



INTERIOR BOARD OF INDIAN APPEALS

Estate of Orville Lee Kaulay

30 IBIA 116 (12/02/1996)



# United States Department of the Interior

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

## ESTATE OF ORVILLE LEE KAULAY

IBIA 96-30

Decided December 2, 1996

Appeal from an order after rehearing issued by Administrative Law Judge Richard L. Reeh in Indian Probate IP OK 96 P 92.

Affirmed as modified.

1. Indian Probate: Wills: Execution--Indian Probate: Wills:  
Witnesses, Attesting

A person who is related to a beneficiary under a will devising trust or restricted property is not automatically disqualified from acting as an attesting witness for that will.

2. Indian Probate: Wills: Undue Influence

A presumption of undue influence arises when the principal beneficiary under a will devising trust or restricted property was in a confidential relationship with the testator and actively participated in the execution of the will. The Board of Indian Appeals has not previously applied a presumption of undue influence in a situation in which the person in the confidential relationship was not named in the will. It recognizes, however, that such a person might in fact be the principal beneficiary under a will in which he/ she was not named, depending upon that person's relationship with the beneficiary(ies) named in the will.

APPEARANCES: Leah Harjo Ware, Esq., Shawnee, Oklahoma, for appellants Archie and Doris Poolaw.

### OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Archie and Doris Poolaw seek review of a November 8, 1995, order after rehearing issued by Administrative Law Judge Richard L. Reeh in the estate of Orville Lee Kaulay (decedent). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision as modified here.

### Background

Decedent, an unallotted Kiowa, died on April 24, 1991. On June 16, 1992, Administrative Law Judge Sam E. Taylor held a hearing to probate decedent's trust or restricted estate. By order dated June 30, 1992, the Judge determined that decedent's only heir was his deceased father, 1/ and approved a September 24, 1987, document purported to be decedent's last will and testament (1987 will). The 1987 will devises all of decedent's trust or restricted property to his niece and nephews, Hattie Sue Plenty Hoops (Plenty Hoops), Johnson C. Tiger and Zachary L. Tiger.

On August 28, 1992, appellants petitioned for rehearing, stating that they were the devisees under a will decedent executed on September 9, 1982, but were not notified of the original probate hearing. They indicated that they intended to challenge the 1987 will. In connection with the petition for rehearing, appellants sought to depose Paula Jo Davidson Wood (Wood), the scrivener of, and a witness to, the 1987 will; Julia Tiger (Tiger), decedent's sister, the mother of the devisees, and the second witness to the 1987 will; and Plenty Hoops. Judge Taylor granted the request for depositions. Tiger and Plenty Hoops were deposed on September 29, 1992; Wood was deposed on October 14, 1992.

Administrative Law Judge William E. Hammett granted the petition for rehearing on November 5, 1992. An additional hearing was held by Administrative Law Judge Keith L. Burrowes on December 3, 1992, and January 13, 1993. Judge Reeh issued the order after rehearing on November 8, 1995. 2/ Appellants appealed from that order to the Board. Only appellants have filed a brief in this matter.

### Discussion and Conclusions

Appellants first contest Judge Reeh's conclusion that the 1987 will was "attested by two disinterested adult witnesses" as required by 43 CFR 4.260 (a). The will was witnessed by Wood and Tiger. Judge Reeh concluded that Tiger was not disinterested within the meaning of 43 CFR 4.260(a), but nevertheless found the will to have been witnessed by two disinterested adults by substituting the signature of Andrew Wood, the notary who signed a self-proving affidavit attached to the 1987 will, for that of Tiger. 3/

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1/ Judge Reeh's Nov. 8, 1995, order clarifies that decedent's father survived decedent, but died later in 1991.

2/ The unusual number of Administrative Law Judges involved in this case was occasioned by the retirement of Judge Taylor and the fact that there was a hiatus before Judge Reeh was hired to replace Judge Taylor.

3/ Judge Taylor did not question Tiger's competence as a witness. The transcript of the hearing before Judge Taylor shows that Tiger was identified as decedent's sister. The will identifies the beneficiaries as decedent's niece and nephews. Although the family history data sheet prepared by the Bureau of Indian Affairs (BIA) did not show that the beneficiaries

In reaching his conclusion, Judge Reeh relied on Estate of Amy Stricker McBride, IA-1396 (1966). In McBride, one of the will witnesses was the wife of the sole beneficiary. The decision held at pages 3-4:

The Hearing Examiner correctly concluded that [the wife] was not a disinterested witness. At common law the spouse of a beneficiary under a will was not competent to attest to the execution of a will on the theory that husband and wife were a unity and that in effect the beneficiary himself was testifying. \* \* \* Here [the wife's] status as an interested witness is clear since her right of dower under South Dakota law would immediately attach to the real property which her husband would receive if the will in question were approved.

Although the Board concludes that McBride does not support the Judge's holding that Tiger was not a disinterested witness, it has reviewed prior Departmental decisions for guidance as to what standard the Department has applied in determining whether a witness is "disinterested." The question appears to have reached the appellate level on only a few occasions.

Estate of Lucy Little Tail, a.k.a. Mrs. Ed Gould, #16965-43 (1943), held that "[t]he fact that a subscribing witness is a close friend of, or even related to a beneficiary does not disqualify him as a witness." In Little Tail the witness was married to a woman who was raised by the testatrix and/or her husband, and the witness had resided in the home of the testatrix and/or her husband for many years. Little Tail cited section 321 of Page on Wills, the substance of which is found in 2 Page on Wills § 19.107 (Bowe-Parker revision 1960).

In regard to this holding in Little Tail, the Department's 1972 Digest of Federal Indian Probate Law comments parenthetically that "[t]his portion overruled by implication in Estate of Ah-teel-thley." In Estate of Ah-teel-thley, IA-1 (1950), the Department declined to probate a will. One of the will witnesses acted as an interpreter for the will scrivener, who was also the second witness and who had no knowledge of the testatrix's language. The witness was the husband of a person who would take as the testatrix's heir in the absence of a will and who received nothing under the will. At the hearing, the witness testified contrary to his actions and statements at the will execution. The decision states at page 3:

If the testimony of [the witness] is to be believed, he did not witness any will made by the decedent. If his testimony is

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fn. 3 (continued)

were Tiger's children, it listed Tiger as the guardian of Johnson and Zachary. The relationship between Tiger and the devisees was not mentioned during the June 16, 1992, hearing before Judge Taylor. It is thus not entirely clear whether Judge Taylor was aware that Tiger was the mother of the beneficiaries under the will she witnessed.

not to be believed, and if it is assumed that his faulty memory and disregard of the truth at the hearing may have been induced by his interest in the outcome of the proceeding, he is an unreliable witness whose testimony can have no probative force and must be completely disregarded.

The decision continues with a discussion of the witness' role as interpreter, noting that Departmental regulations in effect at that time required interpreters to be disinterested. The decision states at page 4:

Although [the witness] is not directly interested in the estate as an heir or devisee, his substantial interest is manifested by the fact of his marriage to one of the heirs at law. \* \* \* One of the two alleged witnesses to the will is an interested party who attempted to act as interpreter, and the other witness is the scrivener who was compelled to rely on the interpreter and on the beneficiaries under the will for information concerning the wishes of the decedent.

The witness in Ah-teel-thley was not related to a beneficiary under the will; he was related to an heir at law who would take in the absence of a will. Witnessing this will was actually against his interest, and probably would not have been questioned but for the conflicts between his actions at the will execution and his testimony. The witness may not have known that his wife was the testatrix's presumptive heir. It is, however, equally possible that he did know it and purposefully set up a situation under which the will was likely to be disapproved. The Board finds that the holding in Ah-teel-thley is based on its unique factual scenario and does not--by implication or otherwise--overrule Little Tail.

In Estate of Matilda Levi, A-24653 (1947), the Department held that an individual who was allegedly having a love affair with one of the beneficiaries under the will at the time the will was executed was not disqualified as a witness. Citing what is section 19.86 of the 1960 edition of Page on Wills, the decision states at page 4 that "[a]n attesting witness is disqualified from acting in that capacity only if his interest in the will is of a fixed, certain, and vested pecuniary character or one which otherwise gives him a direct and immediate beneficial right under the will." The Board cited Levi for this proposition in Estate of Hiemstennie (Maggie) Whiz Abbott, 4 IBIA 12 (1975).

Estate of Ida (Idaho) Horsehead (Wivensaw, Bear) (Han-Bo-No, Haw-Bo-Ris), IA-P-6 (1968), held that the father-in-law of one of the beneficiaries could be a witness to the will. Again citing what is section 19.107 in the 1960 edition of Page on Wills, the decision noted at page 4 that "a possible benefit to a relative of a beneficiary does not amount to an interest under the will which would disqualify the person as a witness. This includes a father, or grandfather, son or brother, of the beneficiary."

[1] Although the Board did not find a case in which the Department held that a parent could witness a will under which his/her children were the beneficiaries, it does not appear that the Department has foreclosed that possibility. Instead, the Department has followed the rule that a person is not disqualified as a will witness merely because a relative--even a very close relative--is a beneficiary under the will.

Here, all of the beneficiaries under decedent's 1987 will were Tiger's children. According to Tiger's deposition, at least two of those children were minors when the will was executed. Thus, it is possible that Tiger might benefit to some extent through the devises to her children. However, for the reasons discussed below, the Board concludes that any such benefit is not of "a direct and immediate" nature, and does not qualify as "a fixed, certain, and vested pecuniary interest" at the time of attestation.

The property devised to Tiger's children, including the minors, would be held in trust for them by the United States. Any funds from decedent's Individual Indian Money (IIM) account and any future income derived from the devised lands would be subject to 25 CFR Part 115, IIM Accounts, and, while the devisees are minors, to the restrictions in 25 CFR 115.4, which concerns disbursements by BIA from the IIM accounts of minors. Furthermore, the lands themselves could not be conveyed without the approval of the Secretary of the Interior. Because it is not certain that BIA would take any action that would make lands or funds held for the minor children available to Tiger, it is also not certain that she would receive any benefit from the devises to her children.

Under the circumstances of this case and in view of the Department's prior decisions in this area, the Board cannot agree with Judge Reeh that Tiger was disqualified from serving as a witness to decedent's 1987 will. Therefore, the Board holds that that will was properly attested by Wood and Tiger. 4/

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4/ Although the Board finds it unnecessary to decide the issue of whether the notary of the self-proving affidavit attached to decedent's will could be substituted for a disqualified will witness, it notes that this issue has apparently been decided by state courts largely as a question of the intent with which the notary signed. When the evidence showed that the notary intended to sign as both a witness and in his/her official capacity, the signature has been accepted as that of a witness. See, e.g., Estate of Leland J. Price, 871 P.2d 1079, 73 Wash. App. 745 (Wash. Ct. App. 1994); Estate of Miguel Martinez, 664 P.2d 1007, 99 N.M. 809 (N.M. Ct. App. 1983); Smith v. Neikirk, 548 S.W.2d 15G (Ky. Ct. App. 1977). However, the notary has not been accepted as a witness in other cases, especially when no evidence was presented indicating that the notary signed with the intent of witnessing the will. See, e.g., Estate of Marie C. Romeiser, 513 P.2d 1334 (Okla. Ct. App. 1973); Baxter v. Bank of Belle, of Belle Maries County, 104 S.W.2d 265 (Mo. 1937).

Appellants also object to the execution of the will on the grounds that the date of the will was typewritten as 1986 in three places, and was changed by hand to read 1987. Noting that no explanation was provided for this alteration, appellants cite In re Cravens' Estate, 242 P.2d 135 (Okla. 1952), for the proposition that "[a]n unnoted and unexplained alteration upon the face of a will is presumed to have been made after execution" (Opening Brief at 12).

In Cravens' Estate, the court found that "there had been erasures made in [the will], and also that certain clauses of the original will had been deleted by typewriting the letter 'X' through the words." 242 P. 2d at 137. The will was submitted to an authority on questioned documents, who concluded that the changes were made by a different person at a different time than the will was executed. The expert was able to restore the original wording that showed that the dispositive scheme had been altered by the erasures and changes. There was further testimony that the attesting witnesses had bad reputations for truthfulness in the community. The court held:

The law is well settled that when from the face of a will it is clearly apparent that there have been erasures and alterations,

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fn. 4 (continued)

The facts in Cooper v. Liverman, 406 S.W.2d 927 (Tex. Civ. App. 1966), are quite comparable to those here. There, as here, a self-proving affidavit accompanied the will; the will was signed by the testator and the witnesses; and the self-proving affidavit was signed by the testator and the witnesses and was notarized. One of the witnesses was disqualified because his signature did not comport with the requirements of Texas State law. The court held at 406 S.W.2d at 932-33:

"It is our view under the record in this cause that [the notary] did not sign as a subscribing witness to the will, as his signature does not appear anywhere but at the end of the self-proving affidavit to the codicil where he signs as a Notary. It is therefore our view that [the notary] was not a lawful subscribing witness to the will. In this connection see the following authorities: McGrew v. Bartlett, Tex. Civ. App., 387 S.W.2d 702, writ refused; Boren v. Boren, Texas Supreme Court Journal, Vol. 9, p. 340, dated April 13th, 1966. We quote from Boren v. Boren, supra, in part as follows:

"The self-proving provisions attached to the will are not a part of the will but concern the matter of its proof only. The only purpose served by such self-proving provisions is to admit a will to probate without the testimony of a subscribing witness. \* \* \* The provision was introduced into the Texas Probate Code \* \* \* as an alternative mode of proving a will. \* \* \* It was not the purpose of the Legislature to amend or repeal the requirement that the will itself must met the requirements of the law. \* \* \* The execution of a valid will is a condition precedent to the usefulness of the self-proving provisions of (the statute).

'A testamentary document to be self-proved, must first be a will.'"

the burden is upon the proponent of that particular will to show that the alterations were made before the will was executed, where the alteration is entirely inconsistent with the original draft of the will, and where the original will did not disinherit the contestant, but by the altered will the contestant would lose all her rights.

(Id. at 137-38). The court relied heavily upon the testimony of the expert witness in reaching its decision not to probate the will.

Here, the only changes are to the date, which was consistently typed as 1986. Tiger testified at her deposition that she had not noticed the changes and assumed the date was a typographical error because she was present when the will was executed. Although Wood testified generally that she did not recall the execution of this will, appellants failed to ask her for an explanation of the change at either her deposition or at the hearing before Judge Burrowes. Appellants do not allege that decedent was not competent to execute a will on September 24 in either 1986 or 1987. Instead, they rely solely on the changes in arguing that the will was not properly executed.

Under the circumstances of this case, the Board declines to hold this will invalid on the sole ground that probable typographical errors were corrected without being initialled or otherwise noted by the decedent and/or witnesses.

The Board thus reaches the question of whether decedent was subjected to undue influence in the execution of his 1987 will. Normally, the burden of proving undue influence rests with those contesting the will. However, appellants contend that the burden of proof here should shift to the will proponents because Tiger was in a confidential relationship with decedent.

In Estate of Grace American Horse Tallbird, 26 IBIA 87, 88 (1994), the Board stated the rule concerning undue influence when a confidential relationship exists:

[I]n order for a presumption of undue influence to arise from the existence of a confidential relationship, three things must be shown: (1) a confidential relationship existed; (2) the person in the confidential relationship actively participated in the preparation of the will; and (3) the person in the confidential relationship was the principal beneficiary under the will.

When these three elements are shown, there is a presumption of undue influence, and the burden shifts to the will proponents to show that the testator was not subjected to undue influence. See, e.g., Estate of Charles Webster Hills, 13 IBIA 188, 92 I.D.304 (1985).

Judge Reeh found that a confidential relationship existed between decedent and Tiger, but that no such relationship existed between decedent and

any of the will beneficiaries. He therefore concluded that the burden of proof as to undue influence did not shift in this case.

[2] For purposes of this discussion the Board assumes that Tiger was in a confidential relationship with decedent and that she actively participated in the execution of decedent's 1987 will. However, Tiger was not named in decedent's will. The Board has not previously applied a presumption of undue influence in a situation in which the person in the confidential relationship was not named in the will. It recognizes, however, that such a person might in fact be the principal beneficiary under a will in which he/she was not named, depending upon the relationship between that person and the beneficiary(ies) named in the will. Here, for the same reasons the Board concludes Tiger was not an interested party for purposes of serving as an attesting witness to decedent's will, it also concludes that she was not a beneficiary--principal or otherwise--under that will.

The Board holds that appellants, as those contesting the 1987 will, have the burden of proving undue influence.

In Estate of Leona Ketcheshawno Waterman Ely, 20 IBIA 205, 207 (1991), the Board summarized the long-established rules concerning proof of undue influence upon an Indian testator:

Normally, to invalidate an Indian will on the grounds of undue influence, it must be shown that (1) the decedent was susceptible of being dominated by another; (2) the person allegedly influencing the decedent in the execution of [his] will was capable of controlling [his] mind and actions; (3) 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) the will is contrary to the decedent's own desires.

Appellants contend that decedent was capable of being influenced because he was "a homeless man with a severe alcohol problem" (Opening Brief at 10). The testimony showed that decedent did not have a home but lived with different relatives and in homeless shelters. Tiger was only one of the relatives with whom decedent lived. In fact, appellants testified that, at times, decedent lived with them. The testimony also showed that decedent routinely abused alcohol. Neither of these facts, either alone or in combination, prove that decedent was susceptible to influence.

Appellants argue that Tiger testified that she "made" decedent make this will. The testimony shows that Tiger testified to influencing decedent to make a will, citing problems encountered in the probate of the estate of their older brother and telling decedent that if he made a will he would know what would happen to his property. However, nothing in the testimony or in appellants' arguments shows that Tiger was responsible for the dispositive scheme set out in the will decedent ultimately executed.

Appellants note that the 1987 will was not sent to BIA for approval while decedent was alive, but was instead "secreted by Ms. Tiger" (Opening Brief at 9). If requested, the Department's Office of the Solicitor will review an Indian will as to form prior to the testator's death and, if requested, BIA will retain a will for safekeeping. 43 CFR 4.260(b). However, there is no requirement that an Indian will be reviewed or that it be within the custody of BIA.

The Board finds that appellants have failed to show that decedent was susceptible of being dominated by another person. It therefore concludes that they have not proven undue influence. 5/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Reeh's November 8, 1995, order after rehearing is affirmed as modified to hold that decedent's 1987 will was properly attested by Wood and Tiger. 6/

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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//original signed  
Anita Vogt  
Administrative Judge

5/ Appellants also object to Judge Reeh's reliance on two earlier wills allegedly executed by decedent on Aug. 26, 1977, and on Mar. 29, 1978, as supporting the dispositive scheme of the 1987 will. Neither of these alleged wills is in the probate record transmitted to the Board. If Judge Reeh intended to rely on these documents in his decision, he should have made them part of the record. However, the Board finds that, under the circumstances of this case, Judge Reeh's reference to these two alleged wills constitutes harmless error.

6/ Any arguments not specifically discussed were considered and rejected.