



INTERIOR BOARD OF INDIAN APPEALS

Estate of Jeanette Little Light Adams

39 IBIA 32 (04/29/2003)

This decision has been redacted under 5 U.S.C. § 552(b)(6) by substituting initials for certain names.



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF JEANETTE LITTLE LIGHT ADAMS : Order Affirming Decision
: :
: Docket No. IBIA 02-24
: :
: April 29, 2003

Appellants J. A., J. D.A., R.A., C. A. R. T. B. A., and E. F. C. seek review of an order denying rehearing of the Estate of Jeanette Little Light Adams (Decedent) issued by Administrative Law Judge Robert G. Holt on October 12, 2001. IP TC-268-H99. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the decision.

Three hearings were held on this estate from 1999 to 2001. ^{1/} Testimony presented at the hearings indicated that Decedent executed a new will in 1998 (1998 will) that was prepared by a will scrivener from the Bureau of Indian Affairs (BIA). It was witnessed by two people not employed by the BIA, James "Jimmie" Medicine Horse (Medicine Horse) and Frank M. Jefferson (Jefferson), and notarized by a notary public employed by BIA. During the hearings, Appellants, who are Decedent's grandchildren and adopted daughters, contested the validity of the 1998 will on the grounds that Decedent lacked testamentary capacity to execute that will; and that J. C. A., Decedent's daughter (Appellee), exercised undue influence upon Decedent to make a new will naming her as the sole beneficiary and excluding them.

On July 5, 2001, Judge Holt approved Decedent's 1998 will. On August 31, 2001, Appellants, D. A., and J. R. T. B. petitioned for rehearing, raising the same issues and also arguing for the first time that the Judge erred in issuing a decision when Medicine Horse failed to attend the hearing.

The Judge denied rehearing on October 12, 2001. The Board received Appellants' notice of appeal on December 12, 2001. On appeal, Appellants raise the same issues as before

^{1/} Administrative Law Judge William S. Herbert conducted hearings on Oct. 27, 1999, and Nov. 1, 2000. The case was then transferred to Judge Holt. He held a hearing on Apr. 10, 2001.

Judge Holt and raise new arguments that the Judge erred in relying on the will scrivener's testimony because he had asked her leading questions, in failing to recognize the existence of a confidential relationship between Appellee and Decedent which would have created a rebuttable presumption of undue influence, and in approving the will despite the will scrivener's failure to publish or read the will to Decedent. In support of their arguments, Appellants attached three new exhibits to their brief. 2/

Appellants first contend that the Judge erred in holding that Decedent possessed testamentary capacity. The Judge summarized the relevant principles for testamentary capacity:

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 object 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).

Oct. 12, 2001, Order at 3. See also *Estate of Sallie Fawbush*, 34 IBIA 254, 258 (2000). 3/

It is undisputed that the will scrivener, notary public, Jefferson, and Medicine Horse were present in Decedent's bedroom on April 24, 1998, to assist with and witness Decedent's

2/ Appellants' Exhibit A is an Affidavit from Medicine Horse dated Mar. 4, 2002. Exhibit B is a copy of an undated handwritten note on a form entitled Nurses' Progress Notes from the Big Horn County Memorial Hospital and Nursing Home. Exhibit C appears to be a handwritten record from a mental health/social service provider dated Mar. 4, 1998. These exhibits are discussed in the text below.

3/ Each case must be examined on its own merits. For example, the Board has held that an Indian testator had testamentary capacity to execute a will even though he was illiterate, unable to speak English or manage his business affairs, *Estate of Joseph Poolaw*, 18 IBIA 358 (1990); under guardianship, *Estate of Blanche Russell (Hosay)*, 18 IBIA 40 (1989); was aged, ill, physically disabled, and sometimes forgetful, *Estate of Carrie Standing Haddon Miller*, 10 IBIA 128 (1982); had periods of confusion, *Estate of Virginia Enno Poitra*, 16 IBIA 32 (1988); on medication for a mental condition, *Estate of Johanna Small Rib (Standing Twenty)*, 18 IBIA 236 (12991); had a long history of alcohol abuse but was not permanently damaged or intoxicated at the time the will was executed, *Estate of Comer Fast Eagle*, 16 IBIA 40 (1988); or hospitalized shortly before death. *Estate of Pearl Big Bow Aungkotoye Nahno Kerchee*, 18 IBIA 153 (1990).

execution of the 1998 will. It is also undisputed that Decedent spoke mostly in the Crow language, and was weak, bedridden, ill and elderly. 4/ What is at issue here is Decedent's testamentary capacity on that day.

At the November 1, 2000, hearing, the will scrivener testified that she went to Decedent's house on April 24, 1998, to assist Decedent in preparing a new will, Nov. 1, 2000, Tr. at 10-13; Decedent told her to prepare a will that devised all her assets solely to Appellee and excluded her adopted daughters, Id. at 13-14; after obtaining these instructions from Decedent, she returned to the BIA office to prepare the will, Id. at 11; after preparing the will, she returned to Decedent's home with a notary public, Id.; and the notary public assisted Decedent in placing her thumb print on the 1998 will rather than signing it because Decedent was too weak to hold a pen, Id. at 12. The will scrivener further testified that she believed Decedent was mentally competent to execute a will. Id. at 14.

Jefferson attended the April 10, 2001, hearing. He testified that Appellee's daughters asked Medicine Horse and him to witness Decedent's execution of her 1998 will, Apr. 10, 2001, Tr. at 12; they agreed to do so; Id.; they were in the kitchen of Decedent's home until called into the bedroom to witness the execution of the will, Id. at 13; and the notary public assisted Decedent in sitting up to execute the will, Id. at 14-19, 21. He also testified that he believed Decedent was competent to execute a will. Id. at 15-16.

Appellants testified at the April 10, 2001, hearing. They indicated that Decedent was ill and did not recognize them when they came to visit her. Id. at 31-36, 40-50. However, their testimony also revealed that none of them were present at Decedent's home on April 24, 1998, to personally observe her demeanor or mental capacity. 5/ Thus, they have no basis to form an opinion as to Decedent's mental capacity on that day.

Also at the April 10, 2001, hearing, Appellee's daughters testified that Decedent had poor eyesight and recognized people by their voices. Id. at 56-57, 61, 76-77. One of Appellee's daughters speculated that Decedent did not recognize Appellants because they did not visit Decedent often enough for her to know their voices. Id. at 65.

The Judge found the testimony of the will scrivener and Jefferson to be more credible than that of Appellants. In his order denying rehearing, he said:

4/ The will shows that Decedent was 85 years old at the time when it was executed.

5/ The Board has found affidavits signed by witnesses at the time the will is executed "'in and of itself is prima facie evidence' of due execution." Estate of Ella Dautobi, 15 IBIA 111, 116 (1987). Appellants have also failed to provide any factual evidence to overcome the prima facie evidence of due execution.

[A]n administrative law judge must weigh conflicting evidence and his findings will not be overturned if supported by substantial evidence in the record. Estate of Philip Malcolm Bayou, 19 I.B.I.A. 20 (1990). The testimony was exhaustively analyzed in the [July 5, 2001] decision and the record contains substantial credible evidence in support of the conclusion that the Decedent possessed testamentary capacity and acted free of undue influence when she executed the 1998 will. Accordingly the undersigned concludes that the discrepancies in the testimony alleged in the petition would not constitute proper grounds for a rehearing had that issue been properly before this forum.

Oct. 12, 2001, Order at 3.

“Normally, witness credibility is a matter for the Administrative Law Judge, not this Board, to determine, because the Administrative Law Judge has had an opportunity to hear the witnesses and observe their demeanor, whereas the Board has not.” Estate of George Dragswolf, Jr., 30 IBIA 188, 193 (1997) (citing Estate of Donald Paul Lafferty, 19 IBIA 90 (1990)). Thus, where evidence is conflicting, the Board will not normally disturb a decision based upon the Judge's findings of credibility. Estate of Joseph Kicking Woman, 15 IBIA 83 (1987).

In addition to their general contention that Judge Holt should have given more weight to their testimony, Appellants also contend that the Judge erred in relying on the testimony of the will scrivener because, by asking her leading questions, it was really the Judge who was testifying on the issue of testamentary capacity.

The Board has long held that “Administrative Law Judges involved in the probate of Indian estates share the duty imposed upon the Department of the Interior to carry out the Federal trust responsibility toward Indians.” Estate of Rose Parshall Dragswolf Crow Flies High, 36 IBIA 54, 57 (2001), and cases cited therein. The Judge has an affirmative duty in an Indian probate hearing “to develop the record and to ensure that the facts, both pro and con, are brought out.” Estate of Blanche Russell (Hosay), *supra*, 18 IBIA at 46, and cases cited therein.

The Board has reviewed the transcripts in this estate and finds that Judge Holt did not commit error in his questioning of the witnesses, and did not commit error in relying on the responses to those questions. 6/

6/ As part of this argument, Appellants contend that the Judge was “duty bound * * * to advocate for all parties in carrying out his fiduciary trust responsibility * * * .” Appellants’ Opening Brief at 8-9. This is clearly incorrect. The Judge is not an advocate for anyone in an Indian probate proceeding.

Judge Holt found that the testimony of the will scrivener and Jefferson was more credible than that of Appellants. Appellants have not raised any argument that causes the Board to question the Judge's credibility determination. Therefore, the Board affirms the Judge's finding that Decedent had testamentary capacity to execute the 1998 will.

Appellants next challenge the Judge's finding that Appellee did not exercise undue influence upon Decedent to execute a new will naming Appellee as the sole beneficiary. Appellants allege that Appellee's and her family's mere presence at the home when Decedent executed the 1998 will indicated she was "up to mischief," and that Appellee's knowledge that she would be named as sole beneficiary "indicates culpability or guilt." Appellants' Opening Brief at 15. Appellants contend that when Appellee and most of her family went outside the house when Decedent executed the 1998 will, "[s]he was playing it safe, but by attempting to play it safe, she tipped her hand and thinking. This entire will process from beginning to the bitter end was engineered and controlled by the mastermind * * * [Appellee] and her daughters." Id. at 15-16.

The Board has summarized the long-established rules concerning proof of undue influence upon an Indian testator:

Normally, to invalidate an Indian will on the grounds of undue influence, it must be shown that (1) Decedent was susceptible of being dominated by another; (2) the person allegedly influencing Decedent in the execution of her will was capable of controlling her mind and actions; (3) such a person did exert influence upon Decedent of a nature calculated to induce or coerce her to make a will contrary to her own desires; and (4) the will is contrary to Decedent's own desires. E.g., Estate of Joseph Poolaw, 18 IBIA 358 (1990). Further, the burden to prove undue influence is upon the will contestant. E.g., Estate of Alice Jackson (John), [17 IBIA 162 (1989)].

Estate of Leona Ketcheshawno Waterman Ely, 20 IBIA 205, 207 (1991).

The will scrivener testified that she never observed Appellee asking Decedent to leave her all the estate assets. Nov. 1, 2000, Tr. at 14-16. Jefferson testified that he saw no one appearing to influence Decedent's decision about executing the 1998 will. Apr. 10, 2001, Tr. at 16. Appellee's daughter-in-law, who lived with and took care of Decedent, testified that she saw no one telling Decedent how to prepare the will or exerting pressure on her about making a new will. Id. at 89.

In his original decision approving Decedent's will, the Judge found:

Although the [Appellant's] testimony touches on each of the factors required to show undue influence, the testimony is insufficient to prove the required elements. The [Appellants] claim Decedent was intimidated by [Appellee]. However, other testimony showed that Decedent was capable of independent decision making. While the [Appellants] claimed that [Appellee] may have been capable of influencing Decedent, the testimony is void of any evidence showing that [Appellee] actually did induce or coerce Decedent to make a will contrary to Decedent's desires. Although [Appellee] was present in the house where [sic] Decedent executed her will, no testimony showed that [Appellee] exerted any influence whatsoever. Indeed the testimony showed that [Appellee] made a concerted effort not to be present in the room when Decedent consulted with the scrivener about the contents of her will and when Decedent executed the will in the presence of witnesses.

* * * * *

Finally, there is insufficient evidence to show that Decedent's 1998 Will was contrary to her intentions. Testimony was received that Decedent expressed a desire to change her will. Her most recent prior Will in 1981 expressly left out her two adopted daughters E. and C., as did her 1998 Will. The 1981 Will had devised portions of her estate to her husband D., [Appellee], her granddaughter J., daughter of her predeceased son, D., and her son L. Since the 1981 will was prepared, her husband D. and her son L. had passed away. It does not seem unusual for Decedent to have changed this scheme to leave all her property to her surviving daughter, [Appellee]. Leaving out the two adopted daughters E. and C. is consistent with the desire she expressed in her 1981 Will.

July 5, 2001, Order at 5-6.

In his Order Denying Rehearing, the Judge stated:

The petition alleges that “the presence of [Appellee] and her daughters [when the 1998 will was executed] most probably constitutes undue influence and overreaching.” Pet. p. 2. This is merely a reiteration of an argument asserted in [Appellants'] written contest of the will. The petition contains no evidence or explanation of how [Appellee's] presence constitutes undue influence. Proximity and “mere opportunity to unduly influence and suspicion thereof is insufficient to invalidate a will.” Estate of Asmakt Yumpquitat, 8 I.B.I.A. 1 (1980).

Oct. 12, 2001, Order at 3.

There is no dispute that Appellee and some of her family members were Decedent's caretakers and were present at Decedent's home on the day that she executed the 1998 will. Appellants' broad, but unsubstantiated, allegations that Appellee had the opportunity and possibly the motive to exercise undue influence upon Decedent are insufficient to meet their burden of proof.

The Board finds that the Judge correctly held that Appellants failed to carry their burden of proving that Appellee unduly influenced Decedent.

Appellants' present attorney challenges the conduct of the hearings on the grounds that the Judges should have provided more guidance to Appellants' non-attorney representative. The record shows that during the hearing phase of this proceeding, both Appellants and Appellee used non-attorney representatives, rather than legal counsel.

The Board first addresses the issue of representation in a probate matter by a person who is not an attorney. Under 43 C.F.R. § 1.3, persons appearing in proceedings before the Department of the Interior, including Indian probate proceedings, must either represent themselves or have a representative who is eligible to appear before the Department by meeting one or more of the criteria established in 43 C.F.R. § 1.3(b). However, 43 C.F.R. § 1.3(a) provides that the representation rules "shall not be deemed to restrict the dealings of Indian tribes or members of Indian tribes with the Department." The Board extensively discussed this proviso in Estate of Benjamin Kent, Sr. (Ben Nawaway), 13 IBIA 21, 22-24 (1985), where it indicated that certain non-attorneys could represent Indians before it. The fact that a person chooses to be represented by a non-attorney does not, however, mean that the person is not bound by that representation, or that the person has the right to argue on appeal that he received inadequate representation merely because the representative was not an attorney. The Board rejects Appellants' present assertion that they should receive special consideration because they were represented during the hearings by a non-attorney.

In this part of their argument on appeal, Appellants raise two specific issues. They contend that the Judges should have issued a subpoena to Appellee and required her to testify, and that the Judges should have informed their representative of his options when Medicine Horse failed to appear at the hearings after being issued subpoenas.

A review of the transcripts reveals that Judge Holt gave both representatives the opportunity to call all their witnesses. At the end of the April 10, 2001, hearing, in discussing possible additional proceedings, Appellants' representative told Judge Holt:

The people I am representing state that there has been plenty of hearings, and there is plenty of opportunity to present all sides. I think that for the sake of the people here, that the representatives could go ahead and handle this on paper from here on, unless there is something comes up that requires a hearing. There's been so many hearings.

Apr. 10, 2001, Tr. at 98.

Neither Appellants nor their representative asked either Judge to subpoena Appellee or requested another hearing to elicit her testimony. Although, as noted above, an Administrative Law Judge has a duty to develop the record, he is “not, however, required to anticipate what issues [a party] might have raised or to discover additional legal arguments or evidence that might have been beneficial to [the party’s] case, but which [the party] did not mention.” Estate of Henry Beavert, 18 IBIA 73, 75 (1989). The Board declines to find that the Judges committed any error in failing to subpoena a witness that Appellants did not ask to have subpoenaed during the hearing phase of this proceeding.

Appellants also contend on appeal that the Judges had a duty to advise their representative that when Medicine Horse failed to respond to the subpoena, they could ask for a court order under 43 C.F.R. § 4.230(b) or they could make an offer of proof. Section 4.230(b) provides that, if a person who has been issued a subpoena to appear at an Indian probate hearing, fails to appear, “the Administrative Law Judge may file a petition in the appropriate U.S. District Court for the issuance of an order requiring the appearance and testimony of the witness.” 43 C.F.R. § 4.230(c) authorizes the Judge “[t]o rule upon offers of proof and receive evidence.”

All parties knew that Medicine Horse had not appeared and had not testified. Appellants’ representative was presumed to be aware of the regulations which governed probate proceedings, including 43 C.F.R. § 4.230(b). Estate of Eugene Patrick Dupuis, 11 IBIA 11 (1982) (person doing business with the government is presumed to know regulations governing that kind of transaction). See also Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). Therefore, Appellants’ representative is presumed to know that he could have taken other steps to compel Medicine Horse’s appearance. Even assuming for purposes of this opinion that he was not aware of the regulation, the Judge had no obligation to point it out to him. This is especially true when Appellants’ representative specifically stated that he did not believe additional testimony or hearings were necessary.

The Board finds that Appellants are not entitled to any relief on the basis of this argument.

Appellants also contend that they should have been permitted to make an offer of proof as to Medicine Horse's testimony. There are two problems with this contention: (1) Appellants did not ask to make an offer of proof, and (2) at the time of the hearings in 2000 and 2001, Appellants had no reason to believe that Medicine Horse would testify differently than did Jefferson. Therefore, any offer of proof that they made at the hearings would have been directly contrary to their position that Decedent's 1998 will was invalid. No doubt, this is not the offer of proof envisioned by Appellants' counsel.

Appellants continue this argument by contending that the Board should consider an affidavit Medicine Horse signed in 2002. In that affidavit, Medicine Horse stated that he believed Decedent did not have testamentary capacity when she executed the 1998 will. The Board does not normally accept new evidence and arguments on appeal. See Estate of Clarence Burke, 18 IBIA 1, 4 (1989). However, even if the Board were to go against this general rule and accept Medicine Horse's affidavit, it would not help Appellants. In 1998 Medicine Horse witnessed the execution of Decedent's will and swore that he believed she had testamentary capacity. In 2002, he executed the affidavit and swore that he believed she did not have testamentary capacity. In the affidavit, he does not provide any justification for, or explanation of, his change of position. Under these circumstances, Medicine Horse has impeached himself and shown that he is not a credible witness in this proceeding.

Appellants raise two new arguments on appeal: (1) that the Judge erred in failing to recognize the existence of a confidential relationship between Appellee and Decedent that would have created a rebuttable presumption of undue influence, and (2) that the will scrivener's failure to publish or read the will to Decedent rendered the 1998 will invalid.

Although not required to address these new arguments at all, the Board does so briefly in the hope of bringing closure to this estate. Appellants at no time prior to this appeal even suggested that there was a confidential relationship between Decedent and Appellee. Even now, the most they are able to say is that, if the matter were examined, they think a confidential relationship might be shown. Appellants' speculation that there might have been a confidential relationship between Decedent and Appellee is not sufficient to cause the Board to order another hearing.

Appellants' argument that the will scrivener failed to read the will to Decedent and Decedent failed to publish the will is also unavailing. The requirements for the execution of an Indian will devising trust property are contained in 43 C.F.R. § 4.260. There is no requirement in this regulation that an Indian testatrix' will must be read and/or published. See Estate of Carrie Standing Haddon Miller, *supra*, 10 IBIA at 132. See also Estate of Hiemstennie (Maggie) Whiz Abbott, 4 IBIA 12, 21 (1975); Estate of William Cecil Robedaux, 1 IBIA 106, 118-19 (1971).

Appellants present two other exhibits which appear to be copies of several miscellaneous medical notes about Decedent's health. See footnote 2. Appellants had more than ample opportunities to obtain this information and submit it during the hearings in this estate. The Board declines to consider these exhibits on appeal.

Appellants have failed to carry their burden to show that the Judge erred in his decision denying rehearing.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Holt's October 12, 2001, order denying rehearing is affirmed. Z/

//original signed
Kathleen R. Supernaw
Acting Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

Z/ Any arguments not specifically addressed were considered and rejected.