



INTERIOR BOARD OF INDIAN APPEALS

Estate of Glenn Begay

16 IBIA 115 (04/19/1988)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF GLENN BEGAY

IBIA 87-44

Decided April 19, 1988

Appeal from an order denying rehearing issued by Administrative Law Judge Patricia McDonald in Indian Probate No. IP GA 108G 83 and IP GA 51G 87.

Affirmed.

1. Indian Probate: Appeal: Matters Considered on Appeal

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

APPEARANCES: Anthony F. Little, Esq., Bernalillo, New Mexico, for appellant; Dorothy Alther, DNA-People's Legal Services, Inc., Crownpoint, New Mexico, for appellee.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On July 29, 1987, the Board of Indian Appeals (Board) received a notice of appeal from Lucinda Begay (appellant). Appellant sought review of a June 1, 1987, order denying petition for rehearing entered in the estate of Glenn Begay (decedent) by Administrative Law Judge Patricia McDonald. For the reasons discussed below, the Board affirms that order.

Background

Decedent, C#12445, an unallotted Navajo, was born September 28, 1915 and died intestate on March 13, 1982. Because decedent died possessed of property in trust or restricted status, Judge McDonald held a hearing to ascertain his heirs on August 8, 1984. At that hearing, Ida Begay (appellee) appeared and presented evidence sufficient to prove that she was decedent's surviving spouse by Navajo custom marriage. Appellee stated decedent had not fathered any children. The information concerning decedent's family relationships presented to Judge McDonald by the Bureau of Indian Affairs (BIA) indicated decedent had a daughter with Sarah Chischilly.

After the hearing, Judge McDonald attempted to contact appellant, decedent's possible daughter. Appellant, Lee Pine, Bessie Pine, and Alta Dodge came to Judge McDonald's office on April 15, 1985. Statements were taken

from each of those individuals on that day. Each person indicated decedent was appellant's father. Copies of the statements were sent to appellee and she was asked if she wished to dispute appellant's claim to be decedent's daughter.

Appellee retained counsel to assist her in opposing appellant's claim. Appellant also retained counsel.

On May 23, 1985, affidavits were taken from appellee; John Sandoval; Fred Padilla; William Henry; and Joe Begay, decedent's older brother. Each of these individuals stated that decedent was not appellant's father. In addition, John Sandoval stated that Joe Begay had admitted to him around 1955 that he was appellant's father; and Joe Begay stated that Sarah Chischilly had accused him of being appellant's father, and admitted it was possible he was her father.

Depositions in aid of discovery were taken from appellant on August 6, 1985, and from Bessie Pine, Alta Dodge, and Lee Pine on September 10, 1985. These individuals gave accounts of how each of them had come to believe that decedent was appellant's father.

A supplemental hearing was held on November 25-27, 1985. Except for the Medical Records Librarian at the PHS Indian Hospital in Crownpoint, all of the witnesses testifying at this hearing were related to each other through complex blood, clan, and marriage ties. Some of the witnesses included individuals who had previously presented testimony either through affidavits or depositions. At the hearing, Joe Begay denied that he was appellant's father, and answered equivocally about whether he could be her father.

On May 19, 1986, Judge McDonald issued an order determining decedent's heirs. In an extensive and detailed discussion, Judge McDonald examined both the oral and documentary evidence relating to appellant's parentage. She found there were discrepancies between the testimony of several witnesses and their affidavits or depositions, some witnesses were not credible, other witnesses were credible, and the documentary evidence was conflicting. Based upon her examination of all of the evidence, Judge McDonald found it was equally possible that either decedent or Joe Begay could have been appellant's father. Accordingly, she found appellant had not sustained her burden of proving that decedent was her father, and ordered decedent's entire estate distributed to appellee as his surviving spouse.

Appellant filed a timely petition for rehearing on the grounds of newly discovered evidence. Attached to the petition was an affidavit from Joe B. Charley, appellant's step-father, stating decedent had admitted to him that he was appellant's father and Sarah Chischilly had confirmed that decedent was the father. In support of the petition, appellant stated she had not previously known that her step-father had any knowledge about the identity of her real father and had refrained from asking him out of respect. Appellant also sought to obtain a blood test from Joe Begay, which she stated would show he could not be her father.

By order dated August 29, 1986, appellee was given an opportunity to respond to the petition. In a filing received on October 2, 1986, appellee opposed rehearing. Appellee argued that the evidence sought to be admitted was not newly discovered because it could, with due diligence, have been discovered prior to the conclusion of the hearing; the evidence was merely cumulative of evidence already in the record; decedent had indicated in her August 6, 1985, deposition that she was aware her step-father had information concerning her real father; and appellee had sought unsuccessfully to depose Joe B. Charley based on the information from appellant's deposition indicating he had information. Appellee also opposed the taking of blood tests on the grounds that this could and should have been done prior to the conclusion of the hearing.

Judge McDonald denied the petition by order dated June 1, 1987. The basis for denying rehearing was that the evidence could and should have been discovered prior to the conclusion of the hearing through the exercise of due diligence.

Appellant's notice of appeal to the Board was received on July 29, 1987. Both appellant and appellee have filed briefs on appeal.

Contentions of the Parties

Although appellant's opening brief mentions that rehearing was sought because of the additional evidence supplied by appellant's step-father, it argues that Judge McDonald failed to give sufficient weight to the documentary evidence indicating decedent was appellant's father. Appellant argues that the Board has inherent authority to correct a manifest injustice and should exercise that authority in this case in order to ensure that documentary evidence is given proper weight and consideration in the future. No argument is devoted to the question of whether rehearing was properly denied.

Appellee contends that appellant's petition for rehearing was properly denied for failure to meet the standard of newly discovered evidence and that appellant cannot raise the question of the weight given to the evidence for the first time on appeal. Appellee further argues that, if appellant's argument raised on appeal is addressed, Judge McDonald properly weighed both the oral and documentary evidence.

Discussion and Conclusions

The scope of the Board's review authority in probate cases is set forth in 43 CFR 4.320, which states in pertinent part:

An appeal shall be limited to those issues which were before the administrative law judge upon the petition for rehearing * * *. However, the Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

The only issue raised in appellant's petition for rehearing was newly discovered evidence. Citing Estate of Ella Dautobi, 15 IBIA 111 (1987), and Estate of Joseph Kicking Woman, 15 IBIA 83 (1987), Judge McDonald held that the petition failed to show the evidence offered as newly discovered could not, with due diligence, have been discovered prior to the conclusion of the hearing. Appellant does not pursue this issue on appeal. Accordingly, the appropriateness of Judge McDonald's denial of rehearing is not before the Board.

Instead, on appeal, appellant argues that Judge McDonald gave improper weight to certain documentary evidence. This issue was not raised in the petition for rehearing. Appellant seeks to overcome the restriction of 43 CFR 4.320 that an appeal is limited to those issues which were raised in the petition for rehearing by contending that the Judge's improper weighing of the evidence constitutes manifest error which should be corrected under the Secretary's inherent authority.

[1] Normally, the Board will not consider issues raised for the first time on appeal. See, e.g., Estate of Virginia Enno Poitra, 16 IBIA 32 (1988); Estate of Fannie Pandoah Fisher Silver, 16 IBIA 26 (1988); Estate of Leon Levi Harney, 16 IBIA 18 (1987); Dautobi, *supra*. A few exceptions to this rule exist, such as when the issue raised involves jurisdiction. See, e.g., Estate of James Wermey Pekah, 11 IBIA 237 (1983), and cases cited therein.

In Dautobi, as in the present case, the Board was asked to consider an issue not raised below on the grounds that allowing the Administrative Law Judge's decision to stand as issued would constitute a manifest error. The Board noted it had authority in extraordinary cases to exercise the inherent authority of the Secretary to correct a manifest error, but specifically declined to exercise this authority when the issue was one which could and should have been raised to the Administrative Law Judge, but instead was raised for the first time on appeal. The Board here reaffirms that ruling. ^{1/}

^{1/} The Board notes, however, that even if it were predisposed to consider the issue raised appellant has not shown that a manifest error was committed. The weight to be ascribed to various items of oral or documentary evidence is a matter for initial consideration by the Administrative Law Judge, who is the finder of fact. Such a determination will not be overturned unless it is clearly erroneous. See, e.g., Day v. Navajo Area Director, Bureau of Indian Affairs, 12 IBIA 9 (1983).

In this case, the documentary evidence appellant seeks to have found dispositive conflicted with other documentary evidence. Although great weight should be accorded to contemporaneous documentary evidence compiled in the regular course of business, Estate of Willard Guy, 13 IBIA 252 (1985), the Administrative Law Judge is not required to be blind to discrepancies or other indicia of unreliability in such records. Judge McDonald's determination of the weight to be given to the documentary evidence presented in this case is not clearly or manifestly erroneous.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge McDonald's June 1, 1986, order denying rehearing is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge