



INTERIOR BOARD OF INDIAN APPEALS

Estate of Lyman Z. Penn

46 IBIA 272 (02/29/2008)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF LYMAN Z. PENN) Order Affirming Decision, as Modified
)
) Docket No. IBIA 06-35
)
) February 29, 2008

Appellant John Horace Penn appeals from an Order of Dismissal of Petition for Rehearing (Order of Dismissal), dated December 3, 2005, entered by Indian Probate Judge (IPJ) George Tah-Bone in the estate of Appellant's father, Lyman Z. Penn (Decedent), deceased Cheyenne-Arapaho Indian, Probate No. 001-801-251A-1. The order let stand the IPJ's Order Approving Will and Decree of Distribution (Order Approving Will), entered July 13, 2004, in which he found that Decedent had testamentary capacity and ordered the distribution of Decedent's trust property in accordance with his will to Decedent's widow, Beulah Yellow Eagle Penn, and her granddaughter, Sarah Nicole Hewlett. The IPJ dismissed Appellant's petition for rehearing on the grounds that it was untimely filed. However, the IPJ conducted further proceedings in Decedent's estate for the limited purpose of determining whether to reopen the estate on his own motion. *See* 43 C.F.R. § 4.242(d) (2004). After admitting Decedent's medical records from the Indian Health Service (IHS) and conducting a supplemental hearing with respect to those records to determine whether his prior decision as to Decedent's competency to execute his will was in error, the IPJ again concluded that Decedent was competent and that reopening the estate was not warranted.

In his appeal to the Board of Indian Appeals (Board), Appellant repeats his arguments concerning the invalidity of Decedent's will: whether the will is invalid because of factual misstatements, Decedent's competency, or undue influence by Beulah. We first conclude that the IPJ erred in finding that Appellant's petition was untimely. However, the error was harmless because the IPJ proceeded to consider Appellant's petition as possible grounds for reopening the estate. Following a careful review of the record, we reject Appellant's claim that Decedent was incompetent or subject to undue influence, and we conclude that Appellant has not shown that the IPJ erred in approving the will. Therefore, we affirm the IPJ's decision as modified, whether characterized as a denial of rehearing or a denial of reopening.

Facts

1. Background

Decedent died September 30, 2000, in Clinton, Oklahoma. His survivors include his widow, Beulah, and two children, Appellant and Della Penn Kelley. Decedent left two wills. The first will was executed on October 3, 1980, and directed Decedent's estate to be evenly distributed between Beulah, Kelley, and Appellant. Decedent executed his second and final will on September 15, 2000.¹ It is this last will, particularly Decedent's competency to execute it, that is at issue in this appeal.²

In his will, Decedent made specific bequests of his trust real property to Beulah and to Hewlett, and directed that the remainder of his property be equally divided between Beulah and Hewlett. The will contains language expressly revoking and canceling all previous wills. The will acknowledges Hewlett as Decedent's granddaughter.³ The will also states, "I declare that I am married and that I have no children." Will, Sept. 15, 2000, at 1. The will witnesses each signed statements on the same day as the will that affirmed that Decedent appeared to be of sound mind and that Decedent acknowledged that he was executing his will of his own accord.

2. Initial Proceedings to Probate Decedent's Estate

Appellant and Kelley challenged the validity of Decedent's will, contending that it contained factual misstatements and that Decedent was not competent to execute it. The IPJ held two hearings for the purpose of taking evidence concerning the validity of the will on January 6 and February 6, 2003.⁴

¹ The ALJ determined that if Decedent had died intestate, his heirs would have been Beulah, Kelley, and Appellant, who would have shared equally in his estate. Order Approving Will at 3 (citing 84 Okla. Stat. § 213 B).

² All references hereafter to Decedent's will are to his final will of September 15, 2000.

³ It is undisputed that Hewlett is Beulah's granddaughter and Decedent's step-granddaughter.

⁴ An initial hearing was held on June 26, 2002, to determine the heirs at law and claims against the estate.

At the January 6 hearing, the IPJ heard testimony from the will scrivener, Amos E. Black III, Esq.; the will notary; and one of the two will witnesses. Black testified that Decedent came to Black's office with an inventory of his trust real property; that only Black, Decedent, and the will notary met to discuss how Decedent wished to devise his property; and that Decedent had been specific with respect to his bequests. Black testified that Decedent was sober and asked a number of questions of Black. Black stated that "there was no objective evidence to show illness, i.e., slowness of movement, pain and . . . no slurring to the speech, nothing. . . . [H]is mannerisms and his thought processes didn't indicate to me that he was under the influence of anything, any substance." Transcript, Jan. 6, 2003, at 9. The will notary testified that she did not notice anything that made her feel that Decedent was incompetent, that he appeared to know what he was doing, and that he did not appear to be under the influence of any drugs or alcohol. The will witness testified that he and the Decedent were "raised together" and were well acquainted. *Id.* at 17. He further testified that Decedent was aware of "what he was doing" on the day he executed his will and that he was not under the influence of medicines or alcohol on that date. *Id.*

On February 6, 2003, Appellant and Kelley presented four witnesses, each of whom testified to Decedent's known history of alcoholism. None testified that they saw Decedent on the day he executed his last will or even within a few days of executing it. Beulah testified in rebuttal that on the day Decedent executed his last will, they drove together to Black's office. Decedent was sober, he was conversing, and he was in a "good mind." Transcript, Feb. 6, 2003, at 23. She further testified that Decedent quit drinking in 1990 or 1991, and that Decedent did not have a close relationship with Appellant and Kelley.

Also on February 6, the IPJ admitted into evidence Decedent's medical records from a Veterans Administration (VA) hospital. The records covered two hospitalizations, the first for 6 days, from September 5-11, 2000, and the second from September 18-19, 2000. Both sets of records reflect a clear history of alcoholism but no indication of mental illness or incompetency. They reflect an awareness by Decedent of his hospitalizations, his ability to articulate his physical complaints, and that he asked questions of his doctors relating to tests and procedures that they were doing.

On July 13, 2004, the IPJ issued the Order Approving Will. He found that Decedent's last will was self-proving and approved the will over Appellant's objections. The IPJ recounted the testimony of the witnesses and the contents of Decedent's VA medical records, and concluded that "[n]o evidence of undue influence was suggested during the proceedings." Order Approving Will at 3. The IPJ concluded that "[n]o evidence was presented to show that the testator made his will contrary to his own desires." *Id.* The IPJ ordered the distribution of Decedent's estate in accordance with his final will.

3. Proceedings on Appellant's Petition for Rehearing

On September 13, 2004, Appellant filed a petition for rehearing with the IPJ in which he reiterated his challenges to the will, both as to form as well as to Decedent's competency.⁵ Appellant claimed that two untrue statements in Decedent's will — that he had no children and that his granddaughter is Hewlett — invalidate the will and demonstrate Decedent's lack of competency. In addition, Appellant claimed that at the time of the February 6 hearing, the IPJ had stated that Decedent's IHS medical records would be subpoenaed and the parties given the opportunity to comment on any evidence in those records before issuing his decision.

The IPJ reviewed the record and set the matter for further hearing on March 23, 2005, at which Decedent's IHS medical records were received and argument was heard from the parties concerning their relevance.⁶ The records themselves primarily covered the months of July and August 2000, and included a 6-day stay at the IHS hospital from August 30, 2000, until Decedent's transfer on September 5, 2000, to the VA hospital. The IHS records noted that Decedent was a chronic alcoholic whose lifestyle included drinking binges. The records do not contain any notes or reflect concerns about Decedent's mental status or competency. As part of his argument at the March 23 hearing, Appellant testified that he and his father "went years without talking to each other." Transcript, Mar. 23, 2005, at 12.⁷

On December 3, 2005, the IPJ denied Appellant's Petition for Rehearing. The IPJ found the petition was not signed under oath and was untimely because it was filed on the 62nd day after his July 13 Order Approving Will. The IPJ also declined to reopen the estate on his own motion, *see* 43 C.F.R. § 4.242(d), finding that the new medical evidence

⁵ Appellant titled his petition as a "notice of appeal." The IPJ construed the notice of appeal as a petition for rehearing within the meaning of 43 C.F.R. § 4.241.

⁶ The IPJ reviewed the transcript of the February 6 hearing and specifically found that there was confusion concerning who was to obtain Decedent's medical records from IHS. Therefore, he reopened the record to permit the addition of these records and to hear the arguments of the parties. Order of Dismissal at 2-3.

⁷ In earlier testimony, Appellant explained that when he was 12 years old, he and Kelley were removed from their father's care and thereafter raised in foster homes. Consequently, contact with Decedent was sporadic and remained so after Appellant reached adulthood.

from IHS did not controvert his previous findings concerning Decedent's competency at the time he executed his will.

Appellant timely appealed the IPJ's decision denying rehearing to the Board. Appellant and Beulah both submitted briefs.

Discussion

On appeal to the Board, Appellant reiterates his previous arguments concerning the misstatements in Decedent's final will, Decedent's competency to execute that will, and undue influence by Beulah. We conclude that Appellant's petition for rehearing was timely but that the IPJ's conclusion to the contrary was harmless because he proceeded to consider Appellant's petition as possible grounds for reopening. We further conclude that Appellant failed to show error in the IPJ's decision. Because we affirm the IPJ on the merits, we need not address whether it would have been proper to deny the petition for rehearing on the ground that it was not submitted under oath.⁸

1. Timeliness of Appellant's Petition for Rehearing

Contrary to the IPJ's determination, we conclude that Appellant's petition for rehearing was timely. The 60th day of Appellant's filing period, September 11, 2004, fell on a Saturday. Pursuant to 43 C.F.R. § 4.22(e) (2004), where the last day of the filing period falls on a Saturday, it is not counted nor is Sunday. *Cf. Estate of George Hanson*, 25 IBIA 47, 47-48 (1993). Instead, the last day for filing is the next business day. *Id.* Because Appellant filed his petition on the next business day, Monday, September 13, 2004, his petition was timely filed. However, because the IPJ proceeded to consider Appellant's petition for rehearing as possible grounds for reopening the estate and thus addressed his petition on the merits, we conclude that his error in finding the petition untimely was harmless.

⁸ In essence, we construe the IPJ's discussion of his decision not to reopen the estate on his own motion as his discussion of the merits of Appellant's petition for rehearing. To the extent the IPJ's proceedings were limited, we conclude that the record is sufficient for us to consider all of Appellant's arguments with respect to either the order denying reopening or the underlying Order Approving Will. In addition, because we find no error on the merits, any difference between the standards for granting rehearing and for granting reopening is not relevant to this appeal.

2. Misstatements in Decedent's Will

Appellant argues that his father's will is invalid as to form because the will erroneously states that Decedent had no children and that Hewlett is Decedent's granddaughter. We disagree that these statements are grounds for invalidating Decedent's will and conclude that they provide no grounds for finding error in the IPJ's decision.⁹

Owners of trust property are expressly authorized to dispose of their trust interests by will and in accordance with regulations promulgated by the Department of the Interior. 25 U.S.C. § 373. With respect to the form of wills that dispose of Indian trust property and subject to certain exceptions not relevant here, the regulations require only that the will be "executed [by the testator] in writing and attested by two disinterested adult witnesses." 43 C.F.R. § 4.260(a) (2004); *Estate of Carrie Standing Haddon Miller*, 10 IBIA 128, 132 (1982). As the Board has recognized repeatedly, a will is the means by which a testator chooses who shall inherit his property, rather than having applicable laws of intestacy determine who shall inherit. *See Estate of Millie White Romero*, 41 IBIA 262, 265 (2005), *aff'd sub nom. Lyons v. United States*, No. 05-cv-1292 RLH (D.Nev. Feb. 6, 2006); *Estate of Anthony Bitseedy*, 5 IBIA 270, 276 (1976), *aff'd sub nom. Dawson v. Kleppe*, No. CIV-77-0237-T (W.D. Okla. Oct. 27, 1977). The law does not require a testator to devise his property only to his blood relatives. *See Estate of Jesse Pawnee*, 15 IBIA 64, 65 n.1 (1986). Nor, as the IPJ observed, is a testator required to acknowledge his children in his will, *see Estate of Reuben Mesteth*, 16 IBIA 148, 151 (1988), much less is he required to leave property to them, *Estate of Aaron (Allen) Ramsey*, 11 IBIA 16, 19 (1982). Finally, we note that misstatements of fact in a will do not, without more, invalidate a will. *See Estate of Edith Walker Brown*, 43 IBIA 221 (2006) (will contained errors in the legal descriptions of devised property); *Estate of Romero*, 41 IBIA at 267 (decedent's will did not leave any property to her children but instead stated that decedent had made her wishes concerning her land clear to her children; children denied that decedent had indicated what she would do with her land).

Appellant asks that we find his father's will invalid as to form based on one clearly false statement — that Decedent had no children — and one statement that is not necessarily untrue — that Hewlett was Decedent's granddaughter. However, and in keeping with 43 C.F.R. § 4.260(a) and our decisions in *Estate of Romero* and *Estate of Brown*, we conclude that the challenged statements in Decedent's will, even if untrue, simply

⁹ To the extent that Appellant also contends that these statements in Decedent's will are indicative of a lack of competency by Decedent, they are addressed in the following section of this decision.

provide no grounds for concluding that the will is invalid. Therefore, we decline to find error in the IPJ's decision on this ground. We turn now to a discussion of this argument and others as grounds to find that the Decedent lacked testamentary capacity.

3. Decedent's Testamentary Capacity

Appellant maintains that Decedent lacked testamentary capacity to execute his will based on Decedent's alcoholism and on the previously discussed misstatements in Decedent's will. We have carefully reviewed the record and we conclude that Appellant has not met his burden of showing error in the IPJ's conclusion that Decedent was competent to execute his will.

We begin our analysis with the presumption that, where a will is self-proved,¹⁰ a testator possesses testamentary capacity at the time of execution. *Cf. Estate of Charles Hall, Sr.*, 8 IBIA 53, 61 (1980), *aff'd sub nom. Hall v. Andrus*, No. CV-80-67 GF (D. Mont. Aug. 26, 1981); *see also Estate of Larry Michael Oskolkoff*, 37 IBIA 291, 297-99 (2002) (explaining the process of self-proving a will under 43 C.F.R. § 4.260). It is then the burden of the will contestor to rebut the presumption through a preponderance of evidence of the testator's incompetence. *See, Estate of Rose Medicine Elk*, 39 IBIA 167, 170-71 (2003). The presumption cannot be overcome by a mere showing that Decedent had an addiction to alcohol. 79 Am. Jur. 2d *Wills* § 73 (2002).¹¹ Rather, the evidence must show that "the decedent did not know the natural objects of [his] bounty,^[12] the extent of [his] property or the desired distribution of that property." *Estate of Sallie Fawbush*, 34 IBIA 254, 258 (2000); 79 Am. Jur. 2d *Wills* §§ 63, 73. The relevant time frame for showing testamentary incapacity is the day on which the will is executed. *Estate of Clara G. Moonlight*, 39 IBIA 119, 124 (2003); *Estate of Fawbush*, 34 IBIA at 258.

Despite an abundance of opportunity, we agree with the IPJ that Appellant failed to establish that Decedent was incapacitated on the day he executed his will. First, there is no

¹⁰ A will disposing of Indian trust assets is deemed to be self-proved where it is executed in compliance with 43 C.F.R. § 4.260 and includes affidavits by the testator and the two witnesses in accordance with 43 C.F.R. § 4.233(a) (2004). The IPJ found, and Appellant does not dispute, that Decedent's final will was self-proved.

¹¹ "Habitual drunkenness does not give rise to a presumption that the testator was incapacitated at the time he executed the will." *Id.*

¹² The "natural objects" of one's "bounty" are deemed to be those "who naturally have a claim to benefit from the property left by [the decedent]." Am. Jur. 2d *Wills* § 63.

evidence that Decedent was intoxicated on September 15, 2000, when he executed his will. Four persons who were present at or near the time that he executed his will — the will scrivener, the will notary, one of the will witnesses, and Beulah — each testified that Appellant was sober and aware of his actions when he made his will. In particular, Black provided clear testimony that nothing in Decedent’s mannerisms, thought processes, speech, or movement gave any indication that he was anything other than sober. None of Decedent’s medical records reflect an entry on September 15. Overall, the medical records reflect that Appellant would have alcohol “binges,” but none reflect a concern by Decedent’s health care providers with his competency or mental health. Consequently, we agree with the IPJ that the evidence does not show that alcohol played any role in Decedent’s execution of his last will.

Although it is undisputed that Decedent did not inform the will scrivener that he had children, it cannot be said that this omission is indicative of a lack of awareness of those who ordinarily would be the natural objects of Decedent’s bounty. Appellant conceded that he and his father went years without speaking and did not visit often. That Decedent stated that he did not have children could be due to Decedent’s knowledge that parents customarily leave bequests to their children and his reluctance to be drawn into a conversation with Black concerning his decision not to do so. Moreover, Decedent did acknowledge his wife of many years in his will and left her property, which is in keeping with usual and customary practices of devising property, and he left property to a step-granddaughter. These devises, coupled with Appellant’s acknowledgment that he and his father “went years without talking to each other,” Transcript, Mar. 23, 2005, at 12, support the IPJ’s conclusion that Decedent was not unaware of the natural objects of his bounty.

As to the last two criteria for overcoming the presumption, Appellant does not claim that Decedent was unaware of the extent of his property or that the devises were contrary to his wishes, for which reason we do not discuss these factors further except to state that the record does not reflect support for a contrary view. Therefore, we conclude that Appellant has not met his burden of showing that the IPJ erred in finding that Appellant had not overcome the presumption of competency.

4. Undue Influence

Finally, Appellant suggests that Beulah may have unduly influenced Appellant because she selected the will scrivener (Black), she went with Decedent to Black’s office, and because she testified untruthfully at the probate hearing that Appellant had quit drinking in 1990 or 1991. We conclude that nothing in these facts suggests that Beulah exercised undue influence over Decedent in the execution of his will.

In order to overturn a will on grounds of undue influence, the will contestor must show that

(1) Decedent was susceptible of being dominated by another; (2) the person allegedly influencing Decedent in the execution of [his] will was capable of controlling [his] mind and actions; (3) such a person did exert influence upon Decedent of a nature calculated to induce or coerce [him] to make a will contrary to [his] own desires; and (4) the will is contrary to Decedent's own desires.

Estate of Jeanette Little Light Adams, 39 IBIA 32, 36 (2003). Appellant's arguments do not demonstrate that Decedent was susceptible to Beulah's domination, let alone coerced by her into making his will. They do not overcome the testimony provided by Black, who stated that Beulah was not present when he and Decedent discussed the will and that Decedent was specific about how he wanted his property to be distributed. Therefore, we affirm the IPJ's conclusion that the will does not appear to be the product of undue influence.

Conclusion

After due consideration of all of the above, we affirm the IPJ's Order of Dismissal, as modified by our decision. Appellant has not established any grounds for setting aside Decedent's 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 Board affirms the IPJ's December 3, 2005, Order of Dismissal of Petition for Rehearing as modified herein.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge