



INTERIOR BOARD OF INDIAN APPEALS

Estate of Mary Red Cherries

38 IBIA 103 (09/10/2002)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF MARY RED CHERRIES : Order Docketing Appeal and
: Affirming Decision
:
: Docket No. IBIA 02-153
:
: September 10, 2002

William Gardner, Sr. (Appellant), seeks review of a June 25, 2002, order denying rehearing issued in the estate of Decedent Mary Red Cherries by Administrative Law Judge Robert G. Holt. IP 001-207-231F. Before issuing this order, the Board of Indian Appeals (Board) requested and received certain documents in the probate record from Judge Holt's office. For the reasons discussed below, the Board docketed this appeal and affirms the Judge's decision.

Decedent, a member of the Northern Cheyenne Tribe, died on February 8, 2000. Judge Holt held hearings to probate her trust estate on October 3, 2001, and January 11, 2002. A document dated February 7, 2000, and purported to be Decedent's last will and testament was introduced at the hearing. The will was on a Bureau of Indian Affairs (BIA) form, but was not prepared by a BIA employee. It was accompanied by an Affidavit to Accompany Indian Will, also on a BIA form. The affidavit inexplicably contained dispositive provisions. Under the will and affidavit, Appellant, who is Decedent's brother, was named as Decedent's principal beneficiary.

On April 17, 2002, Judge Holt issued an order holding that Decedent's will could not be approved because the document was not properly executed as it contained neither Decedent's signature nor her thumbprint. He then considered whether the affidavit could be approved as a will since it contained dispositive provisions. The Judge found that the affidavit also could not be approved because it was not attested by two disinterested adult witnesses; Decedent lacked testamentary capacity at the time the affidavit was executed; and Appellant was in a confidential relationship with Decedent, being her guardian, thus raising a presumption of undue influence which Appellant failed to rebut. Accordingly, Judge Holt held that Decedent died intestate and ordered that her trust estate be distributed to her three grandchildren.

Appellant sought rehearing. In his petition for rehearing, Appellant alleged that he was denied an interpreter at the hearing and was denied his due process right to testify concerning tribal cultural relationships. On June 25, 2002, Judge Holt issued the order denying rehearing at issue here. He found that, although there was some discussion of whether or not Appellant needed an interpreter, Appellant himself stated that he could speak English, but he could not hear well. The Judge concluded that Appellant's allegation that he was refused an interpreter was not supported by the record.

As to the issue of Appellant's testimony concerning tribal cultural relationships, Judge Holt found that Appellant was permitted to testify at both hearings and that he did not raise the issue of tribal cultural relationships at either hearing or in any subsequent offer of proof. Consequently, the Judge found that this allegation was also not supported by the record.

Appellant appealed to the Board. His notice of appeal states:

Grounds for appeal concerns the legal interpretation of [the Indian Land Consolidation Act (ILCA)] as it effects escheats of interests in land on the Northern Cheyenne Reservation. * * *

Questions of validity of ILCA Law as to the language is sufficiently clear to support findings that a Tribe's Probate Code is disestablished in probate of [Decedent].

Is [the Judge's] decision that is based upon state probate law in direct conflict with ILCA?

Has decision of [the Judge] disregarded expressed solemn federal law guarantees to apply tribal probate laws?

Has [the Judge] decided incorrectly important question of federal Indian law?

Does decision of [the Judge] over-reach and cloud import of facts to which party by stipulation were bound, so as to render decision unsupportable on facts stipulated?

Appellant does not mention the issues he raised in his petition for rehearing and, consequently, does not challenge Judge Holt's conclusions on those issues. Instead, as he did in his petition for rehearing, he raises new issues. The Board has previously held that it is not required to address issues raised for the first time on appeal. See, e.g., Estate of Ervin Lyle Waits, 36 IBIA 46, 47 (2001); Estate of Sallie Fawbush, 34 IBIA 254, 258 (2000). Therefore, it is

not required to consider these issues. Under these circumstances, the Board sees no reason why this case should be further delayed by establishing a full briefing schedule. 1/

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 June 25, 2002, order denying rehearing is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

1/ Even if the Board were to consider the issues raised in Appellant's notice of appeal, it would still affirm Judge Holt's decision. No land or interests in land escheated under ILCA in this case and therefore Judge Holt rendered no legal interpretation of ILCA. The Board has been informed that the Northern Cheyenne Tribe does not have a probate code approved under ILCA. Judge Holt therefore properly looked to state laws of intestacy. Furthermore, Judge Holt's decision was not based on stipulated facts.