



INTERIOR BOARD OF INDIAN APPEALS

Estate of Rose Medicine Elk

39 IBIA 167 (10/23/2003)

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
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ESTATE OF ROSE MEDICINE ELK : Order Affirming Decision as Modified in
: Part and Order Remanding Case to
: Serve Notice on C. W.
:
: Docket No. IBIA 02-154
:
: October 23, 2003

Appellants Evelyn Gardner and Stuart Gardner sought review of an order modifying decision after rehearing in the estate of Rose Medicine Elk (Decedent) issued by Administrative Law Judge Robert G. Holt on July 11, 2002. IP TC-180-H-99. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the decision as modified in part, but remands the case to Judge Holt to serve notice of the proceedings on C. W.

Administrative Law Judge William S. Herbert held hearings to probate Decedent's trust or restricted estate on July 28, November 3, and November 6, 1999. At the July 28, 1999, hearing, a document executed by Decedent on July 12, 1989, and purported to be her last will and testament, was introduced. This document divided Decedent's trust estate between her daughter, Appellant Evelyn Gardner; and her granddaughter (Evelyn's daughter), Ava Gardner (Appellee).

An original handwritten document, identified as a codicil to Decedent's July 1989 will, was also submitted at the July 28, 1999, hearing. This document divided the trust land left in one of the devises to Appellee in Decedent's 1989 will between Appellee and Appellant Stuart Gardner, who is Decedent's grandson, Evelyn's son, and Appellee's brother. There is no dispute that Evelyn wrote the document while Decedent was hospitalized with her last illness. Although the document is dated February 20, 1997, there is also no dispute that it was actually written on February 20, 1998.

Although no witness testified to actually having seen Decedent sign the document, Decedent's name appears on the document and no one has seriously challenged that she signed it. The document was witnessed by five individuals and was notarized. Three of the five witnesses signed on the lower left side of the document, across from Decedent's signature. These witnesses were Evelyn; Evelyn's daughter, Delores Gardner (Winters); and Evelyn's husband,

William K. Gardner. These signatures are not dated. The signatures of two additional witnesses appear at the bottom of the page below the signatures of the first three witnesses and Decedent. These witnesses were Father Paul Reichling; and Linda Mangus, a supervisory nurse at the hospital at which Decedent was a patient. Father Reichling's signature is dated February 20, 1998. Mangus' signature and the date next to it, like the signature and date of the notary, Neva Hiwalker, are partially obscured by the notary seal. It appears from the document that Mangus dated her signature as February 20, 1998, the same as Father Reichling's, and that Hiwalker dated hers as July 28, 1999. Hiwalker subsequently testified that she notarized the document on July 28, 1999.

No two people testifying gave the same account of the signing of the document by the witnesses, or whose signatures, including Decedent's, were on the document at the time the person testifying signed.

Judge Herbert issued an order determining heirs and approving the will and codicil on September 14, 2001. He determined Decedent's heirs at law to be Evelyn and Decedent's two surviving adopted sons.

Appellee filed what she termed an appeal with Judge Herbert. The filing was received in Judge Herbert's office on September 24, 2001. The case was transferred to Judge Holt on October 2, 2001. After reviewing Appellee's filing, Judge Holt wrote Appellee on October 17, 2001, informing her that the filing did not conform to the requirements for a petition for rehearing. Appellee subsequently filed a petition for rehearing, which Judge Holt received on November 2, 2001. A copy of the petition filed with the Superintendent, Northern Cheyenne Agency, Bureau of Indian Affairs (Superintendent; BIA), was not date-stamped, but was forwarded to Judge Holt by letter dated November 13, 2001.

On March 12, 2002, Judge Holt scheduled a hearing on Appellee's petition. Judge Holt received an answer to Appellee's petition from Evelyn on April 5, 2002. Supplemental hearings were held on April 19 and 30, 2002. On July 11, 2002, Judge Holt issued an order that modified Judge Herbert's initial decision by disapproving the codicil.

On August 29, 2002, the Board received a combined notice of appeal from present Appellants. Because it appeared that the interests of Evelyn and Stuart might be different, the Board asked counsel to ensure that his representation of both parties did not place him in a conflict of interest. Counsel decided to represent only Evelyn. Ultimately, Evelyn and Stuart filed separate opening briefs, although Stuart in large part adopted the arguments presented in Evelyn's brief. Appellee filed an answer brief. Neither Appellant filed a reply brief.

Appellants argue that Appellee's petition for rehearing was not timely filed. Judge Holt specifically found that the petition was timely, but did not find it necessary to discuss the issue.

Appellants apparently contend that Judge Holt had to have received Appellee's petition for rehearing by November 13, 2001, in order for it to be timely. They argue that Appellee's petition was filed with the Northern Cheyenne Agency, and was not forwarded to Judge Holt until November 13, 2001. Appellants reason that the petition was not timely filed because it could not have reached Judge Holt by November 13, 2001.

The Board rejects this argument. At the relevant time period, petitions for rehearing were to be filed with the administrative law judge in accordance with an interim amendment of 43 C.F.R. § 4.241(a) published at 66 Fed. Reg. 32884, 32889 (June 18, 2001). ^{1/} Judge Herbert notified parties of the proper place for filing a petition for rehearing. The probate record contains what appears to be Appellee's original November 2, 2001, petition for rehearing. The petition is date-stamped by Judge Holt's office as having been received on November 2, 2001. Appellee's petition for rehearing was timely.

Appellants next contend that Judge Holt erred in finding that Appellee satisfied her burden of proving that Decedent lacked testamentary capacity when the codicil was executed. In essence, their argument is that Judge Holt improperly weighed the conflicting testimony given as to Decedent's condition during her hospitalization.

Before reaching his conclusion in regard to Decedent's testamentary capacity, Judge Holt extensively discussed and weighed the testimony and documentary evidence, including the conflicting testimony from the principals concerning the execution of the codicil. Ultimately, he specifically based his decision on his findings of witness credibility.

The Board normally does not disturb a decision based on a Judge's findings of witness credibility because the Judge has had the opportunity to hear the witnesses and to observe their demeanor, while the Board has not. *See, e.g., Estate of Jeanette Little Light Adams*, 39 IBIA 32, 35 (2003), and cases cited there. Here, Judge Holt found that Father Reichling and Appellee presented the strongest, although conflicting, evidence in regard to Decedent's mental condition at the time the codicil was executed. He determined that, of these two individuals, Appellee was more credible. The Judge did not base this determination on any concern about Father Reichling's veracity, but rather on the fact that the Father stated that he had based his own determination of Decedent's mental condition on his belief that she was not on such drugs as morphine. The medical records showed that Decedent was on intravenous morphine. Judge

^{1/} Prior to this interim amendment, petitions for rehearing were filed with the appropriate BIA superintendent, who was responsible for forwarding the petition to the administrative law judge. *See* 43 C.F.R. § 4.241(b) (2000).

The interim amendment was later made final, with an effective date of Jan. 30, 2002. *See* 66 Fed. Reg. 67651, 67661 (Dec. 31, 2001).

Holt concluded that the Father had not been privy to important information about Decedent's treatment.

Whether or not this kind of differentiation between witnesses is technically "credibility," the Board finds that Appellants have not carried their burden of showing that Judge Holt erred in making it. Neither have they made any other argument that convinces the Board that Judge Holt erred in his conclusions in regard to Decedent's testamentary capacity.

However, the Board finds that there is one issue in regard to Judge Holt's discussion of testamentary capacity that needs to be addressed even though it was not challenged by the parties. The Board addresses this issue under 43 C.F.R. § 4.318, which allows it to exercise the inherent authority of the Secretary of the Interior to correct a manifest injustice or error. Here, the Board finds that it has committed the error that needs to be corrected.

