



INTERIOR BOARD OF INDIAN APPEALS

Estate of Philip Malcolm Bayou

19 IBIA 20 (10/23/1990)

Related Board cases:

13 IBIA 200

Reversed & remanded, *Mallonee v. Hodel*, No. A-85-549
(D. Alaska May 5, 1987)

15 IBIA 202



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF PHILIP MALCOLM BAYOU : Order Affirming and Adopting
: Administrative Law Judge's
: Order Disapproving Will After
: Remand
:
: Docket No. IBIA 90-16
:
: October 23, 1990

The above case was previously before the Board of Indian Appeals (Board) in 1985. 13 IBIA 200 (1985). The Board's decision was appealed to the United States District Court for the District of Alaska, which remanded the matter to the Department of the Interior. Mallonee v. Hodel, No. A85-549 Civil (D. Alaska May 4, 1987). The Board in turn remanded the case to Administrative Law Judge William E. Hammett. 15 IBIA 202 (1987).

After considering briefs addressing the implementation of the court's remand and holding a supplemental hearing, Judge Hammett entered an order disapproving will after remand on September 8, 1989. An appeal was filed with the Board by appellant Rudy Mallonee. Briefs were filed for appellant by William Grant Stewart, Esq., and J.L. McCarrey, Esq., both of Anchorage, Alaska; for appellees Martha Taylor and Peter Bayou by Marc W. June, Esq., Anchorage, Alaska; and for appellee William Bayou by D. Todd Littlefield, Esq., Kodiak, Alaska.

The facts in this case were fully set forth in the Board's 1985 decision and will not be repeated here. See 13 IBIA at 201-06. The reason for remand, as set forth in the court's order, was the court's

conclu[sion] that the ALJ weighed the evidence in this case and reached his decision as to the second Fronkier [1/] criterion on the basis of a rebuttable presumption which he found to exist.

^{1/} The case to which the court refers is Estate of Louis Fronkier, IA-T-24 (1970). This is one of several cases in which general rules governing proof of undue influence in the execution of an Indian will have been set forth. These rules state that in order to prove undue influence, the will contestants must show that (1) the decedent was susceptible to the domination of another, (2) the person allegedly exerting the influence was capable of controlling the decedent's mind and actions, (3) the nature of the influence was calculated to induce or coerce the decedent to make a will contrary to his or her own desires, and (4) the will was contrary to his or her desires.

No legal basis has been demonstrated for the construction of a presumption that Appellant controlled the decedent. The injection of this unpermitted presumption into the decisionmaking process necessarily beclouded the ALJ's evidence weighing and fact finding process. It is not possible for this Court to know what finding as to the second Fronkier criterion the ALJ would have made but for the erroneous presumption.

* * * Consequently, the case must be remanded to the administrative law judge to enable him to address the question of the second Fronkier criterion without employing an improper presumption.

This case must also be remanded to the administrative law judge to enable him to reconsider the third Fronkier criterion without making an adverse inference based upon Mallonee's assertion of the attorney-client privilege [in regard to testimony by the will scrivener]. * * *

(May 4, 1987, order at 15-16).

By stipulation of the parties, the supplemental hearing held after remand was limited to the testimony of the will scrivener. Judge Hammett's subsequent order addressed the second, third, and fourth criteria set forth in Fronkier and listed in note 1, supra. Judge Hammett concluded that appellees had met their burden of showing that decedent Philip Malcolm Bayou was subjected to undue influence in the execution of his will by appellant.

On appeal, appellant raises several arguments, all of which allege that Judge Hammett improperly weighed and evaluated the evidence and made erroneous credibility determinations. The Board has carefully considered appellant's allegations, but finds no basis upon which to overturn the Judge's order. The Board has consistently stated that it will not disturb an Administrative Law Judge's findings of fact when those findings are supported by substantial evidence in the record. See, e.g., Day v. Navajo Area Director, 12 IBIA 9 (1983). The Board finds that Judge Hammett's findings of fact are supported by substantial evidence in the record. Furthermore, the Board has held that it will not normally disturb an Administrative Law Judge's determination of witness credibility because the Judge was present at the hearing and had the opportunity to hear the testimony and observe the witness' demeanor. See, e.g., Estate of George Neconie, 16 IBIA 120 (1988), and cases cited therein. The Board finds no reason to deviate from this general rule in this case.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Hammett's September 8, 1989, order disapproving will after remand is affirmed and adopted as the Board's decision. A copy of that order is attached hereto.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge



United States Department of the Interior

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IN THE MATTER OF THE ESTATE OF)	PROBATE IP SA 150N 81
)	
PHILIP BAYOU)	ORDER DISAPPROVING WILL
)	AFTER REMAND
DECEASED ALEUT OF ALASKA)	

On July 25, 1983, this Administrative Law Judge, hereafter ALJ, issued an order disapproving the last will and testament of Philip Malcolm Bayou dated June 16, 1975. The order determined that the four criteria set forth in the Estate of Louis Fronkier, IA-T-24 (February 24, 1970), hereafter, Fronkier, for finding undue influence were met by the will contestants in discharging their burden of establishing that Rudy Mallonee asserted undue influence over the decedent in execution of the will.

The matter was appealed to the Interior Board of Indian Appeals, hereafter Board, which affirmed the order. The will proponent then appealed to the United States District Court for the District of Alaska, which Court entered its decision in Mallonee v. Hodel, et al., No. A85-549 Civil, finding that the order utilized an unpermitted presumption and an improper inference. Pursuant to 5 U.S.C. section 706(2)(A), the Court set aside the conclusions based on such presumption and inference on the basis that they were not made according to law. The Court stated in part that:

The Court concludes that the ALJ weighed the evidence in this case and reached his decision as to the second Fronkier criterion on the basis of a rebuttable presumption which he found to exist. No legal basis has been demonstrated for the construction of a presumption that Appellant controlled the decedent. The injection of this unpermitted presumption into the decision-making process necessarily beclouded the ALJ's evidence weighing and fact finding process. It is not possible for this Court to know what finding as to the second Fronkier criterion the ALJ would have made but for the erroneous presumption... Consequently, the case must be remanded to the ALJ to enable him to address the question of the second Fronkier criterion without employing an improper presumption.

.....
This case must also be remanded to the ALJ to enable him to reconsider the third Fronkier criterion without making an adverse inference based upon Mallonee's assertion of attorney-client privilege.

When the order disapproving the will was appealed to the Board, this forum lost jurisdiction over the matter except that such jurisdiction could be reacquired upon reversal and remand by the appellate body. (See Interim Ad Hoc Committee of the Karok Tribe v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 76; Apache Mining Co., Interior Board Surface Mining and Reclamation Appeals 14, 85 I.D. 395; and United States v. Howe, 280 F. 815, cer den, 259 U.S. 587, 66 L ed. 1077, 42 S. Ct. 590.)

It follows that the extent of the jurisdiction reacquired would be limited by the disposition of the appeal. In the instant case, the Court remanded the case so that this forum could determine whether its findings that the will contestants had met the requirements of the second and third criteria of Fronkier could be sustained by evidence independent of the unwarranted presumption and the improper inference. The Board thereafter remanded the case to the ALJ to take action not inconsistent with the Court's decision.

The general rule as to the extent of jurisdiction acquired on remand appears to be that "the inferior court (or administrative body) has no power or authority to deviate from the mandate issued by an appellate court." ^{1/} Although the Court was specific in its mandate as to the action to be taken, it did not limit reconsideration of the second and third criteria to the record as constituted before the Court, thus, the Court did not appear to prohibit supplementing the record as to these two criteria. In post-remand pleadings, both the proponent and the contestants agreed that the testimony of the will scrivener could be taken at a post-remand hearing.

At the outset, this forum adopts, as if fully set out herein, the language, the findings, conclusions and the rulings of its July 25, 1983, decision as to the second and third Fronkier criteria, with the exclusion of language which refers to the unpermitted presumption or inference. Neither the presumption nor the inference have been given any consideration in reviewing the original record, the record as supplemented by the post-remand hearing, or in the instant decision.

