearing entered in IP TC 362R 80, IP TC 359R 83, by Administrative Law Judge Vernon J. Rausch.

Affirmed.

1. Indian Probate: Wills: Alterations and Erasures

Alterations in an Indian will do not in and of themselves void the will when the meaning of the will is not changed. If a will contains unattested changes, the changes will be disregarded and the instrument admitted to probate when the original intention of the testator can be ascertained.

2. Indian Probate: Wills: Testamentary Capacity: Generally

The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will.

3. Indian Probate: Wills: Revocation

Without some physical act by the testator expressly changing or revoking an Indian will, the Department is without authority to disapprove the will on the grounds that the testator intended to or did revoke the will.

4. Indian Probate: Wills: Undue Influence

To invalidate an Indian will because of undue influence upon a testator, it must be shown: (1) that he was susceptible of being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

APPEARANCES: Rick Johnson, Esq., Gregory, South Dakota, for appellants; Gary W. Conklin, Esq., Lake Andes, South Dakota, for appellee. Counsel to the Board: Kathryn A. Lynn.

#### OPINION BY ADMINISTRATIVE JUDGE LEWIS

Annie Antelope Drapeaux, Debra Standy, and Michael Standy (appellants) have sought review by the Board of Indian Appeals (Board) of a July 20, 1983, order denying rehearing issued by Administrative Law Judge Vernon J. Rausch in the estate of Grace Dion Antelope Horse Ring (decedent, testatrix). Denial of rehearing upheld a March 13, 1981, order approving decedent's will. For the reasons discussed below, the Board affirms the approval of decedent's will.

#### Background

Decedent, Yankton Sioux Allottee No. YS-356, was born on or about February 5, 1892, and died of natural causes on June 13, 1980, at the age of 88. At the time of her death, decedent owned land in Indian trust status on both the Yankton and Rosebud Reservations in South Dakota.

The evidence and testimony at the October 9, 1980, hearing to probate decedent's Indian trust property showed that her heirs at law were a son, Delmar Arrow (appellee); a daughter, Annie Antelope Drapeaux; and two children of a deceased daughter, Debra and Michael Standy (the three appellants here). A document purporting to be decedent's last will and testament was presented at the hearing. This will devised one of decedent's Indian trust allotments to her daughter, disinherited the children of her deceased daughter, and left the remainder of her estate to her son. Appellants attempted to have the will set aside on the grounds that the will was altered after attestation; that decedent was incompetent; and that, if competent, decedent had revoked the will.

On March 13, 1981, Judge Rausch approved the will, finding against appellants on each of their arguments. Appellants sought rehearing by letter dated March 27, 1981. Correspondence ensued among appellee, the Judge, and appellants' counsel aimed at identifying alleged newly discovered evidence, defining the legal theory under which appellants sought rehearing, and considering a settlement offer made by appellee. Because the Judge had not granted rehearing by the time he next scheduled hearings in the area in which the parties resided, he held an evidentiary hearing on June 11, 1982, to assist in determining whether rehearing should be granted. Additional settlement attempts following that hearing further delayed resolution of the petition. On July 7, 1983, appellee rejected the final settlement offer. An order denying rehearing was issued on July 20, 1983.

Appellants sought review by the Board. Briefs have been filed by both parties.

#### Discussion and Conclusions

On appeal, appellants raise the same three issues that were considered by Judge Rausch. The first issue is the fact that the will was altered after execution. The Board agrees with and adopts the Judge's analysis of this issue:

The scrivener of the decedent's will (a Bureau of Indian Affairs employee, not legally trained) added the names, identification numbers, and birthdates of three of the decedent's grandchildren to clause four of the will so that it read as follows:

FOURTH. - I do not wish to leave anything to my grandchildren, namely, Larry Standy, YSU-4440, born 10-21-54; Debra Standy, YSU-4441, born 10-25-56; and Michael Standy, YSU-4442, born 12-12-57. They are well provided for by their father and they inherited the land interests of their mother. [Additions underlined.]

The scrivener testified that the testatrix referred to these grandchildren as "Sophie's children" without naming them specifically. The scrivener could not say whether the testatrix knew their names or had forgotten their names at the time (Tr. p. 22).

[1] In a similar case, the Department has taken the position that alterations in and of themselves do not necessarily void the will where the addition "does not change the meaning of the will. It appears that it was merely an afterthought added for the sake of emphasis or clarity. If omitted from the will, it would neither add nor detract from its construction. If a will contains unattested changes, these changes will be disregarded and the instrument admitted to probate when the original intention of the testator can be ascertained." Estate of Loretta Pederson, 1 IBIA 15, [17] (1970).

The addition of the names of the Standy children to the fourth clause of the will did not change the meaning of that clause. If the names had been omitted, the clause could still be construed to mean the Standy children, because they are the only grandchildren the decedent had by a daughter who predeceased her.

Memorandum of Law in support of March 13, 1981, order determining heirs (1981 memorandum) at 2.

