



INTERIOR BOARD OF INDIAN APPEALS

Estate of Virginia Enno Poitra

16 IBIA 32 (02/03/1988)



United States Department of the Interior

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

ESTATE OF VIRGINIA ENNO POITRA

IBIA 87-22

Decided February 3, 1988

Appeal from an order denying petition for rehearing issued by Administrative Law Judge Keith L. Burrowes in Indian Probate IP BI 229A-84.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity: Generally

The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will.

2. Indian Probate: Wills: Testamentary Capacity: Generally

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of her bounty, the extent of her property, or the desired distribution of that property. Further, the evidence must show that this condition existed at the time of execution of the will.

3. Indian Probate: Appeal: Matters Considered on Appeal

The Board of Indian Appeals is not required to consider arguments and evidence raised for the first time on appeal.

4. Indian Probate: Wills: Undue Influence

The fact that a testator lived with the sole beneficiary of her will and was dependent upon him for her care does not in itself show that they were in a special confidential relationship so as to give rise to a presumption of undue influence.

APPEARANCES: James P. Fitzsimmons, Esq., New Town, North Dakota, for appellant; Linda Catalano, Esq., Bismarck, North Dakota, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Donna Poitra seeks review of a November 12, 1986, order denying rehearing issued by Administrative Law Judge Keith L. Burrowes in the estate of Virginia Enno Poitra (decedent). For the reasons discussed below, the Board affirms that order.

Background

Decedent, Turtle Mountain Chippewa Allottee No. 1118 of the Turtle Mountain Reservation, North Dakota, was born on January 27, 1903, and died on September 11, 1983, in Rolla, North Dakota. She left a will, executed on November 25, 1981, in which she devised all her property to her son Floyd Poitra (Floyd; appellee). In addition to appellee, decedent was survived by eight other children. Three of decedent's children predeceased her, leaving children. In all, decedent was survived by nine children and nine grandchildren who would share in her estate if her will were to be found invalid. Appellant is a daughter of decedent's predeceased son Joseph Poitra, Jr.

Judge Burrowes held hearings to probate decedent's trust estate on May 4 and September 24, 1984, and May 8, 1985, at Belcourt, North Dakota. At the hearings, some of decedent's children challenged her will on the grounds that she lacked testamentary capacity at the time the will was executed.

Judge Burrowes summarized the events preceding execution of the will as follows:

[Decedent] was found in a coma on August 26, 1981, at the retirement home where she lived and was admitted to the Public Health Service Indian Hospital in Belcourt, North Dakota. Part of the diagnosis on said occasion was "senile dementia". [Decedent] was released on September 9, 1981, to her daughter, Joann Ensrude of Garrison, North Dakota, with whom she then lived until October 8, 1981. On that date she moved back to Belcourt and lived with her son Floyd.

On October 15, 1981, [decedent] fell and fractured her hip; she was admitted to the Belcourt Hospital and immediately transferred to the United Hospital at Grand Forks, where she underwent surgery. On October 29, 1981, she was transferred to the Medical Center Rehabilitation Hospital in Grand Forks where she remained until November 20, 1981, at which time she returned to the home of Floyd in Belcourt, North Dakota.

On November 25, 1981, a Realty Specialist from the Turtle Mountain Agency came to the home of Floyd Poitra and prepared a

will for [decedent], and the same was executed that day. The uncontroverted evidence is that [decedent] had requested Floyd to see if the agency clerk could come to the house for this purpose.

(Discussion, Findings of Fact, and Conclusions of Law at 1).

Appellee and his former wife Maude testified that decedent was alert and competent on the date the will was executed. Several other witnesses testified that decedent suffered loss of memory and confusion and that she needed continual supervision from August 1981 until her death. Medical evidence showed that decedent had been diagnosed as suffering from senile dementia on August 26, 1981, and from senility on January 29, 1982. Dr. Lyle Best, who made the January 1982 diagnosis, testified that decedent was often confused and disoriented, although she had "fluctuations in her level of consciousness" (Transcript of May 8, 1985, hearing at 64).

In addition to the testimony at the hearing and the documentary medical evidence, Judge Burrowes took into consideration a deposition of Sister Joanne Wieland, a registered nurse and director of the Prairie Land Home Health Center, who had made home visits to decedent over a 4-year period. Sister Joanne visited decedent on October 13, 15, and December 18, 1981. In October, prior to decedent's hospitalization for her fractured hip, Sister Joanne found decedent confused, but on her first visit after decedent's surgery, found her alert and considerably improved. Judge Burrowes concluded that Sister Joanne was the trained person who had known decedent the longest and been the closest to her.

Judge Burrowes found that the evidence concerning the last several months of decedent's life showed a pattern in which decedent would become run down, sick, or disabled; enter a hospital in a "confused" state; and, after a period of hospitalization, be released in an "alert" state. He acknowledged the difficulty of determining decedent's mental competence on the day she executed her will from the limited evidence concerning that day, and took into consideration the evidence of her confusion and disorientation at various times during the fall of 1981. However, he found there was insufficient evidence of decedent's lack of testamentary capacity on November 25, 1981, to warrant disapproval of the will. Accordingly, on September 3, 1986, Judge Burrowes approved decedent's will.

Appellant filed a petition for rehearing, arguing that the will contestants had established by a clear preponderance of the evidence that decedent lacked testamentary capacity when she executed her will and that Judge Burrowes gave improper weight to the testimony of Sister Joanne. The Judge denied the petition on November 12, 1986, stating that Sister Joanne's testimony was the best evidence concerning decedent's condition nearest the date the will was made.

The Board received appellant's notice of appeal on January 12, 1987. Both appellant and appellee filed briefs on appeal.

Discussion and Conclusions

On appeal to the Board, appellant contends (1) Judge Burrowes' findings and conclusions concerning decedent's testamentary capacity were erroneous in light of the evidence, (2) his assessment of Sister Joanne's testimony was incorrect, and (3) he improperly placed the burden of proof on the will contestants.

Appellant argues that the testimony of medical witnesses showed decedent was disoriented during the fall and winter of 1981-1982. She also argues that Judge Burrowes misinterpreted Sister Joanne's statement that decedent was "alert" on her first visit after decedent's surgery. A person may be alert and yet be insane, senile, or deluded, appellant contends, because "alert" is simply a measure of consciousness.

The record contains ample evidence that medical personnel judged decedent to be in a state of disorientation at various times during the fall and winter of 1981-1982. The medical evidence also shows, however, that the state of decedent's mental competence varied during that period. Therefore, the medical evidence in itself does not show that decedent lacked testamentary capacity on November 25, 1981.

A review of Sister Joanne's statement reveals that she made other remarks about decedent's mental condition during her post-surgery visit beyond her statement that decedent was "alert." She stated that decedent was aware of where she was. She reported a conversation in which decedent described in detail her surgery, her doctors' instructions, and her medicines. Sister Joanne also noted her astonishment at the extent of the improvement in decedent's condition since her surgery (Deposition at 12-14).

Appellant questions Judge Burrowes' conclusion that the visit described by Sister Joanne took place on December 18, 1981, because Sister Joanne did not identify the date of her visit during her deposition. However, Sister Joanne's notes of her visit on December 18, which are part of the record, match the description of the visit she discussed during her deposition. Judge Burrowes reasonably concluded that she was describing her visit on December 18.

Judge Burrowes relied upon the statement of Sister Joanne in part because she had known decedent for several years, unlike the doctors who saw her only briefly during her hospitalizations. Sister Joanne was thus familiar with aspects of decedent's personality which might not have been immediately apparent to others, even medical professionals, during brief examinations. In her deposition, Sister Joanne stated: "[Decedent], as a person, she was very vague in what she was saying, but after you have been with her for an hour, half an hour sometimes, you knew that's just her way. She was vague, but she would give you information that she really knew what was going on" (Deposition at 28).

The evidence of decedent's mental competency on or close to the day she executed her will was, as Judge Burrowes noted, sparse. The medical evidence closest in time to November 25 was the report made upon decedent's discharge from the hospital on November 20. The discharge summary states that decedent was "reported to be confused and disoriented." The occupational therapy progress notes state: "It was felt because of poor judgment and periods of confusion that she requires some live-in supervision." The statement that decedent had "periods" of confusion indicates that she was apparently not in a constant state of confusion. These statements are insufficient proof that decedent lacked testamentary capacity on November 25.

Both appellee and his former wife testified that decedent was alert and competent on November 25. Appellee's testimony might be considered as lacking in credibility because he also testified that decedent suffered no confusion until 1982, a statement in conflict with the medical evidence, including that from Sister Joanne, who found decedent in a confused state in October, prior to her surgery. There is no apparent reason, however, to doubt the credibility of appellee's former wife, who was no longer married to appellee when she gave her testimony.

Unfortunately, there was no testimony from the will scrivener, who was the only unquestionably disinterested party present during the will drafting. The scrivener no longer lived in the area and so was not present at any of the hearings. Attorneys for appellant and appellee apparently made no attempt to depose her or otherwise obtain her testimony. ^{1/}

[1, 2] The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will. Estate of Leon Levi Harney, 16 IBIA 18, 20 (1987). To invalidate a will for lack of testamentary capacity, a will contestant must show that the testator did not know the natural objects of her bounty, the extent of her property, or the desired distribution. Further, the condition must be shown to exist at the time of execution of the will. Estate of Fannie Pandoah Fisher Silver, 16 IBIA 26, 28 (1988); Estate of Samuel Tsoodle, 11 IBIA 163, 166 (1983).

Although appellant has shown that decedent may have lacked testamentary capacity at certain times during the fall of 1981, she has not shown that decedent lacked testamentary capacity on November 25, 1981.

Appellant argues, for the first time on appeal to the Board, that appellee was in a confidential relationship with decedent and therefore bore the burden to rebut a presumption that he exercised undue influence on her. Appellant should have raised this argument before Judge Burrowes.

^{1/} Since both parties were represented by counsel, they, rather than Judge Burrowes, bore the responsibility of ensuring that their own interests were fully developed during the hearing. Cf. Estate of Ella Dautobi, 15 IBIA 111, 118 n.6 (1987).

[3] The Board has held on many occasions that it is not required to consider arguments and evidence raised for the first time on appeal, ^{2/} although it may do so in extraordinary circumstances, through exercise of the inherent authority of the Secretary to correct a manifest error or injustice. E.g., Estate of Harney, 16 IBIA at 20; Estate of Dautobi, 15 IBIA at 20, and cases cited therein. Therefore, the Board will not consider this argument unless appellant has shown that such extraordinary circumstances exist.

Appellant fails to make such a showing. She attempts to invoke the Board's rule concerning confidential relationships, i.e., where the principal beneficiary under an Indian will was in a confidential relationship with the testator, particularly one involving financial matters, 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. E.g., Estate of Charles Webster Hills, 13 IBIA 188, 194, 92 I.D. 304, 307 (1985).

Appellant argues that appellee controlled decedent's finances and that decedent was dependent upon appellee for shelter, food and medication. Such circumstances, appellant contends, show that a confidential relationship existed. While appellant asserts that appellee controlled decedent's finances, the record fails to support her assertion. Dominic Poitra, brother of appellee, testified at the May 8, 1985, probate hearing that when he learned appellee was taking money from an account belonging to decedent, he requested the custodian of the account to cease allowing appellee to take money from the account, and the custodian complied with Dominic's request (Transcript of May 8, 1985, hearing at 14). If appellee had had control of decedent's finances, through a power of attorney or otherwise, Dominic would not have been able to prevent him from taking money from the account. The record contains no evidence that appellee did, in fact, have control of decedent's finances.

[4] Appellant also infers a confidential relationship from the fact that decedent lived with appellee and was dependent upon him for her care. The Board has never held that such circumstances give rise to a confidential relationship. Rather, the cases where the Board has found that a confidential relationship existed have been cases where an individual exercised control over the testator's finances, through a power of attorney, a guardianship, a role as "payee" of the testator's Individual Indian Money account funds, or a similar role. Estate of Julius Benter, 1 IBIA 40 (1970); Estate of Hills, supra; Estate of Philip Malcolm Bayou, 13 IBIA 200 (1985), reversed on other grounds, Mallonee v. Hodel, No. A85-549 Civil (D. Alaska, May 4, 1987); Estate of Roger Wilkin Rose, 13 IBIA 331 (1985); Estate of Jesse Pawnee, 15 IBIA 64 (1986).
Decedent's physical dependence on appellee

^{2/} 43 CFR 4.320 provides in relevant part: "An appeal shall be limited to those issues that were before the Administrative law Judge on the petition for rehearing."

did not create a confidential relationship between her and appellee so as to shift the burden of proof to appellee to show that he did not exert undue influence on decedent. 3/

Appellant has not shown that a manifest error or injustice has been committed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Burrowes' November 12, 1986, order denying rehearing is affirmed.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge

3/ Appellee was apparently present during part of the will drafting. He testified that he was not in the room initially but that the will scrivener asked him to come in (Transcript of May 8, 1985, hearing at 39). Neither this fact nor the fact that appellee, at decedent's request, went to the Turtle Mountain Agency to ask the will scrivener to come to his house are in themselves sufficient to show that appellee exerted undue influence on decedent.