



INTERIOR BOARD OF INDIAN APPEALS

Estate of Mary Gosaduk Johnson Tilden

37 IBIA 97 (02/08/2002)



United States Department of the Interior

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

ESTATE OF MARY GOSADUK : Order Vacating Decisions and Remanding
JOHNSON TILDEN : Estate for New Hearing
: :
: Docket No. IBIA 02-28
: :
: January 8, 2002

On December 27, 2001, the Board of Indian Appeals (Board) received a notice of appeal from Richard Tilden, Sr. (Appellant). Appellant seeks review of an October 31, 2001, order denying rehearing entered in the estate of Decedent Mary Gosaduk Johnson Tilden by Administrative Law Judge James H. Heffernan.

The basis for the petition for rehearing was that Decedent had intended to change the will which she executed in 1983, and had had a new will prepared. Judge Heffernan held that because Decedent had not executed the new will, it could not be admitted to probate. The holding that the Department cannot approve an unexecuted will based upon a decedent's alleged intent is correct. See, e.g., Estate of Ella Sarah Case Barnes, 17 IBIA 72, 76 (1989), and cases cited there.

However, Appellant's notice of appeal alleges that Decedent was unduly influenced in the execution of her 1983 will. According to Judge Heffernan's August 10, 2001, order approving that will, "[t]here were no objections to the will." Aug. 10, 2001, Order at 2. The Judge provided the Board with a copy of the transcript of the June 12, 2001, hearing in this estate. The transcript is replete with notations that certain portions of the testimony were inaudible and most of the witnesses testifying are identified only as "Man" or "Woman." Despite this, it is clear that there were objections to the 1983 will. For example, on page 8 of the transcript, an unidentified man stated:

But the way it's [the will is] written, and if it was, if she understood it, she never would have signed it in its present form. But, because she could not read or write, anybody reading her the will could say whatever they wanted to and tell her this is what it says, when perhaps it says something else.

Again, on pages 9-10, an unidentified man stated:

No, that's not what I'm getting at. What I'm getting at is if the will was read to mom the way we see it here in front of us, she never would have signed

it knowing that statement was in there, because Eva was not adopted out by her and Charlie Johnson.

From a statement by Judge Heffernan at page 12 of the transcript, it appears that the will contained an anti-contest clause, *i.e.*, a clause which provides that any person who objects to the will will receive only a small amount. Judge Heffernan stated that the clause was probably based on the Alaska probate code. In response to questions from family members, Judge Heffernan indicated that, if the will was thrown out, the anti-contest clause would not apply and that a will contest would include an appeal from his decision. Judge Heffernan did not discuss either at the hearing or in his decision how the Board's opinion in Estate of George Levi, 26 IBIA 50 (1994), might apply in this situation.

The basis for Appellant's appeal to the Board was that Decedent was unduly influenced in the execution of her 1983 will. The Board finds that the issue of undue influence, if not the precise words, was raised at the hearing. However, the transcript does not show that the Judge gave family members the opportunity fully to raise and explore the issue. Furthermore, he did not address the objections at all in his August 10, 2001, decision. Under these circumstances, and in view of its responsibility to exercise the inherent authority of the Secretary to correct a manifest injustice or error, 43 C.F.R. § 4.318, the Board finds that the August 10, 2001, order determining heirs and approving will must be vacated. Because of this conclusion, it also finds that the October 31, 2001, order denying rehearing should be vacated even though the single holding there was correct.

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 Heffernan's August 10, 2001, order determining heirs and approving will and his October 31, 2001, order denying rehearing are vacated. This estate is remanded to Judge Heffernan with instructions to hold another hearing at which family members are given a full opportunity to raise their concerns about the execution of Decedent's 1983 will, even though they may not use the precise terms employed in legal writings. Furthermore, Judge Heffernan will ensure in this and all other hearings which he holds that witnesses are properly identified.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

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Anita Vogt
Administrative Judge