



INTERIOR BOARD OF INDIAN APPEALS

Estate of Elizabeth Frank Greene (Green)

3 IBIA 110 (09/19/74)

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# United States Department of the Interior

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

ESTATE OF ELIZABETH FRANK GREENE (GREEN)

(Deceased Nez Perce Allottee No. 1517)

IBIA 74-15

Decided September 19, 1974

Appeal from an Administrative Law Judge's order denying petition for rehearing.

Affirmed and Dismissed.

1. Indian Probate: Wills: Applicability of State Law

Limitations prescribed by state law have no bearing on the validity of wills made by Indians in disposing of trust allotments or restricted personal property, unless such provisions have been adopted in the regulations promulgated by the Secretary of the Interior respecting Indian wills.

2. Indian Probate: Wills: Applicability of State Law

Indian probate proceedings involve considerations which go beyond the conventional issues of a state probate proceeding and evidence may be admitted in an Indian probate proceeding which would not be relevant to the probate of a will in a state proceeding.

3. Indian Probate: Appeal: Administrative Law Judge as Trier of Facts

When the views of witnesses are conflicting, the findings of the Administrative Law Judge, as the trier of facts and as one who had the opportunity to observe the witnesses, shall be given great weight.

4. Indian Probate: Attorneys at Law: Fees

Claim for attorney's fees for services rendered on an appeal is not a proper charge or tax as costs of the administration of an estate.

APPEARANCES: Norman L. Gissel, Attorney for Virginia Miller, appellant; Frank V. Barton, Attorney for Arthur Moore, Sr., appellee.

OPINION BY ADMINISTRATIVE JUDGE WILSON

The above-entitled matter comes before the Board on an appeal filed by Virginia Miller, hereinafter referred to as appellant, from a decision of an Administrative Law Judge denying her petition for rehearing.

Elizabeth Frank Greene, Nez Perce Indian Allottee No. 1517, hereinafter referred to as decedent, died testate on August 23, 1971, at the age of ninety-four years seised of trust property estimated at \$99,050. The decedent was survived by her son, Arthur Moore, Sr., hereinafter referred to as appellee, to whom the entire estate would descend in the absence of a valid last will and testament.

The matter was first set down for hearing on November 1, 1971, with Frances C. Elge, Administrative Law Judge, presiding. Testimony at this hearing was confined to decedent's family history and to the testimony of the subscribing witnesses to the

will, Wallace Wheeler and Mary Moody. Neither the appellant nor the appellee was represented by counsel at this hearing. Thereafter, the first supplemental and second supplemental hearings in the matter were scheduled and held on August 23, 1972, and February 28, 1973, respectively, with Administrative Law Judge Robert C. Snashall presiding. The appellee only was represented by counsel at the first supplemental hearing. In the latter hearing both appellant and appellee were represented by counsel.

Based upon the evidence adduced in the proceedings, Judge Snashall on May 1, 1973, issued an order disapproving the decedent's last will and testament of April 8, 1971. The Judge further ordered distribution of the decedent's trust estate to Arthur Moore, Sr., the appellee herein.

The appellant under date of June 25, 1973, filed a petition for rehearing based on the following issues:

I.

That the administrative law judge based his decision in part on the fact that proponent of will had no knowledge of the conditional terms of the will of Elizabeth Frank Greene. Proponent asserts the position that where a conditional beneficiary of a will is ignorant of the terms of the will, said ignorance does not preclude her receiving the benefits of the

conditional devise or bequeath when the condition to be performed was in fact performed by said conditional devisee.

II.

That the administrative law judge in holding against the proponent, incorporated the theory of undue influence in his decision. That the proponent respectfully submits that this theory was not before the court and therefore not a proper theory upon which to render a decision.

III.

That even if the issue of undue influence was properly before the court, the evidence presented by the contestant of the will was not sufficient to prove undue influence.

IV.

That the administrative law judge based his decision in part on the proponent's failure to overcome the heavy presumption of undue influence, said presumption is not reflective of Idaho law which states that the contestant of a will that has been admitted to probate has burden of showing undue influence and that burden never shifts to proponent.

V.

That the primary issue before the court was the incompetency of the testatrix, and where the contestant places the issue of incompetency before the court, the burden of proving incompetency is on contestant, and said contestant failed to carry this burden.

VI.

That on first hearing in this matter, both proponent and contestant were without legal counsel; Administrative Law Judge Francis Elge advised only the contestant to seek legal assistance, and only contestant sought legal counsel for the second hearing, and that the second hearing was conducted with no legal counsel for proponent, and that this set of facts constitutes prejudicial error on part of administrative law judge.

VII.

That on first hearing in this matter, both proponent and contestant were without legal counsel, Administrative Law Judge, Frances Elge advised only the contestant to seek legal assistance, and only contestant sought legal counsel for the second hearing, and that the second hearing was conducted with no legal counsel for proponent. That there was evidence entered prejudicial to proponent and that proponent was effectively denied right to cross examination, and that this set of facts constitutes prejudicial error on part of administrative law judge.

