



INTERIOR BOARD OF INDIAN APPEALS

Estate of Delma Kingbird

50 IBIA 167 (09/02/2009)



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 DELMA KINGBIRD) Order Affirming Decision
)
) Docket No. IBIA 08-73
)
) September 2, 2009

Derek Daniel Kingbird (Appellant) appeals to the Board of Indian Appeals (Board) from an Order Affirming Order Determining Heirs, Approving Will, and Decree of Distribution (Order) entered February 26, 2008, by Administrative Law Judge Richard J. Hough in the Estate of Delma Kingbird (Decedent), deceased Leech Lake Indian, Probate No. P000026670IP. The Order let stand an Order Determining Heirs, Approving Will, and Decree of Distribution (Decree) entered by Judge Hough on August 23, 2006. On the merits, Appellant contends that Judge Hough erred in failing to ensure distribution to Appellant of an allotment which was to be distributed to him pursuant to the terms of Decedent's will, but which Decedent transferred to another will beneficiary prior to Decedent's death. Appellant also argues that the other beneficiary acted as a probate clerk in the preparation of the probate package and thus created a conflict of interest.

We affirm Judge Hough's Order. Appellant's burden was to show that Judge Hough made an error of fact or law in construing the will. While the will bequeathed property to Appellant, Decedent nonetheless conveyed that property out of her ownership prior to her death. Accordingly, such property was not in the estate at the time of death and could not be subject to the probate proceeding. To the extent Appellant has a grievance against the recipient of Decedent's deed, or against the Bureau of Indian Affairs (BIA) for approving the transfer, such a grievance does not lie in probate. Judge Hough was also correct to conclude that the recipient's alleged conflict of interest did not change the outcome.

Background

Decedent, an enrolled member of the Leech Lake Tribe of Minnesota, was born January 19, 1909, and died March 11, 2004, a resident of Beltrami County, Minnesota. She had five children, four of them with her only husband, Scott Kingbird. One child predeceased her. At the time of Decedent's death, four of her children and six grandchildren of her predeceased son survived her. Decedent possessed interests in real estate held in trust by the United States. In 1995, she prepared a will with a single provision relevant here:

SECOND — I give, devise, and bequeath to — my great grandson, Derek Daniel Kingbird . . . all of my interest in Leech Lake 1 and my home which is located on it. To my daughter, Della Mae Kingbird, . . . all of my interest in Leech Lake 176.

Last Will and Testament of Delma Kingbird, Jan. 23, 1995 (Will).

“Leech Lake 1” is a reference to Decedent’s 1/15 undivided interest in an 86.60 acre tract identified by BIA as Leech Lake Tract 407-1, encompassing Lot 4 and SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 29, T. 146 N., R. 31 W., 5th Principal Meridian, Beltrami County, Minnesota. On September 23, 1996, Decedent deeded her trust interest in the Leech Lake 1 surface estate, reserving the mineral estate, to her daughter Della Mae Kingbird (Della). Deed to Restricted Indian Land, Sept. 23, 1996. The Deed was approved by the BIA on February 4, 1997.¹

During 2006, Judge Hough conducted a probate of the estate. Della was a probate clerk for the Leech Lake Tribe and assisted in the preparation of the probate package. The inventory of Decedent’s trust interests prepared by the Land Titles and Records Office (LTRO) included only the mineral estate for the Leech Lake 1 allotment. Judge Hough conducted a hearing on July 10, 2006, which was subject to public notice. The Office of Hearings and Appeals (OHA) also served personal notice on Della and Appellant (under the name Daniel Kingbird) at addresses of record. Appellant was served at an address in Bemidji, Minnesota. Della appeared at the hearing; Appellant did not.

Judge Hough issued the Decree on August 23, 2006, again serving it on Appellant in Bemidji. He cited and quoted the terms of the Will, and distributed “interests remaining in trust or in restricted status.” Decree at 3. With respect to the Leech Lake 1 allotment, he directed that all “trust real property described as Leech Lake Tract #1 . . . including the home and all income accrued after the decedent’s death” would be distributed to Appellant. *Id.* Citing the LTRO inventory, the Decree necessarily distributed Decedent’s retained interest in the mineral estate of the Leech Lake 1 allotment to Appellant.²

A document in the record, dated October 31, 2006, with initials “BK,” indicates that, at Della’s request, the Decree was served on Appellant at a different address in Cass Lake, Minnesota. This address is the same address listed by Appellant on his Notice of Appeal.

¹ The retained mineral interest is denominated Leech Lake Tract 407M-1.

² It is not clear whether Judge Hough was aware that Decedent had deeded her trust interests in the surface of Leech Lake 1 to Della.

On November 6, 2006, Appellant submitted a letter asking Judge Hough for the matter to be reconsidered. Appellant claimed not to have received notice of the hearing, and contended that he had been at the Cass Lake address “since 1993.” He asserted that on October 31, 2006, Della showed him the Will and explained to him that Decedent had conveyed Leech Lake 1 surface interests to Della by 1996 deed, at Della’s request. Appellant complained that Della had a conflict of interest and asked that his “gramma’s will should be honored because that is what she wanted when she wrote it out in 1995.” Petition at 3.

On November 13, 2006, Judge Hough issued a Notice to Show Cause Why Rehearing Should Not Be Granted.³ Della and Appellant attended a rehearing on March 16, 2007. Della testified and also answered written interrogatories sent to her on November 15, 2006, by Judge Hough. In her testimony and interrogatory answers, Della admitted having asked her mother for a deed to the Leech Lake 1 tract. But she explained that she did not participate in the preparation of her mother’s Will, was unaware that the Will had bequeathed the allotment to Appellant, and had assumed from conversation that her mother had intended to give it to Della.

On February 26, 2008, Judge Hough issued his Order which, by its title and holding, affirmed the 2006 Decree on the merits. Addressing the issue of improper notice, Judge Hough explained that notice of the hearing had been posted at the Leech Lake Tribal office in Cass Lake, where Appellant claimed to have lived during the duration of the probate. Judge Hough explained that during the probate process Della had provided OHA with a correct address for Derek Daniel Kingbird, but that this address had not been “successfully incorporated into the probate package.” Order at 2 n.1. He conceded that OHA had not served notice of the probate on Appellant’s address of record, as corrected by Della, but held nonetheless that public notice in Cass Lake was sufficient to provide Appellant constructive notice of the proceeding. *Id.* at 3. Thus, he held that the “Petition for re-hearing is not proper” because Appellant failed to justify his failure to appear and present his arguments regarding the Will at the July 10, 2006, hearing. *Id.*

Judge Hough nevertheless addressed the petition by affirming the Decree on the merits. Order at 3. With respect to Appellant’s argument regarding Della’s alleged conflict of interest, Judge Hough acknowledged that, while he would

³ The record does not indicate whether Judge Hough considered whether Appellant’s letter was timely as a petition for rehearing. That issue is immaterial because, even if it was not, Judge Hough clearly had authority to consider on his own motion whether to reopen the estate. *See* 43 C.F.R. § 4.242(e) (2006).

discourage[] involvement of potential heirs in the preparation and submission of probate files, the evidence in this instance fails to support Petitioner's contention. In fact, the credible evidence presented is that [Della] did not prepare her mother's will, that she had no knowledge of the contents of the will, and any actions that she may have taken to encourage or assist the decedent to transfer property to her was not under the circumstances improper nor did it constitute a conflict of interest.

Id. Judge Hough explained that the fact that Decedent had deeded her interests in the surface estate of the Leech Lake 1 allotment to Della prior to Decedent's death meant that "the property involved was removed from the decedent's estate and was not subject to probate under her will and can not be distributed under the decedent's probate." *Id.*⁴

Appellant submitted a Notice of Appeal to this Board. In this Notice, he maintains his argument that he did not get proper notice of the July 10, 2006, hearing, and objects to Judge Hough's conclusion that Appellant had constructive notice, complaining that his name was not on the public notice and therefore he had no reason to know it pertained to him. Notice of Appeal at 1. He also accused Della of knowing the contents of the Will; of attempting to keep information about the 2006 hearing from him; and of defrauding an elderly person (Decedent). *Id.* at *passim*. He further speculated that his grandmother had not been aware of what she was doing when she gave the deed for the Leech Lake 1 surface estate to Della. He stated: "I do not challenge the gift deed transfer, it's just how Della [did] it by taking advantage of someone that did not understand what was being asked of her." *Id.* at 4.

On May 29, 2008, Appellant submitted an amendment to the Notice of Appeal. In this document, he argued "that the gift deed transfer is an invalid transfer and therefore the property known as Leech Lake one should be included in the probate proceeding and, pursuant to the terms of the will, should pass to me by the Decree."

No other briefs were submitted.

⁴ The Order affirms the Decree, which by its terms purported to distribute to Appellant the "home," consistent with the term of the Will. The record contains no suggestion that the home mentioned in the Will is property held in trust, either directly by addressing the trust status of the house or indirectly by including it in the trust inventory. Non-trust property is not subject to the jurisdiction of OHA. *Estate of Mary Cecilia Red Bear*, 48 IBIA 122, 126 (2008). Because the parties have not addressed any issue related to the house, we address this matter no further.

Discussion

Appellant bears the burden of showing that an order affirming a decision on rehearing or reopening is in error. *Estate of Lizzie McBride Rhoan*, 46 IBIA 262, 265 (2008). Simple disagreement with or bare assertions concerning a challenged decision are insufficient to carry this burden of proof. *Estate of John Squally Kalama*, 49 IBIA 201, 204 (2009). Appellant has not met his burden.

We reject Appellant's argument that he did not receive constructive notice of the July 10, 2006, hearing for two reasons. First, Appellant appears to misunderstand the nature of the notice provided with respect to that hearing. The notice related to *Decedent's* estate. *See* Notice of Hearing, dated June 9, 2006. Thus, what was provided at the Leech Lake tribal office in Cass Lake was a notice regarding the "Estate of Delma Kingbird, Deceased Leech Lake." *Id.* The subject of the hearing was not Appellant and therefore the Notice did not identify him. The Notice in the record did properly list Daniel Kingbird, though at an old address, as a person for whom "particular notice is given." 43 C.F.R. § 4.217(a)(2) (2007). Given that the Notice properly identified the subject of the upcoming hearing as Decedent's estate and also listed Appellant as a person who might have particular interest in it, we fail to comprehend his contention that he would not have been sufficiently apprised from it of the probate hearing for Decedent's estate. Interested parties are bound by decisions based on a hearing "if they lived near any place of posting during the posting period, whether or not they had actual notice of the hearing." *Id.* § 4.216(c); *c.f. Estate of Elena Kate Belcourt*, 47 IBIA 235, 244 (2008) (constructive notice not sufficient when posted in different state from domicile of both potential heirs and decedent).⁵

But, second, a lack of notice of the 2006 hearing became irrelevant when Judge Hough did, in fact, conduct another hearing in 2007 at which testimony was taken and answers to interrogatories served on Della were examined to address Appellant's arguments. Appellant ultimately was given, through Judge Hough's decision to conduct a second hearing

⁵ We also note that Appellant argued to Judge Hough that OHA did not serve him at his last address of record, and that he had lived in Cass Lake since 1993. It is not clear from the record whether Appellant ever notified BIA of a proper address of record that postdated the one on file in Bemidji, as he would have been obligated to do by 43 C.F.R. § 4.22(d) (2007), in order to claim a right to service at a changed address of record. Recognizing, as did Judge Hough, that Della apparently notified OHA of his Cass Lake address, and that OHA failed to correct its records, it is not necessary to pursue this question.

on the matter, all the process he was due, and accordingly his argument regarding a lack of notice is moot.

Though in the text of the Order, Judge Hough asserted that Appellant's petition "was not proper," he went on to affirm the Decree on the merits. We therefore proceed to consider Appellant's merits-based arguments as well. In her Will, Decedent bequeathed her Leech Lake 1 real property interests to Appellant. Nonetheless, shortly after executing the Will, she transferred her trust surface estate interests in the allotment to Della by deed; the transfer was approved by BIA. The surface estate was therefore not in Decedent's estate when she died. As we explained in *Estate of Genevieve W. Pollak*, 47 IBIA 147, 153 (2008), the trust estate is fixed at the time of death. 43 C.F.R. § 4.201 (2007) ("Estate" includes "trust cash assets, restricted or trust lands, and other trust property owned by the decedent at the time of his or her death."). To the extent Appellant's Notice of Appeal conceded that he did not challenge the deed, he conceded that the land surface interest was no longer held in trust for Decedent at the time of her death and could not have been subject to probate. To the extent his amended Notice of Appeal, submitted in May 2008, contends that the deed was invalid, his argument is not one asserting that Judge Hough erred in distributing property in the estate at the time of Decedent's death, but rather is a contention that BIA should not have approved the deed. In either case, Appellant has not argued, much less shown, that Decedent held any trust interest in the surface estate of the Leech Lake 1 allotment at the time of her death.

For the same reason, Appellant's other arguments are not relevant to the outcome. We recognize that Appellant believes that Della committed some sort of shenanigans with respect to her mother upon, he believes, her learning that the Will bequeathed the Leech Lake 1 allotment interest to him. But neither the Board nor Judge Hough has the jurisdiction to recover, in the context of a probate proceeding, trust real estate interests which were transferred by deed between living family members, and were thereby unavailable for inclusion in an estate later fixed, in order to distribute them under the terms of a will. Della was entirely free to persuade her mother to give Della property by deed, however devious Appellant may believe such action to be. This is true even if Della knew that her mother had intended to devise it to someone else in her Will. Therefore, we need not resolve Appellant's speculation that Della must have known about the Will's terms to resolve his appeal. We agree with Judge Hough's response to Appellant's complaints about Della's alleged conflict of interest for the reason that Appellant has not shown that Della provided false or inaccurate records relating to the Leech Lake 1 allotment. Decedent's surface estate had been transferred to Della no later than 1997, long before Decedent's death, and could not be recovered by OHA for distribution to Appellant in accordance with the terms of the Will.

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 Order Affirming Order Determining Heirs, Approving Will, and Decree of Distribution is affirmed.

I concur:

// original signed
Lisa Hemmer
Administrative Judge*

// original signed
Sara B. Greenberg
Administrative Judge*

*Interior Board of Land Appeals, sitting by designation.