INTERIOR BOARD OF INDIAN APPEALS

Estate of Ernestine Lois Ray

33 IBIA 92 (12/31/1998)

United States Department of the Interior

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

ESTATE OF ERNESTINE LOIS RAY

IBIA 97-86 Decided December 31, 1998

Appeal from an order denying rehearing issued by Administrative Law Judge William E. Hammett in Indian Probate IP PH 234 I 94.

Affirmed as modified.

1. 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 preparation of the will.

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

   The spouse of a beneficiary under a will devising trust or restricted property is not a disinterested witness under 43 C.F.R. § 4.260(a).

APPEARANCES: Lester J. Marston, Esq., Ukiah, California, for Karen Burdick, Lois Horne, and Ernest Merrifield; James R. Mayo, Esq., Ukiah, California, for Audrey Hernandez.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Karen Burdick, Lois Horne, and Ernest Merrifield seek review of a December 11, 1996, order denying rehearing issued by Administrative Law Judge William E. Hammett in the estate of Ernestine Lois Ray (Decedent). For the reasons discussed below, the Board affirms Judge Hammett's order as modified herein.

Background

Decedent, an unallotted Wylacki Indian of the Round Valley Reservation, died on April 25, 1992, having executed a will on January 26, 1992. She was survived by her second husband, Everett Ray, and by six children: Iris Comalli, Lois Horne, Everett Merrifield, Jr., Ernest Merrifield, Audrey Hernandez, and Karen Burdick. At the time of her death, Decedent's trust property consisted of a 9.34-acre tract on the Round Valley Reservation and small fractional shares in four other tracts.

Judge Hammett held a hearing in Decedent's estate on December 14, 1995, and disapproved her will by order dated September 5, 1996. His order stated in part:

> The will was contested by two of the decedent's children, namely, Everett Merrifield, Jr. and Audrey Hernandez. The thrust of their contest is that the will is a product of undue influence and the person allegedly asserting this undue influence is Ernest Merrifield, another son of the decedent. Ernest Merrifield is the scrivener of the will, in fact, he prepared it in his own handwriting, and his wife and daughter are two of the will witnesses, the other will witnesses being Ernest Merrifield and Lois Horne, who is another daughter of the decedent, [1/] and he is the principal devisee under the will.
>
> In response to this forum's inquiry whether a confidential relationship existed between the decedent and Ernest Merrifield, Ernest Merrifield testified that a "lot of times" she referred to him as her attorney and when she needed anything "written up or interpreted" she would ask Ernest. As an example of the type of instruments she would ask him to prepare, he testified that he would prepare for her applications having to do with social security.
>
> Obviously, the decedent placed great confidence in Ernest Merrifield's advice and judgment and relied on him to prepare important documents of a business nature for her. Based on the evidence adduced, this forum observes, and so finds, that a confidential relationship existed between the decedent and Ernest Merrifield.
>
> Numerous Departmental and court decisions have treated with the situation where the person having a confidential relationship with the testator becomes the beneficiary or devisee under the testator's will. In the Estate of Charles Webster Hills, 13 IBIA 188[, 195, 92 I.D. 304, 308] (1985), the Interior Board of Indian Appeals made the following finding and ruling:
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>> * * * [T]he facts of this case are sufficient to show that a special confidential relationship, here involving financial matters, existed between appellant and decedent; appellant actively participated in the preparation and execution of decedent's will; and appellant was the principal beneficiary under the will. Thus, a presumption of

1/ Judge Hammett found Ernest and Lois disqualified as witnesses because they were beneficiaries under the will. He found Ernest's wife and daughter qualified and so took their testimony as witnesses. Tr. at 7, 67.

> undue influence arises. To rebut this presumption, appellant must show that decedent received independent advice regarding the execution of the will. * * *
>
> In a later case the Board reaffirmed its decision in Hills (See Estate of Jesse Pawnee, 15 IBIA 64 (1986)).
>
> The record is devoid of any evidence that the decedent received independent advice concerning execution of the will. Therefore, the presumption of undue influence which arose from the circumstances herein was not rebutted and since Ernest Merrifield did not sustain his burden of proving that there was no undue influence in procurement of the will, the will must be disapproved.
>
> Even if the will had not been disapproved for the foregoing reasons, there is a further reason for disapproving the will. The dispositive language of the will concerning the description of the property interests to be devised is so vague and uncertain as to render the decedent's testamentary intent indiscernible.

Sept. 5, 1996, Order at 1-3.

Appellants sought rehearing from Judge Hammett, offering as new evidence a number of declarations, including one from Appellants' present counsel, Lester J. Marston, Esq. Marston stated that he had seen Decedent in or about December 1992, 2/ when she came to see him about a credit problem and then brought up the subject of a will. His declaration continued:

> [Decedent] said that she wanted to make sure that if anything happened to her that the children didn't fight over her property. I specifically remember her saying that she wanted to make sure that Ernie got his house and that her ex-husband [3/] could stay in her trailer until he died. I also remember her talking about the "hay field" but don't remember exactly what she said. * * *
>
> 6. I remember telling her the different ways she could dispose of her property and the advantages and disadvantages of each. * * *
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> 7. She asked me how she went about preparing her own Will. I told her she needed to write it herself, setting forth who she wanted to leave her property to, date it and sign it at the bottom. She then asked me if "Ernie," meaning Ernie

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2/ Clearly, this date is wrong, because Decedent died in April 1992. In their opening brief, Appellants state that this meeting took place in December 1991.

3/ It appears that this reference is to Decedent's second husband, Everett Ray, to whom she was still married when she died.

> Merrifield, could help her write her Will. I told her as long as the Will was signed and dated at the bottom by her and witnessed by two disinterested witnesses that Ernie could help her write the Will. Again, I told her if she wanted to set up an appointment with me to prepare her Will, she could schedule one with my secretary on her way out. She said she needed to think about it.

Nov. 4, 1996, Marston Declaration at 2-3.

The petition for rehearing also included declarations from each of the three Appellants here and from two land surveyors, both of whom stated their opinions that an accurate description of the divided parcels, as set forth in Decedent's will, could be prepared based upon the descriptions contained in the will and an aerial photograph of the property.

Judge Hammett denied the petition for rehearing on December 11, 1996. He found that Marston's conversation with Decedent "did not constitute independent advice from an objective person concerning the legal effect of the will" (Dec. 11, 1996, Order at 1), and that Marston's declaration, as a whole, was insufficient to rebut the presumption of undue influence. Id. at 1 and 2. Further, he found that the petitioners "did not meet the requirements of 43 CFR 4.241 requiring that there be justifiable reasons shown why the evidence now presented as newly discovered evidence was not available prior to the hearing." Id. at 3. Having concluded that the petition for rehearing must be denied on the basis of these failures, Judge Hammett found it unnecessary to consider the issue of the land descriptions.

Appellants appealed Judge Hammett's December 11, 1996, order to the Board. Briefs were filed by Appellants and by Audrey Hernandez. Proceedings were stayed briefly while the parties attempted to negotiate a settlement.

Discussion and Conclusions

Appellants contend: "There Is Insufficient Evidence In The Record To Establish A Presumption That Ernest Merrifield Exerted Undue Influence Over [Decedent]." Appellants' Opening Brief at 8. In support of this contention, Appellants make arguments, based upon decisions of the state courts of California, concerning the elements of proof necessary to show that undue influence was exerted upon a testator. 4/

4/ Although Appellants unaccountably neglect Board cases, there is well established Board law on this point. See, e.g., Estate of Leona Ketcheshawno Ely, 20 IBIA 205, 207 (1991), in which the Board stated:

"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 her will was capable of controlling her mind and actions; (3) such a person did exert influence upon the decedent of a nature calculated to induce

[1] Appellants' arguments show that they have missed a crucial point in Judge Hammett's decision and have misunderstood the elements giving rise to a presumption of undue influence. As the cases cited by Judge Hammett make clear, a presumption of undue influence does not depend upon proof that undue influence was in fact exerted upon the testator. Rather, the presumption arises in certain cases where a confidential relationship is shown. The principles governing this presumption were most recently summarized in Estate of Orville Lee Kaulay, 30 IBIA 116 (1996), in which, quoting from Estate of Grace American Horse Tallbird, 26 IBIA 87, 88 (1994), the Board stated:

> [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.

30 IBIA at 122.

While arguing at length that Ernest Merrifield did not exert undue influence upon Decedent, Appellants deal only briefly with the elements listed in Kaulay.

They do not dispute Judge Hammett's conclusion that Ernest was the principal beneficiary under Decedent's will. Although Decedent devised property to each of her six children, she devised the largest portion of her 9.34-acre tract to Ernest. Appellants have submitted an aerial photograph of the tract, with an overlay delineating the divisions made in the will. As shown on these documents, the portion of the tract devised to Ernest appears to be somewhat over half of the entire tract. It contains the house. The portion devised to Everett, which appears to be quite small, contains a mobile home. The remaining portion, called the "hayfield" and described by the parties as containing about four acres, was devised to Decedent's four daughters. Decedent's small fractional interests in other tracts were devised equally to her six children.

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fn. 4 (continued)
or coerce her to make a will contrary to her own desires; and (4) the will is contrary to the decedent's own desires."

Disputes concerning the execution or construction of Indian wills are resolved under Federal, not state, law. See. e.g., Estate of Frank (Tate) Nevaquaya Tooahimpah, 21 IBIA 222, 226 (1992); Estate of Pearl Big Bow Aungkotoye Nahno Kerchee, 18 IBIA 153, 154-55 (1990). California law concerning wills has no application to this dispute.

It is apparent that Ernest received considerably more under Decedent's will than did any of his siblings. In light of the failure of Appellants to contest Judge Hammett's conclusion that Ernest was the principal beneficiary under Decedent's will, the Board finds that they have failed to show error in that conclusion.

Appellants touch on element 1 (existence of a confidential relationship), in their reply brief: 5/

> [Ernest] Merrifield did not enjoy a "special relationship" any different from the relationship that [Decedent] had with any of the other children. All of her children assisted her at one time or another with her property or finances. When they did, she would refer to whoever was helping her at the time as her "attorney" or "bookkeeper."

Appellants' Reply Brief at 7.

In his declaration submitted with Appellants' petition for rehearing, Ernest Merrifield stated:

> My mother chose me to write down the terms of her Will for her, because she knew I had the education and training to put down in words exactly what she wanted. She also knew that I had studied civil engineering for three years in college and had worked as a surveyor after I got out of the United States Army and, therefore, had the education and training to be able to write up an adequate description of how she wanted her property to be divided. If I hadn't had that training, my mother probably would have had Lois or Karen act as her "lawyer" to write up her Will for her.

Oct. 17, 1996, Ernest Merrifield Declaration at 1-2.

In its cases concerning confidential relationships, the Board has paid particular attention to relations involving financial matters. See, e.g., Estate of Virginia Enno Poitra, 16 IBIA 32, 37 (1988), and cases cited therein. In this case, Ernest testified that he did not hold a power of attorney for Decedent, Tr. at 48, 49, and nothing in the record shows that he had control over her finances. The Board finds that Ernest did not have a confidential relationship with Decedent with respect to Decedent's financial affairs.

5/ Although not specifically set out prior to Appellants' reply brief, this argument is suggested in Appellants' petition for rehearing and the accompanying declarations. Accordingly, the Board considers the argument here, although it normally does not consider arguments raised for the first time in a reply brief. E.g., Lopez v. Acting Aberdeen Area Director, 29 IBIA 5, 10 (1995).

However, the facts here suggest another kind of confidential relationship. Ernest's actions in preparing Decedent's will were similar to those of an attorney, and Decedent demonstrated the kind of trust in Ernest that a client would repose in an attorney. For instance, Ernest testified that, after preparing the will, he read it to Decedent, who voiced her approval, asked Ernest to keep the will, and stated that she wanted no one but him to know what was in the document. Tr. at 56-57. There is absolutely no indication that Decedent ever read the will herself or even had it in her possession for any amount of time. Even though Decedent may have chosen Ernest to draft her will in part because of his knowledge and skills, her actions demonstrate that she also reposed great trust in him. As the Board explained in Estate of Philip Malcolm Bayou, 13 IBIA 200, 208 (1985), rev'd on other grounds, Mallonee v. Hodel, No. A85-549 Civil (D. Alaska May 4, 1987), "The rebuttable presumption of undue influence exists in order to prevent persons in whom a testator would normally repose trust from using that trust for their own personal advantage."

The Board has stated that "[t]he existence and time of origin of a confidential relationship must be determined on a case-by-case basis." Pawnee, supra, 15 IBIA at 68 n.6. The Board finds that, under the circumstances here, a confidential relationship between Ernest and Decedent existed at the time Decedent's will was prepared and executed, whether or not it existed prior to that time. 6/

With respect to element 2 ("the person in the confidential relationship actively participated in the preparation of the will"), Appellants contend: "[Ernest] Merrifield was not active in procuring the execution of the Will. It was at [Decedent's] direction, after consulting with her attorney, that [Decedent] requested that [Ernest] Merrifield write up her Will. * * * It was also [Decedent's] idea to execute the Will on January 26, 1992 without any prompting from [Ernest] Merrifield." Appellants' Opening Brief at 12.

Element 2 does not require active "procurement" of a will, only active participation in the preparation of a will. Ernest Merrifield testified at the hearing that he had handwritten the will, after taking notes of conversations with Decedent as to her wishes. Further, as discussed above, he testified that he read the will to Decedent, who apparently never read it herself. Ernest was also present at the execution of the will and signed as a witness. In addition, the only two non-

6/ In Pawnee, the Board found that a confidential relationship had arisen on the day the testator's will was executed.

beneficiary will witnesses were Ernest's wife and daughter. 7/ There is no doubt that Ernest actively participated in both the preparation and the execution of Decedent's will.

The Board finds that all three elements listed in Kaulay are present here. It therefore concludes that Judge Hammett was correct in holding that a presumption of undue influence had arisen.

As the Board stated in Hills, supra, 13 IBIA at 195, 92 I.D. at 308, "[i]n order to rebut the presumption [of undue influence], there must be a showing that an objective, independent person discussed the effect of the will with the decedent." Appellants contend that the presumption is rebutted by Decedent's conversation with Marston in December 1991. 8/ However, in his declaration, supra, Marston described that conversation as dealing primarily with the manner in which Decedent might go about making her will and the alternative dispository schemes which she might consider. While the declaration states that Decedent mentioned two of her dispository wishes, it does not indicate that there was any specific discussion of the effect of the particular dispository scheme which was ultimately included in her will.

The Board therefore agrees with Judge Hammett that the conversation between Decedent and Marston did not constitute the sort of independent, objective advice necessary to rebut the presumption of undue influence. Accordingly, the Board also agrees with Judge Hammett's conclusion that Decedent's will must be disapproved because the presumption of undue influence has not been rebutted.

Judge Hammett gave a second reason for disapproving the will. He held that "[t]he dispositive language of the will concerning the description of the property interests to be devised is so vague and uncertain as to render the decedent's testamentary intent indiscernible." Sept. 5, 1996, Order at 3. Both Appellants and Hernandez contend that the descriptions in the will are clear. As noted above, Appellants have submitted statements from two land surveyors in support of their argument. Particularly in light of the statements of the land surveyors, the Board finds that Judge Hammett's decision should be modified to delete his second reason for disapproving Decedent's will.

7/ At least two Departmental decisions have considered a close association between the will witnesses and the person in a confidential relationship to be a factor in determining whether a presumption of undue influence had arisen. See Estate of Roger Wilkin Rose, 13 IBIA 331, 332 n.2, 334 (1985), in which the witnesses were an employee, a former employee, and the father of the person in a confidential relationship; Estate of Milton Holloway, 66 I.D. 411, 413 (1959), in which the witnesses were an employee, the husband of an employee, and the attorney of the person in a confidential relationship.

8/ For purposes of the this decision, the Board assumes that the conversation took place in December 1991, as Appellants now assert.

While deleting one reason for disapproval of the will, however, the Board finds that another reason for disapproval should be added. That reason concerns one of the two will witnesses found by Judge Hammett to be qualified to testify.

[2] In Kaulay, supra, the Board reviewed the Department's appellate decisions on the question of whether particular witnesses are "disinterested" within the meaning of 43 C.F.R. § 4.260(a). The Board found the particular witness at issue in that case, the mother of a minor who was a beneficiary under the will, to be a qualified witness and stated that "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." 30 IBIA at 120. However, in the only Departmental appellate case concerning the spouse of a beneficiary, the spouse was found not to be a qualified witness. Estate of Amy Stricker McBride, IA-1396 (1966), quoted in Kaulay, 30 IBIA at 118. McBride is clearly in accord with the general common law rule concerning spouses of beneficiaries as will witnesses. 2 Page on Wills § 19.106 (Bowe-Parker revision 1960). Just as the Board followed Departmental precedent in Kaulay with respect to relatives of beneficiaries as will witnesses, the Board here follows Departmental precedent with respect to spouses of beneficiaries as will witnesses.

The Board finds that Ernest's wife was not a disinterested witness and that Decedent's will should therefore have been disapproved for failure to comply with the requirement in 43 C.F.R. § 4.260(a) that an Indian will be attested by two disinterested adult witnesses.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Hammett's September 5, 1996, and December 11, 1996, orders are affirmed as modified by the deletion of Judge Hammett's second reason for disapproval of Decedent's will and the addition of a different reason for disapproval))the lack of attestation by two disinterested adult witnesses.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge