



INTERIOR BOARD OF INDIAN APPEALS

Estate of Philip Malcolm Bayou

13 IBIA 200 (07/19/1985)

Judicial review of this case:

Reversed & remanded, *Mallonee v. Hodel*, No. A-85-549 (D. Alaska May 5, 1987)

Related Board cases:

15 IBIA 202

19 IBIA 20



# United States Department of the Interior

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

## ESTATE OF PHILIP MALCOLM BAYOU

IBIA 84-25

Decided July 19, 1985

Appeal from an order denying rehearing issued by Administrative Law Judge William E. Hammett in Indian probate IP SA 150N 81.

Affirmed as modified, 7 IBIA 286 and 9 IBIA 43 limited.

1. Board of Indian Appeals: Jurisdiction--Indian Probate: Appeal: Matters Considered on Appeal

The Board of Indian Appeals will not normally consider a legal issue or allegation of fact first raised on appeal. However, when a manifest error has been committed, the Board has the inherent authority of the Secretary to correct that error.

2. Indian Probate: Wills: Undue Influence

When the evidence shows that the principal beneficiary under an Indian will and the testator were in a special confidential relationship, particularly one involving financial matters, a rebuttable presumption of undue influence is raised, and the burden of rebutting that presumption is borne by the proponent of the will.

APPEARANCES: William Grant Stewart, Esq., Anchorage, Alaska, for appellant; Cynthia L. Ducey, Esq., Anchorage, Alaska, for appellees Ethel Bayou Anthony, Peter Bayou, and Martha Bayou Taylor; Alan L. Schmitt, Esq., Kodiak, Alaska, for appellee William Bayou. Counsel to the Board: Kathryn A. Lynn.

### OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On April 12, 1984, Rudy Mallonee (appellant) filed a notice of appeal from a February 10, 1984, order denying rehearing issued by Administrative Law Judge William E. Hammett in the estate of Philip Malcolm Bayou (decedent). The notice was filed with Judge Hammett who forwarded it to the Board of Indian Appeals (Board). Judge Hammett's order denying rehearing let stand a July 25, 1983, order disapproving decedent's will and determining his heirs. For the reasons set forth below, the order denying rehearing is affirmed, and the order disapproving decedent's will and determining his heirs is affirmed as modified.

### Background

Decedent, an Alaska Aleut, was born on January 7, 1928, and died at Valdez, Alaska, on July 30, 1980. According to records maintained by the Bureau of Indian Affairs (BIA), at the time of his death decedent held Public Domain Allotment A-054785 in restricted status and had an Individual Indian Money account with a balance of approximately \$12,000, the proceeds of an out-of-court settlement agreement negotiated by BIA on his behalf against a trespasser on his allotment. Hearings to probate decedent's Indian trust estate were held by Judge Hammett on August 24, 1981; June 18, 1982; and August 26, 1982. Numerous depositions were also taken.

Prior to the initial hearing, appellant presented to BIA a document purporting to be decedent's last will and testament. This document, dated June 16, 1975, devised all of decedent's estate to appellant, an apparently non-Indian friend. <sup>1/</sup> Decedent's nieces, nephew, and brother (appellees) attacked the will on the grounds that decedent lacked testamentary capacity when it was executed and that appellant had exercised undue influence over decedent in order to procure a will in his favor. Appellees tried to prove that decedent lacked testamentary capacity because of a lifetime of alcohol abuse, and that the will was the culmination of appellant's repeated and allegedly dishonest attempts to obtain decedent's Native allotment.

Decedent's Native allotment plays an integral part in the background of this case. The following chronology of events concerning that allotment is based primarily upon BIA Realty Office records, supplemented with documents presented by appellant at the hearings.

Decedent applied for an allotment on July 25, 1960, under the provisions of the Alaska Native Land Allotment Act of 1906, Act of May 17, 1906, ch. 2469, 34 Stat. 197, 48 U.S.C. § 357 (1952). <sup>2/</sup> The application was approved on November 26, 1963. Decedent's allotment, Lot 4 on U.S. Survey 3682, contains 4.84 acres on the northwest boundary of the Townsite of Valdez, Alaska. It is located near what is now the southern terminus of the Trans-Alaska oil pipeline.

Although from the beginning decedent had problems with trespasses on his allotment, the property's location made it even more attractive for use by others in the 1970's. On June 1, 1970, decedent entered into a lease covering part of the allotment with Valdez Alaska Terminals, Inc. (VAT). This lease was not presented to BIA for approval and, consequently, was not

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<sup>1/</sup> Although appellant mentioned that he thought he had Indian blood, he did not pursue this issue.

<sup>2/</sup> This Act was amended by the Act of Aug. 2, 1956, c. 891, § 1(a) to (d), 70 Stat. 954, and was moved to 43 U.S.C. § 270-1 (1964). It was repealed by section 18(a) of the Alaska Native Claims Settlement Act of Dec. 18, 1971, P. L. 92-203, 85 Stat. 688, 710.

valid. <sup>3/</sup> However, it appears that both decedent and VAT honored the lease. On February 26, 1972, decedent and VAT entered into a second lease, providing for increased rental payments.

About the time the second lease was executed, both decedent and VAT learned that BIA's approval was required for a valid lease. In early March 1972, both parties independently requested BIA assistance in executing a lease. The assistance was given, and BIA began consideration of a long-term business lease to VAT. The record does not show whether any lease was entered into at that time.

In October 1973, decedent discussed with BIA the possible sale of the allotment to Roy Alley. Alley is not further identified in the record. Decedent apparently first requested a negotiated sale of his property, then in January 1974 either requested a supervised sale or was informed that such a procedure should be followed. On April 8, 1974, BIA approved a supervised sale. <sup>4/</sup>

On April 11, 1974, VAT again contacted BIA concerning its desire to lease decedent's allotment. Notwithstanding its earlier request for BIA assistance in executing a valid lease, VAT stated that it had just learned of the necessity for BIA approval of any lease of the property.

The first reference to appellant in the BIA files that are part of the record occurred on May 30, 1974. The hand-written note merely recites appellant's name, address, and telephone number.

On June 10, 1974, a gift deed was signed by decedent, attempting to convey all of his allotment to appellant, subject to a life estate in decedent as to 0.84 acres. The deed was recorded on June 26, 1974, at appellant's request.

On June 24, 1974, Neil Bergt, of Alaska International Industries, Inc. (AII), asked BIA about the possible sale of decedent's allotment. A newspaper clipping from the June 28, 1974, edition of the Anchorage Daily News that appears in the file indicates that AII had recently acquired a controlling interest in VAT.

On July 23, 1974, Audrey Tuck, BIA Realty Officer, visited decedent's allotment and met appellant. Appellant was in the process of clearing debris

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<sup>3/</sup> See 25 CFR 152.22(a):

"Individual Lands. Trust or restricted lands, except inherited lands of the Five Civilized Tribes, or any interest therein, may not be conveyed without the approval of the Secretary. Moreover, inducing an Indian to execute an instrument purporting to convey any trust land or interest therein, or the offering of any such instrument for record, is prohibited and criminal penalties may be incurred. (See 25 U.S.C. §§ 202 and 348.)"

<sup>4/</sup> A supervised, or advertised, sale is a sale by sealed bid, conducted by BIA on behalf of the owner of trust or restricted land. See 25 CFR 152.26-152.30. A negotiated sale, by contrast, is a sale at a mutually agreed upon

off the allotment, and he expressed an interest in buying the land. The next day Tuck wrote to appellant, telling him he would be given an opportunity to bid on the property.

BIA received a letter dated August 12, 1974, from decedent in which he asked the agency to cancel the sale of his allotment and instead to lease it to VAT. On August 23, 1974, decedent went to the BIA Realty Office and said that he had signed the August 12 letter after a representative of VAT had gotten him drunk. He stated that he still wanted to sell the land.

On August 24, 1974, decedent and appellant signed an agreement of sale that included decedent's entire allotment, but reserved a life estate to decedent in 0.84 acres. The selling price was to be determined by a BIA appraisal. 5/

On September 9, 1974, a warranty deed was executed which purported to convey decedent's allotment, subject to the life estate, to appellant for valuable consideration received. Also, apparently on the same day, a second document, entitled "Limited Power of Attorney," was signed. This document gave appellant the right to act in decedent's place in all matters affecting the allotment. Both of these documents were recorded on September 20, 1974, at appellant's request.

On September 10, 1974, BIA received an appraisal of decedent's allotment. The appraisal figure, \$54,500, was later determined to be erroneous in that it was based on 3 acres, rather than 4.84.

During a September 24, 1974, visit to decedent's allotment, Realty Officer Tuck learned about the June 10, 1974, gift deed to appellant. The file indicates that she contacted decedent in Anchorage where he was staying, that he told her he had not signed a deed to appellant, and that he knew appellant wanted to bid on the property. The matter of the gift deed was then referred to the Regional Solicitor. On August 11, 1975, the U.S. Attorney formally requested the Federal Bureau of Investigation (FBI) to look into the matter to determine whether any Federal laws against inducing the conveyance of restricted Indian lands had been violated. 6/

On June 16, 1975, the will at issue in this probate proceeding was executed. On the same day decedent signed a document granting appellant immediate possession and control of the allotment, which stated that all improvements subsequently made on the property would belong to appellant.

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fn. 4 (continued)

price in accordance with and under the conditions set forth in regulations in 25 CFR 152.25.

5/ See 25 CFR 152.24, which states:

"Except as otherwise provided by the Secretary, an appraisal shall be made indicating the fair market value prior to making or approving a sale, exchange, or other transfer of title of trust or restricted land."

6/ See n. 3, *supra*.

On December 19, 1975, decedent and appellant signed a new sales agreement covering the 0.84 acres on which decedent had previously retained a life estate. The agreement stated a total consideration of \$6,000 for the conveyance, and acknowledged receipt of \$500.

On December 31, 1975, the FBI informed BIA of its decision not to recommend criminal prosecution of appellant.

On February 4, 1976, after decedent had failed to attend two previously scheduled meetings at the BIA Realty Office, decedent and appellant met with Bruce Schultheis, of the Regional Solicitor's Office, and Mary Goch, the new BIA Realty Officer. At that meeting, appellant was asked to quitclaim the property to decedent in order to remove the cloud on the title that had resulted from the gift deed. This was the only transaction between appellant and decedent of which BIA was aware at the time. Appellant refused to reconvey the land affected by the gift deed; he also did not disclose the existence of the August 24, 1974, agreement to sell, the September 9, 1974, warranty deed and limited power of attorney, the June 16, 1975, will and right to possession and control, or the December 19, 1975, purchase agreement.

On February 26, 1976, BIA discovered the existence of the warranty deed and the limited power of attorney. BIA did not know of the remaining documents between decedent and appellant until after decedent's death. The complications with respect to decedent's allotment were apparently still unresolved at the time of his death on July 30, 1980.

Other evidence presented to Judge Hammett concerned whether decedent had testamentary capacity when the will was executed and whether appellant had exercised undue influence over the decedent. It was shown that decedent had a long history of alcohol abuse and that he was well known to medical personnel and to police officials in Valdez because of his alcohol-related problems. See police and medical reports in the record. It was also shown that decedent had little appreciation for the monetary value of material possessions and that he apparently could be induced to engage in very imprudent transactions if he needed cash. Gunion deposition at 12-13.

The only evidence available concerning decedent's circumstances when the will was executed, however, was the testimony of the will scrivener, the will witnesses, and appellant. <sup>7/</sup> The testimony of the will scrivener, Ronald Offret, was taken by deposition on May 4, 1982. When the will was executed, Offret was a member of the law firm that normally represented appellant. The firm had also acted for decedent on occasion. See, e.g., Offret deposition at 14, 28. Although prevented from testifying fully because appellant invoked the attorney-client privilege, Offret indicated that decedent had requested the will and that he then had testamentary capacity. Offret deposition at 30. Offret did not remember personally asking

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<sup>7/</sup> Although not proof of decedent's testamentary incapacity or of undue influence, it is interesting that decedent either did not notice or did not mention that his name was misspelled throughout the will. His name was also misspelled on the second document he signed that day.

the will witnesses to be present, but recalled that they were asked to witness the will because they knew the decedent. Offret deposition at 18, 37.

