



INTERIOR BOARD OF INDIAN APPEALS

Estate of Clarence Thompson Burke

18 IBIA 1 (10/02/1989)



# United States Department of the Interior

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

## ESTATE OF CLARENCE THOMPSON BURKE

IBIA 89-20

Decided October 2, 1989

Appeal from an order after rehearing issued by Administrative Law Judge William E. Hammett in Indian Probate IP PO 2L 88, IP PO 85L 88.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity--Indian Probate:  
Wills: Undue Influence

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

APPEARANCES: Celeste Whitewolf, Esq., Portland, Oregon, for appellants; Douglas Nash, Esq., Lapwai, Idaho, for Loretta Alexander.

### OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Loretta Burke Scott and William H. Burke seek review of a January 27, 1989, order after rehearing issued by Administrative Law Judge William E. Hammett in the estate of Clarence Thompson Burke (decendent). For the reasons discussed below, the Board affirms that order.

#### Background

Decendent, Umatilla allottee No. 143-WW70, was born on July 4, 1891, and died testate on July 2, 1987, at Pendleton, Oregon. He executed a will on June 16, 1977, in which he devised a one-third interest in his estate to his daughter, Ellen Thompson Cowapoo, a one-third interest to his son, William H. Burke (appellant here), and a one-third interest to the children of his predeceased son, George T. Burke. <sup>1/</sup> The will also provided that his entire estate was to be subject to a life estate in his wife, Annette Blackeagle Burke. By a codicil to his will, executed on September 27, 1985, decendent devised his own allotment, WW-70, including the house located thereon, to his wife.

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<sup>1/</sup> The children of George T. Burke are Florine Burke Munoz, Emily Burke Littlefish, Carol Burke Simtustus, Willard Daniel Burke, and appellant Loretta Burke Scott.

Administrative Law Judge Robert C. Snashall held a hearing to probate decedent's trust estate on November 4, 1987, at Pendleton, Oregon. Both appellants were present. William Burke objected to the codicil to decedent's will on the grounds that Annette Blackeagle Burke was a member of the Nez Perce Tribe which, unlike the Umatilla Tribe, has a statute authorizing tribal purchase of interests inherited by non-members. <sup>2/</sup> William argued that decedent would not have been able to inherit land on the Nez Perce Reservation from Annette, and it was therefore unfair for Annette to inherit land on the Umatilla Reservation from decedent. Judge Snashall explained that this was not a basis for challenging the codicil but advised William that he could file a petition for rehearing if he discovered that grounds for challenge did exist.

On December 11, 1987, Judge Snashall issued an order approving the will and the codicil. By letter received in Judge Snashall's office on December 30, 1987, Loretta Burke Scott protested the decision. She stated that she believed decedent had been pressured into signing the codicil. She also stated that Annette's family had kept others away from decedent, that decedent was over 90 when he signed the codicil, and that he was not well. On February 10, 1988, Judge Snashall issued a notice of rehearing to consider the validity of the codicil.

The rehearing was held on August 15, 1988, at Pendleton, Oregon, by Judge Hammett, following Judge Snashall's retirement. On January 27, 1989, Judge Hammett issued an order after rehearing, in which he affirmed Judge Snashall's order.

Judge Hammett found that appellants failed to establish by a preponderance of the evidence that decedent lacked the requisite testamentary capacity to execute the codicil. He noted that several witnesses had given uncontradicted testimony that tended to establish decedent's testamentary capacity, and that appellant's only evidence to the contrary was a statement that Annette had once called decedent a senile old man.

Judge Hammett also found that appellants failed to establish that decedent was unduly influenced in the execution of the codicil. He concluded that decedent was not a man susceptible of being dominated by another and that the codicil reflected decedent's own wishes.

Appellants filed a notice of appeal, which was received by the Board on March 27, 1989. Briefs were filed by appellants and by Loretta Alexander, daughter of Annette Blackeagle Burke. <sup>3/</sup>

#### Discussion and Conclusions

On appeal, appellants allege (1) Judge Hammett did not meet his burden of ensuring that all relevant facts were brought out at the rehearing, in

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<sup>2/</sup> See Act of Sept. 29, 1972, P.L. 92-443, 86 Stat. 744.

<sup>3/</sup> Annette Blackeagle Burke died prior to the rehearing in this matter.

which appellants were not represented by counsel, (2) only one of the two attesting witnesses was present at the hearing, in violation of 43 CFR 4.233(c), 4/ and (3) Judge Hammett failed to give adequate consideration to appellants' evidence concerning decedent's lack of testamentary capacity and the undue influence exerted upon him. Appellants request that the matter be remanded for another rehearing so they may have legal counsel reexamine the records and present sufficient evidence concerning testamentary capacity and undue influence.

Alexander argues in response that appellants were represented by an attorney at the initial hearing before Judge Snashall and that the attorney was still listed as appellant's counsel at the time of the rehearing, although he did not appear at the rehearing. 5/ She argues further that, even if appellants were unrepresented by counsel, they have not presented grounds for another rehearing on that basis.

Alexander notes that both attesting witnesses were present at the initial hearing; she argues that 43 CFR 4.233(c) does not require that the witnesses be present at rehearsings. She also argues that the reasons given in subsection 4.233(c) for requiring testimony of attesting witnesses is to establish testamentary capacity and execution of the will, both of which were proved by other testimony in this case.

Finally, Alexander argues that appellants failed to meet their burden of proving that decedent lacked testamentary capacity and/or that he was subject to undue influence.

Upon review of the rehearing transcript, the Board finds that Judge Hammett conducted the hearing in a manner conducive to eliciting all relevant facts. He allowed appellants to examine and cross-examine witnesses and asked questions himself when evidence appeared incomplete. Even if appellants were entirely unassisted by counsel, as they allege, Judge Hammett fully met his burden of assuring that all relevant facts were brought out. See Estate of Thomas Tointigh, 17 IBIA 17 (1988); Estate of Wesley Emmett Anton, 12 IBIA 139 (1984).

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4/ 43 CFR 4.233(c) provides:

"Will contest. If the approval of a will, codicil thereto, or revocation thereof is contested, the attesting witnesses who are in the reasonable vicinity of the place of hearing and who are of sound mind must be produced and examined. If none of the attesting witnesses resides in the reasonable vicinity of the place of hearing at the time appointed for proving the will, the administrative law judge may admit the testimony of other witnesses to prove the testamentary capacity of the testator and the execution of the will and, as evidence of the execution, the administrative law judge may admit proof of the handwriting of the testator and of the attesting witnesses, or of any of them."

5/ Alexander notes that appellant Scott stated at the rehearing that an affidavit for one of the witnesses had been prepared by her (Scott's) attorney.