Judge Holt held that evidence that a decedent lacked testamentary capacity needed to be clear, cogent, and convincing. He based this evidentiary standard on the Board's decision in Estate of John S. Ramsey, 2 IBIA 237, 240 (1974), in which the Board applied that standard, without discussion, to a question of testamentary capacity.

In Estate of Emerson Eckiwaudah, 27 IBIA 245, 249-250 (1995), the Board considered an argument alleging that there was a split in its case law as to the standard for proving paternity. It reviewed its prior cases in which the standard of proof had been explicitly discussed, and found that it had applied a preponderance of the evidence standard in eleven cases and had affirmed without discussion an administrative law judge's application of the preponderance of the evidence standard in three additional cases. It found only one case in which it had explicitly applied a clear and convincing standard of proof to a paternity determination. It concluded that there was not a split in its case law, but instead there was one anomalous decision.

The Board has similarly here reviewed its prior cases as to what standard of proof it has applied in determining testamentary capacity. It found one case, Ramsey, in which it explicitly applied a clear, cogent, and convincing standard. It also found one case in which it explicitly applied a preponderance of the evidence standard, 2/ and six cases in which it affirmed without discussion an administrative law judge's use of the preponderance of the evidence standard. 3/

2/ Estate of Asmakt Yumpquitat (Millie Sampson), 8 IBIA 1 (1980).

3/ Estate of Mary Dorcas Gooday, 35 IBIA 79 (2000); Estate of Henry Beavert, 18 IBIA 73 (1989); Estate of Clarence Thompson Burke, 18 IBIA 1 (1989) (In this case, the Board stated that one of the will witnesses and the will scrivener "testified clearly and convincingly that * * * decedent possessed testamentary capacity." 18 IBIA at 4. Although this choice of words was unfortunate for present purposes, the Board finds that, in context, it was commenting on the

Based upon this review of its cases, as it did in Eckiwaudah in regard to paternity determinations, the Board finds that the correct standard of proof for determining issues related to testamentary capacity is preponderance of the evidence. ^{4/}

Based on its discussion of the proper standard of proof in regard to testamentary capacity, the Board finds that, because the clear, cogent, and convincing standard of proof which Judge Holt applied was higher than the preponderance of the evidence standard that should have been applied, the use of the incorrect standard of proof constituted harmless error. If Appellee met the clear, cogent, and convincing standard of proof, she certainly met the preponderance of the evidence standard.

Appellants next argue that the Judge erred in finding that Decedent was unduly influenced in the execution of the codicil. As was the case with testamentary capacity, Judge Holt exhaustively reviewed the testimony in regard to undue influence. Again basing his decision on witness credibility, Judge Holt found that the evidence indicated that Decedent had been unduly influenced. Although Appellants clearly disagree with that decision and ask the Board to reweigh the evidence, the Board finds that they have not raised any argument that causes it to question the Judge's determination of witness credibility.

(fn. 3, continued)

nature of the testimony, not the standard of proof); Estate of Lucy Buffalo Little Coyote, a.k.a. Thyra Redbird, 17 IBIA 31 (1989); Estate of Joseph Red Eagle, 4 IBIA 52 (1975) (Although stating in this case that evidence of undue influence must be "clear, cogent and convincing," 4 IBIA at 58, the Board's only comment on the administrative law judge's statement that the preponderance of the evidence rule applied in regard to testamentary capacity was that the finding that the testator had testamentary capacity was supported by the "weight of the evidence." 4 IBIA at 60); and Estate of Hiemstennie (Maggie) Whiz Abbott, 4 IBIA 12 (1975).

In one case, Estate of Virginia Enno Poitra, 16 IBIA 32 (1988), a party argued that the standard of proof was preponderance of the evidence. The Board did not explicitly address this argument.

^{4/} Although the question of the correct standard of proof in regard to undue influence is not before it in this case and is therefore not decided, the Board notes that, during its review of its prior cases, it found only one case in which it had explicitly applied a clear, cogent, and convincing standard of proof in regard to undue influence. That case is Estate of Joseph Red Eagle, 4 IBIA 52 (1975). In addition, it found four cases that, while not stating that they were using a clear and convincing standard of proof, built on each other in using the phrase "convincing evidence" or "convincing proof" in regard to allegations of undue influence. Those cases are Estate of Fannie Newrobe Choate, 7 IBIA 171 (1979); Estate of Charles Mjissepe (Pack choa be) or Sapesa Polecat, IA-T-3 (May 12, 1967); Estate of Charlotte Davis Kanine, 72 I.D. 58 (1965); and Estate of An-na-ne, A-24225 (1952).

Appellants contend that the Judge had a special duty and responsibility to protect Stuart's interests because Stuart did not attend the hearings. This is clearly incorrect. As the Board has repeatedly held, an administrative law judge in a probate hearing has a responsibility "to develop the record and to ensure that the facts, both pro and con, are brought out." Estate of Blanche Russell (Hosay), 18 IBIA 40, 46 (1989). However, the Judge is not an advocate for any party and is not required to anticipate a party's arguments or evidence. Adams, 39 IBIA at 35 n.6. The Judge owed no special duty to Stuart.

Stuart also argues that his due process and equal protection rights were violated because Judge Holt allowed the rehearing to go beyond the issues raised in Appellee's petition for rehearing. Stuart makes no attempt to show how the scope of the rehearing impacted either his due process or equal protection rights.

Appellee's petition sought rehearing on the question of whether the codicil was properly executed. Part of proper execution of a testamentary document is an inquiry into whether the Decedent had testamentary capacity and was acting free of any undue influence. The Board rejects Stuart's contention that his due process and equal protection rights were violated by the scope of the rehearing.

Stuart argues that he should not be penalized for actions taken by other persons in regard to the codicil, such as not coming forward with the codicil until the day of the first hearing.

Judge Holt used the fact that the codicil was not presented earlier in his assessment of witness credibility, and ultimate determination that Decedent was unduly influenced in the execution of the codicil. Were it not for that undue influence, the codicil would not have been executed, and Stuart would have no claim to any part of Decedent's estate. The fact that Stuart was not the person found to have unduly influenced Decedent does not give him the right nevertheless to have the codicil approved.

Based on the preceding discussion, the Board affirms Judge Holt's decision as modified by correction of the standard of proof in regard to testamentary capacity.

However, the Board has noted one additional problem with the processing of this estate. In the first documents submitted to Judge Herbert, BIA identified two individuals as having been adopted by Decedent. BIA provided an address for one of those individuals, but not for C. W. Nothing in the probate record shows that any inquiry was made as to C. W.'s whereabouts, and his name does not appear on any probate distribution list. Despite Evelyn's testimony at the July 28, 1999, hearing that Decedent had not adopted C. W., Judge Herbert found that he had been adopted and therefore would have been one of Decedent's heirs had she died intestate.

The Board finds that it must remand this case to Judge Holt for a determination as to whether or not C. W. received constructive notice of the hearings. If he did, Judge Holt should issue a decision making that finding. If he did not, or if it is not possible to make such a determination, Judge Holt should so inform BIA, which will then be responsible for obtaining an address for C. W. Once he has received an address, Judge Holt should provide notice to C. W. that the hearings have been held. C. W. will first have to prove that he did not have constructive notice of the hearings. If he makes this showing, then Judge Holt must provide him with an opportunity to provide any evidence and arguments he may wish to make.

Present parties have had their day in court. If they wish to contest the Board's order further, they may file an appeal in Federal court. However, the proceedings on remand are limited strictly to ensuring that C. W. has been given notice and due process.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, Judge Holt's July 11, 2002, order is affirmed as modified by the correction of the standard of proof to be applied in regard to determinations of testamentary capacity. This case is remanded to Judge Holt for the limited purpose of determining whether C. W. received constructive notice of the hearings and, if he did not, of allowing him the opportunity to present testimony and evidence if he so chooses.

//original signed
Kathleen R. Supernaw
Acting Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge