



INTERIOR BOARD OF INDIAN APPEALS

In re the Will of Louis Claremore Walker

54 IBIA 95 (10/13/2011)

Related Board case:
43 IBIA 5



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

IN RE THE WILL OF)	Order Affirming Decision (No. IBIA
LOUIS CLAREMORE WALKER)	09-074) and Dismissing Appeal
)	(No. IBIA 09-080)
)	
)	Docket Nos. IBIA 09-074
)	09-080
)	
)	October 13, 2011

Louis Claremore Walker (Decedent), Osage Indian, died in 2004 possessed of an Osage headright.¹ Decedent wrote two wills, and a codicil to the first will. In an Amended Order Approving Will, dated June 15, 2009 (Amended Order), the Superintendent of the Osage Agency (Superintendent), Bureau of Indian Affairs (BIA), approved all three testamentary instruments. One of Decedent’s sons, Clifton Fred Walker (Appellant), appealed to the Board of Indian Appeals (Board) from the Superintendent’s decision to approve Decedent’s last will, executed in 1993 (Docket No. IBIA 09-074); Charles Lohah (Lohah), a cousin of Decedent, also filed an appeal challenging the earlier will and codicil (Docket No. IBIA 09-080), apparently in the belief that his challenge to those documents somehow protects his own rights. We affirm the Superintendent’s Amended Order with respect to Decedent’s 1993 will. We conclude, in response to Appellant’s arguments, that Appellant properly bore the burden of showing lack of testamentary capacity and did not

¹ As we explained in *Pappin v. Eastern Oklahoma Regional Director*, 50 IBIA 238, 238 n.1 (2009),

[t]he term “Osage headright” means an individual right to share in the income from an Osage tribal mineral estate and, sometimes, in other tribal income as well. *See, e.g.*, Act of Oct. 21, 1978, 92 Stat. 1660, 1663, 25 U.S.C. § 331 note (1978 Act), § 8(a); *Redleaf v. Muskogee Area Director*, 18 IBIA 268 n.1 (1990); *Estate of Vivian M. Rogers v. Acting Muskogee Area Director*, 14 IBIA 217 (1986).

A brief history of Osage headrights is found at *Smith v. Muskogee Area Director*, 16 IBIA 153, 157-58 (1988).

meet his burden. Given our disposition with respect to Decedent's 1993 will, we dismiss Lohah's appeal on mootness grounds, and thus do not reach the merits of the 1986 will and the codicil thereto.²

Background

A. Events Up Through the Board's Decision in *Walker I*³

According to ProTrac,⁴ Decedent was born on April 28, 1927, and died on April 8, 2004. At the time of his death, the Superintendent reported that Decedent's sole trust asset was a 1.6666 Osage headright interest.⁵ Decedent was unmarried when he died.⁶ During his lifetime, he had two sons, Appellant and Robert Louis Walker (Robert).

In 1986, Decedent executed a will in which he left a life estate in his Osage headright to his then-wife, Mary Louise Walker. The remainder of his estate, including the remainder interest in Decedent's headright, was to go to his two sons in equal shares. In 1987, Decedent executed a codicil, in which he left \$1.00 to Mary Louise, and devised his entire estate to his two sons in equal shares.

In 1993, Decedent executed a second will in which he revoked all previous wills and codicils. In the will, Decedent identified his parents, and stated that he wished to be buried with them. He named his two sons, and left them his love but no property. Instead, he devised a life estate in one-third of his headright to Lila Gritts (Gritts). He devised the remainder of his estate, including the remainder interest in Decedent's headright, in equal shares to his cousins Shirley Howell (Howell) and Hazel Lohah Harper (Harper). The will

² The 1993 will revoked all prior wills and testamentary instruments, and therefore the Superintendent's "approval" of the 1986 will and 1987 codicil was, in effect, an alternate decision to her approval of the 1993 will.

³ *In re the Will of Louis Claremore Walker*, 43 IBIA 5 (2006) (*Walker I*).

⁴ "ProTrac" is the electronic probate tracking system utilized by BIA and the Office of Hearings and Appeals to record information relating to Indian decedents and their heirs.

⁵ There was testimony to the effect that Decedent made *inter vivos* transfers of other trust interests to his two sons, including a one-half Osage headright interest to each son.

⁶ Decedent's first will names Mary Louise Walker as his spouse. Decedent and Mary divorced prior to his death. Petition for Approval of [1993] Will, at 3.

was signed by Decedent and witnessed by George Standing Bear and Stephen Lamirand. At the same time, Decedent and his two witnesses also signed a separate “Acknowledgment of Will Execution.” Helen Auschwitz, a notary public, signed the Acknowledgment as the “undersigned authority,” and affixed her seal to the document.⁷

Testimony confirms that both Harper and Robert died shortly after Decedent executed the 1993 will.⁸ No other wills or codicils have been produced.

In the wake of Decedent’s death, two petitions were submitted to the Superintendent in 2004 for the approval of Decedent’s two wills and the codicil. Appellant challenged the 1993 will; apart from arguing that the 1993 will revoked all prior wills, there was no contest presented to the approval of the 1986 will or 1987 codicil.

On March 22, 2005, the Superintendent approved a settlement of the will contests, which was executed only by Appellant and Howell. Under the terms of the settlement, one half of Decedent’s estate would be distributed pursuant to the 1987 codicil and one half would be distributed pursuant to the 1993 will. Neither Harper’s heirs nor Gritt signed the settlement agreement. Lohah, one of Harper’s heirs, appealed the Superintendent’s approval of the settlement to the Board on the grounds that he was not a party to the settlement agreement which, by its terms, would affect his rights. We agreed, vacated the Superintendent’s decision, and remanded the matter for further proceedings. *Walker I*.

B. Events Subsequent to *Walker I*

Following the Board’s remand, the Special Attorney⁹ held two hearings at which testimonial evidence was received concerning the testamentary capacity and intent of Decedent at the time that he executed the 1993 will. Testimony was first received on

⁷ The will complied with the formalities required of a self-proved will. *See* 84 Okla. Stat. § 55 (1991).

⁸ ProTrac shows that Harper died in 1994.

⁹ Pursuant to 25 C.F.R. §§ 17.1 and 17.3, the “special attorney” is an attorney for Osage Indians or other legal officer designated by the Commissioner (now, Director) of Indian Affairs, who conducts a hearing on the record for the purpose of gathering evidence for the Superintendent to determine whether to approve the will of a deceased Osage Indian. Here, the appointed Special Attorney was the Field Solicitor for the Department of the Interior (Department) in Tulsa, Oklahoma.

August 10, 2006,¹⁰ and the Special Attorney explained that the purpose of the hearing was to determine whether settlement remained feasible and, if not, he would schedule further proceedings. Hearing Transcript (Tr.), Aug. 10, 2006, at 3:7-10. One of the 1993 will witnesses, Geoffrey Standing Bear, Esq., was in attendance. As the parties discussed proceedings, the Special Attorney pointed out that the will proponents bore the burden of showing the validity of the 1993 will. *Id.* at 8:20-25. Standing Bear requested, and the parties agreed, that he be allowed to testify that day, and Appellant's attorney began a direct examination of Standing Bear.¹¹

Standing Bear testified that he recalled Decedent came to his office and told Standing Bear that he was there to have his will done.¹² Appellant's counsel showed him the 1993 will, and Standing Bear authenticated it. He recognized the type font as one used by his office, recognized it as a will drafted by one of the firm's partners, Bill Heskett, and recognized the signature of the notary. Standing Bear explained that he conducted the initial interview of Decedent, and recalled that Decedent was "a little slow," *id.* at 18:2-3, for which reason Standing Bear interviewed him in some depth to determine Decedent's capacity for making a will. He recalled in particular that Decedent was angry with one of his two sons and did not want to leave him any property. Standing Bear did not recall the name of the son, only that he lived in Eastern Oklahoma. He did not recall any other particulars from the interview, other than that he determined that Decedent had the requisite capacity to make a valid will and that he did not believe Decedent to be under anyone's influence at the time he executed the 1993 will. He explained that after he interviewed Decedent, Decedent was interviewed a second time by Heskett,¹³ who then

¹⁰ A hearing also was held on July 6, 2006, but no substantive testimony was received at this hearing.

¹¹ Following a discussion off the record, the Special Attorney explained on the record that Standing Bear's testimony would be taken, after which the matter would be continued to a future date. The following colloquy then occurred:

Special Attorney: Do you - - Mr. Drummond, do you have any questions or - -

Mr. Drummond: Let Mr. Payne go first. I guess I'm the objector though, aren't I? *Id.* at 12:19-22. Thereafter, Drummond — who represented Appellant — commenced his examination of Standing Bear.

¹² Howell testified that Decedent had an appointment with Standing Bear's firm.

¹³ There is no evidence in the record concerning what may have transpired in the interview with Heskett, who also was responsible for drafting Decedent's will. Standing Bear testified that Heskett died in November 1993.

gave directions for drafting the will to Anna Heskett. Standing Bear also explained that the practice in his firm was to videotape the procedure if the firm had a client “who is really out of it,” and there was some concern about the testamentary capacity of the client. *Id.* at 27:1-9; *see also id.* at 31:11-24, 32:18-25. Standing Bear stated that the Heskett firm did not videotape the will procedure with Decedent because there was no need to do so.

Thereafter, proceedings were continued until October 26, 2006. When proceedings resumed, several witnesses testified that Decedent could be slow to understand things,¹⁴ but that he did have testamentary capacity.¹⁵ Appellant and his wife testified that, in their opinions, Decedent could be easily influenced. They did not provide any foundation for their opinions nor did they provide any examples of Decedent being influenced by anyone in making his 1993 will. Appellant called Laura Pitts, his cousin, as his witness. When asked if Decedent was prone to the influence of others, Pitts testified that she did not believe Decedent at times “was 100 per cent mentally capable of making decisions.” *Id.* at 13:20-23. As an example, she testified that he would come over to visit Pitts’ sister and her husband, Charlie, and Decedent “would pop off to somebody. And he couldn’t defend himself at times. He’d come up there and get Charlie [to help defend him].” *Id.* at 15:14-16:7. She also testified that Decedent was prone to changing his mind. The remainder of the witnesses testified that they did not believe Decedent could be easily influenced by others at the time he executed the 1993 will.

Other witnesses testified that Decedent was angry with both sons at the time of the 1993 will, although they disagreed whether Decedent intended to disinherit them. Howell testified in detail that Decedent came to her house and told her he was going to disinherit both of his sons because they fought with him over the belongings of Decedent’s mother. He was angry because his sons removed these belongings from Decedent’s house, which had been his mother’s home. Pitts, who is not a devisee under any of Decedent’s wills, also testified that she spoke with Decedent around the time he executed the 1993 will. She

¹⁴ One witness, Appellant’s wife, testified that Decedent was “crazy” but qualified her characterization by stating that while he might not really be “crazy,” he was slow because one would have to explain things again and again to him, and that he had been that way consistently over the 30 years that she knew him. Tr., Oct. 26, 2006, at 20:22-24:8; 24:23-25:15.

¹⁵ The attorney who drafted Decedent’s 1986 will and the 1987 codicil, Harvey Payne, Esq., testified that Decedent “did not have all of his mental facilities [at the time Payne dealt with him].” *Id.*, at 40:7-8. When asked if Payne had an opinion concerning the 1993 will, he stated that he did not know Decedent “during that period of time.” *Id.* at 40:9-13.

testified that he was very angry with his sons and intended to disinherit both of them, although she believed that his reasons for doing so were to prevent Robert's wife from inheriting any of Decedent's property from Robert. Appellant testified that Decedent was angry with Robert and his wife over the removal of their grandmother's belongings and, therefore, wanted to disinherit Robert. Appellant did not deny supporting his brother in this endeavor nor did he deny arguing or fighting with his father.¹⁶

At the conclusion of the hearings, the Special Attorney submitted his recommendation along with the hearing record and related documents to the Superintendent. *See* 25 C.F.R. § 17.10. On August 15, 2008, the Superintendent issued her decision. *In the Matter of the Will of Louis Claremore Walker*, Hearing No. H-04-216. The Superintendent's decision consisted of a short cover letter, which stated that "the will and testament dated November 25, 1986," was approved, and an Order Approving Will, which appeared to approve all 3 testamentary instruments. This appeal followed.

C. Initial Proceedings Before the Board

Because the Order Approving Will appeared to support the approval of the 1993 will while the Superintendent's cover memorandum expressly approved only the 1986 will, the Board sought clarification from the Superintendent. In response, the Special Attorney issued a "Corrected Memorandum," setting forth his recommendation that each of the wills be approved, and the Superintendent issued her Amended Order and an amended cover letter in which she explicitly approved all 3 testamentary instruments.

