



INTERIOR BOARD OF INDIAN APPEALS

Estate of Gerald Martinez, Sr.

5 IBIA 162 (08/13/1976)

Also published at 83 Interior Decisions 306



United States Department of the Interior

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

ESTATE OF GERALD MARTINEZ, SR.

IBIA 76-29

Decided August 13, 1976

Appeal from an order denying petition for rehearing.

Reversed.

1. Indian Probate: Wills: Disapproval of Will

Regardless of scope of Administrative Law Judge's authority to grant or withhold approval of the will of an Indian under statute, there is not vested in the Judge power to revoke a will which reflects a rational testamentary scheme disposing of trust or restricted property.

APPEARANCES: Boyden, Kennedy, Romney & Howard, by Scott C. Pugsley, Esq., for appellant, Amic Alice Martinez.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

The decedent, Gerald Martinez, Sr., died testate on October 12, 1974, possessed of certain trust or restricted property on the Uintah and Ouray Indian Reservation and a balance of \$280.91 in his Individual Indian Money Account.

The record shows that the decedent married Nancy Lee Nick Martinez on or about July 30, 1957. They were divorced on or about February 27, 1970. He then married Madeline Duncan Martinez on June 25, 1970. Surviving the decedent were six minor children from the first marriage, Madeline Duncan Martinez, his surviving spouse and Amic Alice Martinez, minor child from the second marriage. A Tribal Court Divorce Decree (Uintah and Ouray Jurisdiction) among other things ordered the decedent "shall pay for the support of the said minor children (six children of the first marriage) a sum of \$35.00 for each child, until each child reaches the age of 21 years * * * ."

On December 8, 1972, the decedent executed a last will and testament leaving all of his "property, real, personal and mixed" to his daughter by the second marriage, Amic Alice Martinez, and disinherited each of his other children, listing each of them by name and dates of birth, because his former wife "has turned these children against me and they do not seem to recognize me as their father * * * ."

At a hearing held before Administrative Law Judge William J. Truswell at Fort Duchesne, Utah, on May 16, 1975, the decedent's first wife, Nancy Martinez testified that the children by the first marriage were being supported through welfare payments.

On August 15, 1975, Judge Truswell issued an Order disapproving the will because the decedent had an existing legal obligation to support all of his children; the six minor children by the first marriage are now on welfare; the decedent's estate is needed for the support of all of his children; and that the approval of the will would remove the source forever.

The Judge further decreed in accordance with the laws of the State of Utah the decedent's heirs at the time of his death were and their respective shares are:

| | |
|--|------|
| Madeline Duncan Martinez - wife | 7/21 |
| Julia Ann Martinez - daughter (born 4-10-58) | 2/21 |
| Gerald Martinez, Jr. - son (born 4-19-59) | 2/21 |
| Tracy Martinez -- daughter (born 11-8-62), | 2/21 |
| Adam Martinez - son (born 5-16-63) | 2/21 |
| Larson Berry Martinez - son (born 7-3-64) | 2/21 |
| Chanel Lynn Martinez - daughter (born 1-4-66) | 2/21 |
| Amic Alice Martinez - daughter (born 3-2-71) | 2/21 |

Madeline Martinez, surviving spouse, as guardian ad litem for Amic Alice Martinez, petitioned for rehearing contending the Administrative Law Judge had abused his discretion in disapproving the will, had failed to consider relevant evidence and had premised his decision on false premises of law and fact. She also submitted her own sworn affidavit wherein she declared the six minor children by the first marriage were receiving social security benefits from the decedent's earnings. The petition was denied and an appeal taken to this Board. The grounds for the appeal are similar to those upon which the petition for rehearing was based.

Section 2 of the Act of June 25, 1910, 36 Stat. 856, as amended, by Act of February 14, 1913, 37 Stat. 678, 25 U.S.C. § 373, provides in pertinent part:

That any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator * * *.

Absent proof of fraud or duress in the making of the will, or lack of testamentary capacity of the testator, may the Administrative Law Judge disapprove the will of a deceased Indian disposing of trust or restricted property?

The Court in Tooahnippah (Goombi) v. Hicckel, 397 U.S. 598, 90 S. Ct. 1316 (1970), perceived nothing in the statute that vests in a governmental official the power to revoke or rewrite a will that reflects a rational testamentary scheme.

The record reflects neither fraud nor duress in the making of the will nor lack of testamentary capacity. Instead, it reveals what we consider to be a rational testamentary scheme. The testator exhibited an awareness of those who were his heirs at law. In part "Second" of the will, the decedent left all of his property, real, personal and mixed to his daughter Amic Alice, the only child from his "present" marriage. In part "Third" the decedent disinherited his wife, Madeline Duncan Martinez, "because she owns small, undivided interests in allotments inherited from her father * * *." He disinherited his six minor children by the former marriage in part "Fourth," alluding to each child by name and birthdate. Moreover, he specifies the reason for their disinheritance, namely, "because she has turned these children against me and they do not seem to recognize me as their father * * *."

The Court said in Tooahnippah (Goombi) v. Hickel, supra at 608:

To sustain the administrative action performed on behalf of the Secretary would, on this record, be tantamount to holding that a public officer can substitute his preference for that of an Indian Testator. We need not here undertake to spell out the scope of the Secretary's power, but we cannot assume that Congress, in giving testamentary power to Indians respecting their allotted property with the one hand, was taking that power away with the other by vesting in the Secretary the same degree of authority to disapprove such a disposition.

To recapitulate, the testator attempted to give his property to Amic Alice, his only daughter from his second marriage, to the exclusion of his surviving spouse and six children by the previous marriage. He disinherited the six children of the former marriage because his former wife had turned them against him and because they did not seem to recognize him as their father.

[1] We find based upon the facts before us that the decedent's will reflects a rational testamentary scheme and the Administrative Law Judge was not vested with the power to revoke said will.

We further conclude that the decedent Indian had the right to dispose of trust or restricted property free from intrusion in the form of a Tribal Court decree or otherwise. See Blanset v. Cardin et al., 256 U.S. 319, 41 S. Ct. 519 (1921).

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, we REVERSE the Order Disapproving Will and Determining Heirs issued by Judge Truswell on August 15, 1975.

IT IS ORDERED that the will of the decedent, Gerald Martinez, Sr., executed on December 8, 1972, be, and the same hereby is approved and his trust estate shall be distributed in accordance therewith.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Mitchell J. Sabagh
Administrative Judge

I concur:

//original signed
Alexander H. Wilson
Administrative Judge