It is improper to alter or make additions to a will after its execution without some form of acknowledgment of the changes by the testator. The best procedure would be for the testator to execute a new will which incorporates the alterations. As held in Pederson, when unacknowledged changes appear in a will, they will be disregarded. If the will is capable of construction without the changes, it will be admitted to probate. If it is not capable of construction, so much of the will as cannot be construed must be disapproved. <sup>1/</sup>

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<sup>1/</sup> Because of this holding, it is not necessary to address appellants' allegation that the South Dakota pretermitted heir statute should be applied in this case. The Board notes only that state statutes regarding the execution and construction of wills do not apply in Departmental probates of Indian trust estates. See, e.g., Estate of William Mason Cultee, 9 IBIA 43 (1981), aff'd sub nom., Cultee v. United States, No. 81-1164 (W.D. Wash. Sept. 14, 1982), aff'd, 713 F.2d 1455 (9th Cir. 1983), cert. denied, 52 U.S.L.W. 3776 (U.S. Apr. 24, 1984) (No. 83-1204).

[2] Appellants next contend that decedent was not competent to execute a will because she failed to appreciate or understand the objects of her bounty. The burden of proving testamentary incapacity is on the person contesting the will. See, e.g., Estate of Samuel Tsoodle, 11 IBIA 163 (1983). If appellants proved the above allegation, it would support a finding that decedent lacked testamentary capacity. The Judge's discussion of this issue, found at pages 2-3 of the 1981 memorandum, is hereby adopted:

[T]he testatrix herself, through some employee at the nursing home, summoned a Bureau of Indian Affairs employee (the scrivener) to her bedside to prepare her will. She neither solicited the aid of her two children nor even confided in them, at the time, of her intent to leave a will. The provisions of the will are totally rational: a small bequest to her one daughter, the rest and residue to her son, and an apparent intent to omit the children of her prior deceased daughter for the ostensible reason that they were provided for by their father and they inherited the land interests of their mother. (Judicial notice is taken of the fact that the decedent's prior deceased daughter, Sophie Antelope Standy, did have an estate probated by the Department which was decreed to her three children, TC 632RX 76.)

The testimony of the scrivener clearly indicates that at the time the will was prepared and signed the decedent was sitting up in bed and freely conversed with her while the scrivener brushed the decedent's hair. The scrivener further testified that she was a normal 84-year-old lady, alert, and knew what land she owned and where it was located. The decedent was, in her opinion, a competent person who knew her presence of mind and who her heirs were. This uncontradicted testimony establishes that the decedent had the mentality and memory sufficient to understand intelligently the nature and purpose of the transaction. The fact that her heirs were treated disproportionately or that the will disappoints reasonable expectations of prospective beneficiaries does not show incapacity. The fact that the decedent may have thought or believed that Sophie's children were "well provided for by their father" when in fact they may not have been "well provided for" does not show incapacity. As stated above, she need not have "actual knowledge or appreciation of their deserts." Also, the law does not require a wise disposition of one's property as proof of competency. Nor is the fact that she may be wholly mistaken in and of itself a sign of incapacity. Estate of Charlotte Davis Kanine, 72 I.D. 58 (1965).

Furthermore, the fact that decedent failed to mention that a third child of her daughter Sophie, Larry John Standy, had died the day before she executed her will, does not show incompetence. Although it appears possible that she knew of the death the day it happened, there is no statutory, regulatory, or decisional requirement that she mention the fact in her will or to the scrivener.

Finally, appellants argue that if decedent was competent to make a will, she was also competent to revoke one. They contend that her desire to revoke the will, expressed orally prior to her death, is sufficient to constitute revocation.

[3] The Judge notes:

Although there are no Federal statutes regulating the revocation of an Indian's will, there is a Departmental regulation which provides:

The testator may, at any time during his lifetime, 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, or by physically destroying the will with the intention of revoking it. No will that is subject to the regulations of this subpart shall be deemed to be revoked by operation of the law of any State. (43 CFR 4.260(c).)

(1981 memorandum at 4.)

Assuming, but not conceding, that the evidence is clear that the testatrix wanted her will revoked, there is a definite lack of evidence that a physical destruction or obliteration accompanied that intent or that a subsequent writing executed with the same formalities as are required in the case of the execution of a will was done.

(1981 memorandum at 3.) Intent alone has never been held sufficient to create, alter, or revoke an Indian will. See Estate of Helen Ward Willey, 11 IBIA 43, 48-49 (1983), and cases cited therein. Because decedent took no action legally sufficient to revoke her will, the Department is without authority to disapprove the will on the grounds that she intended to revoke it.

The evidence appellants sought to present on rehearing suggests that decedent may have expressed an intent to revoke the will in 1978 because of her allegation that appellee had forced her to make a will contrary to her desires. Although appellants raise this issue only in regard to their claim that decedent intended to revoke the will, it also indicates the possibility that undue influence was exerted on decedent in the execution of her will.

[4] In order to invalidate an Indian will because of undue influence upon a testatrix, the persons contesting the will must show that: (1) The testatrix was susceptible of being dominated by another; (2) the person allegedly influencing the testatrix in the execution of the will was capable of controlling her mind and actions; (3) that person did exert influence upon the testatrix of a nature calculated to induce or coerce her to make a will contrary to her own desires; and (4) the will is contrary to the testatrix's own desires. Estate of Evelyn Westwolf Mosney Bear Walker Romero, 12 IBIA 215 (1984); Estate of William Cecil Robedaux, 1 IBIA 106, 78 I.D. 234 (1971).

The question of undue influence was addressed in the July 20, 1983, order denying rehearing at page 3: "There is insufficient evidence to support a finding that undue influence was exerted upon the Testatrix by the principal beneficiary, or that she was susceptible to his influence. The circumstances surrounding the will execution do not suggest that the will of the decedent was coerced." See discussion of the circumstances surrounding the execution

