



INTERIOR BOARD OF INDIAN APPEALS

Estate of Helen Ward Willey

11 IBIA 43 (01/31/1983)



# United States Department of the Interior

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

## ESTATE OF HELEN WARD WILLEY

IBIA 82-46

Decided January 31, 1983

Appeal from order by Administrative Law Judge Robert C. Snashall denying petition for rehearing. PO 135L-78.

Reversed.

1. Indian Probate: Reopening: Standing to Petition for Reopening

The Superintendent is a proper party to seek reopening of a closed Indian estate under 43 CFR 4.242.

2. Indian Probate: Wills: Disapproval of Will--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.

3. Indian Probate: Wills: Disapproval of Will

The Department does not have the authority to disapprove a technically valid Indian will that evidences a rational testamentary scheme even though that scheme appears inequitable to an outsider.

APPEARANCES: Gosta E. Dagg, Esq., for appellant Charles Williams; Steven R. Johnson, Esq., for appellees Georgianna Straight and Reginald Willey. Counsel to the Board: Kathryn A. Lynn.

### OPINION BY ADMINISTRATIVE JUDGE ARNESS

This is an appeal by Charles Williams (appellant) from an order denying petition for rehearing entered June 2, 1982, by Administrative Law Judge Robert C. Snashall in the estate of Helen Ward Willey (decendent).

Appellant is seeking review of the Administrative Law Judge's decision disapproving decedent's will, under which he was the sole heir, and ordering distribution of decedent's estate according to the laws of intestate succession. For the reasons discussed below, the Board finds that the will should not have been disapproved and reverses the Administrative Law Judge's decision.

### Background

Decedent, an enrolled member of the Quinault tribe, was born on July 16, 1944, and died on December 10, 1977, the apparent victim of suicide. Decedent was married three times. Her first marriage was to Richard Getty, a non-Indian. The record suggests that decedent and Getty were married in the early 1960's and that they were divorced sometime in 1975. Decedent then married appellant in 1976, and divorced him on July 19, 1977. Finally decedent married Reginald Willey (appellee) on October 22, 1977. Decedent and appellee were married at the time of her death. Decedent had no children.

Sometime in 1973 decedent allegedly executed a will. This will is not part of the record before the Board and is not relevant to the appeal. On June 12, 1974, decedent executed the will at issue here. No questions are raised concerning the execution of this will. Clause I of the will expressly cancels all prior wills. Clauses IV, V, and VI contain the dispositive provisions:

#### IV

I hereby leave my half-sister, GEORGIANNA WARD, nothing.

#### V

I hereby give and bequeath to my husband, RICHARD V. GETTY, nothing as we are now separated and an action for dissolution of the marriage is now pending.

#### VI

I hereby give, bequeath and devise my entire estate to my friend, CHARLES R. WILLIAMS, of Taholah, Washington. [1/]

Following decedent's death, a hearing was held before the Administrative Law Judge on January 25, 1979. Both appellant and appellee were present at that hearing and testified. The Administrative Law Judge issued an order disapproving will and determining heirs on March 7, 1979. The order held:

Although the record does not disclose direct evidence decedent was unaware of the existence of the 1974 Last Will and Testament, the evidence does raise such an inference since the testimony discloses the decedent, in discussing Last Wills and Testaments

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1/ See exhibit 1 to January 1979 hearing.

with her husband [Reginald Willey], failed to indicate acknowledgment of such a document. It appears clear decedent had forgotten the said Last Will and Testament or, alternatively, believed the said Last Will and Testament was null and void upon the divorce from her husband, CHARLES WILLIAMS, as by law provided in the state of Washington in matters under state jurisdiction and therefore could not have intended that said Will be given force and effect on her death on December 10, 1977.

At ecclesiastical law and common law, certain definite changes in domestic relations affected the revocation of a former Will. Among the changes which brought about revocation of a Will were marriage and the birth of a child. 1 Page on Wills (1941 Ed.) Sec. 508. Although the legal principles have not been applied as such to Indian probate cases, the authority of the Administrative Law Judge to pass on the validity of Wills of deceased Indians is not "narrowly limited to passing on the sufficiency of a document claimed to be a Will" and he can do more "than see to it that the various technical requirements of a valid testamentary instrument have been met." Tooahnippah v. Hicikel, 397 US 598, [611], 25 L. Ed. 2nd 600 (1970). [Harlan, J., concurring.]

The gross change in the marital status of decedent HELEN WARD WILLEY subsequent to the execution of the Will and the obvious inconsistency thereto in its provisions compel the conclusion the Will should not be approved. Accordingly, the property of decedent should pass to the heirs at law as intestate property.

(Order at 1-2). The Administrative Law Judge then found that under the laws of the State of Washington, appellee, as decedent's surviving spouse, was entitled to three-fourths of her estate and Georgianna Ward Straight, decedent's half sister, was entitled to one-fourth of the estate. 2/

On February 1, 1980, appellant, through counsel, filed a petition to reopen the estate. The import of appellant's petition was that there was no basis in the testimony for the Administrative Law Judge's conclusions that decedent was unaware of the existence of her 1974 will or that she thought the will to be null and void.

On March 5, 1980, the Administrative Law Judge issued an interlocutory order denying petition for reopening. This order held that appellant was

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2/ Georgianna Ward Straight has not appeared before the Board. She testified at the original probate hearing that she and decedent had the same father, she was some 9 years younger than decedent, and that she and decedent had not known each other because she had grown up in a foster home and had only recently returned from Turkey where she had moved following her marriage. Transcript of Jan. 25, 1979 (I Tr.), hearing at 9-10, 15-16.

not entitled to petition for reopening because he had notice of and participated in the original hearing. See 43 CFR 4.242(a). In addition the Administrative Law Judge found that appellant's recitation of facts was erroneous. The order states: "I not only find no procedural basis for allowance of the Petition, but I also clearly lack jurisdiction therefor. The Petition should be categorically denied" (Order at 2). However, the order concluded that because the evidence of decedent's intent "was admittedly not strong, though sufficient upon which to base a decision," appellant would be given an opportunity to file a petition for reopening meeting the jurisdictional requirements of 43 CFR 4.242(a) and to present further evidence. Id. at 3.

On April 2, 1980, the Superintendent of the Puget Sound Agency, Bureau of Indian Affairs, joined in appellant's petition for reopening. Appellant filed an amended petition on April 3, 1980.

Although the Administrative Law Judge continued to hold that no proper petition for reopening had been filed, he ordered the estate reopened on April 29, 1980, "in the interest of clarification and possible avoidance of manifest injustice" (Order at 1). A second hearing was held on November 4, 1981. Again, both appellant and appellee were present at this hearing. Further testimony was presented relevant to the questions of decedent's relationships with both appellant and appellee, her state of mind, and her possible intent as to the disposition of her property.

An order after reopening was issued on March 16, 1982. This order affirmed the March 7, 1979, order, stating at page 2:

There was simply no believable evidence [presented at the second hearing] upon which it could be reasonably found the Order disapproving the Will was in any sense in error. In fact, what probative evidence there was substantially supported and strengthened the correctness of said Order and totally eliminated the prior weaknesses in the evidence adduced at the first hearing on the question of decedent's intent as to her Last Will and Testament. There was direct and uncontroverted testimony by an independent witness to the effect decedent specifically asked her attorney upon completion of the divorce proceedings from Williams about the Last Will and Testament and the rest of her properties and was advised she had nothing to worry about. Whether or not the statement was true is immaterial, since if decedent believed it to be and relied upon such statement to the effect she believed the Last Will and Testament was revoked and therefore null and void, such belief of itself constitutes constructive revocation. I therefore find and affirm the last paragraph of findings and conclusions in the Order Disapproving Will and Determining Heirs of March 7, 1979, in that the gross change in the marital status of decedent, HELEN WARD WILLEY, subsequent to the execution of the Will and the obvious inconsistency thereto in its provisions compel the conclusion the Will did not represent the intent of the testatrix as of the date of death and should not be approved.

Appellant petitioned for rehearing of this order on May 13, 1982. The petition was denied on June 2, 1982. The Administrative Law Judge stated at page 1 of his order denying petition for rehearing:

[P]etitioner's argument \* \* \* begs the question as the force of his argument is to the effect the Administrative Law Judge does not have the authority to invalidate a Will without there being proof of fraud, duress or lack of testamentary capacity; nor does he have the power to revoke or rewrite a Will that reflects a rational testamentary scheme. No such action was taken in this case. The Will was found to be invalid solely because the testatrix by her own volitional act revoked the document, which was certainly her right. The question of her revocation was a factual matter and the preponderance of the evidence clearly and concisely established the testatrix intent such Last Will and Testament was to be without any force and effect. Petitioner apparently totally missed the point.

Appellant's notice of appeal from this order was received on July 2, 1982. Briefs have been filed on appeal.

#### Discussion and Conclusions

The first question in this case is whether the matter is properly before the Board. The Administrative Law Judge correctly found that appellant lacked standing to petition for reopening of this estate under 43 CFR 4.242(a) because he had notice of and participated in the first hearing. The Board has consistently held that the similar language found in 43 CFR 4.242(a) and (h) requires that a person who had notice of the original probate hearing lacks standing to file a petition to reopen. See, e.g., Estate of Eugene Patrick Dupuis, 11 IBIA 11 (1982); Estate of Katie Crossguns, 10 IBIA 141 (1982); Estate of Rebecca B. Coe, 8 IBIA 164 (1980); Estate of Russell Harold Bobb, 5 IBIA 92 (1976).

[1] The Board has also consistently held that the Superintendent is a proper party to seek reopening under 43 CFR 4.242 when he has information indicating that a manifest injustice has or may have occurred in the probate of an Indian estate. See, e.g., Estate of Walter George and Minnie Racehorse George Snipe, 9 IBIA 20 (1981); Estate of Rebecca (Wahbmeme) Pigeon or Rebecca White Pigeon or Ahn Wahn Ke, 4 IBIA 168 (1975); Estate of John Mahkuk, 3 IBIA 291 (1975); Estate of Rose Josephine LaRose Wilson Eli, 2 IBIA 60, 80 I.D. 620 (1973).

Although in this case, the evidence of error may have been less clear than in some cases in which a Superintendent has sought reopening, the Superintendent's belief that error had been or may have been committed entitled him to petition for reopening. The Superintendent, as the delegate of the Secretary of the Interior, is equally as obligated as the Administrative Law Judge to ensure that the Federal trust responsibility toward Indians is carried out in the administration of decedents' estates. The Administrative Law

judge could have granted reopening on the basis of the Superintendent's petition. <sup>3/</sup> Therefore, the estate was properly reopened.

The second issue is whether the Administrative Law Judge properly disapproved decedent's 1974 will. Appellant argues that there was no authority to revoke this validly executed will merely because it did not comport with the Judge's conception of a rational testamentary scheme. This argument is based on the Supreme Court's decision in Tooahnippah v. Hickel, supra. The Administrative Law Judge states in his June 2, 1982, order denying rehearing that appellant misunderstood his holding: he did not revoke the will under Tooahnippah as not evidencing a rational testamentary scheme, rather he found as a matter of fact that decedent had herself revoked the will.

Appellant's confusion is understandable. The March 7, 1979, order clearly appears to be based on Tooahnippah and the Administrative Law Judge's conception of how a will should be affected by divorce and remarriage. The March 16, 1982, order after rehearing moved away from Tooahnippah and found decedent had herself revoked her will. There is no factual or legal support for such a conclusion.

The Administrative Law Judge maintains that the record "clearly and concisely" establishes that decedent intended to revoke her will. On the contrary, the record is unclear and ambiguous on this point.

The March 16, 1982, order after rehearing relies heavily upon the testimony of an apparently disinterested witness who overheard a conversation between decedent and the attorney accompanying her to the hearing on her divorce from appellant. The witness testified that after the hearing, decedent questioned this attorney about her property and was told not to worry. <sup>4/</sup>

The attorney who accompanied decedent to the hearing was not called as a witness, although there was no evidence that she was unavailable. It is not clear that her conversation with decedent actually concerned the will. Furthermore, this attorney had not been handling decedent's divorce and there is no evidence whether she knew that decedent was Indian or that her will, if one was under discussion, was not subject to State law. Another attorney who had been dealing regularly with decedent testified that she had never mentioned a will (II Tr. 31, 33-34).

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<sup>3/</sup> See 43 CFR 4.242(d) which provides that in order "[t]o prevent manifest error an administrative law judge may reopen a case within a period of 3 years from the date of the final decision, after due notice on his own motion, or on petition of an officer of the Bureau of Indian Affairs." Thus, in addition to reopening being proper on the basis of a petition by the Superintendent, reopening was also an appropriate exercise of the Administrative Law Judge's discretion to reopen a case on his own motion when a manifest error may have occurred.

<sup>4/</sup> See Transcript of Nov. 4, 1981 (II Tr.), hearing at 38-40. The witness stated in response to two questions that the will was not specifically mentioned; the attorney told decedent only that everything was taken care of and she need not worry.

Considering the unreliable nature of the only testimony presented on this vital issue and the fact that the attorney allegedly making the statement was not called as a witness, the Board can give little credence to the evidence cited by the Administrative Law Judge as establishing decedent's intent and understanding concerning the validity of her 1974 will. 5/

Neither is there a permissible inference that decedent wished to revoke her will or thought that it had been revoked. Although there is evidence that appellant beat decedent and that she required hospitalization on at least one occasion, 6/ there is evidence that appellee also beat her. 7/ The fact that decedent wished to be divorced from appellant does not require the conclusion that she no longer wished him to inherit her property. Evidence was presented that decedent and appellant had been friends since childhood, 8/ decedent wrote her 1974 will leaving her quite sizable estate to appellant at a time when there was no apparent expectation that they would be married, 9/ and after their divorce decedent and appellant remained friends and on several occasions she turned to him for help when appellee abused her. 10/ Nor does the fact that decedent did not discuss her will with appellee 11/ mean that she thought the will had been revoked. This fact could just as easily indicate that she did not want to seriously discuss the issue with appellee for any number and variety of reasons.

Therefore, because there is neither credible evidence nor permissible inferences in the record to indicate that decedent intended to revoke her will, it was error to find such an intention.

[2] Furthermore, even if decedent had evidenced an intent to revoke her will, she took no legally sufficient actions toward doing so. The Administrative Law Judge found that decedent "constructively revoked" her will, apparently merely by forming the intention to revoke it or concluding that it was revoked by operation of law. Intent alone has never been held sufficient to create, alter, or revoke an Indian will. See, e.g., Estate of Richard Burke (Thompson), 9 IBIA 75 (1981); Estate of Effie Jennings, IA-138 (1954); Estate of Bessie Perschy, IA-123 (1954); Estate of Esa-tah-ha (Ese-tah-ha), IA-57 (1952). Without some physical act expressly changing or revoking an Indian will, the Department is without authority to disapprove the will on the grounds that the decedent revoked it. The Board rejects the offered doctrine of "constructive revocation."

[3] The Administrative Law Judge also erred insofar as his decision indicated that he had the authority to disapprove decedent's will under the

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5/ Appellees cite Estate of Botone, 7 IBIA 177 (1979), and related cases in which the Board has held that it will not overturn factual determinations based upon an appraisal of the demeanor of the witnesses. Witness demeanor is not at issue here.

6/ II Tr. 23, 31, 43, 59.

7/ II Tr. 55-56, 57, 59, 62.

8/ II Tr. 6, 11.

9/ II Tr. 13.

10/ II Tr. 7-8, 16-17, 56-57.

11/ I Tr. 12; 11 Tr. 45.

Supreme Court's decision in Tooahnippah. In the Estate of Ronald Richard Saubel, 9 IBIA 94, 88 I.D. 993; 9 IBIA 136 (1981), the Board stated that “[a]lthough the Court declined to explore the full extent of the Secretary's power [to disapprove Indian wills], it held that the Secretary or his representative could not revoke or rewrite an otherwise valid will that reflected a rational testamentary scheme simply because the disposition did not comport with the approving officer's conception of equity and fairness.” 9 IBIA at 99-100, 88 I.D. at 996. The Board agrees that the Department's authority to disapprove wills extends beyond merely passing on the technical aspects of the will's execution. However, that authority does not permit the disapproval of a technically valid will that evidences a rational testamentary scheme, no matter how inequitable that disposition may appear to an outsider. 12/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 7, 1979, order disapproving will and determining heirs is reversed. Helen Ward Willey's June 12, 1974, will is hereby approved and distribution of any trust assets under the control of the Department is ordered to be made to Charles R. Williams in accordance with the provisions of that will.

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Franklin D. Arness  
Administrative Judge

We concur:

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//original signed  
Wm. Philip Horton  
Chief Administrative Judge

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Jerry Muskrat  
Administrative Judge

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12/ The Board commented in Saubel, 9 IBIA at 100-01 n.6, 88 I.D. at 996 n.6, on the lack of substantive regulations governing Indian probate.