



INTERIOR BOARD OF INDIAN APPEALS

Estate of William Hayes Wheeler

41 IBIA 106 (06/22/2005)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF WILLIAM HAYES WHEELER : Order Affirming Decision
:
: Docket No. IBIA 05-8
:
: June 22, 2005

Myrtle Phillips (Appellant), *pro se*, seeks review of an order denying rehearing entered by Administrative Law Judge William E. Hammett on September 1, 2004, in the estate of William Hayes Wheeler (Decedent), deceased Makah Indian, Enrollment No. 108U234 (Probate No. IP SA-171-N-03). The order denying rehearing let stand a May 18, 2004, order approving Decedent's will and decree of distribution.

Appellant is a sister of Decedent and of Stanley Wheeler, Jr. ^{1/} Decedent died in 2000, single and without living issue. Decedent had a will, in which he devised his entire estate to his brother, Stanley. Stanley, however, had died in 1990.

Under 43 C.F.R. § 4.261, when an Indian testator — in this case Decedent — devises trust property to a lineal descendent of a grandparent — in this case his brother Stanley — and the devisee dies before the testator, leaving lineal descendants, those descendants take the property devised in the will.

In 1996, during the probate of Stanley's estate, it had been determined that he had a daughter. See Sept. 25, 1996, Order Approving Will and Decree of Distribution, Estate of Stanley Wheeler, Jr., Probate No. IP SA 263N 95.

When Decedent's estate was probated, Judge Hammett found that because Stanley was the sole devisee in Decedent's will, the trust property devised in Decedent's will would descend entirely to Stanley's daughter, pursuant to 43 C.F.R. § 4.261. See May 18, 2004, Order Approving [Decedent's] Will and Decree of Distribution at 4. During the proceedings, Appellant had challenged Stanley's paternity of the individual who had been determined to be his daughter. In his May 18, 2004, order, Judge Hammett noted that Appellant should have raised the paternity issue in Stanley's estate, rather than as a collateral attack in Decedent's

^{1/} The three also had other siblings.

estate. Judge Hammett also recited the evidence supporting the paternity finding, including the fact that Stanley had, in writing, acknowledged the individual as his daughter.

Appellant sought rehearing from the May 18, 2004, order, submitting what she characterized as newly discovered evidence on the paternity issue, and also requested that Judge Hammett order the daughter to submit to DNA testing. Judge Hammett found that Appellant had not offered any evidence that would warrant rehearing in the case, and also rejected Appellant's request to order DNA testing, citing Estate of Paul Greenwood, 38 IBIA 121 (2002) (Department does not have the authority to order DNA testing). Judge Hammett noted that Appellant had not sought reopening of Stanley's estate, but also suggested that Appellant would not likely satisfy the requirements for reopening under 43 C.F.R. § 4.242.

In her appeal to the Board, Appellant did not file an opening brief. In her notice of appeal, however, Appellant argues that she had not received notice of the 1995 probate hearing for Stanley's estate, had not been given a copy of the September 25, 1996, order approving Stanley's will, and was not aware of the paternity issue and Stanley's devise to Decedent until the hearing in Decedent's estate. 2/

Appellant does not explain how she was prejudiced by the alleged lack of notice of the earlier proceedings. 3/ More specifically, Appellant does not explain how Judge Hammett's September 1, 2004, order denying rehearing was in error. Appellant does not contend that Decedent's will was invalid. Nor does she make any arguments that Judge Hammett erred in rejecting her evidence as insufficient to warrant rehearing in Decedent's estate. As Judge Hammett noted in his September 1, 2004, order, Appellant did not seek reopening of Stanley's estate.

Appellant bears the burden of proving error in the decision being appealed. Estate of Glenn Birdinground, Sr., 39 IBIA 160 (2003). Bare allegations about lack of notice of an earlier proceeding, unaccompanied by any substantive arguments concerning how the probate decision being appealed is in error, are insufficient to sustain an appellant's burden of proof. The Board concludes that Appellant has failed to satisfy her burden to prove error in Judge Hammett's order denying rehearing.

2/ With an exception not relevant here, Stanley's will left his entire estate to Decedent.

3/ A copy of the OHA-7 form (heirship and family history information) from Stanley's estate is included in Decedent's probate record. The OHA-7 form, signed by Judge Hammett on Sept. 25, 1996, contains the same address for Appellant as her current address. Therefore, it is unclear on what basis Appellant is alleging that she did not receive notice of the probate proceedings for Stanley's estate.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms Judge Hammett's September 1, 2004, Order Denying Petition for Rehearing, and his May 18, 2004, Order Approving Will and Decree of Distribution.

I concur:

 // original signed
Steven K. Linscheid
Chief Administrative Judge

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Anita Vogt
Senior Administrative Judge