



INTERIOR BOARD OF INDIAN APPEALS

Estate of Peahner (Mabel) (Mable) Mahseet

5 IBIA 27 (02/23/1976)



United States Department of the Interior

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

ESTATE OF PEAHNER (MABEL)
(MABEL) MAHSEET

IBIA 75-66

Decided February 23, 1976

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

Reversed and Remanded.

1. Indian Probate: Evidence: Generally--Indian Probate: Wills:
Testamentary Capacity: Generally

The general rule that an Administrative Law Judge's finding of testamentary capacity rendered after consideration of conflicting testimony will not be disturbed on appeal is not an unqualified rule. The judge's finding must be supported by substantial evidence and the evidence relied upon must be competent.

2. 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.

3. Indian Probate: Attorneys at Law: Generally--Indian Probate:
Evidence: Newly Discovered Evidence

There is no existing requirement that the Secretary of the Interior furnish counsel to parties in Indian probate proceedings conducted in accordance

with 43 CFR 4.200 et seq. Secondly, the absence of eligible private counsel from an Indian probate hearing, standing alone, does not present sufficient justification for requiring a rehearing in order to receive additional evidence.

4. Indian Probate: Attorneys at Law: Generally--Indian Probate: Wills: Generally--Indian Probate: Wills: Testamentary Capacity: Generally--Indian Probate: Wills: Self-Proved Wills

Under the circumstances of a contested will which includes a devise of property to a brother long dead, a "self-proved will" does not pass muster by perfunctory questioning of witnesses. Further, although the task of the Administrative Law Judge to develop a complete record may be made more difficult by the absence of counsel for the parties, this important function must still be satisfied.

5. Indian Probate: Evidence: Requests for Discovery

The Department's regulations concerning the rights of parties to submit discovery requests, 43 CFR 4.220 et seq., were designed to facilitate the achievement of a full and complete hearing. The regulations do not provide that an Administrative Law Judge should reopen discovery, after a hearing, to assist aggrieved parties in a search for new evidence. However, where a hearing de novo has been found to be required, it is appropriate to reopen discovery for all parties up to the time that a new hearing is scheduled.

6. Indian Probate: Attorneys at Law: Generally

An Administrative Law Judge is obligated to advise Indian parties of their right

to counsel in Indian probate proceedings. When parties voluntarily proceed with a hearing without counsel the Administrative Law Judge shoulders an additional responsibility.

APPEARANCES: B. Wayne Dabney, Esq., for appellants; Bill Sexton, Esq., for appellees.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

On appeal from an Administrative Law Judge's order denying a petition for rehearing, appellants seek to overturn an order approving the final will of Mabel Mahseet Peahner, deceased Comanche Allottee No. 879, on grounds that the deceased lacked testamentary capacity to make a will.

Testatrix died on January 17, 1974. Her final will was dated March 10, 1970, and was the subject of a probate hearing conducted September 26, 1974, by Administrative Law Judge John F. Curran. On December 20, 1974, Judge Curran issued an Order Approving Will and Decreeing Distribution. Two nieces of the testatrix filed a timely petition for rehearing on February 19, 1975. By order dated February 27, 1975, Judge Curran denied the petition and this appeal followed.

The Board has reviewed the complete record in this case and considered the points raised by appellants in their notice of appeal. For the reasons set forth herein, the Board concludes that the Administrative Law Judge's order denying the petition for rehearing should be reversed and the cause remanded for a hearing de novo.

[1] The general rule that an Administrative Law Judge's finding of testamentary capacity rendered after consideration of conflicting testimony will not be disturbed on appeal is not an unqualified rule. The Judge's finding must be supported by substantial evidence, Estate of Ton-Nah-Pa (Navajo Allottee No. 011410, Deceased), 2 IBIA 152, 81 I.D. 42 (1974), and the evidence relied upon must be competent. Estate of Frank C. Goings, IA-492 (July 23, 1956).

An examination of the record including the original decision and the subsequent order denying appellants' petition for rehearing indicates that the above-stated requirement was not observed.

First, Judge Curran's determination of testamentary capacity was based in part, on documentary evidence which was not introduced into evidence. At the September 26, 1974, hearing Judge Curran

made available to the parties one will for their inspection. This was the March 10, 1970 will of the testatrix which was identified by the scrivener and the second attesting witness to the will. Since the subject will was contested at the hearing, and in response to certain evidence which brought into question the testamentary capacity of the decedent, discussed infra, Judge Curran made an independent review of two prior wills on file for the decedent, subsequent to the hearing, to assist in his analysis of the 1970 will. Simultaneous with the denial of appellants' petition for rehearing, the two prior wills, dated 1956 and 1966, were "made a part of the original record" (Order Denying Petition, p. 2).

[2] It is the holding of the Board that 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. There was no indication that the documents in question have ever been presented to or considered by either of the interested parties. No single one of these documents was marked for identification at any hearing or admitted in evidence. See Estate of Julius Benter, 1 IBIA 59 (January 12, 1971), and Estate of Greybull, IA-D-2 (September 7, 1966).

Remand would not be necessary in this matter if the Board was satisfied that the original record supported a finding of testamentary capacity. Without the benefit of counsel, however, the appellants elicited evidence that the testatrix lacked the ability to identify surviving members of the family (Tr., p. 3); that not all of decedent's property was included in the will (Tr., p. 3); that the testatrix would not have heard the will recited to her unless the scrivener read it very loudly (Tr., p. 4); and that the will as a whole was too complicated for the testatrix to have comprehended her action (Tr., p. 31, 33). As originally constituted, the record does not satisfactorily dispense with these questions.

After the retention of counsel, the appellants requested a rehearing in this case. In addition to the evidentiary objection discussed supra, it was represented in the petition for rehearing that "newly discovered evidence" was on hand which would further undercut the original finding of testamentary capacity. Affidavits attached to the petition revealed, inter alia, the possibility that unless the decedent's will had been discussed with her in her native Comanche tongue, she could not have understood what she was doing. A witness to decedent's execution of her 1966 will would apparently testify that in his opinion the decedent was incapable of understanding the nature of her actions at that time even though he tried to explain the prior will to her in Comanche. Also, the proposed testimony of

a car dealer who sold a vehicle to the decedent, and who was awarded a claim in the original decision, casts some doubt on the ability of the testatrix to have understood common business transactions. Other statements in the affidavits were directed at the alleged inability of the testatrix to recognize relatives and the extent of her property.

It is undeniable that much of the above “newly discovered evidence” constitutes material which should have been brought out at the original hearing. Appellants recognize this fact but contend that had they been represented by counsel at the hearing the information referred to would have been produced. According to appellants, they were under the impression that counsel from the Bureau of Indian Affairs would be in attendance at the hearing to represent their interests. The lack of counsel at the hearing is cited as appellants’ reason for not producing all of their evidence at the hearing. It is not alleged that this absence impinged on the process of a fair hearing.

[3] It may be correct that the appearance of counsel at the hearing would have resulted in the production of evidence which otherwise failed to develop. However, there is no existing requirement that the Secretary of the Interior furnish counsel to parties in Indian probate proceedings conducted in accordance with 43 CFR 4.200 et seq. Secondly, the absence of eligible private counsel from an Indian probate hearing, standing alone, does not present sufficient justification for requiring a rehearing in order to receive additional evidence.

[4] The gravamen of appellants’ claim regarding their “newly discovered evidence” boils down to the charge that basic information bearing on the testamentary capacity of the decedent was not brought out at the hearing as it should have been and that the appellants, as lay persons, should not be faulted for this occurrence. With this the Board agrees and it is held that under the circumstances of a contested will which includes a devise of property to a brother long dead, a “self-proved will” does not pass muster by perfunctory questioning of witnesses, which the record in this case discloses. Further, although the task of an Administrative Law Judge to develop a complete record may be made more difficult by the absence of counsel for the parties, this important function must still be satisfied.

At 43 CFR 4.233(c), it is provided that if a self-proved will is contested, available attesting witnesses to the will "must be produced and examined." Both attesting witnesses to decedent’s

final will, one of whom also acted as scrivener, were produced in this case. Except for a conclusive determination of their signatures, however, it could hardly be said they were "examined." The most glaring deficiency in this regard is the fact that the Administrative Law Judge failed to pose any questions to the scrivener, or any other witness, in search for an explanation of the devise of property by the testatrix to a brother who had been dead 3 years when the 1970 will was executed. The relevance of this point to the testamentary capacity of the testatrix is obvious; Judge Curran, in fact, described the devise in question as "the most disturbing factor of the will" (Order Approving Will, p. 6).

[5] Appellants have also urged in their Notice of Appeal that the Administrative Law Judge committed error in refusing to grant certain discovery requests. The Request for Subpoena and Deposition cited by appellants was received by the Administrative Law Judge on February 20, 1975, the same date appellants submitted their petition for rehearing. The Department's regulations concerning the rights of parties to submit discovery requests, 43 CFR 4.220 *et seq.*, were designed to facilitate the achievement of a full and complete hearing. The regulations do not provide that an Administrative Law Judge should reopen discovery after a hearing to assist aggrieved parties in a search for new evidence. However, in view of the fact that a hearing *de novo* has been found to be required, it is appropriate in this case to reopen discovery for all parties up to the time that a new hearing is scheduled.

[6] It remains to be seen whether a new hearing will result in a different disposition of the decedent's estate. Whatever the outcome, this case impresses on the Board the obligation of an Administrative Law Judge to convey to Indian parties their right to counsel if they so desire in Indian probate proceedings and secondly, the responsibility which is shouldered by the Administrative Law Judge when parties voluntarily proceed with a hearing without counsel. See Estate of Joseph Mjoetah Masquat, IA-T-16 (Nov. 15, 1968).

On February 9, 1976, the Board received from Administrative Law Judge Jack M. Short, successor to Judge Curran, a motion to Dismiss Appeal, filed by Mr. Bill Sexton on behalf of Mamie Lee Mahseet Prouty. The motion alleges that the appeal discussed in this decision is not timely. The Board issued a Notice of Docketing on May 23, 1975, in which it was stated that the appeal in question was timely filed. The file has been reexamined and the Board reaffirms that the appellants brought a timely appeal. Accordingly, the motion to dismiss should be denied.

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 Order Denying Petition for Rehearing, issued by former Administrative Law Judge John F. Curran on February 27, 1975, is hereby REVERSED and the case REMANDED to Administrative Law Judge Jack M. Short for a Hearing DE NOVO.

The Motion to Dismiss Appeal, received by the Board of Indian Appeals on February 9, 1976, is hereby DENIED.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Mitchell J. Sabagh
Administrative Judge

I concur:

//original signed
Alexander H. Wilson
Administrative Judge