ESTATE OF BLANCHE RUSSELL (HOSAY)

IBIA 89-11 Decided October 31, 1989

Appeal from an order denying rehearing issued by Administrative Law Judge S.N. Willett in Indian Probate IP PH 63I 89, IP PH 49I 85.

Affirmed.

1. Indian Probate: Wills: Undue Influence

A presumption of undue influence, arising from the existence of a special confidential relationship between an Indian testatrix and the principal beneficiary under the will, is rebutted through a showing that the effects of the will were thoroughly discussed with the testatrix by an objective, independent person.

2. Indian Probate: Wills: Witnesses, Attesting

There is no requirement that the witness of an Indian will must be a longstanding and/or intimate acquaintance of the testatrix.

3. Indian Probate: Attorneys at Law: Generally

The Department of the Interior is not required to appoint counsel for an Indian party in a probate proceeding in order to comply with due process requirements.

4. Indian Probate: Administrative Law Judge: Generally--Indian Probate: Representation

When an individual participating in an Indian probate proceeding is not represented by counsel, the Administrative Law Judge bears a greater burden of ensuring that all relevant facts are brought out at the hearing.

APPEARANCES: Daniel Hosay, pro se.

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OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On January 26, 1989, the Board of Indian Appeals (Board) received a notice of appeal from Daniel Hosay (appellant). Appellant seeks review of a November 25, 1988, order denying rehearing issued by Administrative Law Judge S.N. Willett in the estate of Blanche Russell (Hosay) (decedent). For the reasons discussed below, the Board affirms that decision.

Background

Decedent, Unallotted San Carlos Apache No. 527-03-1650, was born in 1889 and died on November 5, 1984. Hearings to probate decedent's trust property were held before Judge Willett on March 8, 1985; January 30 and September 5, 1986; February 27, 1987; and March 24, 1988. Information presented at the hearings showed that decedent had been married twice. She had four children with Felix Hosay, and three children with Thomas E. Russell. She was divorced from Hosay by Indian custom in 1916 ; both Hosay and Russell predeceased her. All of decedent's children except Sena Russell, a.k.a. Sannie Russell (Kozie), also predeceased her. In addition to Kozie, decedent's heirs included 14 grandchildren, and 10 great-grandchildren who were the issue of 2 predeceased grandchildren.

A document purported to be decedent's last will and testament, dated November 25, 1980, and prepared by the Pinal and Gila Counties Legal Aid Society, was presented at the first hearing. Under this will, decedent left all of her property to Kozie. The will was challenged by several of decedent's grandchildren, including appellant, on the grounds that decedent lacked testamentary capacity. 1/ Appellant submitted to Judge Willett a copy of a May 8, 1975, last will and testament under which decedent left all of her trust property to him. 2/ Appellant requested that this earlier will be probated.

Judge Willett issued a decision approving decedent's 1980 will on September 21, 1988. The Judge characterized the case as "a contested proceeding involving the estate of an elderly Apache woman who made three wills over a 5-year period. During this period she was placed under guardianship and was diagnosed as having organic brain syndrome or senile dementia but documented as having fluctuating mental capacity" (Order at 2). Judge Willett noted that the evidence established that decedent had resided in residential care facilities since March 18, 1976. Residential care, the Judge observed, was necessitated primarily by the fact that decedent was not able to care for herself properly and no one was providing the care she

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1/ Because appellant was incarcerated at all times relevant to the hearings and appeal in this case and was not permitted by prison officials to attend the hearings, all of his arguments have been raised through written documents submitted to Judge Willett and the Board.

2/ Documentary evidence established that decedent had first executed a will in favor of appellant on Apr. 25, 1975. Because of an apparent defect in the will under 25 U.S.C. § 464 (1982), it was re-executed on May 8, 1975.

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needed in the home environment. Judge Willett then considered the complex and difficult questions raised in the case, concluding that appellant had received due process, the will contestants had not proven that decedent was subject to undue influence in the execution of her 1980 will, and decedent had testamentary capacity the day on which the 1980 will was executed.

Appellant timely filed a petition for rehearing with Judge Willett. In this petition, he alleged nine points of error. On November 25, 1988, Judge Willett issued an order denying rehearing which specifically considered and rejected all of the points of error raised by appellant. The Board received appellant's notice of appeal from this order on January 26, 1989. Following certain preliminary matters, appellant's opening brief was received on July 27, 1989. No other briefs were filed.

Discussion and Conclusions

Appellant first argues that the testimony of Elsie Johnson, decedent's sister, should have been considered. Judge Willett did not consider Johnson's January 30, 1986, testimony concerning decedent's mental condition because of events that transpired after she testified; namely, statements by Johnson that may have indicated she did not believe she was competent to testify at the proceeding.

The transcript of the January 30, 1986, hearing shows that Johnson remembered events without relating them to particular dates. It appears that Johnson and decedent were at the same care facility for an unclear period of time. Johnson testified that decedent "didn't have her right mind" (Tr. at 5), but gave no indication of how often or when she saw decedent. Johnson emphasized that she and decedent had their own families. While leaving the hearing room, Johnson made a comment in Apache that was variously heard either as saying that she was herself incompetent to testify at the hearing because she could not remember things, or as repeating that decedent could not remember. 3/

Judge Willett did not give credence to Johnson's testimony because of the confusion engendered by the comment made as she left the hearing room. Likewise, she declined to speculate about the exact nature of Johnson's comments based upon the conflicting statements made by various persons present at the hearing.

Judge Willett is the finder of fact. She is responsible for deciding what testimony she will consider in reaching her decision and what weight she will give the testimony. A determination of witness credibility must be made with consideration to the entire situation. The Board will not disturb a finding of witness credibility unless the finding is clearly erroneous

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3/ Johnson was quite elderly when she testified and was clearly uncomfortable. Accordingly, when she finished testifying, Judge Willett excused her and arranged for her to be transported home. No one mentioned the comments she made as she left the hearing room until after she was gone.

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because the Judge is the person who had the opportunity to observe the witness and the circumstances of the hearing. See Estate of George Neconie, 16 IBIA 120 (1988), and cases cited therein. In this instance, Judge Willett determined that she could not give credence to Johnson's testimony. That decision is not clearly erroneous. 4/

Appellant's second major argument is that Judge Willett erred in finding that decedent understood what she was doing on November 25, 1980. As presented in appellant's opening brief, this argument incorporates separate arguments that the decedent did not personally request the preparation of a new will; evidence that appellant had abused decedent and that his incarceration had an effect on decedent's decision to change her beneficiary was improperly considered; the first witness to the 1980 will, Ethel Bullis, was not competent to witness the will because Bullis had not known decedent before she was diagnosed as having senile dementia and had not had business dealings with her; and Bullis was improperly found to be a disinterested party. 5/

[1] Appellant contends the fact that Kozie asked the will scrivener to prepare the will for decedent "raises the specter of foul play" (Opening Brief at 4). It appears that appellant may be arguing that decedent was not even aware of the preparation of the will. Such an argument raises the issue of undue influence. Judge Willett considered this issue at great length and, in fact, applied the most stringent evidentiary test to the preparation of this will; namely, she presumed that Kozie was in a confidential relationship with decedent and required proof that Kozie had not unduly influenced decedent in the execution of the will. Judge Willett found that such proof existed in Bullis' testimony that she independently discussed the matter with decedent and determined that the will expressed decedent's wishes. This conclusion is in accordance with Board decisions. See, e.g., Estate of Jesse Pawnee, 15 IBIA 64 (1986), and cases cited therein.

Appellant asserts he was not arrested until the month after decedent's November 1980 will was executed and his arrest could, therefore, not have been raised by decedent as a reason for changing her will. He thus argues that the testimony given by Bullis, the 1980 will scrivener, and Kozie to the effect that decedent wanted to change her will because appellant was in prison and unable to harm her was fabricated.

4/ Furthermore, even if Judge Willett had considered Johnson's testimony, it would not be sufficient to overcome other testimony indicating that whatever decedent's mental condition was in general, she had sufficient mental capacity on Nov. 25 , 1980, to execute a valid will. See text, infra.

5/ Appellant may also intend to argue that decedent lacked testamentary capacity because she was placed under his guardianship in 1976. The fact that an individual is under guardianship is not sufficient, in itself, to prove lack of testamentary capacity. See, e.g., Estate of Thomas Longtail, Jr., 13 IBIA 136 (1985); Estate of Fannie Newrobe Choate, 7 IBIA 171 (1979).

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Judge Willett made no finding concerning the apparent discrepancy between the dates of decedent's will and of appellant's incarceration because she found decedent was not required to have knowledge of when appellant was arrested in order to have testamentary capacity. The Board acknowledges there appears to be a discrepancy between the testimony and the dates. However, decedent's reasons for making a change in her will are not an aspect of testamentary capacity unless those reasons represent an "insane delusion." 6/ Decedent did not need to express, or even to have, a reason for changing her will in order to have testamentary capacity and for the new will to be validly executed. Conversely, a possibly erroneous statement, such as may have been made here, does not deprive a person of testamentary capacity. The apparent discrepancy is noted, but held to be non-dispositive.

[2] Appellant contends that Bullis' testimony concerning decedent's mental state is void because she did not know decedent before she was diagnosed as having senile dementia and did not have business dealings with decedent. A will witness is not required to have total knowledge of an Indian testatrix. The point at which a testatrix must have testamentary capacity is the date of will execution. Many will witnesses have never met the testatrix before they are asked to witness the execution of a will. All a will witness testifies to is the condition of the testatrix at the time the will is executed. Additional knowledge of the testatrix may be helpful, but is not required. Bullis is not incompetent to testify concerning decedent's mental condition because of the points raised by appellant, and her testimony is not void. Estate of Ella Derand, 12 IBIA 238 (1984).

Appellant asserts that, contrary to Judge Willett's finding, Bullis was not a disinterested party giving unbiased testimony. Appellant argued for the first time in his petition for rehearing that Bullis was interested in the outcome of this proceeding because her brother was previously married to Kozie's daughter, Patricia Little (Schurz), and had custody of the couple's children. On appeal, for the first time, appellant elaborates and states that decedent prepared an earlier, fourth will, in which she left all of her property to Schurz, but, when Schurz married outside the tribe, decedent changed her will and left everything to appellant. Appellant contends that Kozie attempted "many times" (Opening Brief at 7) to have Schurz renamed as beneficiary, and when those attempts failed, sought to have herself named beneficiary. Appellant surmises that when Kozie obtains decedent's estate, she will transfer the property to Schurz, who could then leave the property to one of her children, in the custody of Bullis' brother. 7/

6/ An insane delusion is not merely an erroneous belief. Rather, it is a belief so unreasonable that it defies rational explanation or justification. See, e.g., Estate of Ella Dautobi, 15 IBIA 111 (1987), and cases cited therein, recon. denied, 15 IBIA 164 (1987), aff'd, Domebo v. Hodel, No. CIV-87-844-W (W.D. Okla. Mar. 18, 1988). At most, decedent's statement here would have constituted a mere erroneous belief.

7/ Appellant argues that these matters were not brought out at any of the hearings because he was not permitted to be present to testify. The issue

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The Board notes that it is not required to consider facts and arguments raised for the first time on appeal. See, e.g., Estate of Lucy Buffalo Little Coyote, a.k.a. Thyra Redbird, 17 IBIA 31 (1989). However, because of appellant's allegations that he has been denied due process, the Board will address this argument.

In denying rehearing, Judge Willett stated that under 43 CFR 4.201(i) a party in interest, or interested party, "means any presumptive heir or actual heir, any beneficiary under a will, any party asserting a claim against a deceased Indian's estate, and any Tribe having a statutory option to purchase interests of a decedent." The Judge properly concluded that Bullis did not meet the definition of an interested party. The tenuous "interest" in the outcome of this proceeding expounded by appellant does not change this conclusion. See Estate of Ethel Wood Ring Janis, 15 IBIA 216 (1987).

Appellant's third major argument is that he was denied due process by not being permitted to be present at the hearings. 8/ Appellant specifically argues that Judge Willett should have obtained a court order compelling his attendance at the hearings, held the hearings at the prison in which he is incarcerated, and/or appointed counsel for him. He contends that he was denied the opportunity to confront the will witnesses and to have the Judge observe their demeanor and that he would personally have given testimony concerning decedent's testamentary capacity and Kozie's attempts to have Schurz renamed beneficiary of decedent's property.

[3] The Board has previously addressed appellant's contention that counsel should be appointed for him. On May 8, 1989, the Board received four motions from appellant, one of which requested the appointment of counsel. In an order dated May 10, 1989, the Board stated:

> The simple fact is, however, there is no requirement for the appointment of counsel, even for an indigent, [9/] when liberty interests are not at stake. As the United States Supreme Court

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fn. 7 (continued)
of whether appellant was denied due process by the fact that he was not present at the hearings is discussed, infra. At this point, it is sufficient to note that Judge Willett gave appellant every conceivable opportunity to inform her of the facts and issues he wished to have addressed at the hearings. Appellant never mentioned any relationship between Bullis, decedent, and/or Kozie until he filed his petition for rehearing and never requested that information concerning such a relationship be brought out at one of the hearings, although he was fully aware that Bullis would be testifying as a will witness.

8/ Also for the first time on appeal, appellant raises the possibility that he could have participated in the hearings through a speakerphone arrangement. The Board declines to address a possible arrangement that appellant failed to seek from Judge Willett.

9/ The Board made no finding that appellant was indigent.

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> stated in Lassiter v. Department of Social Services, 452 U.S. 18, 25 (1981), "[t]he pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." The Court held that only where there were compelling circumstances did due process considerations outweigh the general presumption that there was no right to court-appointed counsel when personal liberty was not at stake. See In re Attorney's Fees Request of Ronald Clabaugh, 9 IBIA 294 (1982).

Judge Willett was under no obligation to appoint counsel for appellant.

[4] The Judge was, however, under an obligation to ensure that appellant's interests were fully and fairly developed at the hearing. The Board has frequently discussed the additional responsibilities not normally associated with the position of a judge that are borne by an Administrative Law Judge hearing Indian probate cases. Because of the Federal trust responsibility, the Board has consistently held that an Administrative Law Judge hearing Indian probate cases has an affirmative obligation to develop the record and to ensure that the facts, both pro and con, are brought out. This obligation is especially strong when an Indian party is not represented by counsel. See, Estate of Thomas Tointigh, 17 IBIA 17, 19 (1988); Estate of Wesley Emmet Anton, 12 IBIA 139, 142 (1984); Estate of Katie Crossguns, 10 IBIA 141, 144 (1982); Estate of Simpson Nokusille, 5 IBIA 178, 180 (1976).

As Judge Willett acknowledged, the situation presented in this case, in which a beneficiary under a prior will was incarcerated and therefore unable to attend the hearing, was a matter of first impression for her. In order to ensure that appellant was treated fairly and received due process, she made every attempt to accommodate his many requests, including serving interested parties with all of his filings, making copies of documents in the file for his use, attempting to secure his presence at the hearings, making transcripts of the hearings available to him without charge, and attempting to provide him with tapes of proceedings that were not transcribed. 10/ In addition, Judge Willett gave appellant every opportunity to list witnesses he wanted called and the questions he wanted asked.

The situation of an incarcerated interested party is not a matter of first impression with the Board. After reviewing the record, the Board concludes that Judge Willett properly discharged her responsibilities in this matter. She was under no obligation to seek a Federal court order compelling appellant's presence at the hearings. Furthermore, Indian probate hearing sites are chosen in the discretion of the Administrative Law Judge, usually for the convenience of the majority of the interested parties and witnesses. Judge Willett held hearings in this case in Sacaton, San Carlos, and Tucson, Arizona. She was not required to hold any or all of the hearings at the prison in which appellant was incarcerated. Appellant's

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10/ These attempts were unsuccessful because of equipment incompatibility.

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own failure to inform Judge Willett that he wished to address certain facts and/or arguments is the cause of his dissatisfaction. The Board finds that appellant was accorded due process.

Finally, appellant argues that Judge Willett erred in failing to call certain witnesses who would have given testimony favorable to his position. The witnesses named are Eileen Hoffman, Charlotte Titla, and Lena Nelson.

In testimony given in response to questioning by Judge Willett at the January 30, 1986, hearing, appellant's witness Ophelia James identified Charlotte Titla and Lena Nelson as individuals who might be custodians of records concerning decedent, and Eileen Hoffman as a person who had been a long-time employee of one of the care facilities in which decedent resided who might have information on decedent's condition. On her own initiative, Judge Willett indicated these individuals were persons who might have reliable information on decedent's condition.

Ultimately, none of the individuals was called as a witness, although the documentary information on decedent generated by them or their offices was, to the extent possible, made part of the record. At the beginning of the September 5, 1986, hearing, Judge Willett identified for the record certain documents she had received from the San Carlos Agency, BIA, and noted that other requested documents had not yet been received. 11/ At that time, Judge Willett stated: "Testimony is, of course, useful. But it would be more useful to me to have records that ran throughout the period of her commencement of confinement to the point that we now have actual records, which is 1984" (Tr. at 5). The 1984 records to which Judge Willett referred were those from the San Carlos Agency.

Judge Willett identified Eileen Hoffman, Charlotte Titla, and Lena Nelson as individuals who might be able to provide information concerning decedent's general condition during the period in which she was confined to care facilities and was under guardianship. Appellant at no time identified these individuals as persons he wished to have called as witnesses, and there is no basis upon which to surmise whether their testimony, as distinct from their records, would have been favorable or unfavorable to him. 12/ The information Judge Willett identified as important was provided in the form of documentary records created at the time observations were made. The

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11/ The record shows that Judge Willett was first denied access to certain documents from the Indian Health Service (IHS) Hospital in San Carlos, and when the documents were finally released, an IHS employee, without consultation with Judge Willett, determined that the appearance of the subpoenaed party was not required because she had been subpoenaed merely as a records custodian. Judge Willett properly objected to the IHS employee's supervisor concerning this interference with her conduct of the hearing.

12/ Appellant specifically objected to information presented by social worker Rebecca Officer, as the records custodian at the San Carlos Hospital. See Feb. 10, 1986, letter from Rebecca Officer, and May 5, 1987, objection by appellant. This letter was inadvertently not sent to Judge Willett until Mar. 20, 1987. Judge Willett served the letter on interested parties.

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information duplicated other evidence, already in the record, indicating that decedent needed care and assistance in daily living, had varying levels of mentation, and had several physical problems. Judge Willett did not err in failing to call these individuals as witnesses when she had contemporaneous written records available.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 25, 1988, decision of Judge Willett is affirmed.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

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