



INTERIOR BOARD OF INDIAN APPEALS

Estates of Evan Gillette, Sr., and
Lizzie Gillette/Yellow Bird/Bellanger/Paint/Bedell, a.k.a. Elizabeth Burdell

22 IBIA 133 (06/18/1992)

Judicial review of this case:

Affirmed, *Gillette v. Babbitt*, Case No. A4-92-134 (D.N.D. Oct. 15, 1993)

Affirmed, No. 93-3769 (8th Cir. May 19, 1994)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF EVAN GILLETTE, SR.
AND
ESTATE OF LIZZIE GILLETTE/YELLOW BIRD/BELLANGER/PAINT/BEDELL,
A.K.A. ELIZABETH BURDELL

IBIA 91-43, 91-44

Decided June 18, 1992

Appeals from an order denying request not to close estate in Indian Probate IP TC 120R 88 and an order denying petitions for rehearing and modification in Indian Probate IP TC 119R 88, both issued by Administrative Law Judge Vernon L. Rausch.

Affirmed.

1. Indian Probate: Inventory: Property Erroneously Excluded or Included

Departmental regulations in 43 CFR Part 4, Subpart D, suffice to allow consideration of alleged legal errors in the Bureau of Indian Affairs' inventory of Indian trust assets during an Indian probate proceeding.

2. Indians: Lands: Allotments: Alienation--Indians: Trust Responsibility

In determining whether to approve a gift deed of Indian trust land, the Bureau of Indian Affairs' trust duty requires it to refrain from approving the deed if there is any question as to the Indian landowner's intent.

3. Indian Probate: Appeals: Matters Considered on Appeal

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

4. Indian Probate: Wills: Testamentary Capacity: Generally--Indian Probate: Wills: Undue Influence

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

5. Board of Indian Appeals: Jurisdiction--Constitutional Law:
Generally--Regulations: Generally

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional or a duly promulgated Departmental regulation invalid.

6. Indian Probate: Attorneys at Law: Fees

43 CFR 4.281 does not authorize the award of attorneys fees against an opposing party in an Indian probate proceeding, but only against the party represented or against the estate.

APPEARANCES: Margaret S. Wilson, Esq., Gillette, Wyoming, and Ronald A. Hodge, Esq., Bismarck, North Dakota, for appellants; Wade G. Enget, Esq., Stanley, North Dakota, for appellees; Priscilla A. Wilfahrt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Evadne Baker Gillette, Carol Gillette Hall, Ramona Gillette, Vance Gillette, Austin Gillette, Jill Gillette, Sandra Gillette Bull Tail, and Eric Lee Martincavage seek review of a December 19, 1990, order denying request not to close estate in the estate of Evan Gillette, Sr., and a February 7, 1991, order denying petitions for rehearing and modification in the estate of Lizzie Gillette/Yellow Bird/Bellanger/Paint/Bedell, a.k.a. Elizabeth Burdell (decedent). The orders were issued by Administrative Law Judge Vernon L. Rausch. For the reasons discussed below, the Board affirms both orders.

Background

Decedent, Fort Berthold allottee 301-A699/1308/87A, was born on January 9, 1892, and died on July 16, 1987, at Parshall, North Dakota. She executed a will on November 13, 1985, in which she devised her entire estate to her nephew Wilson Gillette and her niece Elizabeth Gillette Leach, who are appellees here.

Judge Rausch held hearings to probate decedent's trust estate on May 19, 1988, and June 19, 1989, in New Town, North Dakota. At the hearings, appellants challenged decedent's will on the grounds that decedent lacked testamentary capacity, that she had been subjected to undue influence, and/or that she had been induced to execute the will through fraud.

On September 10, 1990, Judge Rausch approved decedent's will, after finding that decedent possessed the requisite testamentary capacity when

she executed her will, that no undue influence was exerted on her, and that no fraud was present.

On November 9, 1990, appellants filed a petition for rehearing and a petition for modification of the estate inventory. They alleged that certain property should be excluded from the estate inventory and instead should be deemed to pass through gift deeds which decedent intended to execute in 1984. They continued to challenge decedent's will, contending that decedent lacked testamentary capacity and had been the victim of undue influence. Further, they contended that they were entitled to a jury trial under the Seventh Amendment to the United States Constitution.

Judge Rausch denied appellant's petitions on February 7, 1991. Concerning the petition for modification of the estate inventory, he stated:

[T]he petition to modify the inventory of the decedent's land interests appears to be an attempt to acquire part of the decedent's lands through Gift Deeds, the paper work for which was apparently begun in February 1984. The petition fails to assert why at this late date (i.e. 6 years later) efforts to complete these transactions are being taken, especially in light of the decedent's conservator writing on March 21, 1984 that the decedent "had changed her mind regarding the Life Estate Gift Deeds she had asked . . . to get prepared."

* * * [T]he Superintendent of the Fort Berthold Agency, BIA, by letter to the Administrative Law Judge dated January 25, 1991, advises, through his Realty Officer, that "no gift deeds thus can or will be prepared by this office." * * * The bureau has implicitly taken a position that its inventory of property * * * correctly reflects the decedent's trust property and I find that it does.

* * * [Appellants] assert * * * that title to real property is not a question to be resolved by the Hearing Examiner (sic). * * * The Interior Board of Indian Appeals in the Estate of Douglas Leonard Ducheneaux, 13 IBIA 169[, 92 I.D. 247] (1985), has ruled that alleged legal errors in BIA's inventory of Indian trust assets can be considered by the Administrative Law Judge during the probate proceedings. Having considered the alleged legal errors asserted by [appellants] I find them to be wholly without merit.

(Feb. 7, 1991, Order at 1-2).

The Judge further found that the petition for rehearing "merely recites the arguments and points that have been alleged and argued prior to the final order entered on September 10, 1990, and offers nothing new by way of evidence or legal arguments" (Feb. 7, 1991, Order at 2).

Decedent's nephew, Evan Gillette, Sr., Fort Berthold allottee 301-A2252, died on December 11, 1987. Judge Rausch entered an order Determining Heirs in his estate on September 25, 1990.

On November 9, 1990, appellants filed a document entitled "Notice of Omitted Property," requesting that the estate of Evan Gillette, Sr., not be closed until the gift deeds discussed above had been issued. Judge Rausch denied the request on December 19, 1990. He noted that 43 CFR 4.272 establishes a procedure for correction of estate inventories in cases where property has been omitted. ^{1/}

Appellants filed a single notice of appeal from the December 19, 1990, order in the estate of Evan Gillette, Sr., and the February 7, 1991, order in decedent's estate. The notice was received by the Board on February 19, 1991. Briefs were filed by appellants, by appellees Wilson Gillette and Elizabeth Gillette Leach, and by the Bureau of Indian Affairs.

Discussion and Conclusions

Appellants make no arguments at all concerning Judge Rausch's order in the estate of Evan Gillette, Sr. The Board finds that appellants have failed to carry their burden of proving error in the Judge's decision. *See, e.g., Estate of Jerry Elmer Coppock*, 20 IBIA 212 (1991). Further, Judge Rausch's order is clearly correct. In light of the specific regulatory provision intended to address the circumstances appellants allege to exist, *i.e.*, omission of property from the estate inventory, there is no need to keep the estate open for this purpose.

With respect to decedent's estate, appellants contend that (1) the gift deeds decedent intended to execute should have been approved by BIA; (2) decedent lacked testamentary capacity when she executed her will; (3) Judge Rausch lacked authority to rule on the gift deed conveyances; and (4) appellants were entitled to a jury trial under the Seventh Amendment.

The Board first considers appellants' first and third arguments, concerning the gift deeds which appellants contend decedent intended to execute. In essence, appellants' argument is that the property covered by the intended gift deeds should have been excluded from the inventory of decedent's estate.

^{1/} 43 CFR 4.272(a) provides:

"When, subsequent to the issuance of a decision * * * it is found that trust property or interest therein belonging to a decedent has not been included in the inventory, the inventory can be modified either administratively by the Commissioner of the Bureau of Indian Affairs or by a modification order prepared by him for the administrative law judge's approval and signature to include such omitted property for distribution pursuant to the original decision."

[1] In Ducheneaux, *supra*, the Board held that the regulations in 43 CFR Part 4, Subpart D, suffice to allow consideration of alleged legal errors in BIA's estate inventory during a probate proceeding. Recognizing that BIA has an interest in such matters, the Board established a procedure providing for participation in the proceedings by BIA officials. The procedure contemplates that the Administrative Law Judge will notify BIA that a question has arisen and take evidence concerning the disputed inventory during the probate hearings. The Judge is then to issue, as a part of the order concluding the probate proceeding, a recommended decision to the Board concerning the disputed inventory. See 13 IBIA at 177-78, 92 I.D. at 252.

Here, the Ducheneaux procedures were not followed precisely, in part because appellants failed to raise the estate inventory issue prior to the hearings. Judge Rausch did, however, seek the views of the Superintendent, Fort Berthold Agency, before issuing his order denying appellants' petition for modification. Further, BIA has participated fully in this appeal. Since the matter is now before the Board, essentially as contemplated in Ducheneaux, the Board finds that any technical errors in applying the Ducheneaux procedures are no longer of any consequence. The Board therefore proceeds to the question of whether BIA should now approve the gift deeds which appellants contend decedent intended to execute.

The matter of the gift deed request arose in early 1984, shortly after appellant Austin Gillette had been approved by the Fort Berthold Tribal Court as decedent's conservator. 2/ By application dated January 16, 1984, decedent apparently sought to convey a 40-acre tract of her trust land to Austin Gillette by gift deed. 3/ Shortly thereafter, by a letter dated February 24, 1984, decedent requested the Superintendent to prepare for her signature "Gift Deeds with Life Estate" for 15 tracts. She named various individuals as the intended recipients. 4/ On March 21, 1984, Austin

2/ The court approved Austin Gillette as conservator on Jan. 5, 1984. The formal appointment was made by court order of Mar. 27, 1984.

3/ The original and a copy of this application are included in the administrative record received from the Agency. The original is signed by decedent. Information about decedent is filled in by hand, although the handwriting is clearly not decedent's. The land description and name of the intended recipient, Austin Gillette, are typed in. On the copy, the same signature and handwritten information about appellant appear, but the typed information is missing. Thus it appears that the land description and name of intended recipient were added to the original application after decedent had signed it.

4/ These were Evan Gillette, Sr., Austin Gillette, Vance Gillette, Wilson Gillette, Elizabeth Leach, Marmie Fricke, Lord Deegan, Denby Deegan, Rose Bell, Laura Huber, Alice Walters, and Verna Tiokasin.

One of the tracts described in the Feb. 24 letter was the same tract described in the Jan. 16 application. In the Feb. 24 letter, however, it was designated for Vance Gillette, rather than Austin Gillette.

Gillette wrote to the Agency Realty Officer, stating, "Just a short note to inform you that my grandmother has changed her mind regarding the Life Estate Gift Deeds she had asked me to get prepared. In any event thank you for any effort you may have put into her request." BIA then closed its file on the request. ^{5/} Nothing further happened until December 28, 1989, 2-1/2 years after decedent's death, when Vance Gillette wrote to the Superintendent, requesting that gift deeds be issued as requested in decedent's February 24, 1984, letter.

Appellants contend that BIA breached its fiduciary duty in failing to process decedent's request to prepare gift deeds or to notify her that her request would not be processed. They further contend that Austin Gillette had no authority to withdraw decedent's request because he was not appointed her conservator until March 27, 1984, 6 days after he wrote the letter informing BIA that decedent had changed her mind.

[2] 25 CFR 152.23 provides that applications for the sale, exchange, or gift of trust or restricted land "may be approved if, after careful examination of the circumstances in each case, the transaction appears to be clearly justified in the light of the long-range best interest of the owner or owners or as under conditions set out in § 152.25(d)." Section 152.25(d) provides:

With the approval of the Secretary, Indian owners may convey trust or restricted land, for less than the appraised fair market value or for no consideration when the prospective grantee is the owner's spouse, brother, sister, lineal ancestor of Indian blood or lineal descendant, or when some other special relationship exists between the grantor and grantee or special circumstances exist that in the opinion of the Secretary warrant the approval of the conveyance.

It is clear from these provisions that BIA's authority to approve gift deeds is discretionary and that its duty is toward the owner of the trust land rather than the prospective recipients, even if those prospective recipients are family members. See Smith v. Billings Area Director, 18 IBIA 36 (1989). Its duty in this regard includes a duty to refrain from approving such deeds where there is any question concerning an owner's intent. In this case, BIA ceased processing decedent's gift deed request once it was notified that decedent had changed her mind.

It is true that Austin Gillette had not been appointed formally as decedent's conservator on March 21, 1984, when he wrote the letter informing BIA of decedent's change of mind. It is clear from the record, however, that BIA was well aware that the tribal court had approved him as decedent's conservator. Further, according to his March 21 letter, it was he who had

^{5/} The record copy of this letter is stamped "Received Mar. 22, 1984" and "Cancelled Mar. 22, 1984."

undertaken, at decedent's request, to secure approval of the gift deeds in the first instance. Finally, inasmuch as he stood to receive substantial interests himself, had decedent's February 24, 1984, gift deed request been processed, his letter was written against his own self-interest. For these reasons, it was entirely reasonable for BIA to accept Austin Gillette's letter as accurately reflecting decedent's wishes.

In an apparent last-ditch effort in this appeal, appellants attempt to file an affidavit from Austin Gillette. The affidavit was received by the Board on December 31, 1991, nearly 2 months after appellants' reply brief was due. In it, Austin Gillette states: "At no time did I tell the Bureau of Indian Affairs in 1984 that [decedent] wanted to withdraw her request for the February 24, 1984, gift deeds" (Affidavit at ¶12). As is apparent, the affidavit directly contradicts the March 21, 1984, letter.

Appellees object strongly to admission of the affidavit, arguing that it is far out of time. Further, they argue, Austin Gillette testified at the second probate hearing and had ample opportunity at that time to submit evidence.

As noted above, the matter of the gift deed request was not fully developed at the probate hearings. Appellants failed to mention the issue at all until the day of the second hearing and failed even then to make any arguments in support of their present position concerning the gift deed request. Austin Gillette testified briefly about the matter at the second hearing (Tr. 128-29). His testimony indicated that he believed BIA had not processed the gift deed request because he, Austin Gillette, was a prospective recipient. No mention was made of the March 21, 1984, letter.

Even though the letter was apparently not in evidence at the hearing, a copy was furnished to appellants' attorney on May 10, 1990, several months before Judge Rausch entered his initial decision. Further, Judge Rausch specifically cited and relied on the letter in his February 7, 1991, order denying modification. Clearly, appellants were aware of the letter long before they filed their brief in this appeal. 6/

[3] Under 43 CFR 4.311(b), no briefs other than those specified in the Board's regulations may be filed except with special permission of the Board. This applies as well to other appeal documents, especially documents such as this affidavit, which make new factual allegations long after briefing has been concluded. In fact, the Board has a well-established practice of declining to consider evidence presented for the first time on appeal,

6/ In fact, they refer to the letter in their opening brief, impliedly conceding that it had been written by Austin Gillette. They argue only that he had no authority to withdraw decedent's request (Appellants' Opening Brief at 4).

even when such evidence is proffered during the briefing period. E.g., Estate of Warren Lewis Lincoln, 19 IBIA 118 (1990); Estate of Alice Jackson (John), 17 IBIA 162 (1989), and cases cited therein. The Board declines to consider Austin Gillette's untimely affidavit. 7/

For the reasons discussed, the Board finds that BIA properly refrained from approving the gift deeds requested in decedent's February 24, 1984, letter.

Appellants next argue that decedent lacked testamentary capacity when she executed her will. There is also a suggestion in appellants' brief that they object as well to Judge Rausch's conclusion that no undue influence was exerted against decedent.

[4] As will contestants, appellants bore the burden of proving that decedent lacked testamentary capacity or was subjected to undue influence. Estate of Johanna Small Rib (Standing Twenty), 19 IBIA 236 (1991), and cases cited therein. As appellants, they bear the burden of proving error in Judge Rausch's decision. Estate of Jerry Elmer Coppock, supra.

Appellants' arguments are conclusory in nature and do nothing to refute Judge Rausch's thorough and carefully reasoned decision. The Board has reviewed the record in its entirety and finds the Judge's decision to be well supported. Appellants have failed to carry their burden of proving error in that decision.

Appellants' final argument, which was not raised at any time before or during the hearings, is that they were denied a jury trial to which they were entitled under the Seventh Amendment to the United States Constitution. The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[5] Appellants' argument is, in essence, a challenge to the constitutionality of the Federal statute, 25 U.S.C. § 373 (1988), which assigns responsibility for probating Indian wills to the Secretary of the Interior. Cf. Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977). It is also a challenge to the Department's Indian probate regulations. The Board lacks authority to declare an act of Congress unconstitutional. Redleaf v. Muskogee Area Director, 18 IBIA 268 (1990), and cases cited therein. It also lacks authority to declare a duly promulgated Departmental regulation invalid. E.g., Kays v. Acting Muskogee Area Director, 18 IBIA 431 (1990). Accordingly, the Board is precluded from considering this argument.

7/ Not only is the affidavit exceedingly untimely, it also suffers from a credibility problem. The affidavit impliedly challenges the validity of the Mar. 21, 1984, letter. Yet it offers no explanation whatsoever for the existence of the letter, which appears, at least to the untrained eye, to be in the same handwriting as the signature on the affidavit.

[6] Appellees seek to be awarded attorneys fees against appellants. They state that their request is made under 43 CFR 4.281. This regulation, however, does not authorize the award of attorneys fees against an opposing party, but only against the party represented or against the estate. Appellees' request must therefore be denied.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Rausch's December 19, 1990, order in the estate of Evan Gillette, Sr., and February 7, 1991, order in the estate of Lizzie Gillette/Yellow Bird/ Bellanger/ Paint/Bedell, a.k.a. Elizabeth Burdell, are affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge