



INTERIOR BOARD OF INDIAN APPEALS

Estate of Jesse Pawnee

12 IBIA 277 (06/11/1984)

Related Board case:
15 IBIA 64



United States Department of the Interior

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

ESTATE OF JESSE PAWNEE

IBIA 83-52

Decided June 11, 1984

Appeal from an order denying rehearing issued by Administrative Law Judge William E. Hammett in IP TU 181P 82.

Vacated and remanded.

1. Administrative Procedure: Administrative Law Judges--Indian
Probate: Hearing: Full and Complete

Although unorthodox methods of conducting hearings in Indian probate proceedings are not encouraged, when circumstances beyond the control of the parties or Judge necessitate unusual procedures, the Administrative Law Judge bears an additional responsibility to ensure that all parties are fully heard and that the Department's trust responsibility is properly discharged.

APPEARANCES: Richard J. Spooner, Esq., Oklahoma City, Oklahoma, for appellant; Les A. Williams, Esq., San Mateo, California, for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

On September 12, 1983, the Board of Indian Appeals (Board) received a notice of appeal from Maggie Bullcoming Domke (appellant), seeking review of an order denying rehearing entered in the estate of Jesse Pawnee (decendent) on July 15, 1983, by Administrative Law Judge William E. Hammett. The order denying rehearing let stand a December 17, 1982, order approving decendent's will, dated February 11, 1982. Under that will, decendent left all of his property to Jean Ann Pawnee Vaitai (appellee). For the reasons discussed below, the Board vacates the order denying rehearing and remands this matter for further consideration. 1/

Background

Decendent, an unallotted Cheyenne Indian, was born on January 9, 1899, and died in San Mateo, California, on February 11, 1982, at the age of 83.

1/ By order dated Mar. 30, 1984, the Board allowed the payment of two creditor's claims against this estate.

Decedent died possessed of Indian trust property on the Cheyenne and Arapaho Reservation in Oklahoma.

Judge Hammett held a hearing to probate decedent's Indian trust estate in San Francisco, California, on September 27, 1982. The hearing was held in California because decedent left a will that had been executed in California, and all persons connected with that will resided there. Appellant, who lives in Oklahoma, did not attend this hearing. Judge Hammett approved decedent's will in an order dated December 17, 1982.

Appellant filed a timely petition for rehearing in which she stated that she had not attended the hearing because she had understood that she would be allowed to present evidence in the proceeding in Oklahoma before a decision was rendered. This understanding was based on a conversation between someone in Judge Hammett's office and a Catholic nun calling on appellant's behalf. The nun reportedly related that appellant could not travel to California for the hearing because of her physical and financial condition.

In response to the petition, Judge Hammett ordered the taking of depositions on appellant's behalf before Administrative Law Judge Sam E. Taylor in Oklahoma. On April 21, 1983, Judge Taylor took depositions in the form of a hearing. After reviewing the transcript of this hearing, Judge Hammett issued an order to show cause, dated May 12, 1983, requiring appellee to give additional proof of decedent's testamentary capacity. Appellee responded with a brief of points and authorities and 17 exhibits. On July 15, 1983, Judge Hammett entered an order denying rehearing and affirming his earlier order approving decedent's will. Appellant sought review of this order by the Board. Both parties filed briefs on appeal.

In summary, the evidence presented in this case shows that decedent had no surviving spouse or children. His three closest living relatives were appellant, who was the daughter of decedent's predeceased half-sister; and appellee and Wilma Rae Pawnee Nibbs, 2/ the two daughters of a predeceased half-brother. Appellant's father and decedent had the same father; appellee's mother and decedent had the same mother. Appellant, who was born on December 17, 1908, was much closer in age to decedent than was appellee, who was born January 22, 1949.

Decedent spent all but the last few weeks of his life in Oklahoma. In 1968 decedent built a one-room house approximately 200 feet from appellant's house. He lived alone in this house from 1968 until he was hospitalized in February 1982, except for periods during the winter when he apparently moved in with appellant because of the lack of adequate heating in his own house. Decedent and appellant both had debilitating physical conditions for which they needed medical attention. They were quite close and relied upon each other for emotional and financial support.

Appellee was born and spent most of her childhood in Oklahoma, near decedent. Appellee states that although she was decedent's niece, he treated her like a daughter because he had no children of his own. Appellee married

2/ Wilma Nibbs is not a party to this case.

at 16 and moved to Nebraska. She did not return to Oklahoma for any period of time between her first marriage and 1982, because she moved to her husband's homes. When decedent died, appellee was living in California.

Appellee came to Oklahoma to see decedent and conduct some business at the Concho, Agency, Bureau of Indian Affairs (BIA), in February 1982, after receiving word that decedent wanted to see her. She states that she found decedent alone in his house, bedridden, without food or drinking water, and in need of medical attention because of infections in his feet. She took decedent to the hospital, where he stayed for about 4 days.

When he was released from the hospital, decedent was advised to enter a nursing home because he required continued care. He was adamantly opposed to this idea, but agreed to accompany appellee to California after he was told that his life would be in danger if he went back to his former living arrangement. Decedent changed his address at the post office and bank. Appellee relates that decedent wanted to go to the BIA agency to make out a will, but because she was concerned about the weather, she suggested that they could do it at another time. The drive to California, including an initial stop in Nebraska to see appellee's children, took several days. Five days after arriving in California, decedent was taken to the hospital, complaining of stomach pain. He was treated in the emergency room and then admitted to the hospital.

According to appellee, the day after decedent entered the hospital in California, he asked her to get someone to make out a paper so that his bills could be paid. The nursing staff told her that he would need a power of attorney. Through her husband's employer, she contacted Mr. Les Williams, an attorney in San Mateo, who agreed to prepare a power of attorney. When Mr. Williams was informed by a doctor that decedent probably did not have long to live, he advised appellee and decedent that a power of attorney would expire on decedent's death and suggested that decedent prepare a will. Because Mr. Williams understood that appellee was decedent's only heir, he suggested that the will leave all of decedent's property to appellee. Such a will was prepared. Mr. Williams and a relative by marriage of appellee witnessed the will. Both will witnesses stated that although decedent was obviously very ill, he appeared alert, clear in his thinking, and aware of what he was doing. Decedent died the same evening.

Appellant suggests that decedent could not have had testamentary capacity when the will was executed because of his physical condition and the effects of the medication he was taking. She asserts that the signatures on the power of attorney and the will are not decedent's and disputes appellee's contention that the illegibility of the signatures is attributable solely to decedent's arthritis and the fact that he was writing while propped up in bed.

Discussion and Conclusions

Appellant's primary argument against the approval of decedent's will is that she was denied due process by not being permitted an opportunity to respond to the additional information and documents submitted by appellee in response to Judge Hammett's order to show cause. Appellant asserts that she has been denied the right to cross-examine witnesses and to counter the evidence presented as to decedent's testamentary capacity.

Judge Hammett was faced with a difficult situation in this case. The will scrivener, witnesses, and devisee resided in California; the will contestant, who resided in Oklahoma, suffered from a debilitating disease that made it impossible for her to travel and difficult for her to speak. Thus, after determining that the hearing should be held in California, Judge Hammett properly allowed the taking of additional evidence in Oklahoma from appellant's witnesses in support of her petition for rehearing. He concluded after reading the transcript of that hearing that appellant had raised serious questions concerning decedent's testamentary capacity and that appellee should be required to give additional evidence as to testamentary capacity.

Judge Hammett issued his order denying rehearing 16 days after receipt of appellee's response to his show-cause order. The Judge was entitled to expect that appellant would have filed any objection to the response soon after she received the document. Appellant alleges on appeal, however, that appellee did not serve her with copies of the documents submitted to the Judge. Appellee admits that she cannot prove service. Under these circumstances, appellant's failure to raise her objections to the Judge are easily explained and excused.

[1] Administrative Law Judges hearing Indian probate cases are responsible for ensuring that all parties receive a full and fair hearing. *See, e.g., Estate of George Swift Bird*, 10 IBIA 63 (1982); *Estate of Hiemstennie (Maggie) Whiz Abbott*, 4 IBIA 12, 82 I.D. 169 (1975). Though the Board, and probably the Judge himself, does not encourage conducting hearings in the manner used in this case, unorthodox procedures may, on occasion, be necessitated by circumstances beyond the control of the parties or Judge. Such unusual methods of conducting a hearing, however, impose an additional requirement that the Judge ensure that all parties are fully heard and that the Department's trust responsibility is properly discharged. Had the Judge known that appellant would dispute the evidence presented by appellee, he would undoubtedly have given her an opportunity to present her objections. The Board believes she should still be afforded that opportunity.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1 and 4.320, the July 15, 1983, order denying rehearing is vacated and this matter is remanded to the Administrative Law Judge for further consideration.

 //original signed
 Anne Poindexter Lewis
 Administrative Judge

We concur:

 //original signed
 Jerry Muskrat
 Administrative Judge

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 Bernard V. Parrette
 Chief Administrative Judge