^{1/} See Briggs v. Pennsylvania Railroad Co., 334 U.S. 304, Britton v. Dowell, Inc., 243 F. 434 (10 Cir. 1957), and cases cited thereunder.

RECONSIDERATION OF THE SECOND FRONKIER CRITERION

This criterion is that the person allegedly exerting the influence was capable of controlling the mind and action of the decedent. The testimony of Mary Goch as to a conversation with Mallonee (Tr 92, 6/18/82 hearing) is of great evidentiary significance in determining this issue. Her testimony concerning this conversation is set out in relevant part as follows:

Q (June) Did he (Mallonee) tell you why Philip told him he should have the land?

A (Goch) He explained that a lot of parties were trying to take advantage of Philip. He did tell me that. He said that, you know, there was this, from Valdez Terminal and then there were various other people that wanted Philip's land, and he explained that they were trying to pressure him (Bayou) into giving them his land and Philip was easily influenced in that regard and that he thought this would be the best way to see that Philip's land was taken care of by having Philip sell it to him.

The record discloses that Mallonee did not deny making these statements, his testimony was that he didn't recall such conversation (Tr 198, 6/18/82 hearing). The evidence of such conversation is substantiated by contestant's Exhibit D, attachments 1-34A and 1-35A. These exhibits provide strong corroboration because they were made a part of the records of the Bureau of Indian Affairs shortly after the purported conversation occurred. 2/

After weighing Mallonee's testimony against Goch's testimony, as corroborated by these exhibits, I find that the evidence preponderates that Mallonee had the alleged conversation with Goch and made the statements attributed to him. Mallonee's statements that "Philip was easily influenced in that regard (giving others his land)," and that he (Mallonee) thought the best way to see that Philip's land was taken care of was by having Philip sell it to him, coupled with the fact that Mallonee prevailed upon Bayou to execute in Mallonee's favor at least five instruments purporting to give Mallonee varying degrees of control over the land, is certainly indicative that Mallonee

2/ Such exhibits were admitted pursuant to 43 CFR 4.232, which vests the ALJ with broad discretion concerning the type of evidence which may be received in the record.

could assert influence over Bayou as to disposition of the property. This bears special significance when Bayou persisted in executing such instruments without approval of the Bureau of Indian Affairs, hereafter BIA, even after both he and Mallonee were advised that the instruments required BIA approval. Further evidence of control is that in every instance in which Mallonee and Bayou met together with BIA personnel, Bayou was most reticent while Mallonee took an active role. It was at these meetings where Bayou indicated he wanted to sell the land to Mallonee, whereas in the meeting which Bayou had with Mary Goch and Joseph Donahue in which Mallonee was not present, Bayou said that he did not want to sell his land to Mallonee. Further, in that meeting Bayou appeared to be much more animated.

Taking the above evidentiary matters together with the evidence, findings and conclusions set forth in the July 25, 1983 decision, and disregarding any reference to the unwarranted presumption, I find that a preponderance of the substantial evidence establishes that Mallonee was capable of controlling the mind and action of Bayou when it came to disposition of Bayou's property.

RECONSIDERATION OF THE THIRD FRONKIER CRITERION

The third Fronkier criterion requires that the will contestants establish that the nature of the influence was calculated to induce or coerce the decedent to make a will contrary to his own desires. The testimony of the will scrivener in the deposition and at the post-remand hearing is important to the determination whether the influence was calculated to induce or coerce the decedent in making the will. The scrivener's testimony is summarized as follows (except as otherwise noted, all page references are to the transcript of the post-remand hearing):

That he thought that Mallonee brought Bayou to the meeting when the will was first discussed (Tr 43); that Bayou came to him as a client at the request of Mallonee (Tr 14); that Mallonee asked him if he would "write" a will for Bayou (Tr 14, 34); that Bayou wasn't present when Mallonee made the request (Tr 15); that he thought that Mallonee brought Bayou

to the office ^{3/}; that Mallonee was present when the scrivener met with Bayou to discuss the terms of the will (Tr 46, 47, Offret deposition); that Mallonee was present when the will was executed (Tr 28, 64) ^{4/}; that Mallonee wanted the will done and was willing to "take the bill" (Tr 19); that the scrivener thought that Mallonee was billed for the will (Tr 33); that the scrivener did not recall what happened to the will, and although it would ordinarily go to the testator, the scrivener believed that the will was sent to Mallonee (Tr 20) ^{5/}; that the purpose of the will was to ensure "as best we could" that Mallonee would get the Valdez property if something should happen to Bayou (Tr 19, 20); that the will was supposed to be a backstop in Mallonee's attempt to gain ownership of the Valdez land (Tr 34, 35); that Mallonee had a desire to have Bayou's will executed as a form of protection or backstop provision with respect to the land (Tr 52, emphasis added).

At the June 18, 1982, hearing Mallonee testified that Bayou had contacted him at Mallonee's home in Anchorage and told Mallonee that he wanted to make a will devising the land to Mallonee (Tr 152, 6/18/82 hearing). Although, the record at this point was not clear as to when the contact was made, Mallonee later testified at the same hearing (Tr 194) to the effect that Bayou had come to his home two or three days before June 16, 1975, the date of execution of the will, and told him that he wanted to "give" Mallonee a will, and that Bayou returned on June 16, 1975, and again stated that he was going to give Mallonee a will; that they "started to town"; that Mallonee said "where are we going" and that Bayou responded to "Boyko's" and "that's where they ended up." There were no witnesses to these purported conversations, but the scrivener did testify at the post-remand

^{3/} Mallonee testified (Tr 194, 195) at the June 18, 1982, hearing that he drove Bayou to the Boyko law firm the day that the will was executed.

^{4/} Offret deposition discloses that Mallonee was present every time Offret saw Bayou and will witness Patricia Treat thought that Mallonee was present when the will was executed (Tr 28, 6/18/82 hearing).

^{5/} Mallonee is the person who was found to be in possession of the original of the will, and he stated that "I put the will in my safe and that's where it stayed" (Tr 179, 6/18/82 hearing).

hearing that he discussed the will with Bayou and he believed that the will reflected what Bayou wanted to do (Tr 24, 26, 54, 55). However, the whole thrust of the scrivener's testimony at that hearing was that Mallonee was the moving force behind procurement of the will and that the purpose of the will was to ensure that Mallonee would receive the land if his efforts to otherwise acquire it went for naught.

The credibility of Mallonee's version of circumstances under which the will came into being is seriously undermined by testimony of Offret in his deposition in which he stated that Mallonee was present at the meeting when the will was discussed and present at the meeting when the will was executed, whereas Mallonee's version appears to be that he was present only when the will was executed. In weighing the credibility of Mallonee's testimony against the scrivener's testimony, the thrust of which was that Mallonee present at both meetings and was actively involved in procurement of the will, I find that the scrivener's testimony is the more believable.

Mallonee's efforts in having the will prepared and the purpose of the will as stated by the scrivener at the post-remand hearing, coupled with the evidence considered in the decision issued July 25, 1983; the Offret deposition; and the evidence received at the post-remand hearing; and disregarding the unpermitted inference, leads me to conclude that a preponderance of the substantial evidence establishes that Mallonee wielded influence over the testator and that the nature of the influence was calculated to induce or coerce the testator to make a will devising the property to Mallonee.

However, there is an additional factor to consider and that is whether the will was against Bayou's desires. Obviously, unless the will contestants can establish that, in the absence of Mallonee's influence, Bayou would have devised the property to someone other than Mallonee or would not have made a will, they will not have fulfilled the evidentiary requirements of the third Fronkier criterion.

This forum recognizes that the July 25, 1983, decision found that the contestants had met the burden impressed by the fourth Fronkier criterion, and it further recognizes that the remand imposed jurisdiction to reconsider only the second and third criteria under the conditions stated in the remand; however, reconsideration of third Fronkier dictates review of the record as to Bayou's testamentary desires, and to this extent, the

findings, rulings, and discussion relating to the fourth Fronkier criteria must be reexamined together with the findings, rulings, and discussion pertaining to Bayou's testamentary desires set forth under any criteria, and with the evidence acquired at the post-remand hearing, in order to ascertain such desires. In doing so, this forum does not believe that it does violence to the mandate because the Court's silence as to the first and fourth Fronkier criteria does not imply that the Court affirmed this forum's findings and rulings as to such criteria.

"A judgement of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided." *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551, at 553-554, 24 S. Ct. 538, 539, 48 L ed. 788 (1904), and *Imperial Chemical Industries Limited v. National Distillers and Chemical Corporation*, 354 F. 2d 459 (2d Cir 1965), and cases cited therein.

In addition to the evidence alluded to in the July 25, 1983, decision concerning the decedent's testamentary desires, two other matters of evidence are here considered: (1) the scrivener's testimony at the post-remand hearing, and (2) the testimony of Richard Nelson given at the August 26, 1982, hearing.

Nelson testified that he was a boyhood friend of Bayou; that the friendship was renewed in 1974; that he had met with Bayou five or six times between 1974 and June or July 1978; that on each occasion, Bayou said that he intended to take care of his niece and nephew, and that on one occasion, Nelson thought it was at their second meeting in the latter part of 1974, that Bayou talked about selling the land and setting up a trust for his niece and nephew (Tr 8, 14-17, 8/26/82 hearing).

Certainly Nelson's testimony constitutes very substantial and credible evidence that the will was against Bayou's testamentary desires, since the devise of all of his property to Mallonee was in apposition to his expressed intent to sell the allotment and set up a trust account for his niece and nephew. Weighing Nelson's testimony as to Bayou's testamentary desires against Mallonee's testimony as to such desires, Nelson's testimony must be given greater weight and credibility because Nelson has no apparent pecuniary interest in the outcome of the proceedings, and because he has no personal relationship with the will contestants, whereas Mallonee's testimony is tainted with self-interest, and, on a least two occasions, the credibility of

his testimony has been undermined: (1) His testimony that Audrey Tuck, former BIA realty officer, had told him to obtain a gift deed, which was contradicted by her letter dated March 5, 1976, to Mary Goch, another former BIA employee, in which Audrey denied that she had ever told Mallonee to acquire a gift deed, and (2) the testimony of Offret, in his deposition, contradicting the implication of Mallonee's testimony that he had not been at the first meeting when the will was discussed.

Offret testified at the hearing on remand that Bayou stated that he wanted to give the property to Mallonee because Mallonee was a good friend and had given Bayou money. The scrivener's testimony must be viewed within the circumstances in which Bayou made the statement. He made the purported statement in the presence of Mallonee and Offret in Offret's office. Offret had provided legal counsel to Mallonee in several matters involving Mallonee and Bayou, and even though he testified that he represented Bayou as to preparation of the will, his concern appeared to be more directed toward protection of his usual client, Mallonee, than an effort to fully apprehend the testamentary intent of Bayou. His statement that the will was to be a back-up in case Mallonee could not acquire the land by purchase is certainly indicative that there was no in-depth effort to ascertain if the will reflected Bayou's true testamentary intent.

In weighing the evidentiary value of Offret's testimony against Nelson's testimony, I am compelled to assign the greater weight to Nelson's testimony as to Bayou's desires concerning the disposition of his property, because Bayou made the statements to Nelson in an unstressed environment and Nelson had no interest in Bayou's wishes as to disposition of his property.

Based on the evidence discussed in my July 25, 1983, decision; the testimonial evidence of Mallonee as cited above; the testimonial evidence of Offret; and Nelson's testimony at the August 26, 1982, hearing, and disregarding any reliance on, or further consideration of, the unpermitted inference, I find and so determine, that a preponderance of the substantial evidence establishes that the will was against the testator's desires. Therefore, the will contestants have met the evidentiary burden and requirements of the third Fronkier criteria.

ACCORDINGLY, it is hereby ordered that, absent the impermissible presumption and inference, the will contestants

