



INTERIOR BOARD OF INDIAN APPEALS

Estate of Dennis Calf Looking

52 IBIA 1 (07/02/2010)



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

ESTATE OF DENNIS CALF)
LOOKING)
)
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) Docket No. IBIA 08-111
)
)
) July 2, 2010

Elton Little Plume (Elton), Loren Little Plume, and Edwin Little Plume (collectively, Appellants) have appealed the April 30, 2008, Order Denying Rehearing issued by Indian Probate Judge (IPJ) James Yellowtail in the estate of Appellants' step-grandfather Dennis Calf Looking (Decedent), deceased Blackfeet Indian, Probate No. P000040229IP. The Order Denying Rehearing let stand the IPJ's November 30, 2007, Decision in which the IPJ declined to approve a photocopy of Decedent's properly executed original Last Will and Testament (Will) submitted by the Blackfeet Agency (Agency), Bureau of Indian Affairs (BIA), because the original could not be adequately accounted for. After first concluding that BIA had given the original to Decedent, the IPJ placed the burden of proof on Appellants to produce or account for the original Will. When Appellants were unable to produce the original Will, the IPJ applied the presumption that Decedent had destroyed the Will with the intent to revoke it. Appellants, who, along with their sister, are the beneficiaries designated in the Will, contend that the IPJ erred in failing to approve the photocopy of the Will and in placing the burden on them to account for the original Will because the evidence was insufficient to establish that Decedent ever took possession of the Will from BIA. We agree and vacate the IPJ's Decision. We remand the case to the Probate Hearings Division for further proceeding consistent with this decision.

In the absence of an original will, a copy of a properly executed will ordinarily may be approved only if the record establishes that the original is sufficiently accounted for to defeat the presumption that the original was destroyed by the testator with the intent to revoke it. *See Estate of Rose Josephine LaRose Wilson Eli*, 2 IBIA 60, 67, 80 I.D. 620, 622 (1973); *see also Estate of Arthur Wishenko*, 8 IBIA 147 (1980). However, when BIA's practice is to keep the original will and there is insufficient evidence that the testator had actual possession of the original will, it is error to apply the presumption. In this case, the

evidence demonstrates that it was the Agency's practice to keep the originals of Indian wills, BIA probate staff did not actually recollect giving the original to Decedent, and the person accompanying Decedent when he went to have the Will prepared testified that Decedent did not have any papers when he left the BIA office. We conclude that the evidence in this case was insufficient to trigger the presumption that, in the absence of an original will, the testator destroyed the original with the intent to revoke it. Because the presumption does not apply, the IPJ erred in relying on it to decline to approve the copy of Decedent's Will.

Background

Decedent, a Blackfeet Indian residing on the Blackfeet Reservation in Montana, was born on February 28, 1933. Decedent had one child, Denise Lynn Looking Calf (Denise), who was born in 1963. Decedent had one marriage, to Marie Little Plume (Marie), whom he married on January 1, 1974.¹ Although the marriage produced no children, Decedent and Marie took in and raised Marie's four natural grandchildren. Marie died on January 20, 2005, and Decedent remained unmarried at the time of his death.

On June 22, 2005, Decedent, accompanied by Elton, went to the Blackfeet Agency Office to prepare his Will. Arlene Dusty Bull (Dusty Bull), a Probate Specialist with the Agency, drafted the Will, which Decedent signed in the presence of two witnesses. *See* Administrative Record (AR), Ex. 16 (photocopy of Will). The Will devised Decedent's entire estate to Marie's grandchildren, Appellants and their sister Mildred Delsa Little Plume. The Will also specifically stated that Decedent was not making any provisions for Denise, "for the reason she is capable of taking care of herself and I have given my land to my grandchildren who I want to have it." *Id.*, Third Paragraph. Decedent died on June 2, 2006.

The probate package forwarded to the IPJ by the Agency included, *inter alia*, a photocopy of Decedent's Will, rather than the original Will. The IPJ held a hearing in Decedent's probate on September 13, 2007. At the hearing, the IPJ inquired about the circumstances surrounding Decedent's execution of his Will and Decedent's actions subsequent to his signing of the Will. Elton testified that he accompanied Decedent to the Agency office but was not present in the room where the Will was drafted and signed. He further testified that Decedent had no paperwork with him when he left the room where he

¹ The source of this information is the Data for Heirship Finding and Family History OHA-7 form prepared for Decedent's probate by BIA. Denise questions whether Decedent and Marie were ever married. That issue is not relevant to the issue of whether or not a photocopy of Decedent's Will should be approved.

signed his Will, nor did Decedent subsequently return to the Agency or discuss the Will. Transcript (Tr.) at 8, 10, 11. Elton also testified that Decedent never mentioned the Will after he wrote it. *Id.* at 11. Additionally, Elton testified that Dusty Bull called him a few weeks before the hearing to ask if he had seen the original Will because BIA had apparently lost it and to request that he search Decedent's records to see if the original was there. *Id.* at 8-9. Elton stated that he had made the requested search but had not found the original Will. *Id.* at 9-10. Neither Elton nor any of the other attendees at the hearing had seen the original Will nor had they heard that Decedent might have destroyed the Will. *Id.* at 10-13.² The IPJ advised the parties that the law required him to account for the original Will and that, absent the original Will itself, he had to have evidence that the Will remained in existence when Decedent died and had not been revoked in order for him to be able to accept the photocopy. *Id.* at 13-15. He also stated that he would question Dusty Bull, who had been unable to attend the hearing, about her knowledge of the Will and about the Agency's records relating to the Will, and that if the records and her testimony convinced him that the original Will remained in existence and had not been revoked, he would distribute Decedent's property in accordance with the Will, but if he was not persuaded that the Will was accounted for, he would distribute the property to Decedent's heir at law, *id.* at 15-17, which is Denise.

The IPJ did not reconvene the probate hearing. But in a memorandum dated September 19, 2007 (AR, Ex. 44), Dusty Bull explained that it was the practice of the Agency to lock Indian last wills and testaments in a safe located in a Realty vault at the Blackfeet Agency. She recounted that she had drafted Decedent's Will, but that when she went to access that document from the safe after Decedent's death, she found only a copy of the Will in the envelope and her subsequent thorough search for the original Will had failed to uncover it. Since she could not locate the original Will, she stated that she "was determined to believe [she] gave it to [Decedent] by mistake." Memorandum from Arlene Dusty Bull to James Yellowtail, Sept. 19, 2007, at 1. She also confirmed that Decedent had not contacted her at any time to revoke or destroy his Will and asserted that she was confident that he intended his "grandchildren" named in the Will — i.e., Appellants — to inherit all his property.

After receiving Dusty Bull's memorandum, the IPJ issued an order providing Appellants with a final opportunity to produce the original Will or have the estate distributed to Denise, as Decedent's heir. Receiving no response, the IPJ issued his November 30, 2007, Decision (AR, Ex. 41), finding that, because there was no evidence

² The other attendees were Appellant Edwin Little Plume, Denise, and Denise's mother, Esther Spotted Bear.

that the original Will remained in existence and had not been revoked or destroyed, he could not approve the copy of the Will. Accordingly, he determined that Decedent had died intestate, and, after approving the payment of one claim against the estate, he ordered that the remainder of Decedent's estate be distributed to Denise, Decedent's sole heir under Montana law.

On January 28, 2008, Appellants petitioned for rehearing of the IPJ's Decision, asserting that they should not be penalized because BIA had lost the original Will. AR, Ex. 37. In response, the IPJ stated that the evidence indicated that Decedent had taken possession of the original Will, and therefore, absent reliable information that Decedent had not destroyed or revoked the Will, a photocopy could not be approved. The IPJ indicated that there was "no factual basis" for concluding that the Will remained in existence and had not been revoked by Decedent "while it was in his possession." Order to Show Cause at 2 (AR, Ex. 35). The IPJ again provided Appellants with an opportunity to search for the Will and provide a statement of their findings. *Id.* Again receiving no response, the IPJ entered his Order Denying Rehearing on April 30, 2008 (AR, Ex. 28), concluding that Appellants had failed to meet their burden of showing that the Decision not to approve the Will was incorrect.

Appellants have appealed the Order Denying Rehearing to the Board.

Discussion

The Board has a two-step process for determining when to approve a copy of a will in the absence of the original will. First, the record must establish that the will was properly executed, and, second, the absence of the original will must be adequately accounted for in order to defeat the presumption that the original was destroyed by the testator with the intent to revoke it. *See Estate of Eli*, 2 IBIA at 67, 80 I.D. at 622; *see also Estate of Wisenko*, 8 IBIA at 147; *Estate of Anthony Bitseedy*, 5 IBIA 270, 272 (1976), *aff'd Dawson v. Kleppe*, No. CIV-77-0237 (W.D. Okla Oct. 27, 1977). In this case, there is no dispute that the Will was properly executed. Thus the key question is whether the evidence supports the application of the presumption that the absence of the original Will signifies that Decedent destroyed the original with the intent to revoke it. We find the evidence in the record insufficient to support applying the presumption in this case because the presumption is only triggered when there is sufficient evidence that a testator took possession of the original will.

In her September 19, 2007, memorandum, Dusty Bull stated that the Agency's practice was to lock Indian last wills and testaments in a safe located in a Realty vault at the

Blackfeet Agency and that, given her discovery of a copy of Decedent's Will, rather than the original, in the safe, she "was determined to believe that [she] gave [the original] to [Decedent] by mistake." Memorandum from Arlene Dusty Bull to James Yellowtail, Sept. 19, 2007, at 1. She did not, however, state that she had any actual recollection of giving the original Will, or any documents, to Decedent, nor has any other person confirmed her supposition that she gave the original Will to Decedent. Elton, on the other hand, gave unequivocal testimony that Decedent had no paperwork with him when he left the room where he signed his Will. We find Dusty Bull's memorandum insufficient to establish that Decedent actually had the original Will in his possession after executing it. And absent sufficient evidence that Decedent had actual possession of the Will, there is no basis for applying the presumption that the absence of the original Will indicates that Decedent destroyed the original with the intent to revoke it. Nor, in light of the Agency's practice of keeping original Indian wills in BIA custody, was there any basis for the IPJ to place the burden of proof on Appellants to produce or account for the original Will. *See* 79 Am. Jur.2d Wills § 565, Practice Guide (when a will has been proved to have been entrusted to a third party, the burden of showing that the testator subsequently took possession is on the party who asserts it was revoked). Accordingly, given the specific facts of this case, we find that the presumption does not apply and that it was error for the IPJ to apply the presumption to refuse to approve the copy of Decedent's Will on that ground.³

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 vacates the Order Denying Rehearing,

³ We note that there is no evidence of changed circumstances that would indicate that Decedent might have changed his mind. He never returned to BIA or otherwise contacted BIA to alter or revoke the Will, he never expressed any discontent with the Will, Denise testified that she stayed away from Decedent (although she blamed Marie for this), and Decedent died slightly less than a year after he executed the Will. Thus, apart from applying the presumption, there appears to be no evidentiary basis to disapprove the Will. We vacate and remand, rather than reverse, only because the burden of proving revocation under the facts of this case rests with the party asserting revocation. If Denise or any other party contends that the Will was revoked or that any other reason exists for refusing to approve the Will, that party must be afforded an opportunity to produce evidence supporting his or her challenge to the Will.

and remands the case to the Probate Hearings Division for further proceedings consistent with this decision.

I concur:

// original signed
Sara B. Greenberg
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.