INTERIOR BOARD OF INDIAN APPEALS

Estate of Millie White Romero a.k.a. Daroldine Lydeth White

41 IBIA 262 (09/30/2005)

Judicial review:

Affirmed, *Lyons v. United States*, No. 2:05-cv-1292-RLH-GWF (D. Nev. Feb. 8, 2006), *aff'd sub nom. Lyons v. Estate of Millie White Romero*, *et al.*, 271 Fed. Appx. 675, 2008 WL 833051 (9th Cir.), *cert. denied*, 555 U.S. 1051 (2008).

United States Department of the Interior

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

ESTATE OF MILLIE WHITE ROMERO	:	Order Affirming Decision
a.k.a. DAROLDINE LYDETH WHITE	:	
	:	Docket No. IBIA 03-125
	:	
	:	September 30, 2005

This is an appeal from a July 1, 2003, order denying rehearing by Administrative Law Judge Andrew S. Pearlstein (ALJ) in the estate of Millie White Romero a.k.a. Daroldine Lydeth White (Decedent), deceased Quechan Indian, Probate No. IP 001-696-1771. That order affirmed a March 4, 2003, decision of Indian Probate Judge Sandra K. Watts (Probate Judge) approving Decedent's will, which left all of Decedent's trust property, located on the Fort Yuma Reservation in California and Arizona, to a sister and a cousin. Appellants Diane Rhodes Lyons and Albert Rhodes Jr., Decedent's children, who receive nothing under the will, claim that some or all of Decedent's trust property should descend to them. 1/ For the reasons stated below, the Board of Indian Appeals (Board) affirms the denial of Appellants' claim.

Background

Decedent died on December 30, 2000, at Winterhaven, California. Decedent executed a will on February 18, 1999. The will devises specified trust property to Decedent's cousin, Richard Anthony White, and other specified trust property to her sister, Dorothea Ellen White (Montague). To Decedent's children, Appellants, the will specifies that "I leave my love and affection, as I have made my wishes clear to both of you throughout my life time on what I wanted to do with my land." Will at ¶ 4. The will is accompanied by an affidavit signed by Decedent declaring, among other things, "that no person has influenced me to make disposition of any part of my property in any other manner than I myself of my own free will desire and wish to dispose of it." Affidavit at 1.

The will was prepared by Dori Allen Duran, a Realty Specialist at the BIA Fort Yuma Agency. Ms. Duran attested, in the affidavit accompanying the will, that the will was drawn in accordance with Decedent's wishes as stated to her and that Decedent "was not, so far as I

1/ In these proceedings, Albert Rhodes Jr. is represented by his sister, Diane Rhodes Lyons, who has power of attorney for Mr. Rhodes. Appellants appear pro se.

could ascertain, acting under duress, menace, fraud or undue influence of any person, and in my opinion was mentally capable of disposing of her Last Will and Testament." Affidavit at 2.

The Probate Judge held a hearing to probate the will on September 28, 2001, at Yuma, Arizona. At the hearing, the Probate Judge read a memorandum accompanying Decedent's will, which was written by Ms. Duran and dated the same day on which she prepared the will. The memorandum states that Decedent "was very clear that she didn't want her children Diana L. Rhodes (Lyons) and Albert L. Rhodes to inherit any of her land. She felt that the land needed to be returned to her family, that she inherited from and that her children had no right to it." The memorandum further states that Decedent "said she has told her children that they would not inherit any of her Indian land and that she hoped they would understand." Ms. Duran, who at the time of the hearing had transferred to employment in New Mexico, was not present at the hearing.

Appellant Lyons appeared at the probate hearing and presented the Probate Judge with a written "Statement of Issues." Appellants explained that Decedent had given them up for adoption at an early age, and that they had only reunited with Decedent 30 years later, some ten years before her death. Appellants argued that the will was defective because Decedent's statement that she had discussed the disposition of the land with them was false; because Decedent's affidavit accompanying the will failed to provide required reasons for disinheriting her children; and because trust lands must legally descend along blood lines from parent to child. Appellants also asked for a continuance to obtain legal counsel.

After the hearing, on October 11, 2001, Appellants submitted a filing entitled "Questions of Impropriety by BIA Personnel," which questioned the memorandum accompanying the will prepared by Ms. Duran. On October 24, 2001, Appellants submitted a "Complaint and Supplemental Statement of Issues," which argued that Ms. Duran's memorandum constituted a prohibited ex parte communication with the Probate Judge and reiterated and amplified arguments made in Appellants' prior filings.

On March 4, 2003, the Probate Judge issued an Order Approving Will and Decree of Distribution. In issuing the order, the Probate Judge denied Appellants' motion for continuance to obtain legal counsel, finding that they had had sufficient time to secure counsel since Decedent's death. The Probate Judge found that Appellants are heirs of Decedent and would inherit in the absence of a will. However, the Probate Judge approved the will as valid and ordered distribution of Decedent's trust property to the individuals named in the will. The order denied the claims of Appellants on the grounds that they had presented no material evidence to invalidate the will. The Probate Judge concluded that there is no requirement that a Decedent leave trust property to his or her children or any other family members. The Judge further ruled that state law relating to the right of a child omitted from a will to share in the parent's estate does not apply to federal Indian probate proceedings, which are governed by

federal law. Finally, the Probate Judge found that there was no showing that, at the time Decedent prepared and signed her will, Decedent was not of sound mind or was under the influence of any person, and that it was immaterial whether the statement that she had discussed the disposition of her land with her children was false.

Appellants filed a timely petition for rehearing. In addition to arguments they had previously made, Appellants argued that the Probate Judge improperly admitted and considered Ms. Duran's memorandum. Appellants also continued to complain that they had been unable to retain legal counsel. The petition was accompanied by several affidavits attesting to the fact that, to affiants' knowledge, Decedent had never discussed her wishes regarding her land with her children and describing the emotional anguish suffered by Appellants.

On July 1, 2003, the ALJ concluded that Appellants had not shown a sufficient basis for rehearing and denied the petition. 2/ The ALJ noted that an Indian will may be challenged only on grounds that the testator lacked testamentary capacity or was under undue influence, and ruled that Appellants had made no such showing. The ALJ agreed with the Probate Judge that there is no requirement that an Indian testator leave any property to her children. The ALJ explained that a false statement by Decedent in her will about discussing her wishes with her children did not provide a basis for invalidating the will. The ALJ also found that the affidavits submitted by Appellants did not provide probative evidence as to the validity of the will and thus did not constitute "newly discovered evidence" in support of a petition for rehearing under 43 C.F.R. § 4.241. The ALJ rejected Appellants' claim that the Probate Judge improperly admitted and relied on the memorandum by Ms. Duran, concluding that the written statement was admitted in compliance with federal regulations and that the memorandum only confirmed what was in the will — that Decedent wished to leave her land to her cousin and sister, and not to her children.

Appellants filed a timely appeal to the Board. Appellants subsequently filed an opening brief, and later submitted corrections to that brief. No other parties have submitted filings to the Board.

2/ The petition was considered by ALJ Pearlstein because the Probate Judge was no longer employed by the Interior Department. Appellants appear to suggest that the departure of the Probate Judge was improperly motivated and/or could affect the accuracy of the transcript but have provided no evidence to support either suggestion.

Discussion

Appellants' arguments are somewhat difficult to understand, but Appellants appear to raise four main arguments on appeal: (1) Decedent's Indian trust land is required to descend to them pursuant to statute, the government's trust duty, or the constitutional guarantee of equal protection; (2) approval of the will was in error because Decedent's affidavit is faulty; (3) the will is fraudulent because the statement in the will that Decedent had discussed her wishes about her land with her children is false; and (4) the Probate Judge improperly considered Ms. Duran's memorandum because it was allegedly written after Decedent's death and backdated, was not admissible evidence, or constitutes a prohibited ex parte communication. Appellants also argue that the Interior Department must provide them with counsel in these proceedings.

While the Board, like the prior adjudicators in this case, appreciates the anguish that Appellants feel, we find that none of Appellants' arguments provides a basis for invalidating the will.

There is no requirement that the Interior Department ensure that Indian trust property disposed of by a decedent by will is distributed to the decedent's children or other heirs. See, e.g., Estate of Alexander Charette, 15 IBIA 92 (1987); Estate of William Mason Cultee, 9 IBIA 43, 50 (1981), aff'd sub nom. Cultee v. United States, No. 81-1164C (W.D. Wash. Sept. 14, 1982), aff'd, 713 F.2d 1455 (9th Cir. 1983); Estate of Anthony Bitseedy, 5 IBIA 270, 275 (1976), aff'd sub nom. Dawson v. Kleppe, No. CIV-77-0237-T (W.D. Okla. Oct. 27, 1977). Appellants rely on Section 5 of the General Allotment Act, 25 U.S.C. § 348, which provides that a trust allotment shall descend to decedent's "heirs according to the laws of the State or Territory where such land is located." That provision applies, however, only when an Indian dies without a legally executed will. See Estate of Ronald Richard Saubel, 9 IBIA 94, 100 (1981).

The disposition of trust allotments by will is governed by 25 U.S.C. § 373, which grants the owner of a trust allotment "the right * * * to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior." See id. Appellants argue that 25 U.S.C. § 348 shows congressional intent for trust allotments to convey from parent to child. As the Board has previously recognized, however, the primary purpose of a will is to alter the normal course of descent of the property. See Estate of Anthony Bitseedy, 5 IBIA at 276. Thus, the subsequent enactment by Congress of 25 U.S.C. § 373 clearly demonstrates Congress's intent to depart from the limitations of section 348 and to allow owners of trust allotments to devise their property by will to others.

Appellants argue that the government's trust duty compels it to assure that trust land descends from parent to child. That is incorrect. The U.S. Supreme Court, in fact, has held that the Department may not revoke or rewrite a decedent's will just because the Department

deems the disinheritance of children to be unfair. See Tooahnippah v. Hickel, 397 U.S. 598 (1970). Thus, when faced with a will that disinherits a child, the Board will give effect to the wishes stated in the will. See Estate of Archie Blackowl, Sr., 29 IBIA 195, 198-199 (1996); Estate of Lois Marie (Francis) Pete (Sanchez), 22 IBIA 249, 99 I.D. 196 (1992).

It is immaterial whether, as Appellants contend here, Decedent's decision to devise trust property to individuals other than her children was irrational or arbitrary and capricious. While the Supreme Court's decision in Tooanippah may leave room for the Department to exercise some limited discretion over the distribution of trust property in probate, the Board has determined that it will not exercise such discretion in the absence of substantive probate regulations, and no such regulations have been promulgated. See Estate of Lois Marie (Francis) Pete (Sanchez), 22 IBIA at 252-253, 99 I.D. at 187-188. In any event, the record does not establish that Decedent's decision — even if unkind — was irrational. The record shows that Decedent considered her options and decided she preferred to devise her trust property to other relatives.

Appellants argue that the failure of Congress to ensure that trust land passes to a decedent's children would be a violation of the constitutional guarantee of equal protection, which they view as requiring that Indian children have the same use and benefits of Indian allotments as did their parents and grandparents. 3/ The Board does not address this argument because the Board has no authority to declare an act of Congress unconstitutional. See Estate of Guadalupe Almanza Conger, 21 IBIA 244 (1992).

For these reasons, the Board concludes that the ALJ and the Probate Judge correctly concluded that there is no requirement that trust property devise or descend to a decedent's children.

3/ In addition to 25 U.S.C. § 373, Appellants identify 25 U.S.C. §§ 2201(15) and 2206(a)(1)(A) as other statutory provisions they believe to work an unconstitutional violation of equal protection. As there is no subsection 2201(15), we assume Appellants intend to refer to subsection 2201(5). These are provisions of the Indian Land Consolidation Act Amendments of 2000, Pub. L. 106-462, 106 Stat. 1991, which prescribed a limited rule for intestate succession of interest in trust lands and provided that such interests may be devised to a decedent's Indian spouse, any other Indian person, or the Indian tribe with jurisdiction over the trust land. Section 2206 has since been amended. See 25 U.S.C.A. § 2206 (Supp. 2005). Appellants apparently view these provisions to be too broad because they allow trust allotments to descend or devise to others than a decedent's children. The Probate Judge did not rely on these provisions and they are not at issue in this appeal.

Now we turn to the question whether the will is invalid because Decedent's affidavit does not contain reasons for disinheriting her children. Appellants argue that Decedent failed to comply with instructions on the affidavit form, which state:

> (*) At this point should be inserted * * * the testator's/testatrix's reasons for making the devises, particularly when the immediate relatives are given little or none of the estate.

Affidavit at 1. Appellants' argument fails because the instructions printed on the affidavit form are advisory only. See Estate of Lucy Buffalo Little Coyote a.k.a. Thyra Redbird, 17 IBIA 31, 36 (1989); Estate of Alexander Charette, 15 IBIA at 95-96. An affidavit to a will is not rendered invalid by the omission of reasons for the omission of heirs. Id.

Appellants' argument that the will constitutes a fraud because it contains a false statement does not provide a reason for invalidating the will. A will may be deemed invalid if the decedent lacked testamentary capacity at the time of making the will or was subjected to undue influence in its preparation. 4/ See, e.g., Estate of Johanna Small Rib (Standing Twenty), 19 IBIA 236, 238 (1991); Estate of Comer Fast Eagle, 16 IBIA 40, 42-43 (1988). The burden of proof to show testamentary incapacity or undue influence is on the will contestant. See Estate of Clarence Thompson Burke, 18 IBIA 1 (1989). Assuming that Decedent' s statement in the will that she discussed the disposition of her land with her children is false, this does not demonstrate that she did not make a reasoned and independent decision to leave her land to relatives other than her children. Appellants paint a picture of a neglectful mother and hostile family but, even if that picture were true, that is a matter of morality, not legality. Appellants have provided no evidence that Decedent lacked testamentary capacity or was subjected to undue influence. Thus, they have not demonstrated that the will is invalid.

4/ Appellants suggest that Ms. Duran may have improperly influenced Decedent because she is the daughter of the BIA Superintendent. Appellants provide absolutely no evidence that Ms. Duran exerted improper influence on Decedent. To invalidate a will for undue influence, the will contestant must show: (1) that the testator was susceptible of being dominated by another; (2 that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions: (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires. Estate of Helen Fisher Parker, 27 IBIA 271 (1995); Estate of Alice Jackson (John), 17 IBIA 162 (1989). Appellants have made no such showings.

Appellants' arguments pertaining to Ms. Duran's memorandum also do not invalidate the will. 5/ Appellants have no basis other than pure speculation for suggesting that Ms. Duran did not write the memorandum at the time the will was created. The memorandum did not constitute a prohibited ex parte communication. An ex parte communication is a

> communication concerning the merits of a proceeding between any party to the proceeding or any person interested in the proceeding or any representative of a party or interested person and any Office personnel involved or who may reasonably be expected to become involved in the decisionmaking process on that proceeding.

43 C.F.R. § 4.27(b) (2004). Ms. Duran is not a party, interested person, or representative of a party or interested person in these proceedings, and her memorandum is not a communication to the Probate Judge but rather a memorandum to the file prepared long before any proceedings were initiated.

It is immaterial whether the ALJ properly admitted the memorandum as evidence because the ALJ did not rely on Ms. Duran's memorandum, which was not necessary to the ALJ's determination that the will was valid. The probate rules require that, if approval of a will is contested, attesting witnesses be produced and examined if they are reasonably available. 43 C.F.R. § 4.233(c). Here, however, Appellants did not contest the will in any manner that called into question Decedent's testamentary capacity or raised other matters that attesting witnesses would be competent to address. Under these circumstances, the testimony of Ms. Duran or other attesting witnesses was not required.

Finally, Appellants are wrong that BIA has a fiduciary duty to ensure that every Indian party appearing before the Office of Hearings and Appeals has counsel. 6/ The right to have appointed counsel exists only where liberty interests are at stake — *i.e.,* where there is the risk of imprisonment. See Estate of Blanche Russell (Hosay), 18 IBIA 40, 45-46 (1989); Lassiter

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5/ In addition to the arguments discussed in the text above, Appellants also contend that use of the memorandum as evidence violated 43 C.F.R. § 4.310(b) or 43 C.F.R. § 4.233(a). Neither of these rules applies here. 43 C.F.R. § 4.310(b) applies to filings made on appeal to the Board, not to evidence submitted in probate hearings. 43 C.F.R. § 4.233(a) pertains to affidavits and oaths attached to wills, and the memorandum does not purport to be such a document, nor did the ALJ treat it as such.

6/ Appellants make numerous statements alleging unkind and unfair behavior and motivations on the part of Decedent and her family members with respect to Appellants. Such interpersonal difficulties, while perhaps of great import to Appellants, have no relevance to the legal issues in this appeal.

v. Department of Social Services, 452 U.S. 18, 25 (1981). Because appellants' have no liberty interests at stake here, there was no requirement to appoint counsel for them.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the ALJ's July 1, 2003, Order Denying Petition for Rehearing and the Probate Judge's March 4, 2003, Order Approving Will and Ordering Distribution.

I concur:

// original signed
Katherine J. Barton
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge