



INTERIOR BOARD OF INDIAN APPEALS

Estate of Edward Kappaisruk Ramoth, Sr.

56 IBIA 271 (04/02/2013)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF EDWARD KAPPAISRUK)	Order Vacating Decision and
RAMOTH, SR.)	Remanding
)	
)	Docket No. IBIA 11-093
)	
)	April 2, 2013

Gary Ramoth (Appellant) appealed to the Board of Indian Appeals (Board) from an Order Denying Rehearing (Rehearing Order) entered on March 2, 2011, by Administrative Law Judge (ALJ) Earl J. Waits. The ALJ upheld a February 28, 2007, decision (Decision) in the estate of Edward Kappaisruk Ramoth, Sr. (Decedent),¹ which disapproved a 2002 will because one of the two attesting witnesses was not “disinterested,” a requirement in the probate regulations. The ALJ rejected Appellant’s argument that the notary for an integrated self-proving affidavit could be accepted as a second disinterested attesting witness because the ALJ found that the notary here did not have the intent to sign the will in the capacity of an attesting witness when he notarized the will.

We vacate the Rehearing Order because we do not construe the probate regulations as imposing a requirement that a witness and signatory to a will must demonstrate that he had an “intent” to act in the capacity of a will witness. We disapprove dicta in a previous Board decision that suggested otherwise. The notary who signed the will in the present case established, through a subsequent affidavit, that he fulfilled the legal functions of an attesting witness. Whether or not he intended to sign “as a witness” is irrelevant in determining whether the will satisfied the requirements of proper execution. We thus vacate the Rehearing Order and remand the matter for further consideration.

Background

Decedent was born on July 28, 1921, and died on June 21, 2005. OHA-7 Form (Administrative Record (AR) Tab 8). Two wills were located after his death. The first was executed in 1987 (1987 will) and incorporated a notarized self-proving affidavit signed by

¹ Decedent, a.k.a. Edward Kappasuk Ramoth, a.k.a. Edward Kappasruk Ramoth, was an Alaska Native. His case was assigned Probate No. P000031178IP in the Department of the Interior’s probate tracking system, ProTrac.

Decedent and two disinterested witnesses. 1987 Will, Aug. 27, 1987 (AR Tab 14). The 1987 will devised Decedent's trust and restricted property to a niece (Elaine) or, if Elaine predeceased Decedent, to Appellant, who is a nephew of Decedent. *Id.*

The second will was drafted by Craig Cook (Cook) and was executed in 2002 (2002 will). 2002 Will, Mar. 26, 2002 (AR Tab 11). The 2002 will also incorporated a self-proving affidavit, was signed by Decedent and two witnesses, and was notarized by Cook. *Id.* at 4-5. The 2002 will made devises to Elaine, Appellant, and two other nephews. Appellant signed the will as one of the two attesting witnesses. *Id.* at 5.

After a hearing, Indian Probate Judge (IPJ) Regina L. Sleater issued the February 28, 2007, Decision. AR Tab 7. No one had objected to either of the wills, but the IPJ determined that Appellant was not a disinterested witness² to the 2002 will. Decision at 2. She thus disapproved the 2002 will for lack of a second disinterested witness, and approved the 1987 will. *Id.*; see 43 C.F.R. § 4.260(a) (2002), now at 25 C.F.R. §§ 15.3–4 (will execution requirements).

Appellant sought reconsideration or, alternatively, rehearing. Motion for Reconsideration or Petition for Rehearing (Petition), Apr. 25, 2007 (AR Tab 6). He first argued that the 2002 will should be approved because it was properly executed under Alaska law. *Id.* at 2; see Alaska Stat. § 13.12.505. Appellant also argued that if he were disqualified as an attesting witness, then Cook, who signed and notarized the 2002 will, should qualify as a second disinterested witness. *Id.* at 2-4. In support, he submitted affidavits from the other 2002 will witness (Ainsworth) and from Cook, each testifying that they were present at and had observed the 2002 will execution; that they had signed the will as witnesses and at Decedent's request; that Decedent was not under undue influence, menace, fraud, or duress at the time of the execution; that Decedent had testamentary capacity at that time; and that they were not interested parties to the will. Cook and Ainsworth Affidavits, May 2, 2007 (AR Tab 6). Appellant also argued that if reconsideration were denied, then rehearing would be appropriate to allow the parties to submit a settlement agreement or stipulation as to the distribution of the estate. Petition at 4.

² A disinterested will witness is one “who does not personally take under the will.” *Estate of Mabel Opal Beach*, 39 IBIA 111, 112 (2003); see also *Estate of Hiemstennie (Maggie) Whiz Abbott*, 4 IBIA 12, 20 (1975) (A witness is not disinterested “if his interest in the will is of a fixed, certain, and vested pecuniary character or one which otherwise gives him a direct and immediate beneficial right under the will.”).

In response, the IPJ issued an interim order holding the Decision in abeyance for 30 days, so that any settlement agreement could be reduced to writing and submitted to the IPJ. Interim Order on Request for Rehearing, June 25, 2007 (AR Tab 6). No agreement was submitted.

The ALJ denied rehearing on March 2, 2011. Rehearing Order (AR Tab 5). He found that Appellant was not a disinterested witness and held that Cook could not qualify as a second disinterested witness because the evidence established that Cook had not intended to sign as a will witness. *Id.* at 2. The ALJ noted that the Board had never decided whether such intent was required, but had discussed the issue in *Estate of Orville Lee Kaulay*, 30 IBIA 116 (1996).

In *Estate of Kaulay*, after resolving the case on other grounds, the Board added in a footnote:

Although the Board finds it unnecessary to decide the issue of whether the notary of the self-proving affidavit attached to decedent's will could be substituted for a disqualified will witness, it notes that this issue has apparently been decided by state courts largely as a question of the intent with which the notary signed. When the evidence showed that the notary intended to sign as both a witness and in his/her official capacity, the signature has been accepted as that of a witness. . . . However, the notary has not been accepted as a witness in other cases, especially when no evidence was presented indicating that the notary signed with the intent of witnessing the will.

30 IBIA at 120 n.4.

The Board cited several state court decisions to support the proposition that whether a notary could be substituted as a will witness depended on the notary's intent at the time her or she signed the will.

The ALJ determined that only Appellant and Ainsworth had signed the will "as the witnesses" and that Cook had "signed only as a notary public and did not sign as a witness under the attestation." Rehearing Order at 2. He found that Cook's affidavit was insufficient to prove that Cook had intended to sign the will as an attesting witness. *Id.* at 2-3. Based on the record and considering "the totality of the circumstances," the ALJ determined that it was "improbable" that Cook had intended to sign the will as an attesting witness and he affirmed the 2002 will's disapproval. *Id.* at 3. He also noted that Elaine, the sole beneficiary under the 1987 will, had not signed the settlement agreement, so the 1987 will would stand. *Id.* He dismissed Appellant's Petition.

Appellant appealed the Rehearing Order to the Board. Notice of Appeal, Mar. 30, 2011. In his brief he argued that Cook intended to sign the will as a witness and also as a notary, so he should be accepted as an attesting witness. Notice of Appeal at 1. No other parties submitted briefs.

Discussion

The probate regulations in effect in 2002 provided: “An Indian 18 years of age or over and of testamentary capacity, who has any right, title, or interest in trust property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses.” 43 C.F.R. § 4.260(a) (2002).³ In *Kaulay*, the Board suggested, in dicta, that whether the notary of a will may be substituted for a disqualified witness is “a question of the [notary’s] intent.” 30 IBIA at 120 n.4. But until now, the Board has not had an opportunity to actually decide whether an attesting witness must have “intent to sign as a witness” at the time of execution.⁴ Whether or not the probate regulations require such intent is a legal question that we review *de novo*. See *Estate of Laberta Stewart*, 54 IBIA 198, 203 (2012). We now reject reading such an “intent” requirement into the probate regulations. The state court cases cited in *Kaulay* do not, in our view, support a conclusion that a will witness must “intend” to be a will witness to satisfy the regulations.⁵ Where, as here, the substitute witness was a notary who signed a self-proving affidavit, the will would not be self-proved, but it would not fail for lack of proper execution. We thus vacate and remand the Rehearing Order for further consideration consistent with this order.

³ In substance, the current regulations are no different, but the provisions in former § 4.260(a) are now found in 25 C.F.R. §§ 15.3 and 15.4.

⁴ See also *Estate of Sallie Fawbush*, 34 IBIA 254, 258 n.9 (2000) (Board found it unnecessary to decide whether notary may be deemed an attesting witness where there is no evidence of the notary’s intent to act as a witness).

⁵ Although not cited in *Kaulay*, in *Estate of Fannie Newrobe Choate*, the Board, in rejecting an argument that an attesting witness must know the tribal language of the testatrix, stated that “it is required that the witness merely know that she is acting as an attesting witness.” 7 IBIA 171, 175 (1979) (citing *Estate of Matilda Levi*, A-24653 (Nov. 3, 1947)). In *Levi*, the evidence showed that the witness knew that she was acting as a witness, and the Acting Assistant Secretary found this “sufficient.” *Estate of Levi*, A-24653, at 2. *Levi* did not state that it was “required.”

I. *Estate of Kaulay*

Kaulay cited three cases for the proposition that a notary's signature may be accepted as that of a witness "[w]hen the evidence showed that the notary intended to sign as both a witness and [as a notary]." 30 IBIA at 120 n.4 (citing *Estate of Price*, 871 P.2d 1079 (Wash. Ct. App. 1994); *Estate of Martinez*, 664 P.2d 1007 (N.M. Ct. App. 1983); *Smith v. Neikirk*, 548 S.W.2d 156 (Ky. Ct. App. 1977)). Those cases, however, do not support that proposition.

The facts in *Price* were similar to those in the current case: A will was signed by the testator, a notary, and two witnesses, one of whom was disqualified. *Estate of Price*, 871 P.2d at 1081-82. The notary's intent was clear: She did *not* intend to sign the will as a witness, but only as a notary. *Id.* at 1082. Nevertheless, the court upheld the will, finding that "a notary's signature can be deemed the signature of an attesting witness if all the legal requirements of a valid attestation were nonetheless complied with by the notary's signature," "because the same legal requirements needed to properly notarize [a] will are sufficient to legally attest the will as well." *Id.* at 1083. The *Price* court thus disregarded the notary's actual intent and instead focused on the substance of her actions. The court also noted that the single notarial signature could not serve simultaneously as both a witness's attestation and as a notary's certificate. *Id.* n.4.⁶

In *Martinez*, a will was signed by the testator, a notary, and one other witness. 664 P.2d at 1008-09. At the time, in that jurisdiction, witnesses to wills were required to "sign *as witnesses*." *Id.* at 1011-12 (quoting N.M. Stat. Ann. § 45-2-502 (1978)) (Emphasis added.). The court acknowledged that some states will accept a notary's signature as that of an attesting witness, while others hold that "one signing as a notary intends to sign as a notary and not as a witness to the will, and the will is invalid for want of due execution." *Id.* at 1013 (internal citations omitted). In *Martinez*, the notary's testimony as to his intent was ambiguous. *See id.* at 1012. Without making any finding on the notary's intent, but after invoking a policy of giving effect to a testator's wishes, the court determined that he "signed as a witness to the will." *Id.* at 1013.

In *Smith*, a will was signed by a testator, two witnesses, and a notary, but only the notary's and one witness's testimony was submitted to probate. 548 S.W.2d at 157. The notary testified that she "signed the will as a notary." *Id.* at 158. The court held that "substantial rather than . . . literal compliance" with the requirements for will execution was

⁶ And in general, a notary may not notarize her own signature. *See, e.g.*, Alaska Stat. § 44.50.062(6)(a). A notary who signs a self-proving affidavit as a witness may not then notarize the affidavit to make it effective.

sufficient to approve a will. *Id.*⁷ The court held that the notary “was there to witness the will and to further sign in an official capacity. The fact that she signed as a notary is mere surplusage.” *Id.* The court thus looked to the notary’s actions to find that she witnessed the will, despite her testimony that she signed “as a notary.” *Id.*

The Board’s footnote in *Kaulay* also cited two cases as rejecting a notary as a witness “when no evidence was presented indicating that the notary signed with the intent of witnessing the will.” 30 IBIA at 120 n.4 (citing *Estate of Romeiser*, 513 P.2d 1334 (Okla. Ct. App. 1973); *Baxter v. Bank of Belle*, 104 S.W.2d 265 (Mo. 1937)).⁸ The first case, *Estate of Romeiser*, makes no mention of a notary or any other potential substitute witness.

In *Baxter*, the court did reject a notary as a witness because the notary intended to sign the will only as a notary and not as an attesting witness. 104 S.W.2d at 268. The court held that witnesses must observe the testator’s mental capacity at the time of the will execution, and that if a witness did not have the intent to act as a witness at that time, he could not be relied upon to observe the testator’s capacity and to be able to testify about it if needed. *Id.* Thus, among the cases cited in *Kaulay*, only *Baxter* illustrates a state court decision requiring a specific intent to be a will witness in order for a signature to be accepted as such.

We would summarize the state of the law as follows: In some jurisdictions, a notary’s subjective intent to sign a will “as a witness” is not required, so long as the notary has fulfilled all of the legal obligations of an attesting witness, which vary by jurisdiction (e.g., seeing the testator sign the will, seeing the other witness sign, observing the testator’s testamentary capacity, hearing the testator’s “publication” of the will, or signing the will). In some jurisdictions, an attesting witness must intend to sign the will “as a witness” at the time he signs it. The authorities generally agree that a single signature cannot act as both a witness’s attestation and a notary’s certification—separate signatures are needed for each function.

⁷ *But see Smith v. Smith*, 348 S.W.3d 63, 65 (Ky. App. 2011) (declining to apply *Smith v. Neikirk*’s substantial compliance doctrine where one of the witnesses failed to sign the will).

⁸ The second paragraph of the Board’s footnote, not quoted above, discusses whether a notary’s signature on a later-executed self-proving affidavit attached to (not integrated in) a codicil could be construed as attesting to the codicil’s execution. *Estate of Kaulay*, 30 IBIA at 121 n.4. The case cited there, *Cooper v. Liverman*, 406 S.W.2d 927 (Tex. Civ. App. 1966), is factually distinct from the case at hand. The self-proving affidavit was not integrated into the codicil, it was signed more than a week after the codicil, and the notary was not present at the codicil’s execution—he only heard its acknowledgment. The court held that this did not amount to witnessing the codicil’s execution.

II. Decedent's 2002 Will

The purpose of the intent requirement, according to *Baxter*, is to ensure that witnesses called to testify in probate hearings performed the legal obligations of attesting witnesses, including observing the testator's testamentary capacity.⁹ 104 S.W.2d at 268. But in our view, this explanation would not justify rejecting as a witness a person who did in fact perform all the legal obligations of an attesting witness and who is available and competent to testify. The Restatement cautions that will execution "formalities are meant to facilitate [the determination of a testator's intent], not to be ends in themselves." Rest. (3d) Property: Wills § 3.3, comment (a). Whether or not certain non-explicit requirements may be properly inferred from the regulations, we are not convinced that proof of intent to act in the capacity of a will witness is one of them.

Here, Cook's affidavit states that he was present at and observed the will execution, he evaluated and found satisfactory the testator's capacity, and he signed the will. *See* Cook Affidavit at 1-2. This is corroborated by his signature on the 2002 will's notarial certificate. *See* 2002 Will at 5. There would be nothing to gain by requiring proof of Cook's subjective intent at the time of execution, because he already swore that he performed the duties of an attesting witness.¹⁰ To disapprove Decedent's will for lack of a second witness when a

⁹ Another argument for requiring intent applies only to jurisdictions that require a witness to sign "at the direction of" the testator (i.e., where the testator must overtly request the witness to sign as a witness). *See, e.g., Estate of Alfaro*, 703 N.E.2d 620, 622 (1998) (quoting Illinois Probate Code § 6-4). Not all states have this requirement, nor is it required by the Uniform Probate Code. *See, e.g.,* AK Stat. § 13.12.502(a)(3); UPC § 2-502(a)(3)(A). Although similar language is found in the sample affidavits for making a will *self-proved*, *see* 25 C.F.R. § 15.9, the Board has rejected the argument that such language creates additional will execution requirements. *Estate of Lena Abbie Big Bear Yellow Eagle*, 17 IBIA 237, 238-39 (1989).

¹⁰ And given that the regulations already permit other witness testimony to substitute for that of an attesting witness when the attesting witness is physically or mentally unable to testify at a probate hearing, *see* 43 C.F.R. § 30.229(b)(2), formerly at *id.* § 4.233(c) (2002), it is not too large of a leap to conclude that when an attesting witness is rejected because he is not qualified, another competent, qualified individual who also signed the will may serve as a substitute will witness.

willing and competent person fulfilled all the obligations of an attesting witness, but signed a notarial certificate rather than an attestation clause, would elevate form over substance.¹¹

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 vacates the March 2, 2011, Rehearing Order and remands the matter for further consideration.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

¹¹ Self-proving provisions in wills disposing of Indian trust land must be signed by the testator and two disinterested witnesses and must be notarized. *See* 43 C.F.R. § 4.233(a) (2002), now at 25 C.F.R. §§ 15.7–.8. As noted above, Cook’s single signature on the will could not act as both the notarial certificate and as a witness’s signature. *See, e.g., Price*, 871 P.2d at 1083 n.4. The 2002 will’s self-proving provisions therefore failed, but the 2002 will did not fail for lack of proper execution.