



INTERIOR BOARD OF INDIAN APPEALS

Estate of Alice Jackson (John)

17 IBIA 162 (07/03/1989)



United States Department of the Interior

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

ESTATE OF ALICE JACKSON (JOHN)

IBIA 89-4

Decided July 5, 1989

Appeal from an order denying petition for rehearing issued by Administrative Law Judge S. N. Willett in Indian Probate IP PH 56I 89, IP PH 35I 86.

Affirmed.

1. Indian Probate: Appeal: Matters Considered on Appeal

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

2. Indian Probate: Wills: Undue Influence

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

3. Indian Probate: Wills: Undue Influence

To invalidate an Indian will because of undue influence upon a testator, it must be shown: (1) That he was susceptible of being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such a person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

4. Indian Probate: Hearing: Full and Complete

The exclusion of irrelevant evidence from an Indian probate hearing is not a violation of the requirement for a full and complete hearing.

APPEARANCES: Joseph Manuel, Private Tribal Court Advocate, Sacaton, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Eleanor Kumpula seeks review of a November 14, 1988, order denying rehearing issued by Administrative Law Judge S. N. Willett in the estate of Alice Jackson (John) (decedent). For the reasons discussed below, the Board affirms that order.

Background

Decedent, Gila River Allottee No. 3022, was born in 1888/89 1/ and died on February 4, 1985, at Phoenix, Arizona. She left a will, executed on September 24, 1973, in which she devised her property to her sons, Wilfred George Jackson and Vernon Mickey Johns, 2/ and her step-granddaughter, Eugenia Johns. Appellant, who is decedent's daughter, is not a beneficiary under the will.

Judge Willett scheduled a hearing to probate decedent's trust estate for July 1, 1986. At the time set for the hearing, a private tribal court advocate representing appellant (not appellant's present representative) appeared, presented a notice of will contest, and left. Judge Willett rescheduled the hearing to allow the parties time to prepare.

The rescheduled hearing was held on May 3, 1988, at Sacaton, Arizona. Appellant, representing herself, appeared and challenged the will. She also submitted a post-hearing brief. As grounds for invalidation of the will, she argued: (1) decedent's will was unnatural because it made no mention of appellant but, instead, stated that decedent had no children other than the two sons to whom she devised property, (2) the omission of appellant from decedent's will showed that the will lacked a rational testamentary scheme, (3) the will did not conform to the "Instructions to Field Offices" printed on the will form, which state that "if a husband, wife, child, or grandchild who is an heir is given nothing, the reason must be set out," (4) Oreen Johns, the wife of Vernon Johns, a beneficiary under the will, was present when the will was drafted and executed, creating a presumption that undue influence was exerted upon decedent, (5) the presence of Oreen Johns during the will preparation violated instructions given in the Bureau of Indian Affairs' (BIA's) probate training manual, 3/ and (6) decedent's failure to include appellant in her will is evidence of decedent's lack of testamentary capacity.

1/ Other years given in the record for decedent's birth are 1898 and 1904.

2/ Different members of the family apparently use different spellings of the family surname. Decedent signed her will "Alice Jackson John." Her son Vernon testified that he used the spelling "Johns."

3/ Appellant quoted from Probates: A Training Manual In Real Property Management, Bureau of Indian Affairs, September 1985, at page I-43: "Have all close relatives and beneficiaries leave the room during the discussion, dictation, and execution of the will. Their presence could lead to a charge of undue influence, and it is also in the best interest of everyone that they not be present when the will is made."

On September 12, 1988, Judge Willett issued an order approving decedent's will. She addressed each of appellant's arguments, concluding that appellant had failed to show decedent lacked testamentary capacity or had been subjected to undue influence, and holding that appellant had presented no legal basis for invalidating the will.

Appellant sought rehearing, which was denied by Judge Willett on November 14, 1988.

The Board received appellant's notice of appeal on January 12, 1989. Only appellant filed a brief.

Discussion and Conclusions

On appeal to the Board, appellant contends that both Oreen Johns and Vernon Johns exerted undue influence upon decedent. She also contends that she was denied due process at the probate hearing because she was not allowed to cross-examine Oreen Johns properly. She apparently abandons the other arguments she made below. ^{4/}

Appellant argues that Oreen Johns exerted undue influence upon decedent by taking her to the agency to make her will. She asserts that Oreen lied at the probate hearing when she stated that she did not know the contents of decedent's will. As proof that Oreen lied, appellant submits an affidavit from appellant's daughter, Georgette Chase, stating that Oreen had told her she had been told not to discuss the contents of the will.

To support her contention that Vernon Johns exerted undue influence upon decedent, appellant submits affidavits from her grandson, Boyd Johns, and Claudia B. Chase. These affidavits describe incidents purporting to show that Vernon attempted to control decedent and that he disliked appellant and attempted to keep her away from decedent. Although no dates are given for most of the incidents, there is no allegation that any of them occurred close to the time the will was drafted.

Appellant contends that decedent was "probably under the close care" of Vernon at the time she made her will. She also contends that decedent's failure to mention her in her will is, in itself, evidence of undue influence.

^{4/} To the extent appellant may have intended to pursue the other arguments she raised before Judge Willett, they are rejected. The Board notes in particular: (1) The omission of a testator's natural child from his/her will does not render the will unnatural, devoid of a rational scheme, or otherwise invalid. E.g., Estate of Reuben Mesteth, 16 IBIA 148 (1988); (2) BIA will drafting and probate training instructions are not Departmental regulations but are advisory only. Estate of Alexander Charette, 15 IBIA 92 (1987); and (3) the burden of proof to show decedent's lack of testamentary capacity was on appellant and required considerably more than the bare allegation made by her. E.g., Estate of Virginia Enno Poitra, 16 IBIA 32 (1988).

[1] Appellant's affidavits should have been presented at the hearing before Judge Willett. The Board has held on many occasions that it is not required to consider evidence or arguments raised for the first time on appeal. E.g., Estate of George Neconie, 16 IBIA 120 (1988); Estate of Glenn Begay, 16 IBIA 115 (1988); Estate of Virginia Enno Poitra, *supra*. Appellant has presented no reason sufficient to justify allowing the introduction of new evidence on appeal.

[2, 3] Even if the Board were to consider appellant's new evidence, however, it would find that appellant has failed to meet the burden of proof imposed upon a will contestant who alleges that undue influence was exerted upon a testator. To invalidate an Indian will on the grounds of undue influence, it must be shown:

- (1) That the decedent was susceptible of being dominated by another;
- (2) that the person allegedly influencing the decedent in the execution of the will was capable of controlling his mind and actions;
- (3) that such a person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and
- (4) that the will is contrary to the decedent's own desires.

Estate of Thomas Longtail, Jr., 13 IBIA 136, 138 (1985). See also Estate of Comer Fast Eagle, 16 IBIA 40, 43 (1988); Estate of Leon Levi Harney, 16 IBIA 18, 21 (1987). The evidence presented by appellant fails to make such a showing. Much of it is vague and conclusory. Even taking appellant's new affidavits into account, the sum of her evidence falls far short of the standard of proof necessary to show that undue influence was exerted upon decedent.

In fact, appellant's own testimony at the hearing before Judge Willett supplies the evident reason for her omission from decedent's will. Appellant testified that decedent deserted her when she was a small child and continued to shun her until about 4 years before decedent's death, when the two became reconciled (Tr. 18-19). It is clear from appellant's testimony that the reconciliation did not occur until many years after decedent executed her will.

The Board holds that appellant has failed to show that undue influence was exerted upon decedent.

[4] Appellant also contends that she was denied due process of law because she was not allowed to cross-examine Oreen Johns fully at the hearing before Judge Willett. The hearing transcript shows that the Judge gave appellant the opportunity to cross-examine Oreen and that appellant did so. Judge Willett stated that appellant should ask questions concerning events before and during the will execution, not questions concerning events that occurred afterwards. It is clear that she was simply attempting to restrict the testimony to relevant events (Tr. at 30-32).

It was not a denial of due process for the Judge to instruct appellant on the kinds of questions that should be asked in order to elicit relevant

testimony. Further the exclusion of irrelevant evidence from an Indian probate hearing is not a violation of the requirement for a full and complete hearing. Cf. Estate of Jesse Pawnee, 12 IBIA 277 (1984); Estate of Hiemstennie (Maggie) Whiz Abbott, 4 IBIA 12, 82 I.D. 169 (1975).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Willett's November 14, 1988, order denying rehearing is affirmed.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge