



INTERIOR BOARD OF INDIAN APPEALS

Estate of Roger Wilkin Rose

13 IBIA 331 (12/04/1985)

Judicial review of this case:

Dismissed, *Pagonis v. United States Department of the Interior*,  
No. CIV-86-265E (W.D. Okla. Dec. 10, 1986)



# United States Department of the Interior

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

## ESTATE OF ROGER WILKIN ROSE

IBIA 85-5

Decided December 4, 1985

Appeal from a denial of rehearing issued by Administrative Law Judge Sam E. Taylor in Indian probate IP TU 17P 80.

Reversed and remanded.

1. Indian Probate: State Law: Applicability to Indian Probate, Testate Indian Probate: Wills: Construction of

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law.

2. Indian Probate: Wills: Undue Influence

When the evidence shows that the principal beneficiary under an Indian will and the testator were in a special confidential relationship, particularly one involving financial matters, a rebuttable presumption of undue influence is raised, and the burden of rebutting that presumption is borne by the proponent of the will.

APPEARANCES: Amos E. Black III, Esq., Anadarko, Oklahoma, for appellants; William D. Graves, Esq., Oklahoma City, Oklahoma, for appellee. Counsel to the Board: Kathryn A. Lynn.

### OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On November 28, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Margaret Ann Rose Sorrells and Roger Bruce Rose (appellants). Appellants sought review of a September 25, 1984, order denying rehearing issued in the estate of Roger Wilkin Rose (decendent) by Administrative Law Judge Sam E., Taylor. The denial of rehearing let stand a July 23, 1983, order issued by Administrative Law Judge Garry V. Fisher that determined decendent's heirs and approved his will. For the reasons discussed below, the Board reverses both orders.

#### Background

Decendent, an unallotted Wichita Indian of the Anadarko Indian Agency in Oklahoma, was born September 6, 1914, and died on February 6, 1979.

Hearings to probate his Indian trust estate were held on November 19, 1980, and February 5, 1981, before Judge Fisher. The evidence presented at the hearings showed that decedent was survived by two children, appellants here, who would have been his heirs if he had died intestate. 1/ A document dated September 13, 1977, and purporting to be decedent's last will and testament was also presented at the hearing. Under the terms of this will, decedent left all of his property to his friend, George J. Pagonis (appellee). Appellants vigorously contested the validity of this will.

Appellants contended alternatively that the will was a forgery, or, if genuine, was procured through undue influence exerted upon decedent by appellee. In approving the will, Judge Fisher first found that the testimony of the will witnesses 2/ that decedent wrote the will was more probative than the testimony of handwriting experts, who disagreed over whether the handwriting was that of decedent or appellee. He thus found that the will was not a forgery.

In deciding whether the will was procured through undue influence, Judge Fisher stated, at page 3 of his order, the following legal proposition: "If it be determined the testamentary act is voluntary, free from duress, undue influence, coercion or mistake, the Secretary shall not substitute his judgment for that of the testator, though it be somewhat improvident or unfair." In support of this proposition, Judge Fisher cited Tooahnippah v. Hickel, 397 U.S. 598 (1970). Judge Fisher then found that appellee, the proprietor of a hotel where decedent resided during the last years of his life, had provided decedent with food and shelter and managed his finances. 3/ He further found that decedent did not have a forceful character, was highly dependent upon alcohol, was influenced by and grateful to appellee, and was remote from his family. The Judge concluded that although there was evidence of influence, the will was nonetheless decedent's voluntary act. Accordingly, he approved the will.

Appellants sought rehearing. By order dated September 25, 1984, Judge Taylor 4/ denied rehearing, stating that the allegations raised by appellants were addressed by Judge Fisher, and that the record showed that the decision was supported by a preponderance of the evidence.

Appellants filed a notice of appeal that was received by the Board on November 28, 1984. Both appellants and appellee filed briefs on appeal.

#### Discussion and Conclusions

[1] Appellants and appellee extensively cite Oklahoma case law relating to the construction of wills, the determination of testamentary capacity,

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1/ Decedent's third child, Leonard Dale Rose, predeceased his father without issue.

2/ The three will witnesses were a person then employed by appellee, a former employee and close associate of appellee, and appellee's father.

3/ Decedent's finances had previously been managed by his brother, Newton Rose. For several years prior to the execution of the will, the Bureau of Indian Affairs (BIA) had managed decedent's Individual Indian Money account.

4/ Judge Fisher retired before the petition was heard.

and the determination of whether a testator was subjected to undue influence. Although informative, these citations are not controlling because the construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law. Accordingly, Federal case law, including the decisions of this Board, are controlling. <sup>5/</sup> See, e.g., Estate of William Mason Cultee, 9 IBIA 43 (1981), aff'd sub nom., Cultee v. United States, No. 81-1164 (W.D. Wash. Sept. 14, 1982), aff'd, 713 F.2d 1455 (9th Cir. 1983), cert. denied, 104 S. Ct. 2150 (1984).

Appellants argue on appeal, as before both Administrative Law Judges, that the will was either a forgery or the product of undue influence. The Board will first address the issue of undue influence.

The general standard, correctly cited by both parties, for determining whether an Indian testator was subjected to undue influence in the execution of his will is set forth in the Board's decision in Estate of William Cecil Robedeaux, 1 IBIA 107, 126, 78 I.D. 234, 244 (1971):

To invalidate a will because of undue influence upon a testator, it must be shown: (1) that he was susceptible to 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.

This standard places the burden of proving undue influence on those contesting the will. It is clear from Judge Fisher's decision that this is also the standard he followed in reaching his decision.

[2] However, as stated in Estate of Charles Webster Hills, 13 IBIA 188, 194, 92 I.D. 304, 307 (1985):

[T]he Board has also held that when the facts of a particular case show that the principal beneficiary under an Indian will was in a confidential relationship with the testator and actively participated in the preparation of the will, a rebuttable presumption arises that undue influence was exerted upon the testator, and the burden shifts to the will proponent to show there was no undue influence. See, e.g., Estate of Julius Benter, 1 IBIA 24 (1970); Estate of Lewis Leo Isadore, IA-P-21 (1970); Estate of George Green, IA-T-11 (1968).

This rebuttable presumption and the shift in the burden of proof was extensively reviewed and reaffirmed in Estate of Philip Malcolm Bayou, 13 IBIA 200 (1985).

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<sup>5/</sup> The wills of those Indians that are by Federal statute made subject to probate in the courts of the State of Oklahoma are, of course, subject to State law. See, e.g., 25 U.S.C. § 375 (1982).

The facts of the present case establish the existence of a confidential financial relationship between decedent and appellee. It is uncontroverted that appellee received decedent's payments from the Veterans Administration, was a joint owner of decedent's checking account, and received BIA's monthly payments to decedent. Appellee wrote all of the checks against decedent's checking account, and provided him with spending money. Appellee also provided decedent with shelter at his hotel and food from his hot dog stand.

It is also uncontroverted that appellee was active in the preparation of decedent's will. The will form was obtained at a local office supply store and was filled out in long-hand without the presence of legal counsel. The parties and their handwriting experts dispute whether the handwriting on the will is that of decedent or appellee. There is, however, no dispute that appellee was present during the execution of the will, under which he is the sole beneficiary. The will witnesses all had close associations with appellee.

These circumstances are sufficient to raise a rebuttable presumption that appellee exerted undue influence upon decedent. The burden thus shifts to appellee to show that he did not exert undue influence upon decedent. As the Board stated in Hills, supra at 195, 92 I.D. at 308, "[i]n order to rebut the presumption, there must be a showing that an objective, independent person discussed the effect of the will with the decedent." See also, Isadore, supra; Green supra. Because no such showing has been made in this case, and no other evidence against the presumption was offered, the Board finds that appellee has failed to carry his burden of proving that he did not exert undue influence upon decedent in the execution of his will. See Bayou, supra at 208-209. 6/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 23, 1983, order approving will issued by Judge Fisher and the September 25, 1984, order denying rehearing issued by Judge Taylor are reversed. The case is remanded to Judge Taylor for implementation of this decision through the issuance of an appropriate order allowing distribution of decedent's estate.

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//original signed

Jerry Muskrat  
Administrative Judge

I concur:

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//original signed

Bernard V. Parrette  
Chief Administrative Judge

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6/ Because of this disposition, the Board does not reach the other arguments raised. It notes, however, that appellee's argument that the will was self-proved must fail under Federal regulation. Under 43 CFR 4.233(a), self-proved wills are not conclusively presumed valid if they are contested. See Hills, supra.