



INTERIOR BOARD OF INDIAN APPEALS

Estate of Elbert W. Exendine, Sr.

54 IBIA 88 (10/05/2011)

Denying Reconsideration of:
53 IBIA 135

his sister, Lorelei Ann Exendine, and the remainder of the estate to their half-siblings, Robert Wayne Exendine and Debra Ann Exendine (Soar), Decedent's oldest children. The remainder of the estate apparently included various trust real property interests that Decedent had inherited as the surviving spouse of Carol Rock Exendine, the mother of Appellant and Lorelei.²

In rehearing proceedings before the ALJ, Appellant objected to the approval of the will and raised questions about Decedent's testamentary capacity and about the authenticity of the will. The ALJ solicited additional evidence to address the issues raised by Appellant. After receiving additional documents, including a sworn statement from one of the will witnesses who had not previously been located, the ALJ mailed copies of the documents to the parties. In a November 10, 2010, Notice of Receipt of Documents and Order to Show Cause (November 10 Order), the ALJ indicated that he found the evidence, as supplemented, sufficient to establish that the will was properly executed and that Decedent had testamentary capacity. The ALJ also noted a letter received from Decedent's third wife, Mary Yellowbird Steele (Exendine), who stated that she had helped Decedent prepare the will and that it reflected Decedent's testamentary wishes. The ALJ allowed responses and concluded by stating: **"In the absence of timely opposition, an Order Denying Petition for Rehearing will issue. Such an order would approve the will as submitted."** November 10 Order at 1. After receiving no responses, the ALJ denied rehearing.

Appellant then appealed to the Board. The Board ordered Appellant to serve copies of his notice of appeal on the ALJ and all interested parties, and to inform the Board that he had done so. The Board advised Appellant that if he failed to respond to the order, the appeal might be summarily dismissed without further notice. When Appellant failed to respond to the Order to Serve, the Board dismissed this appeal on April 20, 2011. 53 IBIA 135.

Appellant filed a timely petition for reconsideration. Letter from Appellant to Board, Apr. 25, 2011 (Petition). Appellant acknowledged that he had not informed the Board of his actions to comply with the Order to Serve, but he contended that he had served all "necessary interested parties." *Id.* at 1. The Petition enclosed postal receipts that showed partial completion of service, including service on Robert and on Debra, but which did not show service on the ALJ, on Lorelei, or on several others on the service list. Nevertheless, based on Appellant's representations in his Petition that he had served all "necessary"

² Appellant has provided the Board with copies of title status reports for property interests owned by Decedent that Appellant contends Decedent received from Carol. Solely for purposes of this order, we accept Appellant's representations concerning which property in Decedent's estate was inherited from Carol.

interested parties, or at least made a good faith attempt to comply with the Order to Serve, the Board allowed Appellant to provide further evidence that he had completed service within the deadline provided in the Order to Serve, or to explain his reasons for not doing so. *See* Order for Appellant to Serve Petition for Reconsideration, Order for Additional Information or Clarification from Appellant, and Order for Appellant to Show Cause, May 26, 2011 (OSC).³

In addition, because granting reconsideration requires a showing of “extraordinary circumstances,” 43 C.F.R. § 4.315(a), the Board required Appellant to address a procedural issue that was raised by his failure to respond to the ALJ’s November 10 Order and failure to first present to the ALJ the arguments he now seeks to raise on appeal. *See* OSC at 4-5. The Board explained that, as a general rule, the Board does not consider arguments that are raised for the first time in an appeal that could have been, but which were not, presented to the decision maker from whose decision an appeal has been brought. *See id.*; *see also Estate of Edwin Melvin Long Soldier*, 52 IBIA 239, 241 (2010); *Estate of Evelyn Broadhead*, 51 IBIA 238, 241 n.2 (2010).

In the present case, Appellant could have, but apparently did not, present his arguments to the ALJ after being afforded an opportunity to do so in response to the additional evidence supporting the validity of the will. Although the Board’s summary dismissal made it unnecessary for the Board to reach this additional issue, the Board viewed this procedural issue as potentially relevant to a determination of whether Appellant satisfies the extraordinary circumstances standard for granting reconsideration of our dismissal. Because it appeared that Appellant had failed to first present his arguments to the ALJ, and thus waived those arguments for appeal, the Board ordered Appellant to show cause why, even if a failure to complete service were excused, the Board would not be required to summarily deny him relief, thus providing an independent ground for denying reconsideration and declining to reopen this appeal.

Appellant responded to the Board’s OSC by letter dated June 21, 2011 (Response to OSC), stating that he had mailed all of the paperwork to the ALJ and to interested parties. Appellant also responded to a footnote in the OSC, which stated that an entry in the Department’s probate tracking system, ProTrac, showed the date of Carol’s death as January 1, 1981. Appellant contends that the date is in error. Appellant also reiterates and expands arguments in his notice of appeal and in the Petition that Decedent treated him and

³ The Board emphasized that its order did not reopen or extend the original deadline for Appellant to serve his original notice of appeal. The purpose of the OSC was to provide Appellant with an opportunity to submit additional evidence that he completed service, or to explain to the Board why he had omitted any parties.

Lorelei poorly, that land inherited by Decedent from Carol should be returned to her family (i.e., to Appellant and Lorelei), and that the Board should “right the wrong that never should have happened.” Response to OSC at 4; *see also* Notice of Appeal at 5-6 (“I am asking for what is rightfully ours to be restored to us [and] to right a wrong done by [Decedent].” Appellant did not explain why these arguments were not presented to the ALJ in response to the ALJ’s November 10 Order.

Discussion

As noted above, a petition for reconsideration will be granted only in extraordinary circumstances. 43 C.F.R. § 3.315(a); *see Estate of Wilda Ethel Ward*, 45 IBIA 195 (2007). After considering Appellant’s Response to OSC, we are not convinced that Appellant has demonstrated that extraordinary circumstances exist to warrant granting reconsideration and reopening this appeal.

Appellant represents that he sent all of the paperwork concerning his appeal to the ALJ after receiving the Board’s OSC, and that all interested parties were contacted. Appellant asserts that the eight parties for whom receipts of mailing were provided were those who need to have “*all* the paperwork,” Response to OSC at 1, and asserts that he sent the others on the list the “necessary paperwork,” *id.*, by first class mail, but without a record of mailing, other than a postage receipt showing the purchase of stamps.

Appellant does not assert that he complied with the original deadline for serving his notice of appeal on the ALJ and on Lorelei. To the contrary, it appears that Appellant may only have completed service on the ALJ after the Board dismissed the appeal on April 20, 2011, and after the Board issued the OSC on May 26, 2011, in response to the Petition. And although Appellant represents that he sent all “necessary” paperwork to all interested parties, it remains unclear which parties received what paperwork.⁴

For purposes of deciding whether to grant reconsideration the Board accepts Appellant’s submissions and representations as showing that he made a good faith attempt to comply with the Board’s orders. In the present case, however, we need not decide whether Appellant’s showing concerning service would, by itself, be sufficient to meet the extraordinary circumstances standard for granting reconsideration, because Appellant has not

⁴ While it is not altogether clear, it appears from Appellant’s response that he may have mailed his notice of appeal and petition for reconsideration to all parties on the distribution list, but only sent the “land paperwork” to those who might be directly affected if the land in Decedent’s estate that Decedent inherited from Carol were to be “returned” to Carol’s children, i.e., Appellant and Lorelei.

shown that, if the appeal were reinstated, he would not be precluded from raising his arguments because he failed to present them first to the ALJ.

In his Response to OSC, Appellant portrays Decedent as having “little interest” in Appellant and Lorelei, and Appellant’s various submissions suggest that Decedent was abusive and treated them poorly. Appellant clearly believes that giving effect to Decedent’s will, in which Decedent devised all of his real property to Robert and Debra — including land Decedent had inherited from Appellant’s mother, Carol — would lead to an unjust result. And in his notice of appeal, Appellant contends that there is a discrepancy in the sworn statements of the will witnesses concerning who was present when Decedent signed the will.

All of these arguments, however, could have been presented to the ALJ in response to the ALJ’s November 10 Order, in which he advised the parties that in the absence of any responses, he would uphold his approval of the will.⁵ We are not convinced that the questions posed by Appellant in his notice of appeal concerning the execution of the will demonstrate any clear or manifest error that would justify considering his arguments for the first time on appeal.

And to the extent that Appellant is arguing that Decedent’s failure to devise to Appellant and Lorelei the real property in the estate that Decedent received from Carol results in a manifest injustice that warrants granting reconsideration and granting him relief, we lack authority to either disregard or to rewrite a valid will to avoid an inequitable result. *See Estate of Teresa Mitchell*, 25 IBIA 88, 94 (1993) (“Department [of the Interior] is not free in ‘construing’ a will to write a new will”); *see also Estate of Ronald Richard Saubel*, 9 IBIA 94, 99-100 (1981) (Department may not revoke or rewrite an otherwise valid will simply because the disposition does not comport with the deciding official’s concept of equity and fairness).

In *Estate of Millie White Romero*, the Board addressed a situation in some ways similar to the present case. *See* 41 IBIA 262 (2005), *aff’d*, *Lyons v. United States*, No. 2:05-cv-1292-RLH-GWF (D. Nev. 2006), *aff’d sub nom. Lyons v. Estate of Millie White Romero*, 271 Fed. Appx. 675 (9th Cir. 2008). In that case, the decedent had left her children entirely out of her will. Although the decedent’s disposition of her property in that case may have been both unfair and unkind to her children, the Board could not set aside the will on those grounds. *See* 41 IBIA at 265-66. Similarly, in the present case, even if we were to find that

⁵ The November 10 Order specifically informed Appellant and other interested parties of the supplemental information received, including the sworn statement from the second will witness.

it was unfair and unjust for Decedent to have devised land he inherited from Carol to Robert and Debra, that would not provide us with a basis, were this appeal reinstated, to reverse the ALJ's approval of the will.⁶

In summary, although we find that Appellant made a good faith attempt to comply with the Board's Order to Serve, Appellant has not shown how he could overcome the procedural obstacle to raising his arguments, if reconsideration were granted. Under those circumstances, we conclude that Appellant has not shown that extraordinary circumstances exist to warrant reconsideration, and we deny his Petition.

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 denies reconsideration of 53 IBIA 135.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge

⁶ Decedent inherited a share in Carol's property as her surviving spouse. Evidence presented in her probate case, and relied on by Appellant in this case, indicates that Decedent married his third wife, Mary Rose (Steele) Skinner, before Carol died and without having divorced Carol. Appellant suggests that Decedent's marriage to Mary prior to Carol's death should have precluded him from being an heir to Carol's estate. That issue, however, would be outside the scope of these proceedings, regardless of whether or not we granted reconsideration, because Decedent's inheritance from Carol was determined through the probate of Carol's estate. Moreover, in 2004, the Superintendent of the Pine Ridge Agency of the Bureau of Indian Affairs sought to reopen Carol's estate on the same ground. The probate judge concluded that Decedent was still legally married to Carol at the time of her death, and he dismissed the petition. *See Estate of Carol Rock Exendine*, Probate No. IP BI 799C 81 (Order Dismissing Case from Docket, June 9, 2004) (copy added to appeal record).

In the OSC, we noted that ProTrac indicates the date of Carol's death as January 1, 1981, which would have been *before* Decedent's marriage to Mary (thus rendering moot the divorce issue). That date-of-death entry in ProTrac is incorrect, as Appellant pointed out in his response. The probate records from Carol's estate, including a copy of her death certificate, show her date of death as May 15, 1981 — after Decedent's marriage to Mary. Thus, Appellant's sequence of events is correct, but is not legally relevant to our disposition of his Petition in the current proceeding.