



## INTERIOR BOARD OF INDIAN APPEALS

Estate of Julius Benter (Bender)

1 IBIA 24 (11/17/1970)

Reconsideration denied:

1 IBIA 59

Judicial review of this case:

Dismissed, No. 71-1559 (9th Cir. Feb. 18, 1972)

Dismissed upon stipulation, *Brazie v. Morton*, No. S-2360 (E.D. Cal. Dec. 28, 1972)

Related Board cases:

15 IBIA 88

17 IBIA 86

Estate of Julius Benter  
Decided November 17, 1970

IBIA 70-5

Indian Lands: Descent and Distribution: Generally

Official notice of documents and records will not be taken unless they be introduced in evidence or unless an order or stipulation provides to the contrary.

Indian Lands: Descent and Distribution: Generally:

Mere objection to the technique of recording and transcribing testimony cannot be a ground for rehearing unless reversible error is specified.

Indian Lands: Descent and Distribution: Wills

When the evidence shows that the legally appointed guardian of the testator actively participated in procuring the execution of a will naming the guardian as a principal beneficiary, a rebuttable presumption of undue influence is raised. The burden of rebutting such a presumption then falls upon the proponent of the will.

## Indian Lands: Descent and Distribution: Generally

A rehearing will not be granted to permit an attorney to impeach his own witness who was a party in interest if no objection to the taking of the original testimony was raised or recess requested at the time of hearing, even though it is later alleged that the witness gave incorrect answers through physical infirmity or through the effect of drugs administered in preparation for surgery.



# United States Department of the Interior

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

ESTATE OF JULIUS BENTER	:	
	:	Decision on Appeal
Redding Allottee No. 551,	:	
Deceased	:	IBIA 70-5
Probate No. F-88-69	:	

Julius Benter, a Wintun-Shasta Indian, Redding Allottee No. 551, died September 16, 1967, at the age of 82 years, the owner of a trust estate consisting of the 160-acre allotment of Jim Benter, Redding Allottee No. 549, valued at \$4,000.00. The decedent died unmarried, without issue, father, mother, brother, sister, or descendants of deceased brothers or sisters surviving. However, he had executed the document designated Last Will and Testament dated August 20, 1951.

At the first hearing held April 6, 1968, Winnie Nelson and Robert Offield appeared personally and by their attorney, Samuel R. Friedman, claiming to be heirs at law as next of kin. George B. Brazie appeared personally and by his attorney, Michael T. Hennessy, claiming as the sole devisee named in the will. Evidence was taken as to family relationships together with preliminary evidence as to the validity of the will. Mr. Friedman announced that the claiming heirs wished to contest the will.

The will matter was set over to August 29, 1968 when a full hearing was held with all parties appearing by their attorneys--Mr. Carlton having joined Mr. Friedman. In order that he might be fully advised as to the positions taken by the parties, Examiner Wilson requested that written briefs be filed by the attorneys within 30 days of the transmittal of the transcripts of testimony.

The proponent Hennessy filed his brief dated December 13, 1968 and the contestants, Friedman and Carlton, filed their brief dated December 30, 1968. Neither attorney included any criticism of conduct of the hearings, the method of recording testimony, or the resulting transcripts. The briefs were directed solely to the merits of the litigation.

On March 14, 1969 Mr. Henry A. Hammond, Attorney, filed his appearance for Clara Wicks, and on May 20, 1969 filed his appearance for Percy Wicks, Emma Rowley, Herman Wicks, Elmer Wicks, Ed McCulley, Joe McCulley, Fay McCulley, Violet Bailey, Charles McCulley, Ann Zuck, Dennis McCulley, and Louise Richardson. The regulations do not require any pleadings and the record does not include a petition to intervene. However, the record does include the notice issued March 13, 1969, by the Examiner scheduling a third hearing for April 10, 1969 in the County Court House, Yreka, California. The notice limited the hearing to the taking of testimony and receiving whatever evidence Clara Wicks, et al, might have in support of their claim to the estate as heirs of the deceased.

The transcript of that hearing reflects the personal appearances of: Mr. Friedman and his client Robert Offield, Winnie Nelson being absent; Michael T. Hennessy and his client George Brazie; and Mr. Hammond and his clients Fred Wicks, Jr., and Clara Wicks, the other claiming parties being absent. The transcript fails to reflect the locale of the hearing or the circumstances under which it was conducted, all of which comes to light only through the briefs of the attorneys and later developments in the case. At this hearing Clara Wicks was the principal witness produced by Mr. Hammond and her testimony includes 38 pages of transcript. She was subject to both direct and cross-examination for the better part of the day.

At the close of the hearing (tr. 78) Mr. Friedman indicated that upon a study of the transcript it might be his desire to request a further hearing to obtain additional testimony from Winnie Nelson. The Examiner stated he would rule upon the matter "upon receipt of a request," and "in absence of any further testimony or questions the hearing is concluded."

No further hearing was held but the record includes a document designated "Affidavit of Winnie Nelson" signed and sworn to by her before a Notary Public on May 20, 1969. It bears no filing stamp, nor is there any indication as to how or when it became a part of the record. It can only be presumed that it was filed

shortly after it was signed and that all parties were aware of the fact.

On June 27, 1969 Mr. Hammond mailed his first brief in compliance with the Examiner's earlier request. This brief was directed solely to the will and to the claim of Winnie Nelson, et al, as heirs while supporting the claim of the Clara Wicks group as heirs. No mention of the Winnie Nelson affidavit is made, and he relied wholly upon the testimony of Clara Wicks as being that which established her relationship to the decedent. No mention is made of her physical or mental condition at the time of giving such testimony. No attack is made upon the transcript, its preparation, the method used in making the record of proceedings at the hearings nor is any attack made upon the record generally. This memorandum is directed solely to the merits. No other paper or document was filed prior to the issuance of the Examiner's decision on July 24, 1969.

In his order the Examiner disapproved the will and determined that the next of kin to inherit the decedent's property included Winnie Nelson, et al, excluding Clara Wicks, et al. There is no indication that the Examiner considered the Winnie Nelson affidavit or that he took official notice of any of the Bureau of Indian Affairs' records touching upon the decedent's family relationship or any of those records supporting the enrollment of the claiming parties.

Petitions for rehearing were filed by George Brazie in support of the will and by Clara Wicks in support of the claim of the Clara Wicks group. Answers to both petitions were filed by all opposing attorneys and two separate orders were entered denying the petitions--Brazie petition on January 20, 1970 and the Wicks petition on February 3, 1970.

From these orders notices of appeal were timely and separately filed with the Solicitor in whom the authority for decisions then rested. Under redelegation of authority in probate the matter is now before the Board of Indian Appeals, Office of Hearings and Appeals, without prejudice.

Mr. Hammond's notice was in the form of a brief and was mailed March 27, 1970. This was supplemented upon the filing of a "Supplemental Brief and Petition to Augment the Record" dated August 22, 1970, received and date stamped August 26, 1970 in the Office of Hearings and Appeals.

In his petition for rehearing Mr. Hammond made his first attack upon the record. The attack culminates on appeal in his "Supplemental Brief and Request to Augment the Record" wherein he makes five demands as follows:.

- "1. The production of the original tapes of the dictating machine.
2. The deposition of the Government employee as to the method of use of the dictating machine.

3. The production of copies of the records of the Office of Indian Affairs referred to in the Notice of Appeal.
4. Testimony by deposition of Clara Wicks to rebut the Winnie Nelson affidavit.
5. Deposition of Winnie Nelson for cross-examination upon her affidavit."

In this petition to augment the record he cites as the authority the decision in the case Kwok Jan Fat v. White, 253 U.S. 454, 40 S. Ct. 566. At page 2 of his petition he quotes from that decision:

"It is the province of the courts, in proceedings for review, . . . to prevent abuse, . . . and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment."

In support of his contentions he also cites the decision in Norris & Hirshberg v. S.E.C., (D.C. Cir. 1947) 163 F. 2d 689 (cert. den. 333 U.S. 867, 68 S. Ct. 788). This decision cannot constitute authority for any determination of the issues raised in this case since the court was there applying statutory provisions controlling the contents of the record and the certification of the transcript.

The statutes and 25 CFR 15 are void of any similar specific requirements for the proceedings here. Nevertheless, as stated in Kwok Jan Fat v. White (supra) the courts will properly review an administrative proceeding where the appellate officers do not have before them an adequate record of the proceedings below. Accordingly,

a determination as to the sufficiency of the record here must be made as a prerequisite to any consideration of the case on its merits.

In this connection although Mr. Hammond describes the technique used in producing a recording of the proceedings at the hearings his criticism of the transcript is not specific. In II(b) of his petition for rehearing dated September 2, 1969, Mr. Hammond describes the technique as being one where a Government employee sat with the microphone from a recording device into which he repeated the questions asked and the answers given by the witness occasionally requiring the assistance of counsel, or the Examiner, when his hearing was not clear. He said:

"At no time was either the question or the answer directly recorded on the dictating machine. It is submitted that this method of making a record of proceedings is fraught with error, that an alleged transcript of the proceedings cannot be audited to determine its accuracy in the light of the irregular and inaccurate method of preparation."

Identical language is used in the Notice of Appeal by which the matter comes before this Board.

In the petition to augment the record he refers to the Notice of Appeal and adds only:

"It has been pointed out that the record made by this employee is inaccurate and incomplete."

By this statement Mr. Hammond has encompassed all of the potential evils which might accompany such a procedure but without

pointing to a single omission or to an inaccuracy in any question, answer, or ruling.

The record does show that at the time Mr. Hammond entered the case, the transcript of the two previous hearings were available for his examination. It shows that at the close of the third hearing in which Mr. Hammond was a participant, transcripts were to be supplied to the attorneys and it is presumed that he had opportunity to examine a copy before filing his brief. Mr. Hammond was present at all times and participated fully in the examination of Clara Wicks and the other witnesses appearing. Had the transcript contained any material error he had the duty of petitioning for further hearing before any decision was rendered, with citations of all specific errors. This he did not do, but he did file a brief on the merits on June 27, 1969, almost a month prior to the Examiner's order of July 24, 1969.

It is required by 25 CFR 15.19(a) that:

"Such notice of appeal shall state specifically and concisely the reasons for the appeal."

The requirements relative to a petition for rehearing, §15.17(a) are almost identical.

The Solicitor said in his decision in the Estate of Katie Reed, IA-D-3 (1967), general allegations in the petition for rehearing and the notice of appeal which fail to specifically establish error will not be considered. In that case the decision in Allison v.

Heller, 289 P. 2d 160 (Colo. 1955) was cited with approval where the court designated non-specific allegations as "mother hubbard generalities."

Mr. Hennessy also attacked the record for the first time in his petition for rehearing having failed to do so in his first brief filed December 3, 1968, which was prior to the entry of the Wicks group into the case. He abandoned that attack in preparing his notice of appeal and it is not here considered. Mr. Carlton and Mr. Friedman joined in a brief filed December 30, 1968 prior to the Examiner's decision, and they made no attack upon the record.

It is here concluded that no good purpose would be served by ordering compliance with the demands made in items 1 and 2 of Mr. Hammond's petition to augment the record. Two reasons for this apply: 1) there has been no tender of any material evidence allegedly omitted from the transcript; and 2) errors, if they exist, are deemed to have been waived at a critical juncture by failure to assert them before the Examiner's decision was issued. The current criticism is an afterthought, a stratagem only.

Demand No. 3 for production of copies of the records of the Office of Indian Affairs suggests that Mr. Hammond is laboring under some misapprehension as to the law of evidence and the provisions of the Administrative Procedure Act. 1/

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1/ Act of June 11, 1946, 60 Stat. 237 as amended; 5 USC 556(e).

"The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title, and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." (Emphasis supplied).

It was determined in the Solicitor's decision in the Estate of Charles White, 70 ID 102, 105-106 (1963) that the Administrative Procedure Act applies to and governs proceedings in Indian probate. It was further held in the Estate of Greybull, IA-D-2 (1966) that the Examiner was in error when testimony received in a different prior probate was quoted in the decision, without having given opportunity to the opposing parties to explain or controvert the statement quoted from the older case.

An examination of the transcript reflects at one point that certain pictures were exhibited to witnesses (tr. 28 & 31 - 4/10/69). These were not offered in evidence. The transcript shows that certain enrollment applications were exhibited to witnesses and selected questions and answers were read into the record. (tr. 25 - 8/29/68). The enrollment documents themselves were not offered in evidence and no ruling admitting them appears. The collateral probate proceedings mentioned in Mr. Hammond's notice of appeal on page 6 were not even mentioned during the hearings, except obliquely, and no documents, possibly consisting of hundreds of pages,

were offered in evidence. No stipulations or order defining any record or documents to be noticed appears. None was admitted by any ruling of the Examiner.

Mr. Hammond did not suggest that any of the documents or pictures were offered in evidence or that the transcript is or may be deficient in not showing such offer. Having failed in this, the attack upon the Examiner for his refusal to consider these records must fail also. It might be further noted that in writing a decision, the Examiner is not bound to mention or discuss each and every item of evidence presented by each contending party.

In his petition to augment the record, Mr. Hammond lists as point No. 4: "testimony by deposition of Clara Wicks to rebut the Winnie Nelson affidavit." This language appears either to be a departure from his original position, or the addition of a new issue. Whatever the purpose, item 4 is later disposed of with item 5.

In his petition for rehearing he relates a set of circumstances at the April 10, 1969 hearing not reflected in the record or in the transcript. He recites that the testimony of Clara Wicks was taken at the hospital while she was a patient confined either in bed or in a wheel chair, the exact situation not being clear; at a time when she was being prepared for surgery that same date, to repair a fractured hip; and that at the time she was under the influence of sedatives and opiates. The certificate of Dr. Albert H. Newton

attached to Mr. Hammond's petition for rehearing includes the statement:

"At the time said Clara Wicks testified at the above time and place she was under the influence of opiates and sedatives and was unable to properly comprehend the nature and effect of her testimony."

The doctor states further that he first treated her for the injury on April 7, preparing her for surgery on April 10. He continues that he was "informed" that she gave testimony on that date for a continuous period from 10 a.m., to late afternoon without stating that he personally examined her at any time during the proceeding. The answer brief filed by Carlton-Friedman asserts that the surgery was not scheduled for April 10, but was scheduled for April 11, the day following.

Mr. Hammond participated in the entire proceedings on April 16, questioning his client at great length, but in his pre-decision brief, none of this is mentioned. He devoted himself entirely to a discussion of the merits of the case.

In his petition for rehearing he asked that Clara Wicks be re-examined in order that the misstatements made by his witness on April 10 could be corrected, but he did not indicate what statements might be the subject of what change. Nothing is added in the notice of appeal or the supplemental petition.

Unfortunately the transcript does not indicate where the hearing was held except that it shows: "Examiner Wilson: Hearing will be reconvened at 3:45 p.m., at the Court House." (tr. 46, 4/10/69). The entire record in this matter is made upon the statements of counsel contained in briefs and petitions filed subsequent to the issuance of the original decision.

Not only did Mr. Hammond participate in the examination of his client on April 10, 1969, but the Examiner was present throughout. No motion to recess the hearing was made by Mr. Hammond and no ruling was made which would indicate the Examiner detected any sign of infirmity on the part of the witness.

This is an attempt by Mr. Hammond to impeach the testimony of his own witness and client, and the petition is denied.

Item No. 5 is a petition for the taking of the deposition of Winnie Nelson for cross-examination upon her affidavit of May 20, 1969. The affidavit appears as part of the record without any receiving stamp or other authentication beyond the discussion relative thereto which was included in the Examiner's order of February 3, 1970 in which he denied the Wicks petition for rehearing.

The Examiner ruled that the statements made in the Nelson affidavit are largely cumulative to the testimony already in the transcript. With this we agree. Whether it was properly filed or not, or whether considered by the Examiner or not, is immaterial on appeal. Upon such a determination, Item 5 of the petition must

fail. Upon the failure of Item 5, Item 4 becomes moot.

A determination is here then made that the entire attack by Mr. Hammond upon the record, including the transcript, fails and that the decision of the Examiner may here be considered on its merits.

The notice of appeal filed by Mr. Hennessy on behalf of the proponent of the will does not include any attack upon the record, although the petition for rehearing did include some of the criticisms made by Mr. Hammond. His position on the matter is not before the Board since he did not choose to raise it on appeal.

Considering the Hennessy notice of appeal on its merits it is noted that: in II (a) he alleges the Examiner did not give sufficient consideration to the testimony of the subscribing witness; in II (c) he alleges the Examiner's finding as to the disposition of property by will to the testator's natural object of affection is in error; and, in II (d) he challenges the veracity and recollection of the witness Winnie Nelson. All of these are within the Examiner's discretion in weighing the evidence while judging the veracity and capacity of witnesses.

Only a short review of the briefs and petition filed in the case is sufficient to demonstrate that the Examiner's decision is based upon conflicting testimony where it is incumbent upon him to make a judgment as to the witnesses' capacity for knowledge,

capacity for recollection, and veracity. When the Examiner's decision is based on conflicting evidence where evaluation of the evidence and the witnesses is necessary, he will be affirmed in absence of manifest error. Estate of George Squawlie, IA-P-12 (1968), and cases cited.

In paragraph II (b) of his notice of appeal Mr. Hennessy indicates that in the Order denying the petition for rehearing issued July 24, 1969, the Examiner failed to follow the California law of evidence as to the burden of rebutting a presumption of undue influence. The laws of the state of the decedent's residence are not controlling in the approval or disapproval of a will disposing of the trust property of a deceased Indian. Homovich v. Chapman, 191 F. 2d 761 (1951); Estate of Simpson, 71 ID 103 (1964).

The Examiner's order of July 24, 1969 includes a discussion of the shifting burden after creation of a presumption of undue influence and these facts appear.

In December of 1949 the testator, being an elderly illiterate Indian of questionable mentality, required the appointment of a guardian in order to obtain the benefits of the California old age assistance program. George Brazie signed the statutory petition, verified upon his oath, reciting the incompetency of the testator and the need for a guardian at the time. Accordingly, he was appointed guardian of the person and estate of the testator by the

Superior Court on January 23, 1950, and letters of guardianship were issued the next day.

Brazie acted in the guardian's capacity until the death of the testator, and was duly compensated from time to time from the estate.

Brazie upon learning the testator had no close relatives, asked the testator who would get his property upon his death. Reportedly the testator indicated it was his intent that Brazie should receive the estate. Brazie informed the testator that a paper upon which he would place his thumbprint would be necessary.

Brazie, by his own testimony, took the testator to the office of Mr. Correia, an Attorney, the next day and sat with the testator at least a part of the time during the discussions, the drafting, and execution of the will of August 30, 1951. He then took the old man home.

Mr. Correia, the only surviving witness to the will was not made aware of the guardianship when the will was drawn. In 1969 he could not recall that any particular precautions against influence were taken, who paid his fee, or to whom the will was delivered.

Upon these facts establishing a fiduciary relationship between testator and beneficiary and establishing the active part played by such fiduciary in the actual making of the will, a rebuttable

presumption of undue influence is raised. If unrebutted, the will must fall. The Examiner correctly followed the rule established by the cases. He cites the decisions in Estate of Roxie, IA-1256 (1966), which in turn cites and follows the decision in Estate of Holloway, 66 ID 411 (1959). He there held that the presumption had not been rebutted with the result that he disapproved the will of August 31, 1951. The Examiner is affirmed here.

Mr. Hammond in his notice of appeal specified as his grounds therefor certain alleged errors going to the merits beyond his allegations of error as to procedures.

In paragraph III (d) he repeats the allegation that he has newly discovered evidence in the form of rebuttal testimony to be given by Stella Howerton. His contention was that with no knowledge of this testimony he could not with reasonable diligence have discovered the same. Stella Howerton's affidavit is attached to the petition for rehearing. It is provided in 25 CFR 15.17:

"If the petition is based on newly discovered evidence, it must state a justifiable reason for the failure to discover and present the evidence at the hearing. . .".

The record shows that Stella Howerton was one of the witnesses called by Mr. Hammond on behalf of Clara Wicks and that she gave testimony on April 10, 1969. Mr. Hammond's only excuse for failing to present the evidence contained in the affidavit is that he had no knowledge that she had such information in her memory. In pre-

paring for trial it is incumbent upon the attorney to be fully advised as to the testimony available from each witness. The question could have been asked while she was on the witness stand on April 10, 1969, to illicit the information contained in the affidavit.

The Examiner did not consider the attorney's omission of "one more question" in the examination of his witness a "justifiable reason for failure to discover and present the evidence". No error is found in this decision.

Mr. Hammond continues in paragraph III (d) to discuss the declaration of Dr. Albert H. Newton, which is also attached to the petition for rehearing. This matter has heretofore been disposed of. Under the same numbering, Mr. Hammond attacks the Examiner's decision for failing to take notice of the United States Department of the Interior's records. Insofar as the applications for enrollment are concerned, it may be said that they were never offered in evidence and were never admitted. He adds for the first time, references to certain probate files and these were never considered and cannot be considered now for the dual reasons that they were not earlier mentioned in the petitions for rehearing, and that they were never offered in evidence or admitted in evidence.

In paragraph III (e) Mr. Hammond attacks the Examiner's decision alleging insufficient evidence and points out the discrepancies in the testimony of Winnie Nelson in which the application

for enrollment is again discussed. That document is not in evidence as heretofore indicated.

As to the balance of the matters recited, the points have been heretofore disposed of.

In paragraph III (f) the Examiner's evaluation of the evidence is challenged and reference is again made to certain pictures discussed during the hearings which were never offered in evidence nor admitted. The Examiner's decision will not be disturbed.

In his notice of appeal paragraphs III (a), (b), and (c), Mr. Hammond mentioned alleged procedural errors which do not require any further comment beyond that heretofore made.

Petitions for oral argument are included in the notices of appeal. In view of the determinations herein made as to the sufficiency of the record, and upon consideration of the voluminous briefs which were filed, it appears that the matter has been fully explored. Nothing further of a probative character has been offered and it is very doubtful that anything could be developed in the course of an oral argument. The petitions are denied.

The decision of the Examiner is hereby affirmed. Under authority delegated to the Board of Indian Appeals by the Secretary of the Interior, it is determined that this matter has been properly conducted, decided, and reviewed. This decision is final for the Department. 35 F.R. 12081.

The Examiner is directed to order immediate distribution of the assets of the estate in accordance with his order of July 24, 1969 disapproving the will and determining the heirs.

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//original signed  
David J. McKee, Chairman  
Board of Indian Appeals

Concur:

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//original signed  
James M. Day, Member of the  
Board of Indian Appeals