



INTERIOR BOARD OF INDIAN APPEALS

Estate of Peter Joseph Chalwain

20 IBIA 128 (07/12/1991)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF PETER JOSEPH CHALWAIN

IBIA 90-77

Decided July 12, 1991

Appeal from an order denying rehearing issued by Administrative Law Judge Keith L. Burrowes in Indian Probate IP PO 35L 88.

Affirmed.

1. Indian Probate: Rehearing: Generally

Under 43 CFR 4.241(b), an administrative law judge must deny a petition for rehearing that is not properly filed with the Superintendent.

APPEARANCES: Robert W. Walker, Esq., Spokane, Washington, for appellant; Richard J. Pinsoneault, Esq., St. Ignatius, Montana, for appellee.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Rita Chalwain seeks review of a February 26, 1990, order denying rehearing issued by Administrative Law Judge Keith L. Burrowes in the estate of Peter Joseph Chalwain (decedent). For the reasons discussed below, the Board affirms that order.

Background

Decedent, Coeur d'Alene 181-U00893, was born on April 17, 1917, and died on July 19, 1987. He was survived by appellant, who is his daughter, and his wife, Rose Andrew Chalwain (appellee). On May 26, 1987, decedent executed a will devising all of his trust property to appellee. The will explicitly identified appellant as his only other heir-at-law, and stated that she was intentionally omitted.

Because appellant and appellee lived in different areas, Judge Burrowes held hearings to probate decedent's trust estate on August 17, 1988, in Spokane, Washington, and on August 18, 1988, in Pablo, Montana. The August 17 hearing was devoted to ascertaining decedent's family history and considering creditors' claims, while the August 18 hearing was for the purpose of receiving testimony from appellee and the will scrivener. Because appellant indicated she was contesting the will, a third hearing was scheduled for November 14, 1988, in Spokane, Washington. Appellee and her attorney, Richard Pinsoneault, were present at the November 14 hearing and were prepared to defend the validity of decedent's will. Also present was Robert Walker, attorney for appellant. However, neither appellant nor her witnesses appeared. Mr. Walker indicated that he had had problems

contacting appellant, and that he was unable to proceed in the absence of appellant and her witnesses. Neither Mr. Walker nor appellant requested a continuance of the hearing at that time or at any other time. By order dated December 22, 1989, Judge Burrowes approved decedent's will.

Appellant filed a petition for rehearing alleging that her late arrival at the November 14, 1988, hearing was due to unforeseen circumstances; that her witnesses were waiting for her in the hallway outside the courtroom and that she arrived just as Judge Burrowes was concluding the hearing. ^{1/} In her petition, mailed February 20, 1990, appellant requested a rehearing to allow her to present evidence questioning the validity of decedent's will.

On February 26, 1990, Judge Burrowes denied the petition on the grounds that appellant failed to file the petition for rehearing in the proper office, the petition was not under oath, and it did not specifically and concisely state the grounds upon which it was based, all in violation of 43 CFR 4.241, which provides in pertinent part:

(a) Any person aggrieved by the decision of the administrative law judge may, within 60 days after the date on which notice of the decision is mailed to the interested parties, file with the Superintendent a written petition for rehearing. Such petition must be under oath and must state specifically and concisely the grounds upon which it is based. If the petition is based upon newly-discovered evidence, it shall be accompanied by affidavits of witnesses stating fully what the new testimony is to be. It shall also state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision. The Superintendent, upon receiving a petition for rehearing, shall promptly forward it to the administrative law judge. * * *

(b) If proper grounds are not shown, or if the petition is not filed within the time prescribed in paragraph (a) of this section, the administrative law judge shall issue an order denying the petition and shall set forth therein his reasons therefor. He shall furnish copies of such order to the petitioner, the Superintendent, and the parties in interest.

Appellant filed a notice of appeal, dated April 27, 1990, with the Board seeking reversal of Judge Burrowes' order denying rehearing.

^{1/} Both Judge Burrowes and Mr. Pinsoneault disputed this statement. In his order denying rehearing, Judge Burrowes stated that he had checked the hallway before the hearing was concluded and that he met appellant and her witnesses on the first floor of the courthouse, at least 20 minutes after the hearing had been concluded and all other parties had left. Mr. Pinsoneault estimated that more than 30 minutes had elapsed after the conclusion of the hearing before he personally left the courtroom, at which time appellant had not arrived.

Discussion and Conclusions

Appellant alleges that she was prevented from presenting testimony at the November 14 hearing by mechanical problems with her automobile, which she now asserts were due to sabotage by appellee; appellee and decedent were not legally married; there was a long-standing pattern of coercion of and undue influence on the decedent by appellee; and appellee induced at least one of her witnesses to commit perjury.

The issues appellant raises on appeal are primarily those she would have raised at the November 14 hearing. The initial question before the Board, however, is whether the Judge properly denied appellant's petition for rehearing.

Judge Burrowes found the petition deficient in several respects, any one of which would be sufficient to uphold the denial of rehearing. He first found that the petition was not filed in the proper office within the time period prescribed in 43 CFR 4.241 (a). The probate record shows that appellant was notified of the proper procedures for requesting a rehearing in the December 22, 1989, order approving decedent's will. 43 CFR 4.241 requires that a petition for rehearing be filed with the Superintendent within 60 days after the decision is mailed to the interested parties. The Superintendent's address was also included in the materials sent to appellant. However, on February 20, 1990, appellant mailed her petition to the Superintendent at the wrong address. Thus, her petition was never properly or timely filed.

[1] Because of this fact, Judge Burrowes was required to deny the petition. The denial of a petition for rehearing that is not properly and timely filed is not discretionary, but rather is mandatory. See 43 CFR 4.241 (b). Cf. *Gallegos v. Anadarko Area Director*, 20 IBIA 36 (1991), and cases cited therein (similarly interpreting 43 CFR 4.332(a)). Based upon the finding that Judge Burrowes correctly denied the petition for rehearing because it was not properly filed, the Board need not reach the remainder of appellant's arguments.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 26, 1990, decision of Judge Burrowes denying appellant's request for rehearing is affirmed.

//original signed

Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed

Anita Vogt
Administrative Judge