



INTERIOR BOARD OF INDIAN APPEALS

Estate of Edwin Melvin Long Soldier

52 IBIA 239 (11/10/2010)



new arguments because the Board does not consider arguments raised for the first time on appeal. Appellant's only argument on appeal that was first presented to the IPJ is that he did not receive notice of the probate hearing and that his incarceration prevented him from investigating Pamela's status further. These arguments do not satisfy Appellant's burden of demonstrating error in the IPJ's Order Denying Rehearing, and therefore we affirm.

### Discussion

Appellant has the burden of proof to demonstrate error in the IPJ's Order Denying Rehearing. *See Estate of Stella M. Flute*, 52 IBIA 163, 164 (2010). In the absence of extraordinary circumstances, the Board's review in an appeal is limited to the issues and evidence that were presented to the probate judge. *See* 43 C.F.R. § 4.318 (Scope of review). With that exception, the Board generally does not consider arguments raised for the first time on appeal. *See Estate of Broadhead*, 51 IBIA 238, 241 n.2 (2010), and cases cited therein.

In his notice of appeal, Appellant contends that (1) Decedent was involved in Appellant's life and supported him; (2) Appellant has been incarcerated and therefore did not have access to information regarding Pamela's status, "if in fact there was [an adoption]," Notice of Appeal at 1; and (3) Decedent was raised in the old tribal way, may not have known the process for providing for the distribution of his estate, and would have split his estate among his children (although Appellant concedes that Decedent did not provide any legal documentation to do so). Upon receipt of the appeal, the Board issued an order for Appellant to show cause (OSC) why the Order Denying Rehearing should not be summarily affirmed because it appeared to the Board that Appellant's arguments, even if accepted as reflecting true statements of fact, would not provide a basis for finding that the IPJ committed any error in his decision.

In response to the OSC, Appellant reiterates that he did not have notice of the probate hearing and that his incarceration interfered with his ability to obtain information. Appellant does not repeat his earlier suggestion that Pamela may have been adopted, but instead now contends that "it hasn't been proven that [Decedent] is [Pamela's] biological father," and that a paternity affidavit signed by Decedent to that effect does not constitute such proof. Appellant's Response at 1-2.<sup>3</sup> In contrast, in his petition for rehearing to the

---

<sup>3</sup> The IPJ found that Pamela was Decedent's daughter based on the paternity affidavit signed by Decedent. Appellant does not dispute that Decedent signed the paternity affidavit.

IPJ, Appellant did not contest Decedent's biological paternity of Pamela, referring to her as his "sister" and "my blood." Appellant's Petition for Rehearing at 2.

Appellant's procedural objection that he did not receive notice of the probate hearing and his complaint that his incarceration interfered with his ability to collect information do not satisfy Appellant's burden of proof to demonstrate error in the IPJ's Order Denying Rehearing. Appellant contends that he did not have notice of the probate hearing, but there is no question that he received the IPJ's original probate decision, from which Appellant sought rehearing from the IPJ. In seeking rehearing, Appellant did not proffer any evidence that he contended he would have presented at the hearing, had he received notice or been able to attend. In his petition for rehearing, Appellant did not identify any efforts he had made, while incarcerated, to obtain information, or impediments he encountered. Nor did he seek a continuance. And he did not identify any credible basis to suggest that evidence existed to show that Pamela had been adopted out. Appellant's argument to the IPJ that Pamela may have been adopted out was, as the IPJ found, speculative, and the mere fact that Appellant may have been limited in his ability to obtain information or evidence does not, by itself, provide a basis for us to find that the IPJ committed error in denying rehearing.<sup>4</sup>

Appellant's argument that the evidence is insufficient to find that Pamela is Decedent's biological daughter is raised for the first time on appeal, and we find no basis to excuse the requirement that arguments first be presented to the decision maker whose decision is being appealed to the Board. Therefore, we decline to consider that argument.<sup>5</sup> Appellant's arguments that Decedent was involved in his life and supported him, and that

---

<sup>4</sup> Even if Appellant's petition for rehearing could be construed as impliedly requesting a continuance from the IPJ, we would not find that Appellant has shown that the IPJ abused his discretion in issuing the Order Denying Rehearing without allowing Appellant additional time to attempt to gather evidence and to supplement his petition for rehearing.

<sup>5</sup> If we were to consider this argument, we would not find that Appellant has met his burden of demonstrating error in the Order Denying Rehearing. As noted above, *supra* note 3, Appellant does not dispute that Decedent signed a paternity affidavit. Paternity is determined based on a preponderance of the evidence. *Estate of Emerson Eckiwaudah*, 27 IBIA 245, 250 (1995). Particularly in the absence of evidence to the contrary, as is the present case, a paternity affidavit may be sufficient evidence to find paternity. *Cf. Estate of Terrance Wayne White Bear*, 7 IBIA 80, 81 (1978) (probate judge relied primarily on a paternity affidavit).

Decedent would have wanted his estate to be split among his children, are similarly raised for the first time on appeal, and we decline to consider them as well.<sup>6</sup>

In summary, we conclude that Appellant has not identified any basis upon which we should either consider arguments not raised below or find error in the IPJ's Order Denying Rehearing.

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 the IPJ's denial of rehearing.

I concur:

\_\_\_\_\_  
// original signed  
Steven K. Linscheid  
Chief Administrative Judge

\_\_\_\_\_  
// original signed  
Debora G. Luther  
Administrative Judge

---

<sup>6</sup> Appellant's new argument that Decedent would have wanted him to share in the estate was supported by his mother, Donna Mae Wounded Head-Long Soldier, from whom the Board received a letter asking the Board to split Decedent's land equally between Appellant and Pamela, or possibly to award all of the land to Appellant. Neither Appellant's response to the Board's OSC nor Wounded Head-Long Soldier's letter were served on all interested parties, as required by 43 C.F.R. § 4.310(b) (copies of all documents filed with the Board must be served on all other interested parties); OSC at 4 (same). Given our disposition of this appeal, we find it unnecessary to order completion of service of those documents. Moreover, as indicated in the OSC, even if we were to consider the arguments that Decedent was involved in Appellant's life or that he would have wanted Appellant to receive all or a portion of his estate, those arguments would provide no basis to find error in the Order Denying Rehearing.