



INTERIOR BOARD OF INDIAN APPEALS

Estate of Jesse Pawnee

15 IBIA 64 (12/02/1986)

Related Board case:
12 IBIA 277



United States Department of the Interior

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

ESTATE OF JESSE PAWNEE

IBIA 86-15

Decided December 29, 1986

Appeal from an order after remand issued by Administrative Law Judge William E. Hammett in Indian Probate No. IP TU 181P 82.

Affirmed and remanded.

1. Indian Probate: Wills: Undue Influence

When the evidence shows that the principal beneficiary under an Indian will was in a confidential relationship with the testator and actively participated in the preparation of the will, a rebuttable presumption of undue influence is raised, and the burden of rebutting the presumption is on the will proponent.

2. Indian Probate: Wills: Undue Influence

In order to rebut the presumption of undue influence arising from the existence of a special confidential relationship between an Indian testator and the principal beneficiary under the will, the will proponent must show that the effects of the will were thoroughly discussed with the testator by an objective, independent person.

APPEARANCES: Leslie A. Williams, Esq., San Mateo, California, for appellant; Richard J. Spooner, Esq., Oklahoma City, Oklahoma, for appellee.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE LYNN

The estate of Jesse Pawnee (decedent) is before the Board of Indian Appeals (Board) for the second time. On June 11, 1984, the Board vacated a July 15, 1983, order denying rehearing entered in this estate by Administrative Law Judge William E. Hammett, and remanded the case for further consideration. Estate of Jesse Pawnee, 12 IBIA 277 (1984). By order dated October 8, 1985, Judge Hammett reversed his December 17, 1982, order approving decedent's February 11, 1982, will. For the reasons discussed below, the Board affirms that order, and remands the case to Administrative Law Judge Sam E. Taylor for consideration of decedent's prior February 10, 1962, will.

Background

The relevant factual and procedural history of this case was set forth fully in the Board's initial decision. 12 IBIA at 277-79. Only a brief recitation of that background will be given here.

Decedent, an unallotted Cheyenne Indian, was born January 9, 1899, and died in San Mateo, California, on February 11, 1982. Decedent had no surviving spouse or children. Jean Ann Pawnee Vaitai (present appellant) and Maggie Bullcoming Domke (present appellee) are decedent's nieces. ^{1/}

Decedent spent all but the last few weeks of his life in Oklahoma. He had a one-room house on the same lot as appellee's house. In the winter months he frequently moved in with appellee because her house had a better heating system. Decedent and appellee, who were close to each other in age, were both in ill health and provided each other with financial and emotional support.

Appellant is considerably younger than decedent and appellee. She was born in Oklahoma, but moved away at age 16, when she married. Except for short visits, she never returned to Oklahoma.

Appellant was in Oklahoma to conduct some business in February 1982. She found decedent in need of medical attention and took him to the hospital. Upon his release, decedent was advised to enter a nursing home. He was opposed to this idea, but agreed to accompany appellant to her home in California. Appellant and decedent traveled to California via Nebraska, where they stopped to see appellant's children. Shortly after arriving in California, decedent was admitted to Mills Memorial Hospital after being treated in the emergency room. He died the next day.

At some time after he was admitted to the hospital, decedent apparently asked about doing something so that his bills could be paid. Appellant's husband obtained the name of an attorney, who prepared a standard form power-of-attorney from decedent to appellant. The power-of-attorney was signed at 2:26 p.m. on February 11, 1982. ^{2/} After learning of the terminal nature of decedent's condition and in the belief that appellant was decedent's sole heir, the attorney advised appellant that the power-of-attorney would expire

^{1/} Because of Judge Hammett's decision on remand, the appellate roles of Jean Ann Vaitai and Maggie Domke have been reversed.

Appellant disputes the Board's statement of the relationship between decedent and appellee. Even if there were no blood relationship between decedent and appellee, this fact would not avail appellant, because there is no rule in Indian law requiring a testator to leave property only to blood relatives. Nevertheless, because of the Board's disposition of this case, any previous statements concerning decedent's family relationships will be subject to modification on remand, if necessary.

^{2/} The time of execution of the power-of-attorney is so precise because of the entry in the notary public's activity log.

upon decedent's death, and that they should probably prepare a will naming her as sole beneficiary. A will was subsequently prepared and executed on February 11, 1982, only a few hours before decedent's death.

The hearing in this estate was complicated because the witnesses to, and the beneficiary under, the 1982 will resided in California, while appellee, the will contestant, was essentially confined to bed in Oklahoma. Consequently, Judge Hammett enlisted the assistance of Judge Taylor, who is stationed in Oklahoma, to take appellee's testimony and other evidence. After considering the testimony presented in California and Oklahoma, Judge Hammett initially approved the will by order dated December 17, 1982.

In response to appellee's request for rehearing, Judge Hammett issued a show-cause order to appellant. Believing that appellee had received a copy of appellant's response, but had declined to reply, Judge Hammett denied rehearing. On appeal, appellee denied receiving a copy of appellant's reply to the show-cause order. Because appellant could not show proof of service, the Board vacated Judge Hammett's July 15, 1983, order denying rehearing, and remanded the case so appellee could respond.

Judge Hammett correctly understood the Board's remand order as reinvesting him with full authority to rehear the estate. He properly considered appellee's response and reviewed the entire record. As a result of this further consideration, the Judge determined that the will should not have been approved. Accordingly, by order dated October 8, 1985, Judge Hammett disapproved decedent's 1982 will.

The Board received appellant's appeal from this order on November 25, 1985. Both appellant and appellee filed briefs on appeal.

Discussion and Conclusions

On appeal, appellant raises two primary arguments: (1) in determining decedent's testamentary capacity, the Judge placed too much reliance on the testimony of appellee's medical expert witness who did not attend decedent during his last illness; and (2) the law concerning confidential relationships between an Indian testator and the principal beneficiary under his will was improperly applied. Under each of these primary arguments, appellant raises several corollary questions.

Appellant first argues the testimony of appellee's medical expert concerning decedent's testamentary capacity should not be credited because the witness did not consider the attending physician's progress notes, 3/

3/ The records of decedent's last illness were supplied by Mills Memorial in response to an order issued by Judge Hammett on Sept. 7, 1984. The attending physician's progress notes were not included in the records sent. The lack of discussion of those notes by appellee's expert witness is not the fault of appellee.

and because his testimony was internally inconsistent. ^{4/} This argument indicates appellant's belief that Judge Hammett found decedent lacked testamentary capacity.

At page 2 of his October 8 order Judge Hammett states: "It appears highly doubtful that the decedent would have had testamentary capacity to execute the will subsequent to 3:30 p.m. on February 11, 1982, and the level of his mental function between 2:26 p.m. and 3:30 p.m. is open to serious question." Judge Hammett did not, however, make a finding that decedent lacked testamentary capacity. His statement was part of a general observation concerning decedent's mental abilities around the time in question. Although the Judge found decedent was in a state of diminished mental functioning, he did not attempt to quantify the amount by which decedent's mental functioning was lessened. The record supports this finding.

[1] Appellant next argues that the Judge misapplied the law concerning the effect of a confidential relationship between an Indian testator and the principal beneficiary under his will. As previously held, when the facts of a particular case show the principal beneficiary under an Indian will was in a confidential relationship with the testator and actively participated in the preparation of the will, a rebuttable presumption arises that undue influence was exerted upon the testator and the burden shifts to the will proponent to show there was no undue influence. Estate of Charles Webster Hills, 13 IBIA 188, 92 I.D. 304 (1985); Estate of Julius Benter, 1 IBIA 24 (1970); Estate of George Green, IA-T-11 (1968).

Appellant first contends it was error to find the existence of a confidential relationship in this case because she never exercised the authority given to her in the power-of-attorney. In support of this statement, appellant cites Estate of Homer James Medicinebird, 8 IBIA 289 (1981).

Appellant's reliance on Medicinebird is misplaced. In Medicinebird there was no probative evidence that the principal beneficiary was in fact the testator's legal guardian. At most the evidence showed the beneficiary

fn. 3 (continued)

The Board considered a motion by appellee to strike the physician's progress notes by order dated July 9, 1986. The Board declined at that time to strike the notes in their entirety, but held they would be considered only if they contained evidence that could not, with reasonable diligence, have been discovered and presented to Judge Hammett. After a more thorough examination of the notes, and despite the fact that consideration of the notes would not have changed the decision in this case, the Board holds that the notes should be stricken because they could and should have been discovered and presented to the trial judge.

^{4/} The alleged internal inconsistencies in the testimony relate essentially to whether and when decedent was "alert," or was in a coma or semi-comatose state. The hospital records, as interpreted by appellee's expert witness without contradiction on appeal from appellant, clearly indicate decedent may have been constantly slipping in and out of consciousness.

had sought appointment as the testator's guardian. The beneficiary's participation in the execution of testator's will was limited to contacting the attorney who prepared the will. The attorney and witnesses testified the beneficiary was not present when the provisions of the will were discussed or when the will was executed. Instead, the testimony was that the testator, even though he was clearly dying, was in complete control of the preparation of his will. The Board there found that even if it were to assume the beneficiary was the testator's legal guardian, "there [was] no proof she took any action to secure for herself through the exercise of her office of trust the devise of decedent's property." 8 IBIA at 291. Medicinebird thus holds that, even if a confidential relationship exists between a testator and the principal beneficiary, the presumption of undue influence does not arise when the beneficiary does not actively participate in the preparation of the will.

In the present case, appellant had decedent's power-of-attorney. The facts that she had previously encouraged him to handle his own affairs and that she did not have an opportunity to use the authority given her under the power-of-attorney 5/ have no effect upon the existence of a confidential relationship between decedent and appellant. A confidential relationship came into existence as soon as the power-of-attorney was signed. 6/

Appellant alternatively contends she did not participate in the preparation or execution of the will. Much reliance is here placed on appellant's statement that decedent wanted to prepare a will before leaving Oklahoma, but appellant was fearful of the weather and wanted to get on the road. There is no evidence of this alleged intent of decedent other than appellant's statement. Furthermore, despite her stated concern about the weather, appellant had no problem making a detour from Oklahoma to Nebraska on the way to California. Under the circumstances, little weight can be given to appellant's statement concerning decedent's desire to make a new will. Likewise, little weight can be given to her argument that the will scrivener's suggestion that decedent execute a will merely "rekindled" his original desire to change his will.

Appellant further argues the scrivener merely "suggested" decedent should make a will, bringing no pressure to bear on him as to the dispositive scheme. She also disputes the Judge's finding that the scrivener must be considered her attorney, rather than decedent's.

The record clearly establishes the scrivener was led to believe appellant was decedent's sole heir. It appears highly unlikely decedent was responsible for this impression, given the fact that he was not able to tell his own medical history to the hospital, including information relating to a

5/ Appellant argues at one point that she rejected the power-of-attorney in favor of the will. There is no evidence of any rescission of the power-of-attorney before decedent's death by either party.

6/ This holding is made under the particular facts of this case. The existence and time of origin of a confidential relationship must be determined on a case-by-case basis.

hospitalization occurring only a few days earlier. The record is also clear that the scrivener suggested the dispositive scheme set forth in decedent's will. Appellant did nothing to disabuse the scrivener of the understanding that she was decedent's sole heir, and instead acquiesced in the plan to prepare a will naming her as sole beneficiary. The Board holds the scrivener's actions evidence concern for appellant rather than for decedent, 7/ and appellant actively participated in the preparation of decedent's will.

There can be no dispute that appellant was the principal beneficiary under decedent's will. Thus it has been shown that appellant was in a confidential relationship with decedent, she actively participated in the preparation of his will, and she was the principal beneficiary under the will. Consequently, a presumption of undue influence arose, and the burden shifted to appellant to show that no undue influence was exerted upon decedent in the preparation and execution of his will.

[2] In Hills, supra, the Board reiterated that in order to rebut the presumption of undue influence, the will proponent must show an objective, independent person thoroughly discussed the effect of the will with the testator. Appellant argues here that the will scrivener discussed the effects of the dispositive scheme with decedent. Even assuming decedent had the mental capacity to participate in and understand such a discussion, the scrivener does not meet the standard of an objective, independent person for the reasons already discussed.

Finally, appellant argues there can be no finding of undue influence unless the four-part test set forth in such cases as Estate of Thomas Longtail, Jr., 13 IBIA 136 (1985), and Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971), has been met. 8/ Appellant misconstrues the law. The cited cases set forth the general rule of undue influence which is necessary to overcome the presumption of testamentary capacity arising from proper execution of a will. This rule applies in the absence of proof of a confidential relationship between the testator and the principal beneficiary under the will. Once a confidential relationship has been shown, the general test for undue influence is inapplicable.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Hammett's order of October 8, 1985, is affirmed. This case is remanded to Judge Taylor for

7/ The Board notes in passing that the will scrivener did not submit a claim in this estate for services rendered to decedent in the preparation of either his will or the power-of-attorney.

8/ Under these cases, the will contestant has the burden of proving (1) the testator was susceptible to being dominated by another; (2) the person allegedly influencing the testator in the execution of the will was capable of controlling his or her mind and actions; (3) such a person did exert influence upon the testator of a nature calculated to induce or coerce the execution of a will contrary to the testator's desires; and (4) the will was contrary to the testator's own desires.

consideration of decedent's prior will, dated February 10, 1962, 9/ and of any other questions arising from the case.

//original signed

Kathryn A. Lynn
Acting Chief Administrative Judge

I concur:

//original signed

Anita Vogt
Administrative Judge

9/ This case is remanded to Judge Taylor because the 1962 will was executed in Oklahoma and the beneficiary under it resides in Oklahoma. Disapproval of the 1982 will raises the question of the possible revival of the 1962 will. See Estate of Anthony Bitseedy, 5 IBIA 270 (1976), aff'd sub nom. Dawson v. Kleppe, No. CIV-77-0237 (D. Okla. Oct. 27, 1977); Estate of Irena (Irene) Crowneck Hawk, 3 IBIA 1, 81 I.D. 407 (1974); Estate of George Green, 1 IBIA 147, 78 I.D. 281 (1971).