The will was witnessed by three people. Two of the witnesses testified at the June 18, 1982, hearing. One of them, Bennie Leonard, was a private investigator who had an office in the suite of offices belonging to Offret's law firm. The law firm was one of Leonard's clients. Leonard testified that he had witnessed perhaps five wills for the firm and that when he was asked to witness a will it was normally a last-minute request. He stated that this situation was unusual because he was asked ahead of time to witness the will. He said that he did not know the decedent and had notes indicating that he had later asked Offret for a picture of the decedent, but could not remember why (June 1982 Tr. 9-21).

The second witness who testified, Patricia Treat, had been employed as a secretary in Offret's law firm for approximately 1 month before she was asked to witness the will. She thought she might have met the decedent once before, but she remembered very little about the signing of the will (June 1982 Tr. 23-30).

The testimony of the remaining will witness, Marvin R. Weatherly, was taken by deposition on September 16, 1982. At the time he witnessed decedent's will, Weatherly was Executive Director of the Alaska Public Broadcasting Commission and Director of the Governor's Office of Telecommunications. He had an office on the same floor as Offret's law firm. Weatherly stated that decedent's will was the only will he had ever been asked to witness for the law firm. He met decedent for the first and last time on the day he witnessed the will. Weatherly deposition at 5. Weatherly said that Leonard asked the decedent if he was signing the will of his own free will, and that the decedent answered yes. He further stated that if Leonard had not asked the question, he would have, because he was concerned about the decedent's demeanor, which he characterized as nervous and as having "the appearance of a person having just come off a drunk of some type". Weatherly deposition at 8. He stated that other than the decedent's demeanor, there were no signs of duress. Because he felt that it was his duty only to witness the fact that the decedent actually signed the document, he did not inquire further into the procedure or decedent's motivations. However, he said that if he had known that the decedent was an alcoholic or that Offret had represented appellant in regard to another document between the decedent and appellant that had been prepared the same day, he would have withdrawn and not witnessed the will. He did not remember Patricia Treat being present when the will was signed and witnessed, or remember anyone else signing the will after Leonard and himself. Weatherly deposition at 7.

Appellant testified that he and decedent had been close friends since they met in 1951 while working on the same construction job. (June 1982 Tr. 148). He said that in 1970 or 1971 decedent told him that he wanted to sell his property and asked him if he wanted to buy it. (June 1982 Tr. 150). Appellant testified that he had paid over \$62,000 to decedent for the warranty deed. <sup>8/</sup> The price was, according to appellant, agreed upon by BIA as they

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<sup>8/</sup> The warranty deed was signed on Sept. 9, 1974.

went along. As evidence of the payments to decedent, appellant furnished copies of receipts that were apparently for bank drafts payable to decedent. (June 1982 Tr. 150-51). These receipts show the following payments and payment dates: September 9, 1974 - \$500; October 3, 1974 - \$10,000; October 16, 1974 - \$600; December 9, 1974 - \$8,500; February 7, 1975 - \$6,500; February 7, 1975 - \$6,000; and June 16, 1975 (the date the will was signed) - \$30,000. The record does not reveal what happened to this money. Appellant said that he also invested additional amounts in improving the property.

Appellant testified that decedent later told him that other people were interested in buying the property and that those people had been talking to BIA. Appellant said that decedent told him that BIA personnel advised him to gift deed the property to appellant to avoid any problems (June 1982 Tr. 176). <sup>9/</sup> Appellant also testified that it was decedent's idea to write the will because other people were trying to get the property.

Appellant stated that decedent was very strong-willed and could not be influenced against his will. Appellant said he was not aware that decedent was an alcoholic or that he had a drinking problem (June 1982 Tr. 154).

#### Discussion and Conclusions

In his order disapproving decedent's will, Judge Hammett held that appellees, as the will contestants, had the burden of proving lack of testamentary capacity and/or undue influence. This holding follows the normal rule that presumes due execution of a will and competence to issue it. See, e.g., Estate of Grace Dion Antelope Horse Ring, 12 IBIA 232 (1984); Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971); Estate of Louis Fronkier, IA-T-24 (1970). Judge Hammett found that appellees did not show lack of testamentary capacity but did sustain the burden of showing undue influence. In reaching his decision, Judge Hammett found that (1) the decedent was susceptible to the domination of another; (2) the person allegedly exerting the influence was capable of controlling the decedent's mind and actions; (3) the nature of the influence was calculated to induce or coerce the decedent to make a will contrary to his own desires; and (4) the will was contrary to his desires.

On appeal, appellant argues that the Judge erred factually and legally in finding that decedent was unduly influenced in the execution of his will. Appellees assert that Judge Hammett reached the correct result but that he actually applied the wrong standard. They contend that if Judge Hammett's decision is not sustained, appellant should be found to have been in a confidential relationship with the decedent and therefore should have the burden of showing that he did not exert undue influence on decedent under the holdings in cases such as Estate of Lewis Leo Isadore, IA-P-21 (1970) and Estate of Julius Benter, 1 IBIA 24 (1970). See also Estate of Charles Webster Hills, 13 IBIA 188 (1985).

In his reply brief, appellant argues that appellees cannot raise a new burden of proof issue for the first time on appeal and, furthermore, that the

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<sup>9/</sup> The gift deed was signed on June 10, 1974.

line of cases upon which appellees rely is no longer good law because the Board rejected those cases in Estate of William Mason Cultee, 9 IBIA 43 (1981).

[1] The scope of the Board's review function in Indian probate appeals is set forth in 43 CFR 4.320, which states in pertinent part:

An appeal shall be limited to those issues which were before the administrative law judge upon the petition for rehearing, reopening or regarding tribal interests. However, the Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

Therefore, although it is correct that the Board will not normally consider either a legal issue or an allegation of fact first raised on appeal, nevertheless, where it appears that a manifest error has been committed, the Board has the responsibility to correct the error. Estate of John Yazza Antonio, 12 IBIA 177 (1984); Estate of Wesley Emmett Anton, 12 IBIA 139 (1984); Estate of Richard Evans Walker, 12 IBIA 44 (1983).

Here, Judge Hammett held that the will contestants had the burden of proving undue influence. This holding, like appellant's arguments in his reply brief, may be based upon a misconception engendered by some overly broad dicta in Estate of Joseph Caddo, 7 IBIA 286 (1979), and in footnote 8 of Cultee, *supra*. In order to correct that misconception and the manifest error resulting from it, the Board exercises the inherent review authority reserved to it in 43 CFR 4.320.

In Caddo, the principal beneficiary under the decedent's will was an individual who was appointed the decedent's guardian after the execution of the will. There was evidence that the beneficiary was active in procuring the will and that he may have prevented the decedent from seeing other relatives. Despite the apparent basis for questioning whether a confidential relationship existed, the decision does not discuss the presumption, but instead notes only the general four-part test for determining whether undue influence was exercised in the absence of a confidential relationship. The case was ultimately remanded to the Administrative Law Judge to obtain the testimony of the attesting witnesses to the will and for a determination of credibility.

The Board in Caddo cited Tooahnippah v. Hickel, 397 U.S. 598 (1970), in support of the proposition that a validly executed will must be approved unless it is shown that the document is contrary to the wishes of the testator. Tooahnippah, however, does not address the question of undue influence arising from the existence of a confidential relationship. Although Tooahnippah lessened the Department's discretion to disapprove an Indian will, it did not alter established Departmental procedures for considering the objective validity of such a will, including the presumption arising from the existence of a confidential relationship between the decedent and the beneficiary. Other than citing the holding in Tooahnippah, no rationale is presented in Caddo for reversing the Department's prior holdings recognizing a presumption of undue influence where a confidential relationship exists between the decedent and the principal beneficiary.

In Cultee, the devisee under the decedent's will was an individual with whom the decedent lived and who had assisted him over the years. The heirs-at-law attacked the will on the grounds that the devisee had exercised undue influence over the testator in order to procure a will in her favor. The Board held that the close relationship between the decedent and the devisee was not sufficient by itself to establish undue influence.

Footnote 8 to Cultee states:

The line of cases establishing the four-part test [for undue influence] in Indian probate will cases noted by the Administrative Law Judge at page 3 of his Feb. 21, 1980, order has eliminated the presumption appellants rely upon to support their contentions concerning undue influence. Estate of Caddo, 7 IBIA 286, 291 (1979); Estate of Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971).

The presumption which the footnote mentions is presumably the rebuttable presumption of undue influence arising from a confidential relationship. Cultee gives no further analysis of the presumption or of the need for its elimination.

[2] The Board has carefully reviewed Cultee and Caddo. The rebuttable presumption of undue influence exists in order to prevent persons in whom a testator would normally repose trust from using that trust to their own personal advantage. Neither Cultee nor Caddo gives an adequate rationale for abandoning the presumption. These cases are, therefore, hereby limited to the holding that close friendships alone do not raise the rebuttable presumption and thereby shift the burden of proof. When, however, a special confidential relationship, particularly one involving financial matters, is shown to exist between an Indian testator and the principal beneficiary or beneficiaries under his will, a rebuttable presumption of undue influence is raised. We find such a relationship here, and we conclude that the burden of rebutting that presumption should have been borne by the will proponent. Benter, supra; Hills, supra. 10/

The question then arises whether justice would be served by remanding this case to the Administrative Law Judge who heard it, in order to determine whether a different outcome might occur if the burden of proof concerning undue influence were placed upon the will proponent (appellant) rather than upon the will contestants (appellees). We conclude that such a procedure would serve no useful purpose.

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10/ Appellant argues that the Board's failure to apply this rebuttable presumption in Estate of Verena Gean Kitchell, 12 IBIA 258 (1984), proves that the presumption has been abandoned and is no longer good law. The failure to apply the presumption in Kitchell means only that the Board did not consider it applicable to the facts of that case.

In Hills, supra, the presumption of undue influence was found applicable to a situation in which the principal beneficiary under the decedent's

First of all, undue influence is clearly a question of fact, 11/ and, in cases involving Indian trust estates the Administrative Law Judge serves as the trier of fact in place of a jury. In this case, Judge Hammett conducted several hearings, received numerous depositions, and weighed all of the arguments for and against the alleged invalidity of decedent's will before making his decision.

Judge Hammett had a second opportunity to consider the matter in the context of appellant's petition for rehearing, when essentially the same arguments seeking to overturn the decision were made as were made on appeal. Although Judge Hammett did not unduly emphasize whatever conclusions he may have arrived at concerning the credibility of witnesses, such conclusions are implicit in his decision that the decedent was subjected to undue influence in the making of his will, particularly in a context where Judge Hammett regarded the burden of proof as falling upon the will contestants. In addition, a careful examination of the entire record convinces us that it is sufficient to sustain that decision.

Moreover, if Judge Hammett believed that contestants had sufficiently met their burden of proof under the far more stringent criteria of undue influence set forth in Fronkier, supra, he would be highly unlikely to change his conclusion under altered circumstances, such as here, where we have relieved contestants of that burden of proof and shifted it to the appellant. Therefore, we see nothing to be gained by remanding this case for further consideration by the trier of fact. Estate of George Green, IA-T-11, June 7, 1968. See also Simmons v. Pinney, 375 F.2d 929 (D.C. Cir. 1967); Wiggins v. Smith, 183 F.2d 831 (D.C. Cir. 1950). Thus, under the circumstances of this case, we regard Judge Hammett's incorrect view as to where the burden of proof should lie as harmless error.

Finally, in order for us to reverse the Administrative Law Judge who heard the testimony and observed the witnesses, it is incumbent upon appellant to show not only that the Judge erred, but that his error altered the outcome of the case. This appellant has failed to do. Estate of Wilma Florence First Youngman, 12 IBIA 219 (1984).

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fn. 10 (continued)

will was the decedent's niece. The beneficiary had acted as the decedent's "payee," receiving money from his Individual Indian Money account in order to ensure that his needs were met. The beneficiary accompanied the decedent to the attorney's office both when the will was discussed and when it was executed, and she acted as the decedent's interpreter in their discussions with the attorney. The attorney had represented both the decedent and the will beneficiary on previous occasions. The will witnesses, who did not know the decedent, remembered little about the execution of the will. The Board found these facts sufficient to raise the presumption of undue influence, and it upheld the Administrative Law Judge's conclusion that the beneficiary had not sustained her burden of proving the lack of undue influence.

11/ See 3 Bowe-Parker: Page on Wills § 29.77 - 29.86 (1961).