The Amended Order expressly approved the 1993 will "for the reasons set forth in the [Corrected Memorandum]." Amended Order at unnumbered 3. With regards to the execution of the 1993 will, the Corrected Memorandum stated that it was "executed in accordance with Okla. Stat. Ann. Tit. 84, § 55 (West 1970)." Corrected Memorandum at 1. In her conclusions of law, the Superintendent expressly held that the "[e]vidence shows that, at the time of the execution of the wills, [Decedent] possessed testamentary capacity." Amended Order at unnumbered 2.

¹⁶ Appellant also testified that Decedent was angry with him but he did not know why. Appellant specifically mentioned that Decedent was angry with him when Decedent was hospitalized towards the end of his life. It also appeared from Appellant's testimony that Decedent was angry with him at other times, but it was not clear whether these other times included the time of Decedent's execution of the 1993 will.

The Corrected Memorandum reviewed the evidence concerning Decedent's testamentary capacity, and the Special Attorney concluded that Appellant had not met his burden of showing that Decedent lacked capacity at the time he executed the 1993 will. The Special Attorney determined that while the evidence concerning Decedent's mental capacity was "somewhat mixed" and that the witnesses testified that the issue of Decedent's testamentary capacity was "close," the Special Attorney concluded that "it appears that he did [have the requisite capacity]." Corrected Memorandum at 5. He based his conclusion on the undisputed evidence: The witnesses agreed that Decedent had a difficult relationship with Robert and his wife, which he found is consistent with an intent to disinherit this particular son. The fact that Decedent's remaining son, Appellant, also was disinherited was troubling, especially in light of Standing Bear's testimony, but the Special Attorney observed that the will itself ultimately was drafted by an attorney other than Standing Bear and that the second attorney conducted a separate interview with the Decedent the substance of which was not known. Ultimately, the Special Attorney pointed out that if an error were made by the attorney in drafting the devises in the will, a cause of action may lie against the will scrivener but would not, itself, invalidate the will.

Discussion

A. Appellant's Appeal (Docket No. 09-074)

At the outset, we conclude that the Superintendent's Amended Order supercedes and replaces her original Order Approving Will. We turn now to Appellant's challenges to the Amended Order, and we conclude that they lack merit. Appellant argues, as to the 1993 will, that (1) the burden was improperly shifted to Appellant to show lack of testamentary capacity prior to the will proponent making a prima facie showing that Decedent possessed such capacity, (2) Decedent did, in fact, lack testamentary capacity, and (3) the 1993 will did not effect Decedent's intent for the post-death distribution of his estate.

We conclude that once the 1993 will was determined to be executed in compliance with Oklahoma law, a presumption of testamentary capacity attached, which shifted the burden to Appellant to show that Decedent, in fact, was not competent to execute a will, and that the record supports the Superintendent's finding that Decedent was, in fact, competent. With respect to Decedent's intent, we find that Appellant has not identified any error in this portion of the Superintendent's decision. Finally, we agree with the Superintendent that a scrivener's error might result in a viable claim against the scrivener under Oklahoma law, but does not invalidate an otherwise valid will based upon an error in the devises set out in the will.

1. Standard of Review

We review questions of law and the sufficiency of the evidence *de novo*. *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011). We will affirm the Regional Director's decision if it is supported by the evidence. *See Estate of Samuel Johnson (John) Aimsback*, 45 IBIA 298, 303 (2007).

Appellant bears the burden of showing error in the Superintendent's decision, *see In the Matter of the Will of Margaret L. Slankard*, 40 IBIA 235, 235 (2005), and is charged with providing support for his arguments, *see Estate of George Fishbird*, 40 IBIA 167, 173 (2004).

2. The Superintendent Properly Allocated the Burden of Proof

Appellant, citing *In re Estate of Allen*, 1998 OK Civ. App. 64, ¶ 4, 964 P.2d 922, 923, claims that the Special Attorney and Superintendent erred as a matter of law in placing the burden on him to prove Decedent's lack of testamentary capacity without first requiring the will proponent to make a prima facie showing that he had the requisite capacity. We conclude otherwise because once the will was shown to be executed in accordance with Oklahoma law, the law presumes the testator to be competent, and the will challenger then bears the burden of rebutting the presumption.¹⁷

Under Oklahoma law as well as Department law, where a will is contested, the proponent of the will has the burden of making a prima facie case that the will is entitled to probate. *In re Estate of Speers*, 2008 OK 16, ¶ 9, 179 P.3d 1265, 1269; *In re Free's Estate*, 1937 OK 708, 75 P.2d 476, 477; *Estate of Margerate Arline Glenn*, 50 IBIA 5, 27 (2009). That burden is to show that the will conformed to the statutory requirements, which in this case are set forth in 84 Okla. Stat. § 55(1)-(4), and that the testator was competent to make his will. *Estate of Speers*, 2008 OK 16, ¶ 9, 179 P.3d at 1269; 43 C.F.R. § 30.229(b)(2).

¹⁷ The parties and the Superintendent all assume that Oklahoma's procedural law applies to the proving of the wills of Osage Indians. The 1978 Act specifically requires Osage wills to be executed in accordance with Oklahoma law and requires Oklahoma's rules of evidence to govern the admissibility of evidence at hearings to approve Osage wills. 1978 Act § 5(a). But the Act is otherwise silent on the procedure, including the parties' respective burdens, for approving Osage wills. This issue has yet to be reached by the Board, and we see no need to reach it in this appeal inasmuch as the burdens and procedure the Department would apply mirror, for the most part, the burdens and procedures applicable under Oklahoma law.

Where the will is shown to be executed in accordance with Oklahoma law, Oklahoma law indulges the presumption that the testator possessed the requisite capacity to execute his will, even in the absence of evidence thereof. *Brown v. Thomason*, 1960 OK 1972, 354 P.2d 451, 454; *see also In re Lacy's Estate*, 1967 OK 123, 431 P.2d 366, 368 (the will proponents established due execution of the will, which “evidence creates a presumption of testamentary capacity”); *Free's Estate*, 1937 OK 708, 75 P.2d at 477. As the court held in *Free's Estate*, “[a] presumption of sanity goes with every one, and the burden of proving unsoundness of mind in a will contest rests upon the contestant.” *Free's Estate*, 75 P.2d at 478 (quoting *In re Blackfeather's Estate*, 1915 OK 1022, 153 P. 839, 842 (*per curiam*)); *see also In re Estate of Holcomb*, 2002 OK 90, ¶ 9, 63 P.3d 9, 13 (“*The burden of persuasion that a will maker lacked testamentary capacity rests upon the will contestant.*”). In its conduct of non-Osage Indian probate proceedings, the Department similarly applies a presumption where a will is shown to be properly executed. *Estate of Jesse Pawnee*, 15 IBIA 64, 69 (1986); *Estate of John S. Ramsey (Wap Tose Note)*, 2 IBIA 237, 240 (1974).

Nothing in *Estate of Allen* is to the contrary. In *Estate of Allen*, the court stated that the will proponent had the burden of proving “[e]ach element of testamentary capacity.” 964 P.2d at 923. But such a statement does not address the prima facie burden nor does it preclude the application of presumptions for determining whether the will proponent has satisfied her burden. Indeed, only after it was shown that the Decedent was unduly influenced by her husband did the court in *Estate of Allen* ultimately conclude that the will proponent had “failed to prove sufficient testamentary capacity.” *Id.* (“Upon the finding of undue influence, Husband failed to prove sufficient testamentary capacity”); *see also Pool v. Estate of Shelby*, 1991 OK 124, 821 P.2d 361, 367 (dissent) (“The clear weight of the evidence supports a finding that [the testatrix’s] testamentary capacity and intent was prevented by the exercise of [the] undue influence of [others].”). Thus, the ultimate burden rests at all times with the proponent of the will to show that the testator possessed testamentary capacity.

Here, there was no apparent dispute concerning Howell’s prima facie burden. That there was no dispute is demonstrated by the direct examination commenced voluntarily by Appellant’s counsel of the first witness, the surviving witness to the 1993 will, Standing Bear, which counsel undertook and accepted as “the [will] objector.” Tr., Aug. 10, 2006, at 12:19-22. And, even assuming that there was a dispute concerning the execution of the will, and the burden improperly shifted to Appellant to show an absence of testamentary intent, Appellant waived any objection on these grounds by voluntarily commencing direct examination of the witnesses and not raising any objection at the time of the hearings. Ultimately, Standing Bear authenticated the will, and testified that there was no showing that Decedent lacked the capacity to make a will or that there was undue influence at play.

His testimony established the prima facie validity of the 1993 will and shifted the burden to Appellant to produce evidence to rebut the prima facie showing. For these reasons, we do not find error in the Superintendent's conduct of the hearings.

3. Decedent Possessed the Requisite Testamentary Capacity

Appellant maintains that the Superintendent "never found that Decedent was competent," at the time of his 1993 will. Appeal, filed Sept.25, 2009, at 3. Appellant also argues that, in the face of "somewhat mixed evidence" concerning the Decedent's mental state, the proponents of the 1993 will did not meet their burden of presenting evidence sufficient to find the requisite testamentary capacity. *Id.* We disagree. We dispense quickly with Appellant's first allegation: The Superintendent expressly concluded that Decedent "possessed testamentary capacity" to execute his wills and she adopted the analysis set forth in the Special Attorney's Corrected Memorandum. Amended Order at unnumbered 2. Contrary to Appellant's claim, nothing in the Superintendent's holding limited that holding to the 1986 will and 1987 codicil. Turning to Appellant's remaining argument, we conclude that the record supports the Superintendent's finding of testamentary capacity.

Oklahoma law finds the following elements critical in determining the presence of testamentary capacity: The testator generally (1) knew the extent of his property, (2) knew the natural objects of his bounty, and (3) appreciated the nature and effect of executing a will. *Estate of Holcomb*, 63 P.3d at 13. The Department's test is similar, requiring the first two elements to be satisfied and, for the third, requiring that the testator know and appreciate the intended devises for his property. *Estate of Glenn*, 50 IBIA at 29. Oklahoma law also takes into consideration, as proof for or against testamentary capacity, the testator's "mental capacity, appearance, conduct, habits and conversation" both before and after the execution of the will to the extent such evidence is shown to bear on the testator's mental state at the time of the will's execution. *Estate of Holcomb*, 63 P.3d at 13-14.

Here, Appellant makes only bald, conclusory statements that the evidence was insufficient to even create a prima facie showing of testamentary capacity, based solely on the Superintendent's *finding* that the evidence was "mixed." Our independent examination of the record supports the Superintendent's *conclusion* that a prima facie showing was made, and that the Decedent possessed testamentary capacity. Decedent took the formal step of keeping an appointment with a law firm for the purpose of making a will. In and of itself, the making of the will is some evidence of a rational action. *See In re Mason's Estate*, 1939 OK 258, 91 P.2d 657, 660. Upon arriving at the law firm, he informed Standing Bear that he was there to make a will. There is no suggestion that anyone was present with Appellant when he discussed his will with the attorneys or that anyone other than Appellant provided the information to the law firm that went into his will, i.e., that he had a headright interest; that he had two sons, both of which are properly identified by name in the will;

and that he wanted to be buried with his deceased parents, also identified by name in the will. Thus, he demonstrated a clear understanding of family relationships as well as the extent of his property. Decedent's will also demonstrates a very specific plan for the devise of his estate, giving a life estate in 1/3 of his headright to a close friend and dividing the remainder of his estate between two cousins. Importantly, he articulated his reasons for disinheriting his sons: He was angry them.¹⁸

In addition, while Standing Bear and other witnesses described Decedent as "slow," prone to changing his mind, and having an inability to make decisions, these characteristics do not, without more, show an inability to appreciate the significance of executing a will nor does it undercut Decedent's apparent knowledge of who the natural objects of his bounty were or the extent of his property. That is, this testimony does not demonstrate that Decedent lacked testamentary capacity nor does it cast doubt on it. Similarly, while Appellant and his wife testified that, in their opinions, Appellant was easily influenced, they provided no examples of such influence or other foundation for their opinions. Given the unsubstantiated and self-serving nature of the latter opinions, the Superintendent evidently gave them little, if any, weight.

In short, we conclude that the record supports the Superintendent's conclusion that Decedent possessed testamentary capacity.

4. Decedent's Intent for the Distribution of his Estate

Appellant argues that the 1993 will fails to reflect Decedent's intent because, according to Standing Bear's testimony, Decedent only intended to disinherit *one* of his sons, not both of them. Therefore, according to Appellant, Decedent's will is invalid because it does not effect Decedent's wishes with respect to his estate. Appellant cites no

¹⁸ It is undisputed that Decedent was extremely upset over the removal of his mother's belongings. This reason, in and of itself and without more, does not demonstrate a lack of testamentary capacity. Rather, it demonstrates that Decedent was hurt by the removal of these items from his home over his strenuous objections, harsh words and perhaps blows were exchanged, and Decedent believed the transgression warranted excluding his sons from inheriting from him. Appellant testified that at the time his brother took their grandmother's belongings, he (Appellant) was out of the area and "had no control over [what was happening between his brother and Decedent]." Tr., Oct. 26, 2006, at 30:5-12. But, Appellant also testified that his father was angry at him at various times, although it was not entirely clear whether this anger occurred only during the last few months of Decedent's life or on a more persistent basis through the years.

law in support of his argument. As the Corrected Memorandum explains and Appellant does not refute, Oklahoma law does not set aside an otherwise valid will if the testator's wishes are not reflected therein. Instead, as explained in the Corrected Memorandum, a cause of action may lie against the drafter of the will, citing *Leak-Gilbert v. Fable*, 2002 OK 66, 55 P.3d 1054.

Appellant bears the burden on appeal of showing error in the Superintendent's decision. Appellant also is charged with supporting any bald arguments that he makes with, in this circumstance, citation to law. Appellant does not show error in the Superintendent's reliance on the decision in *Leak-Gilbert* nor does Appellant cite any law, either Oklahoma's or the Department's, that would permit the Superintendent to disregard an otherwise valid will on the grounds that the evidence shows that a devisee was omitted. On this basis alone, we may affirm the Superintendent's decision. But, we are compelled to point out, further, that while Decedent evidently told Standing Bear he only wanted to disinherit one son, the evidence also showed that he was angry with both sons, that he was prone to change his mind, and that Decedent met with Heskett after his interview with Standing Bear during which time Decedent may have better explained his wishes or simply changed his mind about leaving property to the other son. Ultimately, Decedent lived for another 11 years after executing his 1993 will during which time he could have executed a new will or amended the 1993 will by codicil, both of which processes he knew could be done, as demonstrated by his execution of two wills and a codicil between 1986 and 1993.

Therefore, we conclude that the Superintendent did not err in declining to disapprove the 1993 will on the grounds that it did not reflect Decedent's intent for the distribution of his estate.

B. Lohah's Appeal (Docket No. 09-080)

Given our disposition of Appellant's appeal, we conclude that the appeal filed by Lohah is moot and therefore dismiss this appeal. Even if we were not to dismiss his appeal as moot, we would dismiss it for lack of standing. Lohah would have standing to challenge the 1986 will and its 1987 codicil only if he stood to inherit otherwise, i.e., by intestacy. *Estate of Zane Jackson*, 46 IBIA 251, 256 (2008). Pursuant to 84 Okla. Stat. § 213, Decedent's heirs at law would be his surviving issue, i.e., Appellant and any issue that survived Robert. Because Lohah is not a direct descendant of Decedent but is a collateral relative, he would not inherit from Decedent if the 1986 and 1987 codicils were disapproved and would not have standing to contest the 1986 will or the 1987 codicil. Similarly, Lohah's status as a beneficiary, through Harper, to the devise left to Harper in Decedent's 1993 will does not provide any basis for his standing because rights obtained

through the 1993 will are in no way dependent upon disapproval of the 1986 will or the 1987 codicil. Consequently, for this additional reason, we would dismiss Lohah's appeal.

Conclusion

Appellant has not met his burden of showing error in the Superintendent's decision. Assuming that there was a dispute concerning the will proponents' prima facie burden, Appellant waived any objection when he commenced his direct examination of the first witness, who in any event, established a prima facie case supporting the validity of the will. In addition, we conclude that the evidence in the record supports the Superintendent's conclusion that Decedent possessed testamentary capacity at the time he executed his 1993 will. Finally, Appellant cites no support for his argument that the 1993 will should be disapproved because it omits him as one of Decedent's intended devisees. Moreover, the evidence is insufficient to convince us that the will did not reflect Decedent's ultimate wishes, especially since he had 11 years between the execution of his 1993 will and his death in which to make any changes. Given our disposition of Appellant's appeal, we dismiss Lohah's appeal as moot.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 212 DM § 13.4(c) (Feb. 26, 2009),¹⁹ we affirm the Superintendent's Amended Order Approving Will, dated June 15, 2009.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

¹⁹ At the time Appellant filed his appeal, this delegation to the Board was found in 212 DM § 13.5(c) (Mar. 1, 2005).