The Judge in considering the appellant's petition for rehearing consolidated appellant's foregoing seven issues into the following three basic contentions:

\* \* \* (1) that petitioner's asserted ignorance of the provisions of the Will was a basis for denying her the benefits thereof; (2) an improper finding of undue influence and incompetency of the decedent; and (3) alleged deprivation of the right of counsel.

The Judge considered and disposed of the above contentions in the following language:

Petitioner, by her first contention, seems to be contending that the decision was improper because it was at least in part based upon the belief that petitioner should be precluded from receiving benefits of the conditional devise or bequeath because she was purportedly unaware or ignorant of the terms of condition in the Will. Apparently, petitioner misunderstood the Order since no such interpretation or holding was intended. What was

stated in the Order, as dicta, was that petitioner by her own testimony, emphatically denied the Will's recital that she understood and agreed to the conditions precedent in the Will and that therefore she could not rely upon those conditions which in that context could only have been considered a bilateral contract. The ultimate fact of her denial was used merely for the purpose of showing the untrustworthiness of her testimony since other evidence clearly showed not only her complete knowledge of the conditions contained in the Will but her complicity in their creation and publication.

Petitioner's second basic contention is merely an argument on the facts without the introduction of new and additional evidence and is therefore outside the scope of a Petition for Rehearing. The simple fact is that testatrix, due to a number of reasons, was highly susceptible to the suggestions and promptings of the petitioner and that the Will clearly, when laid alongside the evidence produced upon the hearings, reflected the petitioners (sic) heavy hand in the matter. Petitioner wholly failed to overcome this strong presumption of undue influence. Estate of Mary Ursula Rock Well Known, (sic) IBIA 70-7 (1971); cf: Estate of Louis Leo Isadore, IA-P-21 [1970], Estate of Julius Benter, IBIA 70-5 [1970].

Petitioner's third contention concerning deprivation of the right of counsel is without merit. Administrative Law Judge Frances Elge did in fact advise contestant of the Will to seek legal assistance and it appears obvious from the record she did so in view of her knowledge of the complexity of such an undertaking and the need for technical expertise in so doing. It is hard for me to understand how this could be prejudicial to petitioner. Petitioner in her own right elected by her own volition to appear at the first and second hearings without the assistance of trained counsel; that she did so can not now be used as a means of upsetting an otherwise proper proceeding. She must be held responsible for her own acts and although it may seem incredible that she would undertake to defend a Will contest involving an estate of this magnitude without the assistance of able counsel, she did so elect. Additionally, the record clearly reflects that every effort was made, not only by the hearing Judge but by opposing counsel, to insure to her a fair and impartial hearing and in fact the latter was overly solicitous in this respect. Finally, it should be noted and

the record reflects, a third hearing was granted primarily due to petitioner's failure to obtain assistance in connection with the first two hearings and as a mean of providing her full additional opportunity to come forth with counsel, as she did, and thoroughly present her case.

The Judge on the basis of the foregoing reasons denied appellant's Petition for Rehearing on July 6, 1973.

From the denial of July 6, 1973, the appellant filed the appeal herein assigning in support thereof the following errors:

1. That the administrative law judge based his decision on undue influence when that theory was not properly before the court and therefore was not a proper theory upon which to render a decision.
2. That even if the issue of undue influence was properly before the court, the evidence presented by the contestant of the will was not sufficient to prove undue influence.
3. That the administrative law judge based his decision in part on the proponent's failure to overcome the heavy presumption of undue influence, said presumption is not reflective of Idaho law which states that the contestant of a will that has been admitted to probate has burden of showing undue influence and that burden never shifts to proponent.
4. That the primary issue before the court was incompetency of the testatrix, and where the contestant places the issue of incompetency before the court, the burden of proving incompetency is on the contestant, and said contestant failed to carry this burden.
5. That on first hearing in this matter, both proponent and contestant were without legal counsel;

Administrative Law Judge Frances Elge advised only the contestant to seek legal assistance, and only contestant sought legal counsel for the second hearing, and that the second hearing was conducted with no legal counsel for proponent, and that this set of facts constitutes prejudicial error on part of administrative law Judge.

6. That on first hearing in this matter, both proponent and contestant were without legal counsel, Administrative Law Judge Frances Elge advised only the contestant to seek legal assistance, and only the contestant sought legal counsel for the second hearing, and that the second hearing was conducted with no legal counsel for proponent. That there was evidence entered prejudicial to proponent and that proponent was effectively denied right to cross examination, and that this set of facts constitutes prejudicial error on part of administrative law judge.

7. That the administrative law judge's decision on petition for rehearing was erroneous on the preceding six issues of this Notice of Appeal.

The Board is not in agreement with the appellant's contention that the theory of undue influence was not properly in issue in the proceedings and therefore an improper theory on which the Administrative Law Judge based his decision. The Administrative Law Judge under the general authority of 43 CFR 202 is obligated to approve and disapprove wills of deceased Indians disposing of trust property. To this end, he must receive and consider any and all pertinent evidence, including among other things, evidence regarding undue influence.

The provisions for submitting and receiving evidence in Indian probate proceedings are set forth in 43 CFR 4.232(a) which provides:

Parties in interest may offer at a hearing such relevant evidence as they deem appropriate under the generally accepted rules of evidence of the State in which the evidence is taken, subject to the Administrative Law Judge's supervision as to the extent and manner of presentation of such evidence.

Evidence regarding contested wills are governed by the same provisions except for the provision of 43 CFR 4.233(c) which requires the taking of testimony of subscribing witnesses regarding the execution of the will.

No formal pleadings nor the defining of issues is required in trust probate proceedings by existing rules and regulations presently set forth in 43 CFR 4.200 et seq. Absence of such requirement in Indian probate matters appears to be necessary so as not to possibly preclude introduction of evidence that may prove of major importance in the final determination made by an Administrative Law Judge.

Moreover, the appellant's further contention that the Judge's application of the law regarding presumption and burden of proof

on undue influence was not in accord with Idaho law is without merit.

[1] The Department has long adhered to the rule that state laws have no application in Indian trust probate proceedings involving wills. Estate of Ke-to-sah Jefferson, IA-19 (May 14, 1950); Estate of Annie Devereaux Howard, IA-884 (December 17, 1959); Estate of Laverne Wagon, A-24459 (December 17, 1946) (June 4, 1948) and (September 21, 1948).

[2] Indian probate proceedings involve considerations which go beyond the conventional issues of a state probate proceeding and evidence may be admitted in an Indian probate proceeding which would not be relevant to the probate of a will in a state proceeding. Estate of Mary Ursula Rock Wellknown, 1 IBIA 83, 78 I.D. 179 (1971); Upheld in Shaw v. Morton, Civil No. 974 (D. Mont., July 9, 1973).

[3] In cases where conflicting testimony has been presented and received by an Administrative Law Judge and he concludes that undue influence was exerted, his findings and conclusions will not be disturbed if his decision is supported by credible evidence. Estate of Annie Grace, 63 I.D. 68 (1956); Estate of Richard Wolf, IA-490 (September 6, 1955).

In the case at bar, the Administrative Law Judge, having heard the testimony and having observed the witnesses, properly concluded that undue influence had been exerted on the decedent.

We are not in agreement with the appellant's contention that the primary issue in the proceedings was incompetency of the decedent and that the appellee failed to carry the burden of proving incompetency. The record indicates that the decedent at the time the will was executed was 94 years of age, blind, unable to walk, semi-bedridden, and unable to read, understand or speak the English language. Again as in the case of conflicting testimony regarding undue influence, the Administrative Law Judge, as the trier of facts after having observed the witnesses, must resolve what weight is to be given to the testimony and evidence presented. Estate of Felicite (Mrs. Matches), IA-1441 (July 12, 1966).

The evidence, consisting of some 266 pages of testimony given in behalf of the appellant and appellee with respect to what transpired at the time of the execution of the will and what prompted the making thereof, is in conflict. Considering the record before us, we are unable to say that the decision of the Administrative Law Judge on the issue of undue influence and testamentary capacity is clearly against the weight of the evidence. Accordingly, the Judge's decision is entitled to stand.

The appellant's final contention that the failure of the Administrative Law Judge to advise both appellant and appellee to seek legal counsel constituted prejudicial error is without merit. The record indicates every effort was made to accommodate the appellant in the proceeding. The Judge, in fact, continued the hearing to a later date and advised Appellant to seek legal counsel. The record does not indicate any prejudicial action taken against appellant during the proceedings in the way of limiting her to the number of witnesses she could present or denying her the right to cross-examine.

The Board having reviewed and considered the record as presently constituted finds that the decision of the Administrative Law Judge entered under date of July 6, 1973, denying Virginia Miller's petition for rehearing should be affirmed and the appeal dismissed.

[4] The Board further finds that the motion of Virginia Miller, the Appellant herein, for allowance and payment of attorney's fees in the amount \$500 to Norman L. Gissel for services rendered her in this appeal is an improper and inappropriate claim to be assessed or taxed as costs of the administration of the estate. Accordingly, the motion must be denied.

The Board further finds the motion of Arthur Moore, Sr., for allowance and payment of attorney's fees in the amount of \$500 to Frank V. Barton for services rendered him in connection with this appeal should be allowed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge dated July 6, 1973, denying Virginia Miller's petition to rehear, be, and the same is hereby AFFIRMED and the appeal herein is DISMISSED.

The claim of Norman L. Gissel for attorney's fees in the amount of \$500 for services rendered in connection with this appeal is hereby DENIED.

The claim of Frank V. Barton for attorney's fees in the amount of \$500 for services rendered to Arthur Moore, Sr., in connection with this appeal is hereby ALLOWED and said amount shall be paid from funds in the decedent's estate.

This decision is final for the Department.

Done at Arlington, Virginia.

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//original signed  
Alexander H. Wilson  
Administrative Judge

I concur:

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//original signed  
David J. McKee  
Chief Administrative Judge