



INTERIOR BOARD OF INDIAN APPEALS

Estate of Fannie Pandoah Fisher Silver

16 IBIA 26 (01/06/1988)



# United States Department of the Interior

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

## ESTATE OF FANNIE PANDOAH FISHER SILVER

IBIA 87-36

Decided January 6, 1988

Appeal from an order denying petition for rehearing issued by Administrative Law Judge Keith L. Burrowes in Indian Probate IP BI 176A-85.

Affirmed.

1. Indian Probate: Appeal: Matters Considered on Appeal

The Board of Indian Appeals is not required to consider arguments and evidence raised for the first time on appeal.

2. Indian Probate: Wills: Testamentary Capacity: Generally

The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will.

3. Indian Probate: Wills: Testamentary Capacity: Generally

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property. Further, the evidence must show that this condition existed at the time of execution of the will.

APPEARANCES: Nessie Fisher Sheepskin pro se.

### OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Nessie Fisher Sheepskin seeks review of a February 27, 1987, order denying rehearing in the estate of Fannie Pandoah Fisher Silver (decedent). For the reasons discussed below, the Board affirms that order.

#### Background

Decedent, Shoshone Allottee No. 180-611 of the Fort Hall Reservation, Idaho, was born in 1897 and died on February 9, 1985, in Pocatello, Idaho.

She left a will, executed on October 26, 1983, in which she devised all her property to her cousin, Lois Tyler Navo, 1/ and her cousin's husband, Alfred Navo. Decedent's will further stated: "I have a daughter, Nessie Fisher Sheepskin and I am purposely excluding her from inheriting. I have asked her to take care of me and she refuses to do so."

Administrative Law Judge Keith L. Burrowes held a hearing to probate decedent's trust estate on April 25, 1985, at Fort Hall, Idaho. Appellant attended the hearing and stated that she wanted to contest the will. She testified that decedent often changed her mind and tended to become upset with people, including appellant. In response to Judge Burrowes' question, "Do you feel that [decedent] really did not understand what she was doing, was not mentally capable of making this will or do you feel that she was doing it because she was under the influence of someone else," appellant stated, "I think she's, like I said, she's just changeable in her thinking, in her ways." Another witness, Inez Evening, testified that decedent's emotions became increasingly volatile in her last years. She also testified that she believed decedent could easily be influenced by other people, and that relatives of the will beneficiaries had spent considerable time with decedent in her last years. The witness conceded that she could not testify to events surrounding execution of the will or to the testamentary capacity of decedent at the time the will was executed.

The will scrivener, Judith Burns, Probate Clerk at the Fort Hall Agency, testified that decedent was mentally alert at the time the will was executed but was upset with appellant and wanted appellant removed from her will. The will scrivener further testified that she had drafted several earlier wills for decedent, and that decedent had sometimes omitted appellant from her will and sometimes included her. In July 1984, decedent asked to see the will scrivener, stating she had forgotten whether she had omitted appellant from the will as she intended, and was satisfied when she learned that she had.

On February 24, 1986, Judge Burrowes issued an order approving the will, stating in relevant part:

[Appellant], only daughter of this decedent, was by the terms of the will, excluded from inheriting any property. [Appellant] testified, as did others on her behalf, that [decedent] had a tendency to get mad at people and then exclude them from her will, or be happy with them and say that she would leave them some of her property. I believe them, but such conduct does not prove incompetency, nor does it establish undue influence. It is unfortunate for [appellant] and her family, but I find and conclude that [appellant] has failed in her attempt to contest the will.

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1/ Decedent's will identifies Lois Navo as her cousin. A witness at the probate hearing disputed this identification, stating that Lois Navo was not decedent's cousin but a more distant relative.

On April 24, 1986, appellant, now represented by an attorney, filed a petition for rehearing, stating that within 60 days she would present affidavits and depositions showing that decedent lacked testamentary capacity on October 26, 1983. Appellant failed to present any documents.

On February 27, 1987, Judge Burrowes issued an order denying rehearing, upon finding that appellant's petition for rehearing had not been perfected.

The Board received appellant's notice of appeal from Judge Burrowes' order on April 30, 1987. Only appellant made filings on appeal.

### Discussion and Conclusions

On appeal to the Board, appellant submits two affidavits concerning decedent's mental and physical condition at various times prior to October 1983. One affidavit is from Inez Evening, who was a witness at the hearing. The other is from Jessie L. Clifford, who operates a shelter home for the elderly in which decedent resided until she entered a nursing home.

[1] Appellant should have submitted these affidavits to Judge Burrowes. The Board has held on many occasions that it is not required to consider arguments and evidence raised for the first time on appeal, although it may do so in extraordinary circumstances, through exercise of the inherent authority of the Secretary to correct a manifest error or injustice. Estate of Leon Levi Harney, 16 IBIA 18, 20 (1987); Estate of Ella Dautobi, 15 IBIA 111, 120 (1987), and cases cited therein. Therefore, the Board will not consider appellant's affidavits unless she has shown that such extraordinary circumstances exist.

Neither of the affidavits demonstrate such extraordinary circumstances. Ms. Evening's affidavit adds nothing to her testimony at the hearing. Ms. Clifford states that she last saw decedent in August 1983 and believed that, at that time, decedent was unable to make a rational decision. Neither affiant saw decedent close to the time she made her will. Their statements are less persuasive than the testimony of the will scrivener, who stated that decedent was mentally alert and aware of what she doing on the day she made her will.

[2, 3] The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will. Estate of Harney, *supra*. To invalidate a will for lack of testamentary capacity, a will contestant must show that the testator did not know the natural objects of his bounty, the extent of his property, or the desired distribution. Further, the condition must be shown to exist at the time of execution of the will. Estate of Samuel Tsoodle, 11 IBIA 163, 166 (1983). Appellant has not shown that decedent lacked testamentary capacity when she executed her will in October 1983.

Appellant has made no showing that a manifest error has been committed or that grounds exist upon which decedent's will may be invalidated.

