



INTERIOR BOARD OF INDIAN APPEALS

Estate of Ronald Richard Saubel

9 IBIA 136 (12/01/1981)

Related Board case:
9 IBIA 94



United States Department of the Interior

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

ESTATE OF : Supplemental Order
RONALD RICHARD SAUBEL :
: Docket No. IBIA 80-46
:
: December 1, 1981

It appears necessary that the Board of Indian Appeals issue a supplemental order in this case, not because one of the parties has requested it, but because the Administrative Law Judge assigned the matter on remand, Judge S. N. Willett, has disagreed with the way the Board characterized her holding of July 6, 1978. ^{1/} Specifically, by memorandum dated November 13, 1981, Judge Willett returned the record in this matter to the Chief of the Indian Probate Judges stating that the Board's decision of October 28, 1981, incorrectly held that her 1978 order had disapproved the decedent's last will and testament of February 1, 1973, which disinherited two children of the testator born after the will was prepared, on grounds that it was not rational. This is indeed what the Board said in a desire to make sense of the decision as written. According to Judge Willett's recent explanation of her holding in this case, she disapproved the 1973 will under an inherent discretionary authority which she believes exists and which may be exercised in situations such as the instant case when a will fails to provide for minor children of the testator.

The Board was aware of the "discretionary authority" language employed by Judge Willett in her original decision. However, from the overall context of her findings and conclusions, and based on the clear state of the law, the Board concluded that this language was inextricably linked to a finding that the 1973 will was irrational under the circumstances. Since she ruled that even though the 1973 will was technically proper, that the decedent was competent and not unduly

^{1/} We consider it "necessary" to issue a supplemental order primarily as a means of insuring that the remand proceeding ordered by the Board not be further delayed. As far as the Board is concerned, Judge Willett has not stated grounds sufficient to decline to hear this case (see 43 CFR 4.27(c); Bob's Casing Crews v. NLRB, 458 F.2d 1301, 1305 (5th Cir. 1972)); nor has she any standing to challenge the Board's decision. While we could await some form of agency refereeing in this matter, the interest of the parties would seem best served by our agreement to respond to Judge Willett on the merits.

influenced in the making of the will, that there was no evidence of fraud, mistake or misrepresentation in the will's execution, and that the terms of the will could not be amended by state pretermission laws, but that it was nonetheless proper to disapprove the will "to insure the participation of the afterborn, minor children in the testator's estate," the Board still has difficulty perceiving such a decision as anything other than a repudiation of the will for failure to reflect a rational testamentary scheme. 2/

Although Judge Willett's holding as clarified by her eluded the Board before, our prior decision implicitly, if not expressly, rejects the notion that the Department can disapprove a technically proper will of a deceased Indian which reflects a rational testamentary scheme. The statements made by Justice Harlan in footnote 9 of Tooahnippah v. Hickel, 397 U.S. 598, 618 (1970), relied upon by Judge Willett in her disposition of this case, do not constitute the holding of the Court in Tooahnippah. Further, whereas Judge Willett prefers to read footnote 9 as a statement by Justice Harlan that the Secretary has the authority to disapprove an Indian will even if found to be technically proper and rational, we do not so interpret Justice Harlan's concurring dictum. (For an analysis of this footnote, see concurring opinion in the Board's October 28, 1981, decision, 9 IBIA 94, 103.)

The Supreme Court's explanation of the Secretary's authority to disapprove Indian wills under 25 U.S.C. § 373 was summarized in Akers v. Morton, 499 F.2d 44 (9th Cir. 1974), cert. denied, 423 U.S. 831(1975):

The Supreme Court, however, has substantially limited the Secretary's discretion under section 373. The Secretary may disapprove a will only if it is technically deficient or if it is irrational.

* * * * *

* * * Tooahnippah v. Hickel * * * limited the Secretary's discretion to evaluation of the technical validity of the will and the rationality of the decedent's testamentary scheme.

Id. at 47, 48.

The court in Akers noted Mr. Justice Harlan's special concurrence in Tooahnippah stating: "According to Mr. Justice Harlan, specially concurring, the Secretary might have a greater area of discretion if he acted pursuant to promulgated regulations. * * * No regulations relevant to the issue in this case have been promulgated." Id. at 48 n.4.

2/ Appellants' counsel would seem to have interpreted Judge Willett's order the same way: "Decedent's 1973 will was disapproved by Judge S. N. Willett on other and proper grounds, i.e., that it did not truly conform to his testamentary scheme, as two legitimate children who had been born after the will was written would be left unprovided for" (Notice of Appeal, dated Dec. 13, 1979, at 19).

The Akers decision includes strong language expressing "dissatisfaction" with the state of the law which so limits the Secretary in his disapproval of Indian wills. Id. at 47. Both Judge Willett and this Board have used the case at hand to convey the same dissatisfaction. As the Board stated in its initial decision, however, the solution is for the Department to promulgate substantive probate regulations in areas of need. Justice is not served by giving strained interpretations of otherwise clear statements by the Supreme Court as to the present authority of the Secretary in disapproving Indian wills.

Therefore, pursuant to the authority vested in the Board by 43 CFR 4.1, it is ordered that it was error for Administrative Law Judge S. N. Willett to disapprove decedent's February 1, 1973, will on grounds that it was within her discretion to do so. 3/

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Wm. Philip Horton
Chief Administrative Judge

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Franklin D. Arness
Administrative Judge

//original signed
Jerry Muskrat
Administrative Judge

3/ Although unrelated to this additional holding, the Board is constrained to reply to another charge made by Judge Willett in her memorandum of Nov. 13, 1981. As a footnote to her statement that she would prefer that the Board's decision of Oct. 28, 1981, be withdrawn, she suggests that it was improper for the Board to make a finding that she failed to consider the validity of a holographic will dated Jan. 28, 1973. She states:

"The holograph was not produced in connection with the proceeding. It was not made a part of the record by any party and, therefore, could not by law be considered. Additionally, a holographic will could not be effective to dispose of trust property since such wills do not meet the witness and attestation requirements in 43 CFR § 4.260."

Judge Willett is wrong as to both statements. The holograph was produced by counsel for appellants at the hearing of May 22, 1978 (Tr. 19), to which Judge Willett replied: "Let the record reflect that I have been handed what looks like a holographic will, dated January 28, 1973, and I'm going to label it ALJ Exhibit 8." The holograph indeed appears as ALJ Exhibit 8 and contains the names of two witnesses. Also, while the situation would be rare, there is no reason why holographic wills cannot be prepared to satisfy Departmental requirements that a will be "executed in writing and attested by two disinterested adult witnesses." Holographic wills have been approved by the Department in the past. See Solicitor's Opinion of Mar. 3, 1941 (Vol. I, Ops. of Sol. at 1037).

JAMES A. LIMB CONCURRING:

As Director of the Office of Hearings and Appeals, it is within my authority to participate in any Board decision as an ex officio member of the Board. 43 CFR 4.2(a). I choose to do so in this case primarily to impart that I do not consider it appropriate for an Administrative Law Judge assigned a case on remand to decline to hear the matter because he or she does not agree with an appellate tribunal's decision. Now that Judge Willett has challenged the Board's characterization of her holding, I can appreciate that although a logical extension, the Board's conclusion may not have been completely accurate. I can understand how the Board of Indian Appeals initially regarded Judge Willett's 1978 decision as a repudiation of the February 1, 1973, will for failure to reflect a rational testamentary scheme. Having found the will to be technically sufficient, this was the only proper ground for disapproval under the law. Toahnippah v. Hickel, 397 U.S. 598 (1970); Akers v. Morton, 499 F.2d 44 (9th Cir. 1974). Therefore, I concur in the Board's memorandum order above.

//original signed

James A. Limb, Director
Office of Hearings and Appeals