



INTERIOR BOARD OF INDIAN APPEALS

Estate of Hiemstennie (Maggie) Whiz Abbott

2 IBIA 53 (09/13/1973)

Also published at 80 Interior Decisions 617

Related case:

4 IBIA 12

Reconsideration denied, 4 IBIA 79

Affirmed, *Burkybile v. Smith*, No. C-75-190 (E.D. Wash. Jan. 21, 1977)



United States Department of the Interior

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

ESTATE OF HIEMSTENNIE (MAGGIE) WHIZ ABBOTT

IBIA 73-3

Decided September 13, 1973

Appeal from the Judge's decision denying the validity of Last Will and Testament leaving decedent's entire estate to her niece, Ramona Whiz Smith, as sole devisee.

Reversed and remanded.

Indian Probate: Administrative Procedure: Applicability to Indian Probate

The requirement of the Administrative Procedure Act, that all decisions of a Judge shall include a statement of findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record is mandatory and applicable to all decisions of Judges in Indian Probate proceedings.

Indian Probate: Administrative Procedure: Official Notice, Record

Official notice of documents and records will not be taken unless they are introduced in evidence or unless an order or stipulation provides to the contrary.

Indian Probate: Rehearing: Generally

A rehearing will be granted where the original hearing did not conform with the standards of a full opportunity to be heard embodied in the Administrative Procedure Act (5 U.S.C. §§ 554 and 556 (1970)).

APPEARANCES: Alvis Smith, Sr., for appellants.

OPINION BY MR. SABAGH

The probate of the estate of Hiemstennie (Maggie) Whiz Abbott, an enrolled and allotted Yakima Indian of the State of Washington,

was the subject of a hearing held on October 14, 1971. Judge Snashall denied the validity of a purported last will and testament dated March 2, 1970, leaving decedent's entire estate to a niece, Ramona Whiz Smith, because of: (1) the legal incompetence of the decedent; (2) the legal incompetence of one of the witnesses to the will; and (3) because of a presumption of undue influence in the making and execution of the will. The appellants are the children of the subsequently deceased sole devisee named in the decedent's will.

The Judge decreed that after payment of costs of administration and subject to allowed claims, the trust estate should be distributed to Doris Imogene Whiz Berkybile, the sole surviving heir at law.

A petition for rehearing was denied on June 1, 1972, and an appeal was filed by Alvis Smith, Sr., as guardian ad litem for and on behalf of the children of the devisee subsequently deceased. The appellants, among other things petition the Board to consider the whole record in this cause which petition we hold satisfies the requirements of 43 CFR 4.291.

The grounds for the appeal are identical to those referred to in the appellants' petition for rehearing and official notice is taken thereof.

The appellants, among other things, contend that the minor children of Ramona Smith were not previously advised or represented by counsel.

A rehearing will be granted where the original hearing did not conform with the standards of a full opportunity to be heard embodied in the Administrative Procedure Act 5 U.S.C. §§ 554 and 556 (1970); Estate of Joseph Red Eagle, 2 IBIA 43; 80 I.D. 534 (1973).

It does not appear from an examination of the record that the children of Ramona Whiz Smith were represented by counsel. It does appear from the transcript that Alvis Smith, Sr. was appointed by the Judge as their guardian ad litem at the only hearing held (Tr. 24), and that he requested a continuance of the hearing in order that he as guardian ad litem of the minor children could be represented by counsel (Tr. 32) which request was denied.

We note the colloquy between the Judge and Alvis Smith, Sr. concerning the matter of continuance (Tr. 32, 33), and the Judge's statement in his order denying petition for rehearing (Order Denying Petition For Rehearing, p. 1, par. 4.) which statement is nowhere substantiated in the record.

We cannot agree that the minor children of Ramona Whiz Smith were granted a full opportunity to be heard.

The Board turns its attention now to the record itself. It is noted that in addition to the transcript of the October 14, 1971 hearing, the record includes several affidavits which purportedly are detrimental to the interests of the devisee's minor children. The affidavits were not tendered or admitted in evidence, and the affiants were never subjected to cross-examination. It is further noted that reliance is given, in the Order of March 10, 1972 disapproving the will and decree of distribution, to purported evidence included in the records of other estates already probated. (Estate of Ramona Whiz Smith, IP PO 466L 71-65; Estate of Nocktusie Willie William Whiz, Sr., IP PO 467L 71-66).

There is no indication that the above were incorporated into the proceedings of October 14, 1971, by being submitted for identification and introduction into evidence, nor were the interested parties afforded an opportunity to see and refute same during the course of the hearing or afterward.

It is also noted that the Judge made no findings of fact, as such. See Estate of Lucille Mathilda Callous Leg Ireland, 1 IBIA 67, 78 I.D. 66 (1971); Estate of Joseph Red Eagle, 2 IBIA 43, 80 I.D. 534 (1973).

The Board is not unmindful of the trials and tribulations of an Administrative Law Judge in matters such as these. However, due process dictates the manner in which one must proceed.

We find that the minor children of Ramona were not granted a full opportunity to be heard; that the evidence considered by the Judge was not incorporated into the record; and that no findings of fact were made.

Therefore, we remand the case for rehearing so that the record shall include inter alia, a transcript including therein, all relevant testimony and documentary evidence admitted at the hearing relating to: (1) the issue of competency of the testatrix and one of the witnesses to the will of Hiemstennie (Maggie) Whiz Abbott, deceased; and (2) the issue of undue influence. The Judge shall then issue a decision including findings of fact and conclusions of law based upon the record.

NOW THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, we REVERSE the order denying the petition for rehearing and REMAND the matter to the Administrative Law Judge for rehearing to determine heirs, and to approve or disprove the will.

//original signed
Mitchell J. Sabagh, Member

I concur:

//original signed
David J. McKee, Chairman