ESTATE OF ALEXANDER CHARETTE

IBIA 86-48 Decided January 21, 1987

Appeal from an order denying rehearing issued by Administrative Law Judge Keith L. Burrowes in Indian Probate No. IP BI 154A 85.

Affirmed.

1. Indian Probate: Wills: Witnesses, Attesting

There is no requirement in the regulations or elsewhere that the attesting witnesses to an Indian will be present at the same time or sign in the presence of the testator.

2. Indian Probate: Wills: Failure to Mention Child--Indian Probate: Wills: Witnesses, Attesting

Bureau of Indian Affairs instructions to will drafters concerning attesting witnesses and omitted heirs are not Departmental regulations and are advisory only.

3. Indian Probate: Wills: Failure to Mention Child

The failure of an Indian testator to mention his natural children in his will does not invalidate the will.

APPEARANCES: Alfred A. Charette, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Alfred A. Charette seeks review of a May 14, 1986, order issued by Administrative Law Judge Keith L. Burrowes denying rehearing in the Estate of Alexander Charette (decedent). For the reasons discussed below, the Board affirms that order.

Background

Decedent, an unallotted Turtle Mountain Chippewa Indian, was born on December 23, 1906, and died on April 22, 1984, in Billings, Montana. He left a will, executed on July 24, 1978, in which he devised all his interests in

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trust land to an individual identified in the will as his adopted son, Robert J. Charette. Appellant is the natural child of decedent, as are Alfreida Charette McNabb and Albert Charette.

Judge Burrowes issued an order approving will on March 6, 1986, and an order denying rehearing on May 14, 1986, following hearings held at Belcourt, North Dakota, on May 9, 1985, and at Poplar, Montana, on September 9, 1985. The second hearing was held at the request of appellant and his sister, who attended the first hearing and requested time to contest the will.

At the second hearing, appellant raised two issues: (1) whether Robert had been legally adopted, and (2) whether Pat Boyer, whose name appears on the will as a witness, actually witnessed the will.

In his order denying rehearing, Judge Burrowes found that, although Robert had been raised by decedent from the age of three months, there was no evidence that he had been legally adopted by decedent. The Judge concluded therefore that there had been no legal adoption. He noted that, if the will was valid, it did not matter whether Robert had been legally adopted.

As to the circumstances under which the will was executed and witnessed, Judge Burrowes found that the evidence was conflicting. At the first hearing, Regina Laducer, Realty Specialist at the Turtle Mountain Agency, testified that she prepared the will and was present when it was executed. She stated that she knew both of the attesting witnesses and that both were present when the will was signed. She saw both sign as witnesses.

At the second hearing, appellant, who was represented by a lay advocate, argued that one of the attesting witnesses, Pat Boyer, was not present when the will was executed. Boyer did not appear at the hearing, although he lived nearby, at Wolf Point, Montana. When asked about Boyer's absence by Judge Burrowes, appellant's lay advocate stated that he was unable to reach Boyer that day and that Boyer "moves around quite a bit." Appellant stated that Boyer had told him he had signed the will but had not gone to Belcourt, North Dakota, to do so. On April 29, 1986, after Judge Burrows issued his order approving will, appellant submitted a May 22, 1985, affidavit from Pat Boyer, which stated that decedent's will "was never signed by me as a witness in North Dakota." Judge Burrowes accepted the affidavit into evidence.

Other conflicts in the testimony at the second hearing arose from the statements of family members concerning the occasion at which decedent's will was executed. Decedent apparently traveled from Montana to the Turtle Mountain Agency at Belcourt, North Dakota, on various occasions and, during one of those visits, executed his will. Judge Burrowes concluded that most of the conflicts in the testimony resulted from the fact that the witnesses were remembering different trips to Belcourt. He further concluded that there was no credible evidence to overcome the strong and direct testimony of the will scrivener, Regina Laducer, concerning execution and witnessing of the will.

The Board received appellant's notice of appeal from Judge Burrowes' order on July 1, 1986. Only appellant filed a brief on appeal.

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Discussion and Conclusions

Appellant argues that the will is invalid because (1) it was not signed by the two attesting witnesses in the presence of each other and (2) no reason is given in the will for the omission of appellant and his brother and sister from the will. He also continues to argue that Robert was not legally adopted 1/ although he concedes that this point is not relevant unless the will is invalid.

Decedent's will is prepared on a standard Indian will form. The signatures of Pat Boyer and John F. Delorme appear in the "witness" spaces. The attestation clause states:

> The foregoing instrument of writing was here and now signed by [decedent] in our presence, and at his request and in the presence of each other we have signed as witnesses and he has published and declared this to be his Last Will and Testament.
>
> /s/ Pat Boyer
> Residing at Wolf Point, MT
>
> /s/ John F. Delorme
> Residing at Belcourt, ND

An affidavit to accompany Indian will contains the sworn and notarized statement of both witnesses that:

> [Decedent] published and declared the attached instrument to be his last will and testament, signed the same in the presence of both of us and requested both of us to sign the same as witnesses; that we, in compliance with his request, signed the same as witnesses in his presence and in the presence of each other; * * *

The affidavit also contains the sworn statement of the will scrivener that:

> [Decedent] signed the [will] and published and declared it to be his last will and testament before Pat Boyer and John F. Delorme, whom he requested to act as witnesses thereto; that there were present in the room with the testator at said time besides myself and the above named witnesses, the following-named persons: None.

Of the three individuals (other than decedent) who signed the affidavit to accompany Indian will, only the will scrivener testified at the hearing. Her testimony was clear. She stated that she knew both attesting witnesses and that both were present when the will was executed. Appellant submitted an affidavit from one attesting witness stating that he did not sign the will in North Dakota. The witness did, however, according to appellant, admit to signing the will.

1/ As noted above, Judge Burrowes held, in his order denying rehearing, that Robert had not been legally adopted.

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On appeal to the Board, appellant submits for the first time an affidavit from the other attesting witness, John F. Delorme, which states: "[C]ontrary to the declaration in the attestation clause set forth above this Will was not executed in the presence of myself and Pat Boyer as witnesses. I do not know Pat Boyer and he was not present when I affixed my signature to the Will of [decedent.]" (Emphasis in original.) Appellant should have submitted this witness's statement to Judge Burrowes. The Board is under no obligation to consider new evidence first raised on appeal. Estate of Harold Humpy, 5 IBIA 132 (1976).

Even if the document were properly part of the record, however, it would add little. Like Boyer, Delorme was not present at either hearing. Like Boyer, he was not subject to examination regarding the conflict between his sworn statement made when he signed the will as a witness and his later affidavit. The Judge was correct in affording more credibility to the statement of the will scrivener, whose testimony at the hearing was consistent with her earlier sworn statement, than to Boyer's affidavit. Had Delorme's affidavit been before the Judge, he may well have reached the same conclusion with regard to it.

[1, 2] However, resolution of the factual issue present here, i.e., whether the attesting witnesses signed in the presence of each other, is not necessary to the disposition of this appeal. Both witnesses stated that they signed the will. As the Board has previously held, "[t]here is no requirement in the regulations [2/] or elsewhere that the attesting witnesses be present at the same time, or sign in the presence of the testat[or], * * *." Estate of Hiemstennie (Maggie) Whiz Abbott, 4 IBIA 12, 21, 82 I.D. 169, 172 (1975). This is so despite the provision of the "Instructions to Field Officers" printed on the will form and relied upon by appellant, which states that "[w]itnesses and testator must sign in the presence of each other." 3/ The instructions on the will form are advisory, not controlling. The Board holds that decedent's will was properly executed.

[3] Appellant also argues that the will is invalid because no reason is given in the will for the omission of appellant and his siblings. Again, appellant relies on the instructions printed on the will form. Instruction No. 2 states: "Inquire carefully into the immediate family of testator. If

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2/ 25 CFR 4.260(a) provides:

"An Indian of the age of 21 years or over and of testamentary capacity, who has any right, title, or interest in trust property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses."

3/ Although the Board is not certain of the source of this instruction on the will form, it notes that it may be intended to meet the requirements of state or tribal law in cases where the will disposes of both trust and nontrust property. The manual Drafting of Indian Wills Covering Trust and Restricted Property, published by the Office of Hearings and Appeals in 1971, states at page 7, "The testator and two witnesses must sign the will. If the will is to dispose of any non-trust property they must all sign at the same time in the presence of each other."

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a husband, wife, child or grandchild who is an heir is given nothing, the reason must be set out." This instuction, like the one discussed above, is advisory only. Estate of William Mason Cultee, 9 IBIA 43, 50 n.11 (1981), aff'd sub nom., Cultee v. United States, No. 81-1164 (W.D. Wash. Sept. 14, 1982) aff'd, 713 F.2d 1455 (9th Cir. 1983), cert. denied, 466 U.S. 950 (1984). The Board had held that a testator need not mention omitted heirs in his will. "There is * * * no rule requiring an Indian testator to mention and specifically disinherit probable heirs." Estate of Eastman John Kipp, 13 IBIA 242, 245 (1985). See also Cultee. The Board holds that decedent's will is not invalidated by his failure to give reasons for the omission of his natural children.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Burrowes' May 14, 1986, order denying rehearing is affirmed.

_____
Anita Vogt
Administrative Judge

I concur:

_____
Kathryn A. Lynn
Acting Chief Administrative Judge

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