



INTERIOR BOARD OF INDIAN APPEALS

Estate of Arnita Lois Parton Gonzales

35 IBIA 207 (09/27/2000)

Reconsideration denied:
35 IBIA 224

Judicial review of this case:
Dismissed without prejudice based upon a settlement agreement,
Parton v. Babbitt, CIV 00-2111 L (W.D. Okla. May 24, 2001)



United States Department of the Interior

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

ESTATE OF ARNITA LOIS PARTON : Order Vacating Administrative Law
GONZALES : Judge's Order of Modification
: on Petitions for Rehearing and
: Reinstating Order Approving Will
: as that Order is Modified Herein
:
:
: Docket No. IBIA 99-68
:
:
: September 27, 2000

This is an appeal from a March 26, 1999, Order of Modification on Petitions for Rehearing issued by Administrative Law Judge Richard L. Reeh in the estate of Arnita Lois Parton Gonzales (Decedent). The appeal was filed by Lenora Parton (Appellant), who is Decedent's niece. For the reasons discussed below, the Board vacates the March 26, 1999, order and reinstates Judge Reeh's April 7, 1998, Order Approving Will, as that order is modified herein.

Decedent, Caddo 806U11590, executed a will on January 8, 1985, in which she devised her entire estate to Appellant. The will was prepared by a private attorney in Anadarko, Oklahoma.

Decedent died on August 26, 1996. In September 1996, her brother, Thurman Parton (Parton), submitted a copy of her January 8, 1985, will to the Anadarko Agency, Bureau of Indian Affairs (BIA). Later, another copy of the will was furnished to BIA by the attorney who prepared it. According to a July 21, 1997, memorandum signed by the Acting Anadarko Agency Superintendent, the attorney was asked by BIA staff whether he had the original will, and he responded that Decedent had taken "both originals." No original will was ever located. However, BIA included a copy of the will in the probate record transmitted to Judge Reeh.

Judge Reeh held a hearing in Decedent's estate on October 31, 1997, at which he took testimony from Appellant, Parton, and Rudolph Gonzales (Gonzales), Decedent's surviving husband. On April 7, 1998, the Judge issued an Order Approving Will. He found that the January 8, 1985, will was properly executed. He continued:

* * * Gonzales was the decedent's surviving spouse. Mr. Gonzales testified that he destroyed the will at the decedent's direction. He stated that he did so by setting the instrument afire at the couple's home and in her presence. He further stated that no other person was present either at the time decedent directed him to destroy the instrument or at the moment of its destruction. Other family members suspected, but could not establish, that Mr. Gonzales destroyed the will after his wife passed away.

Paragraph Third of the January 8, 1985 will provides as follows, to wit: "I make no provision herein for my husband, Rudolph Gonzales, although I am aware that he may make a claim to a portion of such unrestricted property I may own at the time of my death as surviving spouse under the laws of Oklahoma." Thus, the surviving spouse was intentionally omitted as a beneficiary of decedent's Indian trust property.

It is well established that an Indian will-maker 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. 43 CFR 4.260.

When a will, which intentionally omits an heir-at-law, is destroyed by the omitted person, the following matters should be proved by disinterested witnesses: (1) the fact decedent desired to revoke his or her will; (2) the fact that he or she directed the instrument's destruction; and (3) the fact that the instrument was actually destroyed. In this case, the surviving spouse established that he actually destroyed the will. This evidence, however, is not sufficient to establish the fact that he had been directed to do so by the decedent.

In this circumstance, the purported revocation fails. Based upon the evidence adduced, therefore, the will should be admitted to probate as the decedent's Last Will and Testament, and it should be approved.

Order Approving Will at 1-2.

Separate petitions for rehearing were filed by Gonzales and Parton. On March 26, 1999, after allowing for responses to the petitions, Judge Reeh issued an Order of Modification on Petitions for Rehearing. He stated in part:

Paragraphs 2 and 3 of Rudolph Gonzales' Petition for Rehearing allege the evidence fails to show that he destroyed the decedent's January 8, 1985 Will, as was determined in that Order. A review of the record demonstrates that his assertion is correct. Although the record shows [Gonzales] built a fire at the

decedent's request, it also shows that the decedent physically destroyed the will by burning it up. * * * It does not contain evidence which establishes that [Gonzales] destroyed the will, and no one presented anything beyond suspicions to the contrary.

* * * * *

43 CFR § 4.260(c) provides that a testator may "... revoke (her) will ... by physically destroying the will with the intention of revoking it." The record shows that this is exactly what [Decedent] did. There is no showing that she made either an earlier or later Will.

Order of Modification at 1.

Judge Reeh rejected Parton's contention that attesting witnesses should have been called to testify under 43 C.F.R. § 4.233(c). ^{1/} He held that it was not necessary to call the witnesses who attested to Decedent's execution of her will because no one had challenged the validity of the will when made. Rather, he noted, the dispute concerned the revocation of the will. He continued: "In consequence, it appears that 43 C.F.R. 4.233(c) envisions calling witnesses to the revocation rather than witnesses to the Will's execution. Parties failed to address this issue which -- in view of the instant finding -- is moot." Id.

Reversing his April 7, 1998, approval of Decedent's will, Judge Reeh held that Decedent died without a valid will. He therefore ordered that Decedent's trust estate be distributed in accordance with the Oklahoma laws of intestate succession, under which Gonzales would receive one-third of the estate and Parton would receive two-thirds.

Appellant appealed the Order of Modification to the Board. She filed an opening brief, and Parton filed an answer brief. Gonzales has not participated in the appeal.

No party to this appeal has contended that Appellant's January 8, 1985, will was not validly executed. Nor was any such contention made before Judge Reeh. Therefore, the Board affirms Judge Reeh's conclusion that the will was validly executed. The Board agrees with him that, because there was no challenge to the will itself, there was no need for testimony from the witnesses who attested to Decedent's execution of her will.

^{1/} 43 C.F.R. § 4.233(c) provides:

"Will contest. If the approval of a will, codicil thereto, or revocation thereof is contested, the attesting witnesses who are in the reasonable vicinity of the place of hearing and who are of sound mind must be produced and examined."

As noted above, Judge Reeh found in his Order of Modification that Decedent "physically destroy[ed] the will with the intention of revoking it." The central issue in this appeal is whether there is sufficient evidence in the record to prove either Decedent's act or her intention. A related issue, which Judge Reeh did not address in his orders but which he mentioned at the hearing, is the question of whether Decedent had testamentary capacity at the time of the purported revocation.

The only witness to the purported revocation was Gonzales, who clearly stood to benefit from a revocation of Decedent's will. Thus, Gonzales' testimony must be considered in that light)) that is, as the testimony of a person with an interest in the matter. Moreover, Gonzales' credibility is called into question by the fact that he has made inconsistent statements concerning the will. For instance, at the probate hearing, he testified under oath that Decedent showed him her will (or a copy of her will—see discussion below) on the day she purportedly revoked it. See Tr. at 9, where Gonzales stated: "I didn't even know there was a will. She went in there and got it and showed it me [sic]." In his Petition for Rehearing, he stated, also under oath, that he did not see the will on that day and that the first time he saw it was when BIA attempted to evict him from the house he had shared with Decedent. 2/

Gonzales' statements also lack the clarity necessary to show that the original will was destroyed. At the hearing, he stated that the document Decedent showed him and then burned was a copy, not the original will. This statement appears on page 9 of the transcript, in a passage starting with the sentence quoted in the previous paragraph:

GONZALES: * * * I didn't even know there was a will. She went in there and got it and showed it me [sic]. It was a copy she said for her to keep. It wasn't the original.

ALJ REEH: Who tore up the copy?

GONZALES: She had me build a fire and she just burned it.

2/ This incident occurred in May 1997, several months after Decedent's death.

In his Petition for Rehearing, Gonzales stated:

"Neither was the testimony of petitioner Rudolph Gonzales that he had destroyed a will but that he had built a fire in which his deceased wife told him that she destroyed a will she had made. Petitioner had not seen any will but was told by his wife that she did not desire to include [Appellant] in her will. The first sight of an alleged will was the uncertified document relied upon by the BIA Superintendent at Anadarko when they sent out BIA police to tell petitioner to give his keys to the BIA police and vacate taking only his clothes. * * * He had never seen the alleged will until it was used by BIA to order eviction of the spouse of decedent." Gonzales' Petition for Rehearing at 2-3. (Emphasis in original.)

See also Tr. at 5, concerning the same occasion: "GONZALES: * * * I said, well, there ain't no will or nothing is there, and she said, yeah. She went into the house and got it. She had one. It was a copy."

It is not at all clear from Gonzales' hearing testimony that the document Decedent purportedly destroyed was the original will. 3/

Further, although his hearing testimony suggests that Gonzales actually saw Decedent burn a will document (whether it was the original will or a copy), his Petition for Rehearing indicates that he did not actually see the document burned but was only told about it by Decedent. See the excerpt from his Petition for Rehearing quoted in footnote 3. See also his Petition for Rehearing at 3:

The reason that I, Rudolph Gonzales, testified that I had built the fire in which my wife told me she was burning a will as well as other papers is because it is the truth and the absolute truth, and was done as stated. She said she was burning a will and did so of her own free choice and will.

In this latter statement, Gonzales mentioned for the first time that "other papers" were burned. At the least, this new statement shows that his testimony at the hearing was incomplete. Further, if Gonzales observed Decedent burn a number of papers rather than a single document, his testimony that she burned the will would be less persuasive (because his ability to identify the will among the documents would presumably have been diminished). Of course, if he did not observe the burning at all, as he suggests in his Petition for Rehearing, his testimony would be even less persuasive. 4/

3/ As noted above, the attorney who prepared the will indicated to BIA staff that there were two originals and that both were given to Decedent in 1985. There was no discussion of this statement at the hearing.

4/ Although it considers the internal contradictions in Gonzales' statements most damaging to his credibility, the Board notes that his testimony was also contradicted by Parton.

At the hearing, Parton testified:

"[O]n this will situation, my sister was in the hospital in Oklahoma City. I went up there to see her, you know. I asked if she had a will made. She said, well, yeah, I had one, but [Gonzales] tore it up. She said he burned it because he wasn't included on . . . the will. * * * [S]he also told Peggy, basically the same thing, that he had tore it up cause he wasn't included in the will that he got nothing . . . he didn't like that, so he tore it up. She told me that." Tr. at 14-15. Judge Reeh asked, "[D]id [Decedent] say that she had asked him to tear it up or to burn it?". Parton replied, "No, she said he did. She said he tore it up after he found out he wasn't included in the will." Tr. at 15-16.

Parton gave this testimony against his own self-interest (because he stood to inherit if the will was revoked). His hearing testimony seems inconsistent with his Petition for Rehearing and the position he takes in this appeal. However, he has not repudiated his hearing testimony.

The Board concludes that the testimony given by Gonzales at the hearing was insufficient to show that Decedent "physically destroy[ed her] will with the intention of revoking it." Because there was no other witness to Decedent's purported destruction of her will, and no written evidence to confirm Decedent's intent to revoke her will, the Board finds that there was insufficient evidence to establish that Decedent's will was validly revoked. This finding requires that Judge Reeh's Order of Modification be vacated and that his Order Approving Will be reinstated as modified in this decision.

One other matter requires mention. Although Judge Reeh observed at the hearing that Decedent's testamentary capacity at the time of the purported will revocation was an issue to be considered, Tr. at 12, 27, he did not specifically address the issue in his Order of Modification. Assuming he meant to incorporate into the Order of Modification an implied conclusion that Decedent possessed the requisite testamentary capacity, the Board finds that he erred in doing so. Gonzales was the only witness whose testimony touched on Decedent's testamentary capacity at any time close to the time of the purported revocation. See Tr. at 8-9, 12. For the reasons discussed above, Gonzales' testimony in general has credibility problems. Further, Gonzales was not able to state, except in a very general way, when the purported revocation occurred. Without even an approximate date identified, there was only a remote possibility that medical or other testimony could be found to corroborate or refute Gonzales' testimony concerning Decedent's testamentary capacity. ^{5/} In any event, the only evidence on the subject being Gonzales' testimony, the Board finds that there was insufficient evidence to support a conclusion that Decedent had testamentary capacity at the time of the purported will revocation.

Because it is not necessary to do so here, the Board does not decide the question of whether the uncorroborated testimony of a person in the position of Gonzales (the spouse of a decedent and/or one who stands to benefit from a will revocation) could ever be sufficient to prove the revocation of a will. While there are no regulatory requirements for witnesses to the revocation of a will by physical destruction, "[t]he revocation of a will is a testamentary act as significant as the execution of a will." Estate of Stella Red Star/Swift Bird, 14 IBIA 140, 146 (1986). Thus it would be reasonable to require that the oral testimony of a person with an interest in the matter be corroborated by other evidence.

^{5/} The testamentary capacity of a testator, or lack thereof, must be shown as of the time the testamentary act occurs. See, e.g., Estate of Virginia Enno Poitra, 16 IBIA 32, 36 (1988), and cases cited therein.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Reeh's March 26, 1999, Order of Modification is vacated. His April 7, 1998, Order Approving Will is reinstated but modified to state that Decedent's January 8, 1985, will was valid when executed and there is insufficient evidence to show that she ever revoked that will.

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge