



INTERIOR BOARD OF INDIAN APPEALS

Estate of Emory Dennis Juneau

7 IBIA 164 (1979)



United States Department of the Interior

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

ESTATE OF EMORY DENNIS JUNEAU

IBIA 79-6

Decided June 29, 1979

Appeal of an order affirming disapproval of a will after rehearing.

Affirmed.

1. Indian Probate: Wills: Witnesses: Attesting

An Indian of the age of 21 years 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.

2. Administrative Authority: Generally

Where an Agency lays down its own procedures and regulations, those procedures and regulations cannot be ignored, even by the Agency itself.

3. Indian Probate: Wills: Holographic Wills

A holographic will that does not meet the requirement of attestation by two disinterested adult witnesses is invalid.

4. Administrative Authority: Estoppel

Inaction or unauthorized acts by an employee of the Bureau of Indian Affairs cannot serve as the basis for conferring rights not authorized by law. Moreover, neither the Secretary of the Interior nor the Department is bound or estopped by such inaction or unauthorized acts.

APPEARANCES: Daniel S. Press, Esq., for appellant, Myrna Juneau Galbreath; James W. Zion, Esq., for appellees, Montana F. Juneau Kennedy and Joyce M. Juneau Conway.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

Emory Dennis Juneau, Blackfeet Allottee No. 2655, died December 14, 1976, leaving two wills. The first will was executed on February 8, 1960, naming his wife Daisy Juneau, who predeceased him, as sole devisee and residuary.

Decedent subsequently executed a holographic will on December 1, 1973, naming his daughter, Myrna Fay Juneau, as sole devisee. It was not attested to by two disinterested adult witnesses as prescribed by Departmental regulations.

After a hearing held July 28, 1977, at Browning, Montana, an order was entered February 10, 1978, disapproving both wills and at the same time determining decedent's heirs.

A petition was filed on March 23, 1978, by Lillian Marjorie Reed, widow of decedent's predeceased son, Edmond Lee Juneau, alleging that one of the son's children, Michael Juneau, had been erroneously omitted as an heir of the decedent.

A second petition for rehearing was filed on April 3, 1978, by Myrna Fay Juneau Galbreath, wherein she alleged in substance misfeasance on the part of Bureau of Indian Affairs' personnel in failing to inform the decedent during his lifetime of the defect found in the holographic will, namely, lack of execution by the testator and attestation by two disinterested adult witnesses in the presence of each other.

Appellant further alleged that the gross negligence of the agents of the Secretary of the Interior was directly responsible for the failure of the will to comply with the technical requirements of 43 CFR 4.260, and that the Secretary has the inherent authority to waive the above requirement. She urged that for such reason the will should be approved despite the defect therein.

On September 28, 1978, Administrative Law Judge David J. McKee issued a decision and order amending the February 10, 1978, order to include Michael Juneau, decedent's grandson, as an heir entitled to a one-fortieth interest in decedent's trust estate.

Judge McKee reaffirmed his previous order of February 10, 1978, disapproving the holographic will for the reason that no new or additional evidence was presented at the rehearing which would justify changing his previous determination.

Myrna Juneau Galbreath appealed to this Board on November 20, 1978, for the same reasons alleged in her petition for rehearing, referred to, supra.

Pursuant to the Act of February 14, 1913, the Congress decreed in part that any persons of the age of 21 years having any right, title, or interest in any allotment held in trust has the right to dispose of such property by will, in accordance with regulations prescribed by the Secretary of the Interior, provided, however, that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior. 37 Stat. 678, 25 U.S.C. § 373 (1976).

[1] The aforementioned Act was implemented by Departmental regulations which provided in pertinent part that an Indian of the age of 21 years 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 CFR 4.260(a).

Section 4.260(b) of the Code of Federal Regulations provides that when an Indian executes a will and submits the same to the Superintendent of the Agency, the Superintendent shall forward it to the Office of the Solicitor for examination as to adequacy of form, and for submission by the Office of the Solicitor to the Superintendent of any appropriate comments. The will or codicil or any replacement or copy thereof may be retained by the Superintendent at the request of the testator for safekeeping. A will shall be held in absolute confidence, and no person other than the testator shall admit its existence or divulge its contents prior to the death of the testator.

The appellant contends that the Bureau of Indian Affairs and the personnel thereof failed to abide by the provisions of 43 CFR Part 4, referred to above as 4.260(b).

On April 11, 1978, Judge McKee ordered a rehearing and gave notice of the date of the hearing, indicating therein, inter alia, that allegations were made in the proponent's petition of the failure of the Bureau of Indian Affairs and the personnel thereof to abide by and follow the provisions of 43 CFR Part 4.

Judge McKee further indicated that since a rehearing was necessary for other reasons to consider the existence of an alleged grandchild, the proponent of the will should be permitted to present such evidence as she might have in support of her allegations of misfeasance on the part of the Government.

At the rehearing nothing further was offered by the appellant to substantiate her allegation of misfeasance or nonfeasance on the part of Bureau of Indian Affairs' personnel.

The record indicates the will came from the custody of the Blackfeet Agency. The will was not stamped "received" nor does the record show the circumstances surrounding its being in the custody of the agency, *i.e.*, how it got into the hands of the agency, who received it, when it was submitted, for what purpose, etc.

The appellant without more would have us hold that an apparent failure of the Bureau of Indian Affairs' personnel to transmit the holographic will to the Solicitor for consideration constituted a basis for approval of the holographic will. We know of no legal grounds to support this contention.

The appellant was afforded the opportunity of submitting evidence to substantiate her allegation of Bureau of Indian Affairs' personnel misfeasance at a hearing held on July 28, 1977, and again at a rehearing on May 9, 1978. This she failed to do. It was expected that the Bureau of Indian Affairs personnel who may have had knowledge of the handling of the holographic will would give testimony. This was not done. Nor did appellant apprise the Judge timely or otherwise of witnesses who would have relevant knowledge. Consequently, Judge McKee could not be expected to exercise the subpoena power afforded him by 43 CFR 4.230(b).

Appellant Galbreath was represented by able counsel at the July 28, 1977, hearing.

We turn now to the Departmental regulation which provides in pertinent part that a will must be executed in writing and attested to by two disinterested adult witnesses. See 43 CFR 4.260(a).

[2] The courts have consistently held that where an Agency lays down its own procedures and regulations, those procedures and regulations cannot be ignored, even by the agency itself. United States v. Wilbur, 427 F.2d 947 (9th Cir. 1970), cert. denied, 400 U.S. 945, 91 S. Ct. 250; Smith v. Resor, 406 F.2d 141 (2d Cir. 1969).

[3] We further find that the holographic will executed by the decedent on December 1, 1973, is invalid because it does not meet the requirement of attestation by two disinterested adult witnesses. Estate of Matilda K. Tamaree, IA-118 (Jan. 18, 1954).

[4] Assuming arguendo that the appellant had supported her allegation of misfeasance by a preponderance of the evidence, the failure to act or unauthorized acts of an employee of the Bureau of Indian

