



INTERIOR BOARD OF INDIAN APPEALS

Estate of Maggie Johnson Phillips

37 IBIA 26 (10/25/2001)



United States Department of the Interior

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

ESTATE OF MAGGIE JOHNSON : Order Vacating Orders and Remanding
PHILLIPS : Case for Hearing
: :
: Docket No. IBIA 01-13
: :
: October 25, 2001

Appellant Pauline P. Miller seeks review of an order denying rehearing in the estate of Decedent Maggie Johnson Phillips. The order was issued on August 31, 2000, by Administrative Law Judge Harvey C. Sweitzer. For the reasons discussed below, the Board of Indian Appeals (Board) vacates the probate orders issued in this case and remands the matter to Judge Sweitzer to hold a hearing on Appellant's contest of Decedent's will.

Administrative Law Judge Keith L. Burrowes held a hearing to probate Decedent's trust or restricted estate on September 14, 1995. Although no transcript was prepared for that hearing, other documents in the probate record indicate that a document purported to be Decedent's last will and testament, dated May 6, 1994, was introduced at the hearing and that Appellant sought to contest the will. It is possible, but not now susceptible of proof, that, at this hearing, Judge Burrowes informed the parties that he would hold another hearing at which the validity of the will would be at issue. 1/

On July 12, 1996, Judge Burrowes wrote to the parties in this estate. He stated:

At the hearing held September 14, 1995, [Appellant] gave notice that she wanted to contest the will. I gave her until November 15, 1995, to have her attorney get in touch with me. I didn't hear from any attorney, but did get a letter in December from [Appellant] stating she wanted to contest the will because she was left out of the will, as were the children of the deceased brothers.

1/ The Board takes official notice of the fact that the Department's administrative law judges frequently do not know that there will be a will contest when they schedule hearings, but rather learn this fact only at the hearing. If the judge does not know there will be a will contest, he or she may not have allowed enough time in the hearing schedule for the full development of the parties' positions. When this occurs, it is standard practice for the judge to continue the hearing to a later date in order to ensure that the parties have ample time in which to present their positions.

I have determined that I will retire sometime near the end of this year, and my supervisors have stated that I can hold no more hearings but can only do work to try to complete pending cases, so I will not be able to hold another hearing in this case.

If the family can agree upon a compromise settlement in accordance with the provisions of 43 CFR 4.207 * * *, [then] draw it up, have everyone sign before a notary and send it to me. If it is sufficient, I will approve it and issue the final orders.

If you cannot agree, then this case will be assigned to another judge at some point, and another hearing will be set.

The record shows that the parties were not able to reach an agreement.

After Judge Burrowes' retirement, this case was reassigned to Judge Sweitzer. Without holding an additional hearing, on March 28, 1997, Judge Sweitzer issued an order determining Decedent's heirs and approving her will. In regard to Appellant's contest of the will, Judge Sweitzer held:

[Appellant] gave notice that she wanted to contest the will. Judge Burrowes gave her until November 15, 1995 to file an objection. There has not been anything further filed as of this date that would indicate any legal basis for a challenge to the will. I hereby find that decedent's will was properly executed and at the time of execution the decedent possessed testamentary capacity and acted free of undue influence. Accordingly the will should be and hereby is approved.

Mar. 28, 1997, Order at 2.

The probate record contains a petition for rehearing filed by Deanna K. Phillips Iness, the daughter of Decedent's predeceased son, Elery Phillips, and therefore a granddaughter of Decedent and a potential heir. There are no other petitions for rehearing in the probate record.

By notice dated March 16, 1998, Judge Sweitzer informed the parties that he would hold a hearing on April 13, 1998. On March 25, 1998, the Judge issued another notice converting the hearing into a prehearing conference. Although there is no documentation of it in the probate record, the April 13, 1998, prehearing conference was apparently held. Subsequently, on July 29, 1998, Judge Sweitzer ordered "all parties contesting decedent's will * * * to file a status report" with him, "postmarked no later than September 15, 1998." The Judge stated:

At the prehearing conference * * * on April 13, 1998 the parties asserted grounds for their argument but failed to present evidence as required by

43 C.F.R. * * *. The parties are hereby ordered to produce evidence to support their contentions. If the parties fail to comply with the order, the petition for rehearing will be denied.

The probate record contains a September 3, 1998, filing from Appellant entitled "Status Report." Appellant's status report showed that she continued to contest the will and set out evidence that she would attempt to show at a hearing.

On August 31, 2000, Judge Sweitzer issued an order denying rehearing. This order stated:

The initial probate hearing in this matter was held September 14, 1995 * * * before [Judge Burrowes]. [Appellant] gave notice she desired to contest decedent's will. She was given two months to file an objection in writing. She did not respond within the specified time frame. However, she did file a delinquent request for further hearing, stating in the context her objection to approval of decedent's will for the reason that she and predeceased son Elry [sic] were not mentioned in the will.

Judge Burrowes responded by letter July 1996 [sic] to all parties acknowledging receipt of [Appellant's] letter, denying a second hearing, suggesting a compromise settlement * * *. Judge Burrowes also informed the parties of his upcoming retirement and alerted them that if they could not agree on a settlement, the case would be assigned to another judge and a rehearing set.

The parties were unresponsive to a compromise settlement. Consequently, the file was transferred to this office and a decision approving the will was issued March 28, 1997.

In May of 1997, * * * Deanna Phillips Iness, filed a Petition for Rehearing * * *. [Discussion denying this petition for rehearing omitted.]

PREHEARING CONFERENCE

Petitioners were granted a prehearing conference on April 13, 1998. At the conference, petitioners stated two issues they planned to discuss at the anticipated upcoming hearing to contest the will (grounds):

- A. Competence of the testator.
- B. Duress, coercion, and undue influence.

Petitioners requested [Judge Sweitzer to] subpoena witnesses for the anticipated upcoming hearing. Petitioners were asked by [Judge Sweitzer] to provide a list of the witnesses names and addresses following the hearing. No list has been received as of this date.

STATUS REPORT

[Judge Sweitzer] issued an order dated July 29, 1998 notifying all parties contesting decedent's will to file a status report postmarked by September 15, 1998. No response have [sic] been received as of this date.

Aug. 31, 2000, Order Denying Rehearing at 1-3. Judge Sweitzer then denied rehearing. 2/

Appellant appealed to the Board. She did not file any statement in support of her appeal other than her notice of appeal. The Board received statements from Manuel P. Phillips, Rosaline Phillips James, Darlene Phillips, and Loretta Phillips-Johnson. Only the statement filed by Loretta Phillips-Johnson shows that copies were sent to the other parties.

In reviewing this case, the Board exercises the inherent authority of the Secretary of the Interior to correct a manifest injustice or error. 43 C.F.R. § 4.318. It finds numerous errors and inaccuracies in Judge Sweitzer's orders in this case, which have resulted in a denial of due process and a violation of the Department's trust responsibility to the parties in this case.

In both his March 28, 1997, order approving Decedent's will and his August 31, 2000, order denying rehearing, Judge Sweitzer stated that, after the first hearing, Judge Burrowes gave Appellant time in which "to file an objection" or "to file an objection in writing." However, none of Judge Burrowes' letters contain such a statement. In a November 20, 1995, letter

2/ The Board repeats that only one petition for rehearing—the one filed by Deanna K. Phillips Iness—appears in the probate record. However, in his order, Judge Sweitzer consistently uses plural forms, such as "petitioners." The Board is unable to determine from the probate record whether there were more petitions for rehearing which were not included in the probate record, or whether Judge Sweitzer used incorrect plural forms.

If there were more petitions for rehearing, they should be in the probate record. The Judge is reminded that probate records are not only Federal records, but also land title records which form the basis for much of the Federal trust responsibility to individual Indians. These records must be accurately maintained. Each administrative law judge or other Departmental probate hearing official is responsible for ensuring that all filings relevant to a probate proceeding are included in the probate record lodged with the designated Land Titles and Records Office. 43 C.F.R. § 4.236. The Land Titles and Records Office, in turn, is responsible for forwarding the complete original record to the Board upon receipt of notice that the matter has been appealed to the Board. 43 C.F.R. § 4.321.

to Rosaline Phillips James, Judge Burrowes stated that he had given Appellant an opportunity “to have her counsel, whomever that might be, to let me know that they wanted a hearing.” He continued in that letter: “I have not heard from any attorney representing [Appellant], so I assume she has decided not to contest the will.” Appellant appears to have responded to this statement in her December 7, 1995, letter to Judge Burrowes in which she said that she did, in fact, intend to contest the will and requested a hearing. In his July 12, 1996, letter, Judge Burrowes again stated that he gave Appellant time in which “to have her attorney get in touch with me.” Judge Sweitzer’s statement that Judge Burrowes gave Appellant an opportunity to file an objection misrepresents Judge Burrowes’ letters. ^{3/}

Judge Sweitzer stated that Judge Burrowes denied a second hearing. In fact, in his July 12, 1996, letter, Judge Burrowes stated that he would “not be able to hold another hearing” because his supervisors would not permit him to hold hearings because of his impending retirement. This inaccurate characterization of Judge Burrowes’ statement makes it appear that Judge Burrowes determined that another hearing should not be held, when in fact he made no such determination and actually stated later in his letter that a hearing would be held, although by another judge.

Judge Sweitzer stated that Judge Burrowes told the parties that if they were unable to reach a settlement, the case would be referred to another judge “and a rehearing set.” Judge Burrowes actually stated that “another hearing” would be set. Judge Sweitzer’s change from “hearing” to “rehearing” makes it appear that Judge Burrowes had held a hearing on the will contest when in fact he had not. The hearing which he promised the parties was not a “rehearing,” but was instead an initial hearing on the will contest.

Judge Sweitzer appeared to chastise the parties for not presenting their evidence for or against the will at the April 13, 1998, “prehearing conference.” Judge Sweitzer’s March 16, 1998, order set a hearing in this matter for April 13, 1998, and stated that the hearing was for the purpose of taking evidence in order to determine whether his March 28, 1997, order approving Decedent’s will was issued in error. However, his March 25, 1998, order specifically converted that hearing into a prehearing conference. The March 25 order stated:

Pursuant to 43 C.F.R. 4.225, the purposes of this prehearing conference are to:

- (a) Simplify or clarify the issues;

^{3/} The Board notes that there is no evidence in the probate record that Appellant was ever represented by an attorney. No appearance of counsel for Appellant is noted on the attendance list for the Sept. 14, 1995, hearing. Judge Burrowes’ Nov. 20, 1995, letter suggests that Appellant did not have an attorney at that time. Appellant signed all of her filings subsequent to the July 12, 1996, order. She has not been represented by counsel before the Board.

(b) Obtain stipulations, admissions, agreements on documents, understandings on matters already of record, or similar agreements which will avoid unnecessary proof;

(c) Limit the number of expert or other witnesses in avoidance of excessively cumulative evidence;

(d) Effect possible agreement disposing of all or any of the issues in dispute; and

(e) Resolve such other matters as may simplify and shorten the hearing.

Nothing in Judge Sweitzer's March 25 order required the parties to present evidence, or even suggested the possibility that evidence would be taken or expected at the prehearing conference. Therefore, the fact that any party did not present evidence at the prehearing conference cannot be used against that party.

Judge Sweitzer stated that he did not receive any timely status reports from the persons contesting the will as required by his July 29, 1998, order. As noted above, the probate record contains a September 3, 1998, document entitled "Status Report" from Appellant. The envelope in which that report was mailed is not, however, in the record. It is therefore impossible at this point in time to determine whether Appellant's status report was postmarked by September 15, 1998. However, Judge Sweitzer's statement makes it appear that nothing was filed in response to his order when in fact Appellant filed a response. Furthermore, it was the Judge's responsibility to retain the envelope when he ordered a filing by a mailing date. Because he did not retain the envelope, he cannot now hold that Appellant's status report was untimely.

The bottom line in this case is that the parties were never given an opportunity to present their positions and evidence in regard to the approval or disapproval of Decedent's will at a hearing. Judge Burrowes promised that such a hearing would be held, and no hearing has ever been held. ^{4/} The hearing which Judge Burrowes promised to the parties in his July 12, 1996, letter would have been the first chance for anyone to contest Decedent's will. It is a violation of basic due process and the trust responsibility for the Department to issue a decision in a contested will case without allowing the parties a legitimate opportunity to present their positions. Furthermore, even if due process and the trust responsibility did not require a hearing here—a finding the Board obviously does not make—one would be required by the fact that the parties were affirmatively promised that a hearing would be held. See Estate of George Fishbird, 36 IBIA 269 (2001).

^{4/} The Board is aware that the probate record does not show that the parties responded to all of Judge Sweitzer's orders. However, under the circumstances of this case, the Board finds that the Judge's errors outweighed any errors committed by the parties.

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 Sweitzer's March 28, 1997, order determining Decedent's heirs and approving her will, and his August 31, 2000, order denying rehearing are vacated. This matter is remanded to him to hold an initial hearing on Appellant's contest of Decedent's will.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge